

**UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF TEXAS  
MARSHALL DIVISION**

BRIGHT RESPONSE, LLC	§	
F/K/A POLARIS IP, LLC,	§	
	§	
Plaintiff,	§	
v.	§	
	§	No. 2:07-cv-00371-CE
GOOGLE INC., ET AL.,	§	
	§	
Defendants.	§	Jury Demanded

**DEFENDANT’S MOTION FOR ENTRY OF AMENDED PROTECTIVE ORDER**

Plaintiff has demanded that Defendants allow Mr. Pridham 1) continued access to confidential information produced prior to June 2, 2010, 2) participate in the preparation of expert reports, and 3) access to all confidential financials going forward. Based upon Plaintiff’s refusal to withhold confidential information from Pridham or even meet and confer regarding these issues, Defendants are left with no choice but to file this motion. Defendant Yahoo! Inc. respectfully requests that the Court enter the Amended Protective Order attached hereto as Exhibit A (“Amended Protective Order”). The Amended Protective Order specifically addresses this Court’s Order of June 2, 2010 (Dkt. No. 349; *granting in part* Dkt. Nos. 288 and 317) and the orders issued in *Hyundai Motor Am. v. Clear With Computers, LLC*, 6:08-cv-302 (E.D. Tex. May 11, 2009) (Dkt. Nos. 71 and 98) and *ST Sales Tech Holdings, LLC v. Daimler Chrysler Co.*, 2008 WL 5634214 (E.D. Tex. Mar. 14, 2008) (Dkt. Nos. 160 and 181).<sup>1</sup> Indeed, the great majority of the language added to the Amended Protective Order is copied directly from the

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<sup>1</sup> A true and correct copy of the protective orders entered in *Hyundai* and *ST Sales* are attached hereto as Exhibits B and C respectively.

protective orders entered in *Hyundai* and *ST Sales*.<sup>2</sup> The language not directly copied from *Hyundai* and *ST Sales* is added to address this Court's June 2, 2010 Order and the issues fashioned by Plaintiff's counsel. Further, Plaintiff's proposed amended protective order runs afoul of the Order of this Court and the orders in *Hyundia* and *ST Sales*, and attempts to gut the Defendants of the protection granted by this Court. For all of the reasons detailed herein, the Defendant's Amended Protective Order should be entered.

**I. The Amended Protective Order Addresses the Orders in *Hyundai*, *ST Sales*, and this Court's June 2, 2010 Order.**

First, the Amended Protective Order tracks the orders entered in *Hyundai* and *ST Sales* regarding the exclusion of confidential information from David Pridham and others similarly situated, and the barred use of confidential information in patent acquisition, patent applications, and the asserting of infringement claims. For example, paragraph 8 of the protective order in *ST Sales* states:

Protected Matters and any information contained therein shall be used solely for the prosecution or defense of this litigation and shall not be used as a basis for filing a new complaint or a new claim for patent infringement against the producing party. "Confidential" information shall not be disclosed or made available by the receiving party to persons other than Qualified Persons. Information designated as "For Counsel Only" (of "Attorney's Eyes Only") shall be restricted in circulation to Qualified Persons described in Paragraphs 7(A) through (E) above. Information designated as "For Counsel Only" (or "Attorney's Eyes Only") may also be disclosed to up to 2 in-house counsel for each party as described in paragraph 7(f) above. But in no circumstance will information designated as "For Counsel Only" (or "Attorney's Eyes Only") be disclosed to David Pridham of IP Navigation Group LLC or others similarly situated with respect to the business operations of Erich Spangenberg (or entities within his direction or indirect control or influence), irrespective of their capacity under 7(A) through (F).

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<sup>2</sup> It is worth noting that the language from *Hyundai* and *ST Sales* is in the proposed protective order attached to the motion to amend the protective order (Dkt No. 288, Exhibit A). Plaintiff was on notice of the amendments sought. The only language added addresses this Court's June 2, 2010 Order and the issues raised by Plaintiff's counsel after June 2, 2010.

*ST Sales* Protective Order at ¶8 (emphasis added). This language tracks nearly identically the first portion of paragraph 8 in the Amended Protective Order and paragraph 8 of the protective order in *Hyundai*. Plaintiff, however, seeks to remove the majority of the underlined excerpt above – undermining the backbone of this Court’s Order and the orders in *Hyundai* and *ST Sales*.

Further, Plaintiff requests to preclude an entire paragraph of the Amended Protective Order that but for certain defined terms is copied directly from the protective order entered in *Hyundai*. Specifically, paragraph 21 of the protective order in *Hyundai* and paragraph 34 of the Amended Protective Order both preclude using confidential information in future patent acquisitions, patent applications, and patent infringement actions. Compare Exhibit B ¶21 to Amended Protective Order ¶34. This provision is at the heart of preventing the repeated litigation addressed in the briefing to amend the protective order, and the distress caused by competitive decisionmakers using confidential documents against the Defendants in the future. Likewise, the Court specifically addressed this protection in an order requiring Yahoo! to produce certain confidential information. See June 8, 2010 Order (Dkt. No. 355). If Yahoo! is required to produce such highly confidential materials it must be protected. In addition, the two year prosecution bar addressed in the Amended Protective Order also originates from the orders in *Hyundai*. See *Hyundai* at p. 6-7; Amended Protective Order at ¶21.

Second, the Amended Protective Order corresponds with this Court’s June 2, 2010 Order. The Court’s Order specifically provides that Bright Response may petition the Court for access to confidential information – the Amended Protective Order includes procedures for such. Further, the Court’s Order specifically states that access will be granted on a “showing of adequate need and after determining that such access would not tend to undermine the orders issued in *Hyundai* and *ST Sales*” – the Amended Protective Order presents this same language.

There is no reason Plaintiff's counsel should not agree to these provision. Indeed, the Court has already ordered such.

Tellingly, Plaintiff's counsel is attempting to unilaterally limit this Court's Order. As pointed out above, the Amended Protective Order tracks the language from this Court's Order and the orders in *Hyundai* and *ST Sales*. The limits imposed by Plaintiff are not practical and do not arise from any of these orders. In reality, Plaintiff's proposed protective order strips Defendants of protection granted by the Court. Thus, Defendant's proposed Amended Protected Order should be entered.

## **II. The Amended Protective Order Addresses Issues Presented by Plaintiff after the Court's June 2, 2010 Order was Entered.**

The Amended Protective Order precludes the attempts by Plaintiff's counsel to limit this Court's Order and the orders in *Hyundai* and *ST Sales*. After the Court entered the Order on June 2, 2010, Plaintiff's counsel advised Defendants' counsel that Mr. David Pridham would continue to assist in preparing expert reports which rely on confidential information and that Mr. Pridham would continue to review confidential financial information. *See* June 7, 2010 email from A. Spangler to J. Doan and J. Ainsworth, a true and correct copy which is attached hereto as Exhibit D. This limitation does not exist in any of the aforementioned orders and does not protect Defendants' confidential information. Indeed, this limitation runs completely contrary to the Court's orders. Plaintiff cannot now attempt to gut the Defendants of the relief granted by the Court.

In order to address Plaintiff's assertions that Mr. Pridham would continue to review confidential information, the Amended Protective Order specifically requires Mr. Pridham and others similarly situated to destroy or return any confidential information that was previously provided. *See* Amended Protective Order at ¶8. While Mr. Pridham may not be able to forget

what he previously learned, he cannot continue to review confidential information that he is now precluded from accessing. Further, the Amended Protective Order protects Defendants from Plaintiff's attempts to limit the Court's Order and allow Mr. Pridham to aid in preparing expert reports based upon confidential information. Specifically, paragraph 8 precludes confidential information from being "disclosed to, viewed, accessed, or in any way used by David Pridham or others similarly situated . . . ." *Id.* Plaintiff's intent is apparent – they will only limit the use of confidential materials when specifically ordered. This provision must be included to prevent Plaintiff from reading in a limitation that simply does not exist.

Indeed, Defendants provided Plaintiff's counsel with a draft of the Amended Protective Order that addresses the Court's June 2, 2010 Order, the orders in *Hyundai* and *ST Sales*, and the limitation imposed by Plaintiff. In return, Plaintiff's counsel halfheartedly joked that he would need to finish cleaning his garage before he could give the proposal any attention. *See* June 8, 2010 Email from A. Spangler to Defendants' counsel, a true and correct copy which is attached hereto as Exhibit E. Then, in response to Defendant's proposal, Plaintiff ran roughshod of the orders and proposed a protective order that steals the protection granted to Defendants. Further, Plaintiff refused to meet and confer if Yahoo would not agree to allow Mr. Pridham to continue to have access to confidential material and allow Mr. Pridham access to all confidential financials. *See* June 8, 2010 Email from A. Spangler to J. Thane, a true and correct copy which is attached hereto as Exhibit E. Therefore, based upon Plaintiff's insistent stance on robbing Defendants of the protection granted, Yahoo! is left no other option than to file this motion.

### **III. Conclusion**

This Court granted the Defendants protection from disclosure of confidential information to competitive decisionmakers. Defendant's proposed Amended Protective Order is based upon

the relief granted in this Court's June 2, 2010 Order and the orders in *Hyundai* and *ST Sales*. Conversely, Plaintiff is proposing a protective order that does not protect the disclosure of Defendants' confidential information and ignores the aforementioned orders. For all of the reasons stated herein, the Court should enter the Amended Protective Order attached hereto as Exhibit A.

Dated: June 9, 2010

Respectfully submitted,

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*Attorneys for Defendant Yahoo! Inc.*

**CERTIFICATE OF SERVICE**

The undersigned certifies that the foregoing document was filed electronically in compliance with Local Rule CV-5(a). All other counsel of record not deemed to have consented to electronic service were served with a true and correct copy of the foregoing by certified mail, return receipt requested, on June 9, 2010.

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/s/ Jennifer H. Doan

Jennifer H. Doan

**CERTIFICATE OF CONFERENCE**

Defendants' counsel contacted Plaintiff's counsel on June 9, 2010 to schedule a meet and confer regarding the issues in this motion. Plaintiff's counsel refused to meet and confer. Thus, the parties are presumably at an impasse and the present motion is filed opposed.

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/s/ Jennifer H. Doan

Jennifer H. Doan