

**IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF ILLINOIS  
EASTERN DIVISION**

|                                                |   |                             |
|------------------------------------------------|---|-----------------------------|
| ERICH SPECHT, an individual and doing business | ) |                             |
| as ANDROID DATA CORPORATION, and THE           | ) |                             |
| ANDROID’S DUNGEON INCORPORATED,                | ) |                             |
|                                                | ) |                             |
| Plaintiffs/Counter-Defendants,                 | ) |                             |
| v.                                             | ) | Civil Action No. 09-cv-2572 |
|                                                | ) |                             |
| GOOGLE INC.,                                   | ) | Judge Harry D. Leinenweber  |
|                                                | ) |                             |
| Defendant/Counter-Plaintiff.                   | ) |                             |

**PLAINTIFFS’ MOTION TO VACATE ORDER AWARDING COSTS [ECF 360]**

Plaintiffs Erich Specht, an individual and doing business as Android Data Corporation and The Android’s Dungeon Incorporated (collectively, “Plaintiffs”), by and through their attorney, respectfully move this Court to vacate its Memorandum Opinion and Order [ECF 360] allowing costs pursuant to Federal Rule of Civil Procedure Rule 54 (b).

1. Rule 54 (b) provides in pertinent part that: [A]ny order or other decision, however designated, that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties does not end the action as to any of the claims or parties and may be revised at any time before the entry of a judgment adjudicating all the claims and all the parties' rights and liabilities.

2. On December 17, 2011 the Court granted summary judgment in favor of Google as to Plaintiffs’ Second Amended Complaint and two of Google’s seven counterclaims. [ECF 296]

3. On February 24, 2011, the Court granted Google’s oral motion to dismiss without prejudice Counts II, IV, V VI, and VII of the counterclaim. The Court also stated that having

previously granted Google's Motion for Summary Judgment on Counts I-V of Plaintiffs' Second Amended Complaint, and Counts I and III of Google's counterclaim; judgment is hereby final for the purposes of appeal. [ECF311].

4. On March 22, 2011, Plaintiffs filed their Notice of Appeal. [ECF 312]

5. On March 23, 2011, Google filed its bill of costs. [ECF 321]

6. On April 13, 2011 Plaintiffs filed their objections to Google's Bill of Costs arguing in part that Google's filing was improper because Local Rule 54.1 only permits the filing of a Bill of Costs where the judgment specifically awards costs, which the judgment did not. Plaintiffs also objected because Judgment may not have been final. [ECF328.]

7. On June 27, 2011, over Plaintiffs' objections, the Court awarded costs in favor of Google and against Plaintiffs. [ECF 360.]

8. On August 22, 2011 the Court of Appeals dismissed Plaintiffs appeal as premature citing the non-finality of the Court's February 24, 2011 order. [ECF 370.]

9. On October 6, 2011 the Court entered an order permitting Plaintiffs to file an interlocutory appeal pursuant to FRCP Rule 54 (b). [ECF 373.]

10. Because Google has declined to dismiss its unadjudicated Counterclaims with prejudice, there are still claims which may need to be adjudicated. Thus, without a final adjudication of all claims, there is no prevailing party. (See, for e.g., *Farrar v. Hobby*, 506 U.S. 103, 112 (1992). "[T]he moral satisfaction [that] results from any favorable statement of law cannot bestow prevailing party status." (Citation omitted.) )

11. Because Google's refusal to dismiss its remaining counterclaims with prejudice is preventing a final judgment, it would not be unduly prejudiced by this Court vacating the Order awarding costs pending resolution of all claims.

12. Accordingly, the Order awarding costs is premature and should be vacated pending a final resolution of all claims.

WHEREFORE, Plaintiffs move this Honorable Court for an order vacating the Order awarding costs [ECF 360] pending a final resolution of all claims.

Respectfully submitted,

ERICH SPECHT, an individual and doing  
business as ANDROID DATA  
CORPORATION, and THE ANDROID'S  
DUNGEON INCORPORATED

By: /s/Martin J. Murphy

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**CERTIFICATE OF SERVICE**

Martin J. Murphy, an attorney, certifies that he caused copies of the foregoing to be served by electronically filing the document with the Clerk of Court using the ECF system this 20th day of October, 2011.

/s/ Martin J. Murphy