IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
MARSHALL DIVISION

BRIGHT RESPONSE, LLC	**NO. 2:07-CV-371-CE**
v.	**JURY**
GOOGLE INC., et al.	

BRIGHT RESPONSE, LLC'S RESPONSE IN OPPOSITION TO 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 BY YAHOO! INC.

Plaintiff Bright Response, LLC ("Bright Response") respectfully files this Response to Yahoo! Inc.'s Motion To Stay Discovery Ordered in Docket Number 355 Pending Entry Of Amended Protective Order And Pending Resolution of Yahoo!'s Motion for Partial Reconsideration (the "Motion") (Dkt. No. 364). This response addresses one point[1] in particular that reveals Yahoo's stratagem again, just six weeks from trial, to avoid complying with the Court's orders. That one point is to bring to the Court's attention the fact that Yahoo may not use the pending dispute over a revised Protective Order—that has nothing to do with source code—as an excuse to refuse to produce source code pursuant to a Court Order. The Motion should be denied.

I. The Narrow Dispute Over Revised Protective Order Language Has Nothing To Do With Source Code: The Stay Motion Proves Yahoo's End Game Is Only More Delay To Prejudice Bright Response.

Yahoo has manifested over the past year a pattern of finding ways of deciding for its own purposes how and when to comply with the Court's orders. *See* Bright Response Motion to Compel (Dkt. No. 252) at 6 (quoting Ex. A thereto at 14) (Court: "To the extent that you [Yahoo] are imposing additional requirements on the other side for

[1] Bright Response reserves the right to supplement this response if necessary within the time allotted for a response. A more immediate response is required, however, given Yahoo's delay maneuver and the imminent need for production of the requested source code.

printing--for printing source code materials, you are violating or threatening the violation of an order of this Court, okay? ***So you're not entitled to resort to self-help***. Do you understand me?") (emphasis added); *id*. at 6 (quoting Ex. I thereto at 9) (Court: "Well, that was -- just for purposes that record, that would have been the third time you had been provided with my suggestions as to how to comply with the order.").

Yahoo's new stratagem to avoid a Court order is its seeking to avoid compliance with the Court's Order of June 8, 2010 Order ("Discovery Order"; Dkt. No. 355). Yahoo requests a stay of that order and bootstraps its request to a Rule 60(b)-esque motion to reconsider the Discovery Order (Dkt. No. 363).[2] Yahoo has no relevant legal authority for such extreme relief just six weeks from trial. Mischaracterizing the nature of the parties' (very) narrow dispute over the terms of a revised protective order does not justify more purposeful delay from Yahoo and more prejudice to Bright Response.

There is absolutely no dispute over Mr. Pridham's access to confidential information – let alone source code, produced after the June 2 Order. Pursuant to the Court's June 2, 2010 Order, Mr. Pridham has not – nor will he until permitted by the Court – view confidential information produced after June 2, 2010. More importantly, as Bright Response has advised Yahoo on a number of occasions, Mr. Pridham has not reviewed any highly confidential document produced since the Court's order; instead, Bright Response filed a proposed order with two discrete carve outs for the Court to consider. *See* Bright Response Opposed Motion for Entry of Protective Order (Dkt. No.

[2] Yahoo's motion to reconsider demonstrates why such motions are disfavored: they are attempts to obtain another round of briefing to cure gaps in earlier briefing. As Yahoo's authority states: "A motion [to reconsider] is not a proper vehicle for 'rehashing evidence, legal theories, or arguments that could have been offered or raised before the entry of judgment.'" *Computer Acceleration Corp. v. Microsoft Corp*., No. 9:06-CV-140, 2007 WL 2584827, at *1 (E.D. Tex. Aug. 28, 2007) (quoting *Templet v. HydroChem, Inc*., 367 F.3d 473, 478-79 (5th Cir. 2004)) (cited in Yahoo Motion at 4). Yahoo's motion to reconsider is no different. Bright Response will file a separate response to that motion to refute various inaccurate accusations.

356).[3] In particularly, the protective order dispute turns solely on (i) allowing Mr. Pridham to see ***financial*** documents for ***damages*** issues; and (ii) addressing in a logical manner the breadth of information Yahoo has allowed Mr. Pridham to view since this case was filed. *See* Bright Response Opposed Motion for Entry of Protective Order (Dkt. No. 356); Notice of Filing Letter Brief of Mr. David Pridham (Dkt. Nos. 357, 360).

The specter of doom Yahoo continues to raise about the harm to it from unfettered disclosure of its source code is therefore a transparent ghost devoid of substance. That Yahoo is using the protective order modification issue—focused on financial issues—as a straw man argument is apparent in the fact that Yahoo has sent Mr. Pridham financial documents ***after the June 2 Order***. Wiley Decl. Ex. A. At best, Yahoo's conduct proves Yahoo sees ***no harm*** in allowing Mr. Pridham to continue review of financial documents related to damages issues. At worst, Yahoo's continuing to send financial documents to Mr. Pridham proves that Bright Response's concerns are well-founded: Yahoo is intent on entrapping Mr. Pridham with a protective order violation. *See* Dkt. No. 356 at 3-4 (describing issues of timing to address documents reviewed by Mr. Pridham before the June 2 Order); Dkt. No. 360 at 1 ("First, the protective order terms that Defendants have proposed—as set forth in Bright Response's motion—were such that I [David Pridham] would be considered in violation of the Court's Protective Order since the beginning of this lawsuit."). Yahoo is on the one hand advocating overly-broad protective order revisions—that would preclude Mr. Pridham from reviewing financial documents—while at the same time sending him the very documents Yahoo refuses to agree that he may

[3] Further, under the parties' current agreement, documents or pleadings that implicate the Click-Protection source code, or other information within the Court's June 2 Order are sent to Mr. Pridham in a redacted version. *See* Wiley Decl. Ex. B (S. Sherwin email serving redacted version of Motion to Reconsider on Mr. Pridham and including email from J. Thane of 5-16-2010: "Further, we have agreed that the information in these confidential documents should not be communicated to David Pridham or others similarly situated for any reason by any person, including experts or those individuals reviewing source code… Tomorrow, we will provide a redacted copy of the pleading for Mr. Pridham's review pursuant to our agreement.").

review. Yahoo's bases for a stay, even if the Court were to ignore the obvious procedural machinations, are insupportable. The Court should see Yahoo's Motion for what it is – another self-help measure.

In short, there is no dispute between Yahoo and Bright Response that Mr. Pridham will not see any confidential information produced after June 8, 2010. The Court's June 2 Order already protects Yahoo in this regard. Yet this is the very type of information that Yahoo uses to justify ceasing discovery, staying Yahoo's complete compliance with the Order. The subterfuge is obvious and does not merit such extreme relief as a stay just six weeks from trial.

II. Yahoo Cites No Legal Authority To Justify Staying A Discovery Order Entered On A Motion to Compel Based on Documented Recalcitrance by Yahoo on its Discovery Obligations.

Yahoo cites as authority for stay relief Rule 54 of the Federal Rules of Civil Procedure, but there is no stay procedure in that rule. Rule 54 concerns attorneys' fees and entry of judgment. Nor does the case cited, *Computer Acceleration Corp. v. Microsoft Corp*., No. 9:06-CV-140, 2007 WL 2584827 (E.D. Tex. Aug. 28, 2007) anywhere mention the word "stay" or how a party could be absolved from Court-ordered discovery compliance. *Computer Acceleration* is a case in which the plaintiff sought an extension of time to file a motion to reconsider, an order by which the district court (Judge Clark) struck portions of the plaintiff's P.R. 3-1 infringement contentions. *Id*. at *1. The court rebuffed the renewed and "rehashed" arguments in the motion to reconsider and denied reconsideration. *See id*. (noting issues on reconsideration already briefed and such reconsideration motions to be used "sparingly"). There was no issue of staying a discovery order while the court reconsidered its order striking portions of the contentions. As Yahoo cannot justify stopping the discovery process now just 6 weeks from trial, the Court should deny the Motion.

CONCLUSION

For the above-stated reasons, the Court should deny the request to allow Yahoo to avoid compliance with the Court's June 2, 2010 Discovery Order by securing the stay relief requested.

Dated: June 17, 2010

Respectfully submitted,

By: /s/ Elizabeth A. Wiley
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CERTIFICATE OF SERVICE

I certify that counsel of record who are deemed to have consented to electronic service are being served this 17th day of June, 2010, with a copy of this document via the Court's CM/ECF systems per Local Rule CV-5(a)(3). Any other counsel will be served electronic mail, facsimile, overnight delivery and/or First Class Mail on this date.

\s\ Elizabeth A. Wiley
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