

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

**ILLINOIS COMPUTER RESEARCH,** )  
**LLC,** )  
*Plaintiff and Counterclaim Defendant,* )

v. )

**GOOGLE, INC.,** )  
*Defendant,* )

*and* )

**FISH & RICHARDSON P.C.,** )  
*Defendant, Counterclaimant and* )  
*Third-Party Plaintiff,* )

v. )

**SCOTT C. HARRIS,** )  
*Third-Party Defendant and* )  
*Counterclaimant,* )

v. )

**FISH & RICHARDSON P.C.,** )  
*Defendant, Counterclaimant, Third-* )  
*Party Plaintiff and Counterclaim* )  
*Defendant.* )

No. 07 C 5081  
Judge Rebecca R. Pallmeyer  
Magistrate Judge Maria Valdez

**FISH & RICHARDSON’S PRELIMINARY MEMORANDUM OF LAW  
IN OPPOSITION TO MR. HARRIS’S MOTION FOR A PROTECTIVE ORDER**

Fish & Richardson P.C. (“Fish & Richardson”) respectfully submits this *preliminary* response to the Motion for a Protective Order filed yesterday by Scott C. Harris (“Mr. Harris”). Mr. Harris’s motion for a protective order should be denied or, at the very least, Fish & Richardson should be given adequate time to respond.

## ARGUMENT

### A. The Documents At Issue Are Not Privileged.

Fish & Richardson's motion to compel demonstrated at least four reasons why emails exchanged by Mr. Harris through Fish & Richardson's computers, email accounts and servers are not privileged. First, at least some of the documents requested were not exchanged with the Niro Firm and therefore could not be privileged. (Fish Mot. to Compel, 9-10.) Second, Mr. Harris was subject to Fish & Richardson's internet, email and computer policies and therefore had no reasonable expectation of privacy. (*Id.* at 10) Third, Mr. Harris had a fiduciary duty of disclosure. (*Id.*) Fourth, Mr. Harris may not use his attorneys to further his breach of fiduciary duties. (*Id.* at 10-11.)

Mr. Harris entirely ignores Fish & Richardson's first, third and fourth arguments. By not addressing those arguments, Mr. Harris has waived any argument in opposition. *Blakely v. Brach & Brock Confections, Inc.*, 181 F. Supp. 2d 943, 951 (N.D. Ill. 2002). As will be demonstrated in Fish & Richardson's papers to be submitted tomorrow, those three arguments are independently dispositive of this question. Thus, Mr. Harris's motion is moot.

In requesting a protective order, Mr. Harris argues only that he had a reasonable expectation of privacy regarding emails he exchanged through Fish & Richardson's computers, email accounts and servers, despite express firm policies to the contrary. However, in the Seventh Circuit, where an employer announces that it is permitted to inspect the computers it is furnishing for its employees' use, it "destroy[s] any reasonable expectation of privacy" that its employees may have regarding use of those computers. *Muick v. Glenayre Elec.*, 280 F.3d 741, 743 (7th Cir. 2002)<sup>1</sup>. Moreover, a case Mr. Harris relies upon holds that the employee's absence

---

<sup>1</sup> Although Mr. Harris's motion fails to highlight the *Muick* precedent, it is cited in at least two cases relied upon by Mr. Harris – *Sims* and *In re Asia Global Crossing*. (Harris Mot. Prot. Order, 3-4, 6.)

of privacy rights “also extends to the emails he sent and received using [the employer’s] accounts.” *Sims v. Lakeside School*, No. C06-1412RSM, 2007 WL 2745367, at \*1 (Sept. 20, 2007) (cited in Mot. Prot. Order, 3-4).

Here, it is undisputed that Fish & Richardson announced, through multiple internal policies signed by its principals and employees, that all materials reviewed, received, or transferred using any Fish & Richardson computer are the property of Fish & Richardson, are subject to Fish & Richardson’s review, and could not be the subject of a reasonable expectation of privacy. (Fish Mot. to Compel, 10.) Mr. Harris’s self-serving affidavit regarding his purported lack of personal knowledge of the policies is, therefore, irrelevant. Consequently, no reasonable expectation of privacy existed, and Mr. Harris’s emails cannot be privileged.

**B. Fish & Richardson Is Entitled To Adequate Time To Respond.**

At the very least, Fish & Richardson is entitled to adequate time to respond to Mr. Harris’s motion for a protective order. To the extent that Mr. Harris’s personal knowledge is relevant, which it is not, Fish & Richardson already is developing substantial evidence that Mr. Harris was aware of Fish & Richardson’s policies. Mr. Harris’s personal knowledge is – at best for him – a matter of factual dispute that may call for additional discovery and an evidentiary hearing before that question can be resolved. Accordingly, to the extent that the Motion for a Protective Order will be heard – a matter that should be decided after full consideration of all of Fish & Richardson’s argument concerning these emails – Fish & Richardson should be permitted adequate time to respond, both to the law and facts submitted by Mr. Harris. Given the press of the holidays, Fish & Richardson proposes that it respond to the motion on January 8, 2008.<sup>2</sup>

---

<sup>2</sup> January 8, 2008 is a reasonable schedule given that Fish & Richardson has been engaged in a discussion with counsel for Mr. Harris about access to his laptop for more than two months. Not until yesterday did Mr. Harris, for the first time, assert that he had no knowledge of the policies – a contention that Fish & Richardson expects to vigorously contest.

**CONCLUSION**

For the foregoing reasons, Mr. Harris's motion for protective order should be denied, or Fish & Richardson should be accorded adequate time to respond, including for example additional discovery or an evidentiary hearing.

Dated: December 19, 2007

Respectfully submitted,

FISH & RICHARDSON P.C.

By: s/ David J. Bradford  
dbradford@jenner.com  
One of Its Attorneys

David J. Bradford  
Terrence J. Truax  
Eric A. Sacks  
Daniel J. Weiss  
JENNER & BLOCK LLP  
330 North Wabash Avenue  
Chicago, IL 60611  
Telephone No: 312 222-9350  
Facsimile No: 312 527-0484

**CERTIFICATE OF SERVICE**

I certify that a copy of the foregoing was filed with the Court by means of the Court's CM/ECF system, which will send notification of such filing to the following counsel at their email address on file with the Court:

Raymond P. Niro  
Paul K. Vickrey  
Richard B. Megley, Jr.  
Karen L. Blouin  
David J. Sheikh  
Niro, Scavone, Haller & Niro  
181 W. Madison, Suite 4600  
Chicago, Illinois 60602

December 19, 2007.

s/David J. Bradford

JENNER & BLOCK LLP  
330 North Wabash Avenue  
Chicago, Illinois 60611  
Telephone No: 312 222-9350  
Facsimile No: 312 527-0484