Polaris IP, LLC v. Google Inc. et al Doc. 356

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TEXAS
MARSHALL DIVISION

BRIGHT RESPONSE, LLC f/k/a POLARIS LP, LLC	**No. 2:07-cv-371-TJW-CE**
v.	
GOOGLE INC., et al.	**JURY TRIAL DEMANDED**

OPPOSED MOTION FOR ENTRY OF AMENDED PROTECTIVE ORDER

Pursuant to the Court's Order of June 02, 2010 (Dkt. No. 349) Granting in part and Denying in part Defendant Yahoo!, Inc.'s ("Yahoo") Motion to Modify the Protective Order, Plaintiff Bright Response, LLC, f/k/a Polaris LP, LLC ("Bright Response"), files this motion to respectfully request that this Court enter its proposed Amended Protective Order. The Court ordered that "[t]he parties shall jointly submit an amended protective order within seven days that complies with the rulings in this order." Despite Bright Response's best efforts – and this Court's directive – the parties are unable to file an agreed amended Protective Order. The facts below will (1) explain why an agreed order is not being filed and (2) set forth Bright Response's reasons for asking the Court to allow Mr. Pridham access to certain documents (a request the Court specifically allowed in its order).

INTRODUCTION

To be blunt, working with Yahoo has been a lesson in futility. Whether it is Yahoo repeatedly violating Discovery Orders and Protective Orders, ignoring discovery obligations or simply refusing to engage in good faith with Bright Response, Yahoo has flouted the rules that control both litigation process and conduct. The issues surrounding submitting an agreed

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Protective Order are no different, with Yahoo over-reaching beyond the Court's Order and unduly delaying the process of conferring on a revised Protective Order.

FACTUAL HISTORY

On June 2, 2010 – the same day the Court issued its ruling – counsel for Bright Response, Andrew W. Spangler, sent an email to Jennifer Doan (Yahoo local counsel) and Jennifer Ainsworth (Google local counsel) reminding them that the current Protective Order needed to be modified. *See* June 2, 2010 e-mail from A. Spangler to J. Doan and J. Ainsworth, attached hereto as Exhibit A. Bright Response stressed that time was critically important. *Id*. ("Defendants (and specifically Yahoo) need to get us a proposed modified PO as soon as possible. Let me know when I can get it please….Again, in light of impending deadlines, I would again urge to you get me a proposal promptly.") At that same time, Bright Response also stated "when making your proposal please consider how you will address the fact that Mr. Pridham has already seen AEO documents for over 2 years. I am not really sure how he is to unlearn that so please keep that in mind when making your proposal." *Id*. Both Yahoo and Google stated they would pass the request along to their respective clients.

What happened? No response. No proposal. Nothing. Accordingly, two days before the deadline, Monday, June 7, 2010, Bright Response again initiated the process by sending an email to Yahoo and Google local counsel. Specifically, Bright Response again reminded Yahoo and Google that "[t]he Court specifically ordered us to get him a revised Protected Order." June 7, 2010 e-mail from A. Spangler to J. Doan and J. Ainsworth, attached hereto as Exhibit B. Bright Response noted in its correspondence that neither Yahoo or Google had engaged in the Court ordered process at all. *Id*.

In that same correspondence, Bright Response stressed that time was of the essence – noting impending discovery deadlines, expert reports and trial. *Id.* While the Court ordered the parties to submit an *agreed* Protective Order, Bright Response informed Google and Yahoo that it would simply provide the Court with its competing version in accordance with the practice the Court has used in the past. *Id.* Bright Response further stated that it would file its version on Wednesday at the latest – as the Court required. *Id.*

Most importantly, however, is that Bright Response reiterated – and provided even more clarity on – the relief it would like regarding Mr. Pridham's access to Protected Information. Specifically, Bright Response raised two issues: (1) would Mr. Pridham have the ability to work with experts based on information produced ***before*** the June 2, 2010 Order and/or (2) would Mr. Pridham be able to review financial data in helping develop ***damages*** reports. *Id.*

The parties then engaged in a flurry of emails where Yahoo counsel made numerous tangential arguments – including stating that Bright Response "may choose to violate the Protective Order at your peril" – rather than addressing the points made repeatedly by Bright Response: (1) it would file an order by COB Wednesday as required, (2) would Defendants agree to a carve out regarding previously viewed documents and (3) would Defendants agree to a carve out regarding financial information. *See* June 7, 2010 e-mail chain between A. Spangler, J. Doan and J. Ainsworth, attached as Exhibit C. Defendants again refused to respond.

At 6:44 p.m. the day before the agreed order was due, Defendants finally provided their proposal. See June 8, 2010 email from J. Thane et al to A. Spangler et al, attached as Exhibit D and Defendants Proposed Protective Order attached as Exhibit E. Defendants' proposal added numerous changes to the simple relief requested – that Mr. Pridham be barred from accessing

any Protected Information. Notably, however, Defendants' proposal did not address any of the repeated issues Bright Response had raised.

At 11:00 p.m., Bright Response responded with a red-line to Defendants' proposal. See June 8, 2010 email from A. Spangler to J. Thane et al., attached as Exhibit F, and Bright Response's Proposed Red-line to Defendants Protective Order attached as Exhibit G. Bright Response strongly encourages the Court to read that correspondence attached as Exhibit F. It accurately reflects the facts – ***and obvious frustration felt by Bright Response*** – regarding Yahoo's conduct in this litigation.

The next day – for the first time and on the day the order is due – Yahoo asked Bright Response if it could meet and confer, but only after 1:30 p.m. CST. *See* June 9, 2010 email from J. Thane to A. Spangler, attached hereto as Exhibit H. Notably, nowhere in that correspondence will the Court find any mention of the two carve outs Bright Response had repeatedly raised. Instead – more radio silence.

Before noon, Bright Response had sent no less than three (3) more emails asking for Defendants to at least take a position – any position – on the carve outs Bright Response was requesting. See June 9, 2010 email string between J. Thane and A. Spangler attached hereto as Exhibit I. The response? Nothing. More radio silence. Defendants would not even provide the decency of a reply. The delay tactics and blatant refusals to respond that have pervaded this case continued.

ARGUMENT

To say this last week has been a source of frustration for Bright Response would be an understatement. Defendants seek "expedited" relief and, when they get it, do nothing. Moreover, when they finally do engage in the conduct the court ordered they engage in over-

reaching far flung edits unnecessary to encompass the relief they requests (even seeking to increase the length of time a prosecution bar is in affect).

Bright Response believes the issues before the Court are simple and straightforward.

First, if the Court were to deny Bright Response's requests for limited access by Mr. Pridham, the only edits necessary to the Protective Order would simply be a statement that "Mr. Pridham is barred from accessing Confidential, Confidential Outside Counsel Only, and Confidential Source Code information." With that provision in place Mr. Pridham can no longer access any Protected Information – the relief Yahoo requested. The other additions Defendants seek to add should be rejected and would result in the parties engaging in full blown motion practice on numerous provisions not needed.

Second, however, were the Court to entertain allowing Mr. Pridham limited access to Protected Information, Bright Response believes now is the time to address the issue. Discovery closes in a month, expert reports are due shortly, and trial is a little over six weeks away. Waiting to bring these issues to the Court would result in more time wasted and, unless, there is extremely expedited motion practice, a result not even being available for a month. Consequently, Bright Response would request that the Court address Bright Response's request now.

The limited carve outs Bright Response seeks can be easily viewed in the red-line attached as the Proposed Order to this Motion. Basically, Bright Response requests that (1) Mr. Pridham may view documents pre-dating June 2, 2010 but is barred from all information produced thereafter and (2) Mr. Pridham may view financial documents.

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Bright Response would request that Mr. Pridham be permitted to view documents and information produced prior to the Court's entry of its Order on June 02, 2010 because, in part, that Mr. Pridham is unable to unlearn what he has already seen. What prejudice is there to allowing Mr. Pridham to discuss with experts and co-counsel information already in his possession? Bright Response can think of none. But as Mr. Pridham is an extremely important asset to Bright Response's trial team and has vast experience in working with experts, prohibiting him from assisting on reports based on information he already has would be prejudicial to Bright Response. In addition, the bases for Yahoo's motion were directed to ***future*** productions and potential harms.

Bright Response also requests that Mr. Pridham be permitted to view financial data produced by the parties. The basis for excluding Mr. Pridham from access to confidential documents in all the cases cited by Yahoo and arguments in its motion are directed to concerns regarding technical information. Bright Response believes disclosure of technical information gives rise to concerns different than those associated with financial information. For example, the Federal Circuit, when considering the proper scope of a Prosecution Bar, made clear that confidentiality concerns surrounding financials should be treated differently than those directed to technical information. *See* In re Deutsche Bank Trust Company Americas and Total Bank Solutions, LLC, Misc. Dkt. No. 920 (Fed. Cir. May 27, 2010) (granting writ of mandamus) ("For example, financial data and other sensitive business information, even if deemed confidential, would not normally be relevant to a patent application and thus would not normally be expected to trigger a patent prosecution bar. On the other hand, information related to new inventions and technology under development, especially those that are not already the subject of pending patent applications, may pose a heightened risk of inadvertent disclosure by counsel involved in

prosecution-related competitive decision making as described above"). Bright Response believes that there is no prejudice in allowing Mr. Pridham access to financial data and informs the Court that Mr. Pridham has been actively involved in the development of the damages report in this case. Accordingly, denying Mr. Pridham the ability to view these financial documents will result in severe prejudice to Bright Response.

For the above-stated reasons, the Court should enter Plaintiff's proposed Amended Protective Order.

Dated: June 9, 2010

Respectfully submitted,

By: /s/ Andrew W. Spangler

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CERTIFICATE OF SERVICE

I hereby certify that counsel of record who are deemed to have consented to electronic service are being served this 9th day of June, 2010, with a copy of this document via the Court's CM/ECF system per Local Rule CV-5(a)(3). Any other counsel of record will be served by electronic mail, facsimile transmission and/or first class mail on this same date.

/s/ Andrew W. Spangler
Andrew W. Spangler

CERTIFICATE OF CONFERENCE

The Parties were ordered to submit to the Court today, June 9, 2010, an Agreed Protective Order regarding the Court's June 2, 2010 Order Granting-in-Part and Denying-in-Part Yahoo's Motion to Modify the Protective Order. Despite repeated requests from Bright Response to provide proposals/comments/input, etc. in compliance with the Court's Order, Defendants did not respond until June 8, 2010 with their proposal for meeting the Court's order. Plaintiff lead and local counsel, Andrew Spangler, correspondence with numerous counsel from defendants, including Jennifer Doan, Josh Thane and Jennifer Ainsworth. Defendants refused to address any of the issues raised by Bright Response – despite no less than 5 requests in a one week period. At the last second, defendants sought a meet and confer but Bright Response counsel was unable to participate – especially in light of defendants' failure to respond to Bright Response's repeated requests. Pursuant to Local Rule CV-7, Bright Response asserts that Defendants have engaged in bad faith conduct by their delay and refusal to discuss repeated requests. Accordingly, as defendants have not even addressed Bright Response's issues and the Court has ordered a filing for today, Bright Response believes the parties are at an impasse and that it is required to file the present motion – which relief Defendants oppose.

/s/ Andrew W. Spangler
Andrew W. Spangler