

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TEXAS
MARSHALL DIVISION

PERFORMANCE PRICING, INC.,

Plaintiff,

v.

GOOGLE INC. and AOL LLC,

Defendants.

Civil Action No. 2-07CV-432-RRR
(Eastern District of Texas)

JURY TRIAL DEMANDED

OPPOSED MOTION FOR ADJUSTMENT AND CLARIFICATION OF SCHEDULE

Defendants Google Inc. and AOL LLC (“Defendants”) file this opposed motion and respectfully ask the Court to clarify certain scheduling deadlines, and modify deadlines regarding sur-replies to motions for summary judgment.

I. PRE-TRIAL CONFERENCE AND TRIAL DATES

Under the Docket Control Order (Dkt. 99), the pretrial conference was set for March 18, 2010, jury selection was set for April 6, 2010, and trial was set for April 12, 2010.

On December 29, 2009, the Court had a video conference in which matters including the schedule going forward were discussed. The Court indicated during the conference that he would contact the parties after summary judgment briefing had been completed, to schedule the trial and pretrial conference, if necessary. (Pretrial Tr., 66:16-67:6, 67:8-21.)

Defendants proposed to Plaintiff that the parties’ recent joint motion regarding pretrial deadlines (Dkt. 288) clarify that the deadlines for pretrial conference, jury selection, and trial are vacated pending Order of the Court, as discussed on the December 29 conference. Plaintiff would not agree to include this in the motion. Plaintiff reasoned that despite the Court’s statements on the December 29 conference, these dates have not been vacated because the

Court's December 31, 2009 Order states that "All other deadlines contained in the Docket Control Order, and any amendments thereto, remain the same." (Dkt. 282.)

Defendants therefore seek clarification that the pretrial conference, jury selection, and trial deadlines have been vacated, pending further Order of the Court, as discussed on the December 29 call.

II. SUR-REPLIES FOR MOTION FOR SUMMARY JUDGMENT BRIEFING

On the parties' December 29, 2009 call, the Court indicated that it wanted all summary briefing completed by January 19, 2010. To meet this date, Defendants proposed there would be no sur-replies for the parties' summary judgment motions. (The transcription of this proposal, "One thing we could do is just -- you know, I don't know that there's really any need for a certify at this point." (Pretrial Tr., 64:1-4), contains an obvious error as to "a certify")¹. However, the Court's Orders left in Plaintiff's sur-replies to Defendants' motions, while removing Defendants' sur-replies.

In effort to resolve this issue, Defendants pointed out to Plaintiff that it was not their intention for only Plaintiff to get sur-replies, which would not be equitable. Plaintiff, however, indicated that it would not give up its sur-replies. Defendants, therefore, proposed that the deadline to Plaintiff's Replies to its Motions for Summary Judgment be moved to January 13, 2010, and that Defendants' Sur-Replies be due by January 19, 2010, which was the date by

¹ Defendants' suggestion was made during the discussion of Plaintiff's summary judgment motions. Defendants, however, would not have agreed to unilaterally give up only their sur-reply briefs—especially when the Court made clear that it would have moved both the Plaintiff's reply briefs to an earlier date than previously scheduled. *See* Pretrial Tr., 63:13-17 ("MR. DOVEL: And if they're filed tomorrow, then our replies would be due on January 20th and the surreplies would be due on January 28th. JUDGE RADER: Now, we're cutting that all back. It's all going to come in on the 19th.").

which the Court indicated it wanted all briefing completed. Plaintiff would not agree to this change either.

Defendants, therefore, suggest the following options, any of which would be acceptable to Defendants:

- (1) Neither party gets sur-replies;
- (2) Plaintiff's reply briefs on its motions for summary judgment be due January 14, and Defendants' sur-reply briefs be due January 19, in order to complete all briefing by January 19; or
- (3) Plaintiff's reply briefs on its motions for summary judgment be due January 19, and Defendants' sur-reply briefs be due January 22, if this short extension is acceptable to the Court.

The first two solutions would allow briefing to be completed by January 19, 2010, as requested by the Court. (*See* Pretrial Tr., 63:16-17.) Any of these three solutions would be equitable to the parties, as they would allow both Plaintiff and Defendants to have an opportunity to have the same amount of briefing in response to each side's motions for summary judgment.

CONCLUSION

Defendants respectfully request that the Court clarify the pretrial conference, jury selection, and trial deadlines and sur-reply briefing as outlined above.

DATED: January 11, 2010

/s/ Emily C. O'Brien

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that all counsel of record who are deemed to have consented to electronic service are being served with a copy of this document via the Court's CM/ECF system per Local Rule CV-5(a)(3) on January 11, 2010.

/s/ Emily C. O'Brien

Emily C. O'Brien, *pro hac vice*

CERTIFICATE OF CONFERENCE

I am counsel for Defendants Google and AOL. On January 5, 2010, David Perlson, also counsel for Defendants, discussed the issue of the summary judgment briefing with Greg Dovel, counsel for Plaintiff Performance Pricing, Inc. On January 6, 2010, I sent a proposal to Plaintiff's counsel to modify the deadlines for summary judgment briefing. Greg Dovel responded by e-mail, rejecting this proposal. David Perlson further corresponded with Greg Dovel and Rick Lyon, counsel for Plaintiff, regarding this issue and the issue of the deadlines for pretrial conference, jury selection, and trial on January 6, 2010. Plaintiff's counsel disagreed that there was any ambiguity regarding these other deadlines. On January 11, 2010, I spoke with Rick Lyon regarding these issues, and the parties agreed that they were at an impasse. Defendants therefore file this motion opposed.

/s/ Emily C. O'Brien

Emily C. O'Brien, *pro hac vice*