

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

SPECHT, et al.	)	
	)	C.A. No. 09-cv-2572
Plaintiffs,	)	
	)	Judge Leinenweber
v.	)	
	)	Magistrate Judge Cole
GOOGLE INC.,	)	
	)	
Defendant.	)	

**GOOGLE INC.’S RESPONSE TO PLAINTIFFS’ MOTION TO VACATE ORDER  
AWARDING COSTS**

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Defendant Google, Inc. (“Google”) hereby responds to the “Motion to Vacate Order Awarding Costs [ECF 360]” (“Motion”) filed by Plaintiffs on October 20, 2011 (Dkt. No. 382). The basis for Plaintiffs’ Motion is that Google is somehow not the prevailing party in this case, and there is no “final” judgment so that any award of costs would be inappropriate. Plaintiffs’ assertion that Google is somehow not the prevailing party is contrary to law – which would explain why Plaintiffs have failed to cite any relevant authority in support of their Motion.

As discussed below, Plaintiffs failed to raise any of these “issues” when the Court first considered Google’s bill of costs -- thereby waiving them. Accordingly, Plaintiffs’ Motion comprises nothing more than an impermissible attempt to have this Court reconsider a matter which has already been fully considered and adjudicated. Moreover, even if Plaintiffs had raised these issues in a timely manner, Google is clearly the prevailing party in this case. Further, this Court has already entered an order permitting Plaintiffs to post a supersedeas bond or cash deposit with the Court in order to stay enforcement of the cost award, which Plaintiffs have failed to do. Accordingly, this Court should deny Plaintiffs’ Motion, and award Google its reasonable attorney’s fees incurred in preparing this response.

**I. PLAINTIFFS FAILED TO RAISE THESE ISSUES IN A TIMELY MANNER, AND THUS THEIR MOTION IS NOTHING MORE THAN AN IMPERMISSIBLE MOTION FOR RECONSIDERATION**

At the outset, this Court should deny Plaintiffs' Motion on the procedural basis that Plaintiffs failed to raise these issues when the Court first considered Google's bill of costs. As such, Plaintiffs' Motion is merely an impermissible motion for reconsideration, and Plaintiffs have shown no basis for this Court to revisit its earlier ruling.

Indeed, the case before this Court is in the very same posture that it was in when Google originally filed its bill of costs – namely, the Court had entered a judgment in Google's favor on all of Plaintiffs' claims and Counts I and III of Google's counterclaims, and Google's remaining counterclaims stood dismissed without prejudice. The only thing that has changed is that the Court has since revised its judgment to indicate that it is entered under Rule 54(b). As such, Plaintiffs could have raised the "ripeness" issue in its objections to Google's bill of costs, but failed to do so.

Plaintiffs now would like a second bite at the apple, asking this Court to reconsider and vacate its Order awarding costs to Google (the "Order", Dkt. No. 360). However, Plaintiffs provide no excuse for their failure to raise this issue previously, and simply request a "do-over" from this Court. As Plaintiffs provide no justification for this Court to revisit its prior ruling, the Court should decline Plaintiffs' invitation to do so.

**II. THE AWARD OF COSTS IS PROPER BECAUSE GOOGLE WAS THE PREVAILING PARTY AND THE COURT HAS ENTERED A JUDGMENT UNDER RULE 54(b)**

Further, even if this Court were inclined to revisit its prior ruling, Plaintiffs' suggestion that Google is not a "prevailing party," because several of Google's counterclaims were dismissed without prejudice to enable Plaintiffs to appeal this Court's ruling on Google's motion for summary judgment (Dkt. No. 296), is without merit. This Court has – at Plaintiffs' request –

entered a judgment under Rule 54(b) on all of Plaintiffs' claims and two of Google's counterclaims (Dkt. No. 374). There is no question that Google is the prevailing party, inasmuch as Google prevailed on all of the claims on which this Court has entered judgment.

Plaintiffs have not identified any authority holding that a party cannot have "prevailing party" status in a litigation where a final judgment has not been entered on all of the claims and counterclaims asserted in the case. Under Rule 54(d), a party "prevails" when a final judgment awards that party substantial relief. *See Smart v. Local 702 Int'l Brotherhood of Elec. Workers*, 573 F.3d 523, 525 (7th Cir. 2009). This Court entered a judgment under Rule 54(b) (at Plaintiffs' request) on October 6, 2011 awarding Google substantial relief – ruling in Google's favor on all counts of Plaintiffs' Second Amended Complaint and Counts I and III of Google's counterclaims (Dkt. No. 374). Neither Rule 54(d), nor any authority cited by Plaintiffs, supports Plaintiffs' novel legal theory that "without a final adjudication of all claims, there is no prevailing party"<sup>1</sup> (Motion, p. 2). Indeed, Local Rule 54.1 confirms that the judgment need not be a "final judgment." Local Rule 54.1 states that "Within 30 days of the entry of **a judgment** allowing costs, the prevailing party shall file a bill of costs..." There is no requirement in the Federal or Local Rules that the judgment be a final judgment as to all parties and claims.

Plaintiffs' theory simply makes no sense, as it would prevent a court from ever entering any award of costs in cases having multiple parties where any claim is still pending – even where all of the claims involving one party have been resolved and a final judgment has been entered with respect to that party. Such a result is simply inconsistent with the Federal Rules.

Moreover, even assuming *arugendo* that Plaintiffs were to ultimately prevail on Google's remaining counterclaims, Google would still be the prevailing party in this litigation, since it

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<sup>1</sup> The single sentence that Plaintiffs plucked out of a Supreme Court decision (*Farrar v. Hobby*, 506 U.S. 103 (1992)) does not even come close to supporting the proposition advanced by Plaintiffs. It does not speak to "final" judgments, and the Supreme Court found one of the parties in that case to be a prevailing party.

successfully defended against all of the claims brought by Plaintiffs. When a party obtains substantial relief, that party prevails even if it does not win on every claim. *See Slane v. Mariah Boats, Inc.*, 164 F.3d 1065, 1068 (7th Cir. 1999). Plaintiffs brought this lawsuit, and failed to meet their burden of proof with respect to any of their claims. Courts routinely hold that where a plaintiff utterly fails to prevail on any of its own claims, the defendant is a “prevailing party” under Rule 54(d) even if it did not prevail on some or even all of its counterclaims. *See, e.g., Haynes Trane Service Agency, Inc. v. Am. Std., Inc.*, 573 F.3d 947, 967 (10th Cir. 2009) (“In a case like this in which all claims and counterclaims have failed, costs may be awarded to the counterclaimant if it ‘successfully fend[ed] off a large claim . . . despite failure to prevail on a [smaller] counterclaim.’”) (citation omitted). Given the enormity of the damages which Plaintiffs sought in this case, Google’s success in defeating those claims on summary judgment clearly entitles Google to prevailing party status.

### **III. PLAINTIFFS HAVE FAILED TO POST A BOND IN ORDER TO STAY ENFORCEMENT OF THE COSTS AWARD PENDING APPEAL, AS THIS COURT PREVIOUSLY PERMITTED AT PLAINTIFFS’ REQUEST**

The genesis of Plaintiffs’ Motion is their refusal to comply with the Court’s Orders regarding payment of Google’s costs. Specifically, Plaintiffs filed a motion with this Court on August 2, 2011 requesting a stay of enforcement of the Court’s Order (Dkt. No. 363). The Court granted Plaintiffs’ request and stayed enforcement of the cost award under Rule 62(d) upon Plaintiffs’ posting of a supersedeas bond in the amount of \$21,000 with the Court or alternatively depositing \$21,000 with the Clerk of Court (Dkt. No. 366). Plaintiffs offer no reason why this relief already granted to them is inadequate.

Indeed, the timing of Plaintiffs’ Motion is no coincidence, inasmuch as several days earlier Google had inquired of Plaintiffs’ counsel as to whether Plaintiffs had posted a bond or

deposit with the Clerk (Ex. 1). To date, Plaintiffs have refused to even respond to Google's inquiry.

Based upon Plaintiffs' filing of this Motion, Google assumes that Plaintiffs have neither posted a supersedeas bond nor deposited \$21,000 with the Clerk of the Court so as to effect a stay of enforcement of the Order. Instead, Plaintiffs, or its counsel, chose to waste more of this Court's and Google's time and resources with yet another baseless motion.

WHEREFORE, Google respectfully requests that the Court deny Plaintiffs' Motion for the reasons set forth above. Google further requests an award of its reasonable attorney's fees against Plaintiffs, their counsel or both, in the amount of \$2,500 incurred in responding to Plaintiffs' meritless Motion.

Respectfully submitted,

Dated: October 24, 2011

/s Jeffrey P. Dunning

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**CERTIFICATE OF SERVICE**

I hereby certify that on the date set forth below, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which will send notification of such filings to all counsel of record.

Dated: October 24, 2011

/s Jeffrey P. Dunning