

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 05-80387 CIV RYSKAMP/VITUNAC

STELOR PRODUCTIONS, LLC
a Delaware limited liability company,

Plaintiff,

v.

GOOGLE INC., a Delaware corporation,

Defendant.

**DECLARATION OF MORGAN L. SWING IN SUPPORT OF STELOR
PRODUCTIONS, LLC'S REPLY TO DEFENDANT GOOGLE, INC.'S RESPONSE TO
ORDER COMPELLING BETTER ANSWERS TO INTERROGATORIES**

I, Morgan L. Swing, hereby declare as follows:

1. I am an associate with Coffey Burlington, counsel for Plaintiff Stelor Productions, LLC ("Stelor") in this action. I am submitting this declaration in support of Stelor's Reply to Defendant Google, Inc.'s Response to Order Compelling Better Answers to Interrogatories. I make this declaration of my personal knowledge.

2. On October 7, 2008, I engaged in multiple e-mails with Ramsey Al-Salam, counsel for Defendant Google, Inc. ("Google"), about discovery responses and, in particular, Plaintiff's Motion to Compel Better Answers to Interrogatories ("Motion"). This e-mail exchange was an attempt by me to confer in good faith about the discovery responses.

3. When it became clear to me that the e-mail exchange was not producing a clear resolution, I picked up the phone that afternoon and called Mr. Al-Salam directly. I told Mr. Al-Salam that I wanted to ensure no confusion existed as to Stelor's position on the issue. I advised

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him that Stelor would agree to a motion by Google to extend the time for its response to the motion to compel, while Stelor revised any supplemental interrogatory responses served by Google. I emphasized to him that Stelor could not commit to withdrawing its motion, until we had a full opportunity to review any supplemental responses and confirm they were sufficient. As it turned out, the supplemental responses were not sufficient, and Stelor renewed its motion.

4. Mr. Al-Salam indicated to me on the phone that he understood Stelor's position. He did not suggest to me that he "assumed" Stelor would be withdrawing the motion; nor, in my view, could he reasonably have believed that was to be done, based on the content of that phone call.

5. Indeed, even the progression of e-mails that Mr. Al-Salam and I exchanged on October 7th clearly concluded with Stelor's suggestion that Google file an agreed motion for enlargement of time if Google needed.

- In an e-mail at 9:40AM (PST)/12:40PM (EST), I note that the motion to compel "will *likely* be moot since you [Mr. Al-Salam] are sending up the revised responses" (emphasis added). Exhibit A attached hereto.
- Mr. Al-Salam states at 9:52AM (PST)/12:52PM (EST) that "I don't know what you mean by letting the motion to compel "sit." Mr. Al-Salam also indicates that he was still attempting to "clarify what we're doing on the motion to compel." *Id.*
- In a later e-mail, at 10:08AM (PST)/1:08PM (EST), I state that "once we receive your revised interrogatory answers, we *would* file a notice to strike or remove the motion from the docket." Exhibit B attached hereto.

- In order to ensure that Google assumed responsibility itself for addressing the pending deadlines, though, my final e-mail on October 7, 2008 to Mr. Al-Salam at 10:59AM (PST)/1:59 (EST), I state that Stelor would agree “to grant [Google] additional time to serve [its] opposition to the motion to compel.” *Id.* Mr. Al-Salam replies at 11:06AM (PST)/2:06PM (EST) “Okay, thanks.” *Id.*

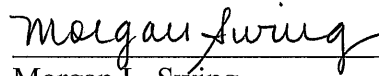
6. As set forth above, my phone call to him followed later that afternoon.

7. At no time during the three weeks between the time of these communications and entry of the Court’s Order on October 28th did Google’s counsel ever contact us to discuss withdrawal of the motion to compel.

8. For these reasons, I respectfully suggest that the contents of Google’s Response are not an accurate or complete account of the communications between counsel.

I declare under penalty of perjury that the foregoing is true and correct.

EXECUTED this 6th day of November, 2008, in Miami, Florida.


Morgan L. Swing

Morgan Swing

From: Al-Salam, Ramsey M. (Perkins Coie) [RAlsalam@perkinscoie.com]
Sent: Tuesday, October 07, 2008 2:06 PM
To: Morgan Swing
Cc: Kevin C. Kaplan
Subject: RE: Discovery Deadlines

Okay, thanks.

Ramsey M. Al-Salam

Perkins Coie LLP
1201 Third Ave. Ste. 4800
Seattle, WA 98101

Direct Dial: 206.359.6385
Direct Fax: 206.359.7385

From: Morgan Swing [mailto:MSwing@coffeyburlington.com]
Sent: Tuesday, October 07, 2008 10:59 AM
To: Al-Salam, Ramsey M. (Perkins Coie)
Cc: Kevin C. Kaplan
Subject: RE: Discovery Deadlines

Ramsey:

If you are concerned, we could just agreed right now to grant you additional time to serve your opposition to the motion to compel. And once we receive your interrogatories, we would withdraw the motion to compel as I explained in the previous email.

From: Al-Salam, Ramsey M. (Perkins Coie) [mailto:RAlsalam@perkinscoie.com]
Sent: Tuesday, October 07, 2008 12:52 PM
To: Morgan Swing
Cc: Kevin C. Kaplan; Samantha Tesser Haimo
Subject: RE: Discovery Deadlines

Morgan:

I don't know what you mean by letting the motion to compel "sit." If we don't respond on time, couldn't the court enter an order granting it? Don't you have to reschedule it? In my local court, we would re-note the time for hearing or change the briefing schedule. I don't mind giving you a few more days on your responses, but I do want to clarify what we're doing on the motion to compel. Thanks.

Ramsey M. Al-Salam

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1201 Third Ave. Ste. 4800
Seattle, WA 98101

Direct Dial: 206.359.6385
Direct Fax: 206.359.7385

From: Morgan Swing [mailto:MSwing@coffeyburlington.com]
Sent: Tuesday, October 07, 2008 9:40 AM
To: Al-Salam, Ramsey M. (Perkins Coie)
Subject: RE: Discovery Deadlines

Yes, we're letting the motion to compel sit, and as we discussed last week, it will likely be moot since you are sending up the revised responses. I am working on our discovery to you, but it looks like I might need another couple of days to get it to you. Would this be alright? Thank you.

From: Al-Salam, Ramsey M. (Perkins Coie) [mailto:RAlsalam@perkinscoie.com]
Sent: Tuesday, October 07, 2008 12:36 PM
To: Morgan Swing
Cc: Matt, Elana Sabovic (Perkins Coie); Kevin C. Kaplan
Subject: RE: Discovery Deadlines

Thanks Morgan. I think this is okay, but I'm going to check with Google to make sure. Am I correct that you are moving the motion to compel out? We are getting you revised responses today. Thanks.

Ramsey M. Al-Salam

Perkins Coie LLP
1201 Third Ave. Ste. 4800
Seattle, WA 98101

Direct Dial: 206.359.6385
Direct Fax: 206.359.7385

From: Morgan Swing [mailto:MSwing@coffeyburlington.com]
Sent: Tuesday, October 07, 2008 9:10 AM
To: Al-Salam, Ramsey M. (Perkins Coie)
Cc: Matt, Elana Sabovic (Perkins Coie); Kevin C. Kaplan
Subject: Discovery Deadlines

Ramsey: Attached are drafts of the motion and order to extend discovery based upon our previous conversation. These are subject to final agreement from our client. Please let me know if you agree.

Thank you.

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Morgan Swing

From: Morgan Swing
Sent: Tuesday, October 07, 2008 1:08 PM
To: Al-Salam, Ramsey M. (Perkins Coie)
Cc: Kevin C. Kaplan
Subject: RE: Discovery Deadlines

Ramsey,

We don't currently have a hearing date on the motion to compel, nor have we asked for one. Once we receive your revised interrogatory answers, we would file a notice to strike or remove the motion from the docket. Based upon our experience with the SDFL, I don't expect them to make a ruling on such a motion immediately. As soon as I receive your revised responses, I will submit such a document to the court.

From: Al-Salam, Ramsey M. (Perkins Coie) [mailto:RAlsalam@perkinscoie.com]
Sent: Tuesday, October 07, 2008 12:52 PM
To: Morgan Swing
Cc: Kevin C. Kaplan; Samantha Tesser Haimo
Subject: RE: Discovery Deadlines

Morgan:

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Ramsey M. Al-Salam

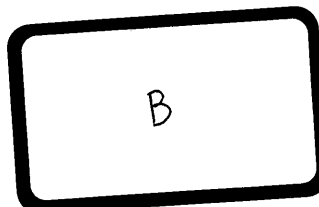
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Ramsey M. Al-Salam

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