

**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 RESPONSE IN OPPOSITION TO PLAINTIFF’S MOTION FOR
ENTRY OF AMENDED PROTECTIVE ORDER**

Yahoo is entitled to the protection provided by this Court’s June 2, 2010 Order. Plaintiff’s proposed amended protective order [Dkt. No. 356, Ex. G] and Mr. Pridham’s letter of June 10, 2010 [Dkt. No. 360] are merely attempts to avoid this Court’s June 2, 2010 Order and force Yahoo! to accept Plaintiff’s unilaterally imposed limitations. The heart of Yahoo!’s motion to amend the protective order was to prevent competitive decisionmakers from furthering their knowledge regarding Yahoo’s confidential documents – this Court granted such protection. Now, Plaintiff proposes an amended protective order that would eviscerate this protection. Indeed, Plaintiff’s proposal demands that Defendants allow Mr. Pridham 1) continued access to confidential information produced prior to June 2, 2010, 2) to participate in the preparation of expert reports, and 3) access to all confidential financials going forward whether marked confidential or not – this proposal is untenable. Mr. Pridham should not be allowed to continue to educate himself regarding Yahoo!’s confidential information, including confidential information produced before June 2, 2010 and confidential financial information. Plaintiff’s proposed amended protective order is illogical and fails to protect Yahoo! from the barred use of

confidential information in patent acquisition, patent applications, and the asserting of infringement claims. For all the reasons detailed herein, Plaintiff's motion for entry of an amended protective order should be denied, and Defendant's proposed Amended Protective Order should be entered.

I. Mr. Pridham and others similarly situated cannot be permitted to retain or access confidential documents produced prior to June 2, 2010.

Plaintiff's proposed amended protective order would allow Mr. Pridham to continue to review, analyze, and investigate confidential Yahoo! documents as he seeks to acquire and assert additional patents against Yahoo! – the exact protection proscribed in Yahoo! motion to amend the protective order and this Court's Order. Indeed, the overwhelming majority of Yahoo!'s confidential documents were produced to Plaintiff before June 2, 2010. Although, Mr. Pridham cannot unlearn what he already knows, he should not be allowed to continue to acquire knowledge and understanding regarding Yahoo!'s confidential information. Plaintiff's proposal to only bar access to certain confidential information produced after June 2, 2010 is contrary to the reasoning behind the protection provided by this Court's June 2, 2010 Order, and the orders 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). To allow Mr. Pridham and others similarly situated continued access to these confidential documents would be illogical and would fly in the face of the Court's orders.

Further, Mr. Pridham and others similarly situated cannot be allowed to work with experts based upon confidential information produced before June 2, 2010. This would be contrary to the reasoning behind excluding competitive decisionmakers from confidential information. An expert's primary job is to review complicated material and present an analysis

that allows the common person to comprehend the material. Mr. Pridham and others similarly situated should not be allowed to participate in this activity. For example, Plaintiff admits that Mr. Pridham cannot read source code. *See* Dkt. No. 305, Declaration of David Pridham at ¶3. An expert with the ability to read source code, however, would be able to explain the code and functionality to Mr. Pridham, which would enable Mr. Pridham to file patent applications, analyze and acquire patents, and assert infringement claims based upon the confidential source code. The Court's June 2, 2010 Order and the orders in *Hyundai* and *ST Sales* were entered to prevent these actions. Plaintiff's proposal to allow such interaction with experts would thwart the protection sought and granted to Yahoo!.

II. Mr. Pridham and others similarly situated cannot be permitted to retain or access confidential financial documents.

In addition, Mr. Pridham and others similarly situated should not be permitted to review Yahoo!'s confidential financial data. Notably, Plaintiff never sought such relief during the briefing regarding Yahoo!'s motion to amend the protective order. Plaintiff raised this concern for the first time after the Court's June 2, 2010 Order. Without a doubt, one basis for bringing a patent infringement claim is to seek financial damages. Mr. Pridham's access to Yahoo!'s confidential financial information would allow him to know which Yahoo! systems generate significant revenue before deciding which systems to assert infringement claims against. This furthers a competitive decisionmaker's use of confidential information to decide in the future what patents to acquire and assert against defendants. Once again, such protection is at the heart of this Court's June 2, 2010 Order and the orders in *Hyundai* and *ST Sales*.

Plaintiff's citation to *In re Deutsche Bank Trust Company Americas and Total Bank Solutions, LLC*, Misc. Dkt. No. 920 (Fed. Cir. May 27, 2010) misses the mark. In *Deutsche Bank*, the Federal Circuit addressed financial information in a discussion regarding the types of

information that trigger a patent prosecution bar. While confidential financial information might not itself trigger a prosecution bar, it is still confidential information that Mr. Pridham or others similarly situated could use to make decisions regarding which patents to acquire and assert against Yahoo! This Court provided the Defendants protection from that type of conduct. Plaintiff's proposed amended protective order would omit the protection granted in this Court's June 2, 2010 Order and the orders in *Hyundai* and *ST Sales*. As such, Plaintiff's motion for entry of an amended protective order should be denied.

III. Anyone with access to Yahoo!'s confidential information should be precluded from using such information against Yahoo! outside of this litigation.

Plaintiff acts shocked that Defendant's proposed Amended Protective Order bars Plaintiff, or anyone employed by, related to, or representing Plaintiff, who has access to Yahoo!'s confidential information, from applying for, acquiring, or asserting infringement claims based upon that confidential information. This provision, however, was included in the proposed amended protective order attached to Yahoo!'s March 17, 2010 motion. *See* Dkt. No. 288, Ex. A at ¶¶ 12, 34. Thus, Plaintiff has been aware of this proposed amendment for nearly three months. Moreover, this is the exact same limitation that the Court imposed in *Hyundai* to protect the defendant from repeated litigation based upon confidential documents produced to competitive decisionmakers. *See* Def.'s Mot. for Entry of Am. Protective Order, Ex. B at ¶21; *Hyundai* at p. 6-7. This provision is necessary and supported under *Hyundai*, because it diminishes the fact that Mr. Pridham, and others, have already seen substantial amounts of Yahoo!'s confidential information. In fact, this provision directly addresses one of the concerns Plaintiff's counsel raised with Defendants' counsel. *See* Opposed Mot. for Entry of Protective Order at 2; Ex. A to Opposed Mot. for Entry of Protective Order. The two-year bar would lessen the likelihood that Mr. Pridham or others similarly situated will use Yahoo!'s confidential

information when they seek to acquire a new patent or bring a new lawsuit against Yahoo!. Indeed this same logic was advanced in *Hyundai*, and the Court entered protective provisions nearly identical to those suggested by Yahoo!.

IV. Plaintiff will not be prejudiced by denying Mr. Pridham's access to confidential information.

Plaintiff will not be unduly prejudiced by denying Mr. Pridham's access to Yahoo!'s confidential financial documents. Plaintiff made this same argument in opposition to Yahoo!'s motion to amend the protective order, and the Court rejected it. As previously noted, Mr. Pridham is not the only counsel representing Plaintiff. According to the latest docket sheet, eleven other attorneys presently represent Plaintiff. Thus, while Mr. Pridham may not be allowed to review confidential information, Plaintiff will still be adequately represented by competent counsel. Further, it is unlikely that Mr. Pridham is the only attorney working with experts, and Plaintiff's expert reports are not due for at least twenty-one days. Plaintiff should not be allowed to impose limitations upon Yahoo! that are contrary to this Court's June 2, 2010 Order and the orders in *Hyundai* and *ST Sales*.

V. Yahoo! has not alleged that Mr. Pridham or others similarly situated violated the protective order over the past two years.

Mr. Pridham's argument that Defendant's proposed protective order would result in a two-year violation of the current protective order is not based in reality. Mr. Pridham's letter regarding this point is nonsensical and fails to support entry of Plaintiff's proposed amended protective order. The Court's June 2, 2010 Order precludes Mr. Pridham from accessing Yahoo!'s confidential documents, period.

VI. Conclusion

Based upon the Court's June 2, 2010 Order and the orders in *Hyundai* and *ST Sales*, Mr. Pridham and others similarly situated should not be allowed access to confidential documents produced before June 2, 2010 or confidential financial documents. Yahoo! sought, and the Court granted, protection of this confidential information. For all the foregoing reasons and those stated in Defendant's Motion for Entry of Amended Protective Order [Dkt. No. 357], Plaintiff's motion should be denied, and Defendant's proposed Amended Protective Order should be entered.

Dated: June 15, 2010

Respectfully submitted,

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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 15, 2010.

/s/ Jennifer H. Doan
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