

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.)
)
)

Civil Action No. 13-cv-00893-RG

JURY TRIAL DEMANDED

**GOOGLE INC.’S OPPOSITION TO ROCKSTAR’S MOTION TO STRIKE UNDER
LOCAL RULE CV-7(A) GOOGLE INC.’S OPPOSITION TO PLAINTIFFS’ MOTION
FOR LEAVE TO FILE A SUPPLEMENTAL BRIEF IN RESPONSE TO GOOGLE’S
MOTION TO TRANSFER, AND, IN THE ALTERNATIVE, CROSS-MOTION TO STAY
CASE PENDING RESOLUTION OF GOOGLE’S TRANSFER MOTION)**

Preliminary Statement

This Court should deny Plaintiffs Rockstar Consortium US LP and NetStar Technologies LLC's (collectively "Rockstar's") Motion to Strike because the only reason that Rockstar has given to strike Google's Opposition to Rockstar's Motion for Leave to File a Supplemental Brief Regarding Transfer ("Opposition") is that Google is seeking an expedited resolution of Rockstar's Motion for Leave to File a Supplemental Brief ("Motion for Leave"). This is not, however, a basis to strike Google's Opposition. As Google explained in its Opposition, Google opposes supplemental briefing on transfer because it will further delay this Court's resolution of the Transfer Motion, which is prejudicial to Google given upcoming case deadlines.

Rockstar argues that Google's inclusion in its Opposition of a request for alternative relief of a stay pending resolution of the Transfer Motion is improper pursuant to L.R. CV-7(a) because the request to stay should be a separate motion. But Google's inclusion in its Opposition of a request for alternative relief of a stay pending resolution of the Transfer Motion was proper because it is part of the analysis of whether to grant Rockstar's Motion for Leave. One of the factors the Court should consider in analyzing Rockstar's Motion to Leave is "the availability of a continuance to cure [Google's] prejudice." The availability of a stay of the litigation pending resolution of the Transfer Motion fits squarely within that factor and thus was properly addressed in Google's Opposition.

Rockstar further contends that combining that request with Google's Opposition is prejudicial to Rockstar because it deprives Rockstar of the opposition and sur-reply to which it would be entitled if filed as a separate motion. But there is no prejudice to Rockstar by Google including this argument in its Opposition. In response to Rockstar's concerns that Rockstar would not have fifteen pages to respond to Google's Opposition, or the opportunity for a sur-reply, Google offered to give Rockstar additional pages for its reply, and to discuss additional

briefing. Rockstar did not take Google up on that offer because it did not agree to an expedited briefing schedule on its Motion for Leave.

In any event, in just one day, Rockstar filed a motion to strike that is longer than the Opposition Rockstar seeks to strike and includes substantive arguments on the merits. This undermines any claims that Rockstar would be prejudiced by having to respond on an expedited schedule. Indeed, Rockstar filed its Motion to Strike four days earlier than Rockstar would be required to file its reply in support of its Motion for Leave under Google's proposed expedited briefing schedule. That Rockstar opposes a quick resolution of its own motion is no basis to strike Google's Opposition thereto.

Finally, many of the arguments in the Motion to Strike address the merits of Google's alternative requested relief of a stay pending resolution of the Transfer Motion. Those arguments, however, have no bearing on whether inclusion of that request in the Opposition was proper, and thus have no bearing on the Motion to Strike.

Statement of Relevant Facts

The relevant facts are set forth in Google's Opposition to Rockstar's Motion for Leave ("Opposition") (Dkt. No. 97, at 2-3), and incorporated by reference herein.

Argument

I. GOOGLE'S REQUESTED ALTERNATIVE RELIEF WAS PROPERLY INCLUDED IN ITS OPPOSITION TO ROCKSTAR'S MOTION FOR LEAVE.

Google's Opposition does not violate L.R. CV-7(a) because Google's request for a stay pending resolution of the Transfer Motion is not a separate motion, and thus need not be filed as a separate motion. It is intertwined with the analysis of Rockstar's Motion for Leave. Google's inclusion of its alternative request for relief in its opposition to Rockstar's Motion for Leave is proper because it fits squarely within the analysis of whether there is "good cause" to allow a supplemental brief. As explained in Google's Opposition, Federal Rule of Civil

Procedure 16(b) provides that a scheduling order “may be modified only for good cause and with the judge's consent.” Fed. R. Civ. P. 16(b). In determining “good cause” the following factors are relevant: “(1) the explanation for the failure to timely move for leave to amend; (2) the importance of the amendment; (3) potential prejudice in allowing the amendment; and (4) the availability of a continuance to cure such prejudice.” *Intel Corp.*, 2009 WL 8590766 (citing *Sw. Bell Tel. Co. v. City of El Paso*, 346 F.3d 541, 546 (5th Cir. 2003).) (emphasis added); (see Dkt. No. 97.) Rockstar does not dispute this. (See generally Dkt. No. 100.) In its Opposition, Google substantively addressed all four factors, including the availability of a continuance to cure such prejudice. (Dkt. No. 97, at 4-8.) It was not improper for Google to do so.

More specifically, Google argued that it will suffer prejudice if the Court grants Rockstar leave to re-open briefing on the Transfer Motion because doing so will further delay resolution of the Transfer Motion. (*Id.*, at 5-7.) Given that the parties have imminent upcoming deadlines (see Dkt. No. 68), any further delay is prejudicial. (Dkt. No. 97, at 4-8) Consistent with the standard, however, Google acknowledged that a cure to that prejudice exists: staying the litigation pending resolution of the Transfer Motion. (*Id.*, at 7-8.) Thus, that Google addressed the availability of a stay pending resolution of the Transfer Motion in its Opposition was entirely proper. In fact, it would have been improper for Google to argue that it will suffer prejudice, but to ignore the availability of a cure to that prejudice. And, contrary to Rockstar’s argument (Dkt. No. 100, at 6), addressing the availability of a continuance to cure the prejudice to Google in a separate brief would cause Google prejudice because it would force Google to include an incomplete analysis in its Opposition to Rockstar’s Motion for Leave.

Rockstar argues that there is no exception to the separate pleading requirement in the Local Rules just because arguments in one motion relate to arguments in another motion. (Dkt. No. 100, at 6.) But, the availability of a stay to cure Google’s prejudice is more than just

“related to” Google’s Opposition. It is part and parcel with it; it is a factor in the analysis of whether to grant Rockstar’s Motion for Leave.¹ This is also why Rockstar’s argument that Google filed a separate motion to expedite and thus should have done the same here (*id.*) fail. The motion to expedite is truly a separate motion; the discussion of the availability of a cure to Google’s prejudice is not.

II. THE INCLUSION OF GOOGLE’S ALTERNATIVE² REQUEST FOR RELIEF IN ITS OPPOSITION DOES NOT PREJUDICE ROCKSTAR.

Throughout its brief, Rockstar argues that Google’s inclusion of alternative requested relief of a stay pending resolution of the Transfer Motion prejudices Rockstar because it deprives Rockstar of fourteen days to prepare a fifteen-page opposition to the request, and a five-page sur-reply seven days after Google files its reply. (Dkt. No. 100, at 1; *see also id.* at 2 (“Google seeks to deny Plaintiffs adequate time to respond and replace Plaintiffs’ right to file a fifteen-page Response and a five-page Sur-Reply with a single, five-page ‘Reply’ to two motions instead”), 3 (“[Google]insisted that Plaintiffs were not entitled to invoke the rules regarding Responses and Sur-Replies to motions, but instead would be limited to 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”), 7 (“Google asserts that Plaintiffs are limited to filing a single, five-page Reply regarding both motions (and should do so on an expedited schedule)”). But this misstates the facts.

When the parties met and conferred on June 25 regarding Google’s Opposition and alternative request for relief³, and Motion to Expedite, Rockstar argued that the request for a stay

¹ It is worth noting that while Rockstar complains about that Google combined “related” issues into one brief, Rockstar’s Motion to Strike does too: it moves to strike Google’s Opposition, it replies to Google’s Opposition and Cross-Motion (Dkt. No. 100 at 3-4, 6, 8-12), and it opposes Google’s request to expedite briefing (*Id.*, at 2).

² Rockstar takes issue with Google referring to this as an “alternative” request for relief because Google’s response to Rockstar’s Motion for Leave is not a request for relief. (Dkt. No. 100, at 5.) Google’s request is an alternative to outright denial of Rockstar’s Motion for Leave.

³ As Rockstar acknowledges, the parties met and conferred regarding Google’s proposal that a stay be entered pending resolution of the Transfer Motion during their June 20 meet and

should be filed as a separate motion because, if it were, Rockstar would be entitled to a fifteen page opposition brief, and a sur-reply giving Rockstar the last word on the issue. (Declaration of Andrea Pallios Roberts (“Roberts Dec.”), ¶ 5.) In response to this concern, and contrary to the statements throughout Rockstar’s Motion to Strike, Google offered to give Rockstar additional pages for its reply, and to discuss additional briefing (*Id.*) Indeed, Rockstar acknowledges this in footnote 2 of its brief.⁴ (Dkt. No. 100, at 4, n.2.) Thus, there would be no prejudice to Rockstar because Google was willing to address the very concerns Rockstar raises in its Motion to Strike.

Rockstar did not take Google up on that offer, saying there was no point in doing so because Rockstar objects to an expedited briefing schedule. (Roberts Dec., ¶ 5.) In other words, the sole basis for Rockstar taking issue with Google’s discussion of a stay in its Opposition, and ultimately in moving to strike Google’s Opposition, is Google’s request for an expedited briefing schedule. But Rockstar was able to file in one day, and four days earlier than its reply brief would be due under Google’s proposed expedited briefing schedule, a twelve-page motion to strike an eight-page opposition, which raises the same substantive arguments that would have been in the reply. This demonstrates that there is no prejudice to Rockstar in having to respond on an expedited schedule.

confer. (*See* Dkt. No. 92, Certificate of Conference; Dkt. No. 100, at 4; Roberts Dec., ¶¶ 2.) Rockstar’s complaint that that the parties did not discuss at that time that Google would include that alternative request in its Opposition (Dkt. No. 100, at 4) is irrelevant as Rockstar agrees that this was discussed on the June 25 meet and confer. (Dkt. No. 100, at 4; Dkt. No. 100-2; Roberts Dec., ¶ 5.)

⁴ Google asked Rockstar to advise the Court of these misstatements today. (Roberts Dec., ¶ 6, Ex. A.) Rockstar refused to do so, saying that Google insisted that Rockstar be limited to a five-page Reply brief “before, during, and after the meet-and-confer.” (*Id.*) But, this is inconsistent with Rockstar’s own admission in footnote 2 of its brief (Dkt. No. 100, at 4, n. 2), and in its correspondence today that Google offered to discuss additional pages and additional briefing. (Roberts Dec., ¶ 6, Ex. A.) Rockstar claims, however, that Google’s offer to discuss additional briefing “came with strings attached.” (*Id.*) The “strings” to which Rockstar refers is the expedited briefing schedule Google proposed. (*Id.*, Dkt. No. 100, at 4 n.2.) But, Google never made its offer to try to resolve Rockstar’s concerns conditional on acceptance of the expedited briefing schedule. (*Id.*, ¶ 5.) It was Rockstar’s counsel who said that there was no point in discussing those issues because it would not agree to an expedited briefing schedule. (*Id.*)

III. ROCKSTAR'S SUBSTANTIVE ARGUMENTS REGARDING GOOGLE'S ALTERNATIVE REQUEST FOR RELIEF HAVE NO BEARING ON THE MOTION TO STRIKE.

The remainder of Rockstar's arguments relate to the merits of whether a stay should be entered. For example, Rockstar argues that a stay is unnecessary because Google caused the delay in resolution of the Transfer Motion because it opposed Rockstar's Motion for Leave. (Dkt. No. 100, at 9.) Rockstar similarly argues that any prejudice to Google of delay in resolving the Transfer Motion is Google's own fault because it did not move to stay earlier. (*Id.*) And Rockstar further argues whether a stay is appropriate. (*Id.*, at 10-12.) These arguments go to the merits of Google's Opposition. Rockstar will presumably make those arguments in its reply in support of its Motion for Leave. But, they have no bearing whatsoever on whether it was proper for Google to address a stay in its Opposition. Thus, they are irrelevant to whether Google's Opposition should be stricken, and therefore should be ignored.

Conclusion

For the foregoing reasons, this Court should deny Rockstar's Motion to Strike.

DATED: June 27, 2014

QUINN EMANUEL URQUHART & SULLIVAN, LLP

By /s/ David A. Perlson

J. Mark Mann
State Bar No. 12926150
G. Blake Thompson
State Bar No. 24042033
MANN | TINDEL | THOMPSON
300 West Main Street
Henderson, Texas 75652
(903) 657-8540
(903) 657-6003 (fax)

QUINN EMANUEL URQUHART &
SULLIVAN, LLP
Charles K. Verhoeven
charlesverhoeven@quinnemanuel.com
David A. Perlson
davidperlson@quinnemanuel.com
50 California Street, 22nd Floor
San Francisco, California 94111-4788
Telephone: (415) 875 6600
Facsimile: (415) 875 6700

Attorneys for Google Inc.

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 June 27, 2014.

/s/ Andrea Pallios Roberts _____

Andrea Pallios Roberts