IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
MARSHALL DIVISION

ROCKSTAR CONSORTIUM US LP AND NETSTAR TECHNOLOGIES LLC **Plaintiffs,** **v.** **GOOGLE INC.** **Defendant.**	**Case No. 2:13-cv-00893-JRG-RSP** **JURY TRIAL DEMANDED**

PLAINTIFFS' RESPONSE IN OPPOSITION TO GOOGLE INC.'S MOTION FOR EXPEDITED BRIEFING SCHEDULE ON PLAINTIFFS' MOTION FOR LEAVE TO FILE A SUPPLEMENTAL BRIEF IN RESPONSE TO GOOGLE'S MOTION TO TRANSFER, AND, GOOGLE'S REQUEST, IN THE ALTERNATIVE, TO STAY PENDING RESOLUTION OF GOOGLE'S TRANSFER MOTION

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I. INTRODUCTION

Google's Motion for Expedited briefing is procedural gamesmanship at its worst. After briefing on Google's motion to transfer was complete, Google served Invalidity Contentions and subpoenas related to prior art in late May and June 2014, respectively. Dkt. No. 92-3 at Exhs. 2, 46-66. Google's contentions and subpoenas confirmed what Plaintiffs had suspected—that Google had cherry-picked prior art witnesses in its transfer motion in order to give the Court a false impression that such witnesses were primarily located in the Northern District of California. Mot. to Transfer, Dkt. No. 18 at 3; Resp. to Mot. to Transfer, Dkt. No. 33 at 1, 8, 12. As a result, Plaintiffs sought leave to file a supplemental three-page brief addressing the location of witnesses and evidence relating to Google's asserted prior art.

Not only did Google oppose Plaintiffs' uncontroversial request to file a short, supplemental brief, it did so on the grounds that the Court's consideration of a three-page brief would cause undue delay. Moreover, Google combined with its opposition to Plaintiffs' motion for leave an entirely separate "Cross-Motion to Stay Case Pending Resolution of Google's Transfer Motion." Dkt. No. 97. Without any apparent sense of irony, Google now insists that expedited briefing on both Plaintiffs' Motion for Leave and Google's "Cross-Motion" for a stay is necessary because "Google is concerned that, after Rockstar's Motion for Leave is fully briefed, it will take time for the Court to resolve the Motion for Leave, and if Rockstar's Motion for Leave is granted, Google should be entitled to an opportunity to respond," which will "further delay resolution of the Transfer Motion . . . ." Mot. at 1. Of course, all of this delay could have been avoided if Google had simply consented to Plaintiffs' straightforward request to file a three-page supplemental brief and filed a short supplemental response brief of its own yesterday.

Instead, Google has multiplied the proceedings unnecessarily by not only opposing Plaintiffs' Motion for Leave but by folding in an entirely separate "Cross-Motion to Stay" into its opposition. This violates Local Rule CV-7(a), which requires that "[e]ach pleading, motion or response to a motion must be filed as a separate document," with the only exception being "motions for alternative relief, e.g., a motion to dismiss or, alternatively, to transfer." L.R. CV-7(a). As a result, Plaintiffs have moved to strike Google's combined opposition and "cross-motion" to stay. *See* Dkt. No. 100.

Because it combined a completely separate Motion to Stay into its Response to a different motion, Google takes the position that Plaintiffs are only entitled to file a single, five-page "Reply" on both motions and further demand that such Reply be filed on an expedited schedule. *See* Mot. at 1. Of course, that is not what the Local Rules prescribe. Under the Local Rules, Plaintiffs are permitted to file one Reply to its Motion for Leave on July 2, 2014. Moreover, had Google complied with Local Rule CV-7(a) and filed its motion to stay as a separate pleading, Plaintiffs would have been entitled to a Response due fourteen days later and a Sur-Reply due seven days after Google files its Reply. L.R. CV-7(e)-(f). Google's procedural maneuvering thus has the apparent purpose of eliminating Plaintiffs' ability to adequately respond to Google's "Cross-Motion to Stay." Compounding this prejudice to Plaintiffs, Google further seeks to force Plaintiffs to respond to a Motion to Stay in just five days rather than fourteen as the Local Rules permit (not to mention eliminating Plaintiffs' right to file a Sur-Reply altogether).

Google's Motion for Expedited Briefing seeks the Court's endorsement of Google's disregard of the Local Rules and attempt to prevent full and fair briefing on a motion to stay pending transfer. As a result, Plaintiffs respectfully request that the Motion be denied.

II. BACKGROUND

On January 10, 2014, Google filed a motion to transfer this case to the Northern District of California, representing to the Court that transfer was warranted because "[k]ey witnesses with knowledge of highly relevant prior art systems and publications concerning Internet search and search advertising, along with crucial documentary evidence, are thus likely located in the Northern District." Mot. to Transfer, Dkt. No. 18 at 3. The importance of this argument to Google's transfer motion is evident even in the motion's Table of Contents:

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See Dkt. No. 18 at *i.* Plaintiffs opposed the motion and briefing was completed on March 27, 2014. *See* Dkt. No. 41. Plaintiffs pointed out that Google likely was "cherry-picking" its persons with relevant knowledge, and despite Plaintiffs' suggestion in its Response that it identify all possible prior art witnesses, Google refused to do so in its Reply. *Compare* Resp. to Mot. to Transfer, Dkt. No. 33 at 1, 8, 12; *with* Reply to Mot. to Transfer, Dkt. No. 36.

Google subsequently served its Invalidity Contentions in late May 2014 and several subpoenas relating to prior art in the first three weeks of June 2014. *See* Dkt. No. 92-3 at Exhs. 2, 46-66. On June 20, 2014—the very same day that Google served eight such subpoenas—Plaintiffs moved for leave to file a three-page supplemental brief addressing the location of prior art witnesses and evidence. *See* Dkt. Nos. 92-93. Remarkably, Google indicated that it intended to oppose Plaintiffs' motion for leave on the grounds that (1) contrary to its earlier arguments to the Court, the location of prior art witnesses and evidence is irrelevant to the transfer motion

(apparently because the location of such witnesses and evidence, as it turns out, favors Plaintiffs' position rather than Google's) and (2) the Court's consideration of a three-page supplemental brief would unreasonably delay resolution of the transfer motion. *See* Dkt. 97. During the meet-and-confer on Plaintiffs' motion for leave, Google indicated that it would nevertheless stipulate to the filing of such a supplemental brief so long as Plaintiffs would stipulate to stay the case pending the Court's disposition of the transfer motion. Dkt. 92 at 4 (Certificate of Conference). Google did not indicate that it intended to seek a stay from the Court—merely that it would accede to the filing of a supplemental brief if Plaintiffs would agree to a stay. *See* Bonn Decl. Exh. 1.

On June 24, 2014, Google indicated for the first time not only that intended to seek a stay from the Court, but that it further intended to (1) fold its request for a stay into its response to Plaintiffs' motion for leave and (2) demand an expedited briefing schedule on both Plaintiffs' motion and Google's "cross-motion" in opposition. *See* Bonn Decl. Exh. 1. Google sought Plaintiffs' agreement that they would not be permitted to file a Response brief and Sur-Reply related to Google's "cross-motion" for a stay, but instead would file only a single, five-page Reply and on an expedited schedule at that.[1] *Id.* Despite Plaintiffs' repeated requests that Google explain its basis for disregarding Local Rule CV-7(a), Google's only justification for doing so was that it believed its request for a stay related to its arguments in opposition to Plaintiffs' motion for leave. *See* Bonn Decl. Exh. 1; *see also* Dkt. No. 98 at 2.

[1] Google later suggested in a meet-and-confer that it might consider stipulating to additional pages of briefing, though only if Plaintiffs would agree to the expedited schedule that Google proposed. *See* Bonn Decl. at ¶ 3.

III. ARGUMENT

A. The Court Should Not Reward Google's Disregard of Local Rule CV-7(a) by Adopting Google's Expedited Briefing Schedule.

Local Rule CV-7(a) requires that "[e]ach pleading, motion or response to a motion must be filed as a separate document . . . ." L.R. CV-7(a). The only exception is a "motion[] for alternative relief, e.g., a motion to dismiss or, alternatively, to transfer." *Id.* This rule serves several critical purposes. First, the rule allows the public (including other litigants) to follow activity on the docket without guessing whether a new request for relief is buried in the briefing on another matter. Second, and as the Court understands best, burying requests for relief in briefing on separate matters frustrates the Court's ability to track and report on pending motions. Third, the rule prevents litigants from manipulating other Local Rules—including the rules setting forth deadlines and page limits on briefing.

Yet that is precisely what Google did in this case—it combined a "Cross-Motion to Stay Case Pending Resolution of Google's Motion to Transfer" with its "Opposition to Plaintiffs' Motion for Leave to File a Supplemental Brief in Response to Google's Motion to Transfer." *See* Dkt. No. 97. And, by virtue of having done so, it now insists that Plaintiffs are not entitled to invoke the rules regarding Responses and Sur-Replies to motions, but instead would be limited to filing a single, five-page "Reply" brief (on an expedited schedule) to both its own Motion for Leave and to Google's Cross-Motion to Stay and must do so within five days. Bonn Decl. Exh. 1. Google's maneuvering accomplishes no apparent purpose other than to benefit Google.

Google apparently attempts to justify its failure to file a separate Motion for Stay by labeling its motion as a request for "alternative" relief. *See* Dkt. 97 & Bonn Decl. Exh. 1. But the exception to Local Rule CV-7(a) is for "motions" that seek alternative forms of relief, such as "a motion to dismiss or, alternatively, to transfer." L.R. CV-7(a). The underlying motion here is

Plaintiffs' Motion for Leave to File a Supplemental Brief—which does not seek any form of relief in the alternative. Google's response to that motion, in turn, is not a request for relief at all—it is an opposition to the relief Plaintiffs seek. Thus, the offending pleading is not a motion that seeks two alternate forms of relief—it is simply an opposition brief into which Google has bootstraped a completely separate request for its own relief.

Google further attempts to justify its decision to flout Local Rule CV-7(a) by noting that its "arguments regarding a stay . . . fit squarely within the factors the Court should consider in determining whether Rockstar's requested supplemental briefing should be permitted." Mot. at 2 (citing *Intel Corp. v. Commonwealth Scientific & Indus. Research Org.*, No. CV 06-551, 2009 WL 8590766, at *1 (E.D. Tex. Apr. 9, 2009)). As an initial matter, there is no exception to the separate pleading requirement in Local Rule CV-7(a) based on whether counsel believes its arguments in opposition to one motion relate to its arguments in favor of a separate motion of its own. Moreover, Google's cited authority is inapposite on its face. The *Intel* decision merely stands for the proposition that the Court may consider the "availability of a continuance," as a factor in deciding whether to permit amendments to pleadings under Rule 16(b) after the deadline in the scheduling order has passed. *Intel*, 2009 WL 8590766, at *1. It does not stand for Google's apparent proposition that the Court is required to entertain an entirely separate motion to stay in a combined opposition/cross-motion rather than on a separately-filed motion to stay per Local Rule CV-7(a).

Courts in similar circumstances have refused to permit such manipulation of the Local Rules. For example, in *White v. Indymac Bank, FSB*, No. CV 09-00571 DAE-KSC, 2012 WL 139203, at *6 (D. Haw. Jan. 18, 2012), the plaintiff filed an opposition brief to the defendants' motion for summary judgment, including in its opposition a request for a temporary restraining

order or preliminary injunction enjoining any trustee's sale of the property at issue during the pendency of the action (*i.e.*, to stay any such proceeding). The court noted that this "fails to comply with Local Rule 10.2(g), which contemplates that an application for TRO or preliminary injunction be filed as a separate document with its own supporting points and authorities." *Id.* (emphasis added). Similarly, in *Persky v. Dolgencorp, Inc.*, No. CIV-07-136-C, 2008 WL 542959, at *4 n.6 (D. Okla. Feb. 25, 2008), the plaintiff opposing a summary judgment motion also sought to strike certain evidence the defendants had submitted. The court held that this was improper, as the local rules "require[d] each motion to be filed as a separate document." *Id.* (emphasis added).

Similarly, this Court has not hesitated to strike improper pleadings that violate either the Local Rules or the Court's standing orders. *See, e.g.*, *Phoenix Licensing, LLC v. AAA Life Ins. Co.*, No. CV 13-1081-JRG-RSP (E.D. Tex. June 5, 2014), Order Granting Mot. to Strike, Dkt. 171 at *1 (Payne, J.) (granting motion to strike "Statement Regarding Discovery Order and Docket Control Order and Request for Deconsolidation," and noting "[i]f Defendants wish to file a motion, and have a good faith basis for doing so, they may do so under the rules" regarding filing motions); *Adrain v. Vigilant Video, Inc.*, No. CV 10-173-JRG (E.D. Tex. March 25, 2013), Order Granting Motion to Strike Defendants' Second Mot. for Summary Judgment, Dkt. 153, at *1-2 (Payne, J.) (granting motion to strike summary judgment motion for failure to comply with the Court's standing order).

The same result is warranted here. Plaintiffs have filed a motion to strike Google's pleading for the reasons set forth above. Dkt. No. 100. If Google wishes to file a Motion to Stay as a separate pleading as the Local Rules require, it is entitled to do so. If it then wishes to move to expedite Plaintiffs' Response and Sur-Reply, it can file that motion as well. But it is not

entitled to disregard the Local Rules, fold its Motion to Stay into a separate Response, and then demand expedited briefing on its procedurally-improper filing.

B. Expedited Briefing Is Unnecessary as Any Delay Is Caused by Google's Unnecessary Motion Practice.

Ironically, the entire basis for Google's Motion for Expedited Briefing (and underlying "Cross-Motion to Stay") is that "it will take time for the Court to resolve the Motion for Leave, and if Rockstar's Motion for Leave is granted, Google should be entitled to an opportunity to respond" which "will further delay resolution of the Transfer Motion . . . ." Mot. at 1. The reason Plaintiffs were forced to file the Motion for Leave in the first place is that Google refused to consent to Plaintiffs' filing a supplemental three-page brief, claiming that the Court's consideration of such a short brief would unduly delay disposition of the transfer motion. And yet by requiring Plaintiffs to file an opposed Motion for Leave, Google has <u>further</u> delayed the proceedings by forcing the Court to consider not only short, supplemental briefs on the transfer motion but also briefing on (1) an opposed Motion for Leave; (2) Google's "Cross-Motion to Strike," (3) Plaintiffs' Motion to Strike Google's improper combined opposition and request for stay; and (4) Google's Motion for Expedited Briefing. Google could have saved the parties and the Court unnecessary time on these matters by simply agreeing to Plaintiffs' supplemental brief and filing a three-page supplemental brief of its own. Had it done so, any purported "delay" would have ended yesterday when Google elected to multiply these proceedings with unnecessary motions to stay the case and expedite briefing rather than simply filing a responsive supplemental brief of its own. To the extent there is any delay and prejudice moving forward, it is of Google's own making.

The only other supposed prejudice warranting an expedited schedule that Google complains of consists of complying with claim construction deadlines that have been known to

Google all along and would be imposed regardless whether the case were litigated here or in the Northern District of California. Mot. at 1-2; *see also* Dkt. No. 97 at 7-8. That process already has begun, as the parties exchanged claim terms for construction the day before Google filed its Motion. *See* Dkt. Nos. 96, 99. If Google truly believed it would be prejudiced by complying with such deadlines pending transfer, it could have filed a motion to stay at any time previously and regardless of the Court's consideration of an additional three-page brief. It did not do so. Instead, Google filed its motion to transfer in January 2014 and only now requests a stay in the event that the Court elects to consider Plaintiffs' three-page supplemental brief (but not otherwise). And yet now—because of its belated filing of a "Cross-Motion to Stay"—Google requests that briefing on the motion be circumscribed (with only a Reply brief from Plaintiffs instead of a Response and Sur-Reply) and expedited.

As a result, the Court should deny Google's request for expedited briefing.

C. Expedited Briefing Would Unfairly Limit Plaintiffs' Ability to Respond to Google's Request to Stay the Case.

If the Court is inclined to consider the question of a stay, the subject warrants full and proper briefing on the timetable set by the Local Rules—fourteen days for a Response, seven days for a Reply, and seven days for a Sur-Reply. Google's relies on the Federal Circuit's decision in *In re Fusion-IO*—and, in particular, its dicta regarding a stay pending disposition of a transfer motion—as justifying a stay in this case. Before that dicta becomes law, its underpinnings warrant examination in a proper motion briefed on the regular schedule, not on expedited and circumscribed briefing on a request for "alternative relief" hiding in a Response. Full briefing will show that *In re Fusion-IO's* dicta does not stand up to examination. This is not the appropriate avenue for such briefing, but Plaintiffs endeavor to highlight a few of the reasons

why *In re Fusion-IO* is wrongly decided (and why full briefing, on the regular briefing schedule, is warranted).

The language Google relies on from *In re Fusion-IO* is dicta. In what started out as a multi-defendant case, this Court granted the defendants' motions to sever, and in so doing, denied transfer motions *without prejudice to refiling* should transfer still be warranted in light of severance. *Solid State Storage Solutions, Inc., v STEC, Inc, et al*, 2:11-cv-00391-JRG-RSP, Dkt. No. 226 (E.D. Tex. Sept. 17, 2012). Instead of refiling its transfer request, Fusion-IO, Inc., sought an immediate mandamus, asserting that the denial without prejudice somehow constituted a ruling denying their transfer request on the merits. The Federal Circuit ***denied*** mandamus. *In re Fusion-IO, Inc*., 489 Fed. Appx. 465, 465 (Fed. Cir. 2012) ("Fusion–IO's petition asks us, in effect, to bypass the district court's weighing of the facts and considerations relevant to its transfer motion, which we decline to do.") Indeed, the Federal Circuit directed the mandamus petitioner to refile its transfer request, which is exactly what this Court provided in the first place. *Id.*

The question of a stay was not presented to this Court in the first instance, nor to the Federal Circuit on mandamus. *See* Bonn Decl. Exhs. 2-4 (briefing from *In re Fusion*). So what came next was pure dicta: "We fully expect, however, for Fusion–IO to promptly request transfer in the lead case along with a motion to stay proceedings pending disposition of the transfer motion, and for the district court to act on those motions before proceeding to any motion on the merits of the action." *In re Fusion-IO, Inc*., 489 Fed.Appx. at 465 (citing *McDonnell Douglas Corp. v. Polin*, 429 F.2d 30, 30–31 (3d Cir. 1970)).

The presumption under Local Rule CV-26(a) is that cases will proceed during the pendency of a motion to transfer. L.R. CV-26(a). *In re Fusion-IO* did not address Local Rule

CV-26(a). A district court has discretion to adopt local rules. *Frazier v. Heebe*, 482 U.S. 641, 645, 107 S.Ct. 2607, 96 L.Ed.2d 557 (1987) (citing 28 U.S.C. § 2071; Fed. R. Civ. P. 83). Those rules have "the force of law." *Weil v. Neary*, 278 U.S. 160, 169, 49 S.Ct. 144, 73 L.Ed. 243 (1929). Local Rule CV-26(a) not only anticipates that cases will continue despite transfer motions, it explicitly provides that the pendency of a transfer motion is no excuse to dodge discovery obligations. This approach is not a local idiosyncrasy. It is consistent with longstanding understandings of core concepts such as "just, speedy, and inexpensive determination of every action." Fed. R. Civ. P. 1.

Proceeding with cases during the pendency of a transfer request also has roots in deference to the plaintiff's choice of forum. That deference is embodied in the "clearly more convenient" standard. *In re Volkswagen of Am., Inc.*, 545 F.3d. 304, 314 (5th Cir. 2008) (en banc). Deference to the plaintiff's choice of forum would vanish if defendants could stay the case against them simply by filing a transfer motion and waiting to the time of their choosing to request a stay.

There is ample precedent in the Federal Circuit for cases proceeding during the pendency of a transfer motion. Indeed, the ability of the district court to assess the facts as the case develops has been recognized crucial to proper evaluation of § 1404(a) motions. *In re Vistaprint, Ltd.*, 628 F.3d 1342, 1346 (Fed. Cir. 2010) ("[A] trial judge has superior opportunity to familiarize himself or herself with the nature of the case and the probable testimony at trial, and ultimately is better able to dispose of these motions."); *In re HTC Corp.*, 494 Fed. Appx. 81, 83 (Fed. Cir. 2012) ("[T]here is at least some evidence that Google will have little or no role in the litigation, as Google has not been subpoenaed …."); *In re Apple Inc.*, 456 Fed. Appx. 907, 909 (2012) ("[S]ome reasons for transfer because of convenience and fairness in regard to pre-

trial proceedings such as subpoena power to secure witnesses for deposition deserve less consideration so close to trial."). As with the regional circuits, one panel of the Federal Circuit cannot reverse another. *Cardiac Pacemakers, Inc. v. St. Jude Med., Inc.*, 303 Fed. Appx. 884, 893 (Fed. Cir. 2008), *aff'd in part & rev'd in part on other grounds*, 576 F.3d 1348 (Fed. Cir. 2009) (*en banc*). Thus, the dicta in *In re Fusion-IO* cannot reverse these other precedents.

The parties should have an opportunity to properly brief how (or whether) *In re Fusion-IO* can be reconciled with these and other Federal Circuit cases. The appropriate avenue for such briefing is on a separately-filed Motion to Stay and on the briefing schedule set forth in the Local Rules. Google should not be permitted to hamstring Plaintiffs' ability to respond to its argument for a stay—and the Court's ability to fully consider the implications of *In re Fusion-IO*—through procedural gamesmanship.

IV. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court deny Google's Motion for Expedited Briefing.

DATED: June 26, 2014

Respectfully submitted,

By: */s/ Amanda K. Bonn*

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CERTIFICATE OF SERVICE

I hereby certify that all counsel of record, who are deemed to have consented to electronic service, are being served this 26th day of June, 2014 with a copy of this document via the Court's CM/ECF system per Local Rule CD-5(a)(3).

/s/ Amanda K. Bonn
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