UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TEXAS
MARSHALL DIVISION

BRIGHT RESPONSE, LLC,
    Plaintiff,
 	
    vs.
 	
GOOGLE INC., et al.,
    Defendants.
	Civil Action No. 2:07-cv-371-CE
	JURY TRIAL DEMANDED

YAHOO! INC.'S MOTION TO STAY DISCOVERY ORDERED IN DOCKET NUMBER 355 UNTIL AN AMENDED PROTECTIVE ORDER IS ENTERED AND PENDING THE RESOLUTION OF YAHOO!'S MOTION FOR PARTIAL RECONSIDERATION

Under Rule 62(b) of the Federal Rules of Civil Procedure, Defendant Yahoo! Inc. ("Yahoo!") respectfully requests that this Court stay the Click Protection source code discovery ordered in Docket Number 355 until an amended protective order in compliance with this Court's Order (Dkt. No. 349) is entered in the case and pending the resolution of Yahoo!'s Motion for Partial Reconsideration of Docket 355 Regarding the Production of Click Protection source code.

I.   INTRODUCTION

On June 8, 2010, this Court ordered Yahoo! to produce additional Click Protection documents, to produce Yahoo!'s Click Protection source code in its entirety, to designate a corporate witness regarding the Click Protection System, and to reorganize the source code it has already produced on Plaintiff. (Dkt No. 355). Except for the limited portions of the June 8th Order for which Yahoo! is seeking reconsideration, Yahoo! is complying in good faith with the remainder of the Order. In entering the June 8th Order and referring to its June 2, 2010 Order, this Court attempted to address Yahoo!'s security concerns with respect to production of its

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confidential Click Protection source code. Specifically, in ordering the production, the Court's June 8, 2010 Order provided: "Yahoo!'s confidentiality concerns are mitigated by the court's June 2, 2010 order that excludes Mr. David Pridham from viewing confidential information." (Dkt. No. 355 at 1.) Plaintiff, however, disputes that the June 2, 2010 Order requires that Mr. Pridham no longer have access to confidential information (Dkt. No. 356) and will not agree to exclude Mr. Pridham from documents marked "confidential." At this point, since Plaintiff disputes the Defendant's proposed Amended Protective Order (Dkt. No. 357, Ex. A) and an amended protective order has not been formally entered in the case, Yahoo!'s confidentiality concerns remain.

Furthermore, Yahoo! filed a motion for partial reconsideration of this Court's June 8, 2010 Order – specifically the portion of the order requiring Yahoo! to produce its Click Protection System source code in its entirety – because of its security concerns that any public disclosure could compromise a significant portion of Yahoo!'s business. Accordingly, Yahoo! requests that this Court stay a portion of the discovery ordered by the Court on June 8, 2010, until it enters the amended protective order and resolves the motion for partial reconsideration.

II. BACKGROUND

A. Yahoo!'s Confidentiality Concerns Still Exist

To ensure that any production of confidential material remains confidential and is produced in a way that maintains the trust of Yahoo!'s clients and third parties, Yahoo! requests this Court stay a portion of the discovery ordered on June 8, 2010 until an amended protective order that complies with the Court's June 2, 2010 Order is entered in the case.[1]

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[1] Yahoo! moved for entry of an Amended Protective Order (Dkt. Nos. 357 and 362), which are incorporated by reference herein.

Following the Court's June 2, 2010 Order, Plaintiff's counsel informed Defendants' counsel that Mr. David Pridham 1) would continue to assist in preparing expert reports which rely on confidential information, 2) would continue to access confidential information produced prior to June 2, 2010, and 3) would continue to review confidential financial information. *See* Dkt. No. 357, Ex. D.

The requirement of these limitations do not exist in the June 2, 2010 Order and, importantly, do not protect Yahoo!'s confidential information. Indeed, these unilaterally imposed limitations run completely contrary to the Court's order. Furthermore, Plaintiff refused to meet and confer on the Amended Protective Order if Yahoo! would not agree to allow Mr. Pridham continued access to confidential material produced prior to June 2, 2010, and access to all confidential financials. *See* Dkt. No. 357, Ex. E. Plaintiff's current proposal, however, guts Defendants of the relief granted by the Court and does not mitigate Yahoo!'s concerns. Instead, Plaintiff's insistence that the Amended Protective Order not grant all the protection in this Court's June 2nd Order heightens Yahoo!'s concerns regarding the confidentiality of any future discovery.

B. Yahoo!'s Request for Partial Reconsideration

Yahoo! has also moved the Court to partially reconsider its June 8, 2010 Order for three reasons: (1) an amended protective order has not yet been entered in this case and Yahoo! has serious concerns over who may access its confidential information; (2) contrary to its representations to this Court, Bright Response has not accused the Click Protection System of infringement; and (3) the Click Protection System is not relevant to this case.[2] Furthermore, Yahoo!'s motion further explains that any public disclosure of the details in this confidential

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[2] Contemporaneously with this filing, Yahoo! moved for partial reconsideration of the Court's June 8, 2010 Order (Dkt. No. 363), which is incorporated by reference herein.

source code could compromise a significant portion of Yahoo!'s business. Thus, Yahoo!

requests that a stay be granted with respect to the June 8, 2010 Order pending the resolution of

Yahoo!'s motion for partial reconsideration.

III. ARGUMENT

Rule 62(b) provides that:

(b) **Stay Pending the Disposition of a Motion**. On appropriate terms for the opposing party's security, the court may stay the execution of a judgment--or any proceedings to enforce it--pending disposition of any of the following motions:
   (1) under Rule 50, for judgment as a matter of law;
   (2) under Rule 52(b), to amend the findings or for additional findings;
   (3) under Rule 59, for a new trial or to alter or amend a judgment; or
   (4) under Rule 60, for relief from a judgment or order.

FED. R. CIV. P. 62(b). Rule 62(b) allows a district court, in its discretion, to stay execution of

judgment pending disposition of a Rule 59 or Rule 60 motion. *Castille v. Pomroy,* 1994 WL

261219, * 1 (5th Cir. 1994). Yahoo! moves for a stay with respect to the June 8, 2010 discovery

order for its security. First, Yahoo! moves for a stay pending the execution of an amended

protective order in compliance with this Court's June 2, 2010 Order. Second, Yahoo! moves for

a stay pending the resolution of a motion for reconsideration under Rule 54, which is governed

by Rule 60 in the Fifth Circuit. *See* FED. R. CIV. P. 54, 60; *Computer Acceleration Corp. v.*

Microsoft Corp., 2007 WL 2584827, *1 (E.D. Tex. Aug. 28, 2007)

A. The Court Should Stay the Discovery Ordered by The June 8th Order Until an Amended Discovery Order is Entered

Plaintiff's recent representations and disputes with this Court's June 2, 2010 Order

heighten Yahoo!'s concerns regarding the confidentiality of the discovery ordered by the Court

on June 8, 2010. First, Plaintiff asserted that Mr. Pridham would continue to assist in consulting

with experts who have reviewed Yahoo!'s confidential information and assist in preparing their

expert reports which rely on confidential information. Second, Plaintiff asserted that Mr.

Pridham would continue to have access to confidential documents produced prior to June 2, 2010. Third, Plaintiff asserted that Mr. Pridham would continue to review confidential financial information, regardless of whether the documents were marked "confidential" under the current or the Amended Protective Order. *See* Dkt. No. 357, Ex. D. This proposition puts Yahoo!'s current and future confidential production at risk and threatens Yahoo!'s security.

In fact, Plaintiff's current proposals gut the relief granted by the Court and do not mitigate Yahoo!'s concerns, which this Court acknowledges in its June 8, 2010 Order. For the security of Yahoo!'s confidential documents, this Court should stay Yahoo!'s production of its confidential Click Protection source code ordered on June 8, 2010 until an Amended Protective Order is entered. The discovery that Yahoo! has been ordered to produce is of the exact confidential nature that would allow a competitive decisionmaker to use Yahoo!'s confidential information against Yahoo! in future patent acquisitions, patent applications, and patent infringement claims. For this reason alone, a stay should be granted so that Yahoo! is not required to produce its most confidential proprietary information without appropriate protection.

B.   **The Court Should Stay Discovery Pending the Outcome of Yahoo!'s Motion for Partial Reconsideration**

Yahoo! has also moved for partial reconsideration of this Court's June 8, 2010 Order. Yahoo!'s security of its confidential documents is also directly threatened if it is required to comply with the June 8, 2010 Order without resolution of its Motion for Partial Reconsideration (Dkt. No. 363). In its motion, Yahoo! explains that any public disclosure of the details in this confidential source code could compromise a significant portion of its business. Relying upon Plaintiff's misleading "claim chart" information, this Court found Yahoo!'s confidential Click Protection source code relevant and ordered its production. Importantly, however, the "claim chart" addressing this confidential code was not a part of the amended infringement contentions

at issue in this case as Plaintiff lead this Court to believe – nor has Plaintiff moved to include these charts in its "infringement contentions." Instead, these newly-created charts were only submitted to Yahoo! **after** Plaintiff moved to compel the Click Protection source code and then only in a "700-page supplemental" interrogatory response, which was formatted identically to the claim charts in the infringement contentions. Moreover, Plaintiff attached this "claim chart" to its reply brief in support of its motion to compel **after** Yahoo! had already responded to Plaintiff's motion to compel – a motion which did not have any support for this accused instrumentality or code. Notably, Plaintiff did not move to amend its infringement contentions to add these claims and identify this source code – it did not for it knew its ruse on the Court would be evident. For Plaintiff to represent to this Court that the Click Protection source code is "relevant" by attempting to bootstrap its belated "supplemental" discovery response created after it moved to compel is disingenuous and should not be tolerated by this Court. Indeed, following this pattern, plaintiff need never move to amend its infringement contentions and, instead, need only merely supplement its interrogatory response 30 days before trial and add all new contentions—a practice which is not condoned by the Local Patent Rules, nor the Eastern District courts. Thus, Yahoo! requests a stay be entered until the resolution of the motion for reconsideration to ensure the security of Yahoo!'s business.

IV.   CONCLUSION

Yahoo! respectfully requests that this Court grant its Motion to Stay until an amended protective order is entered and Yahoo!'s Motion for Partial Reconsideration is resolved.

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
Jennifer H. Doan

CERTIFICATE OF CONFERENCE

Pursuant to Local Rule CV-7(h), Defendant Yahoo! hereby certifies that its counsel has conferred on June 15, 2010, with Plaintiff Bright Response, LLC in a good faith to attempt to resolve this matter without the Court's intervention. There was no agreement because Plaintiff Bright Response's counsel feels that a motion to stay should be denied. These discussions have conclusively ended in an impasse. Thus, Bright Response opposes this motion.

/s/ Jennifer H. Doan
Jennifer H. Doan