

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

BRIGHT RESPONSE, LLC

v.

GOOGLE INC., et al.

NO. 2:07-CV-371-CE

JURY

**BRIGHT RESPONSE, LLC'S RESPONSE
TO YAHOO! INC.'S MOTION FOR A LIMITED STAY PENDING
THE RESOLUTION OF YAHOO!'S PETITION FOR WRIT OF MANDAMUS
TO THE FEDERAL CIRCUIT**

Plaintiff Bright Response, LLC ("Bright Response") respectfully files this Response to Yahoo! Inc.'s Motion For A Limited Stay Pending Resolution Of Yahoo's Petition For Writ Of Mandamus To The Federal Circuit. A stay is not appropriate for two reasons: first, Yahoo failed to fully present its arguments concerning the Click Protection System in its response to Bright Response's motion—waiting until a motion to reconsider to fully brief the issue and provide proof in support; and second, Yahoo has represented to the Court that it has designated a Rule 30(b)(6) witness to respond to questions concerning certain functionality of the Click Protection System source code (Dkt. No. 370 at 1-2), but Yahoo has yet to provide dates for this deposition and Bright Response remains without assurance that this will actually occur. To allow a stay when Yahoo cannot still commit to a firm date for the alternative they present further prejudices Bright Response given the time expended on this issue to date.

I. BACKGROUND AND SUMMARY.

As the Court recognized in denying Yahoo! Inc.'s Motion for Stay pending the Court's reconsideration of its June 8, 2010 Order ("Order"), the Court has broad discretion in denying or granting stay relief. Dkt. No. 366. The Court's discretion was properly exercised here based on its long-time oversight of this litigation, including addressing the numerous and repeated problems with Yahoo's discovery obligations and

source code production in particular. That oversight includes, among other things: (i) a motion to compel hearing before the Court in November 2009 (Dkt. No. 229 (hearing involving Yahoo); *see also* Dkt. No. 250 (hearing involving Yahoo)); Dkt. No. 195 (Bright Response motion to compel Yahoo); (ii) another hearing on another motion to compel on April 1, 2010 after the *Markman* hearing (Dkt. No. 314; *see also* Dkt No. 252 (Bright Response Motion to Compel as to Yahoo; Jan. 25, 2010)); and (iii) the Court's awareness that despite Google's and Bright Response's resolution of source code production issues set forth in Bright Response's January 25, 2010 motion to compel as to Google (Dkt. No. 251), no such progress or resolution could be obtained with Yahoo. *E.g.*, Dkt. No. 341 at 3 (Bright Response Reply on Emergency Supplemental Briefing in Support of Motion to Compel).

In light of Yahoo's continuing disregard for its discovery obligations, Bright Response had to inform the Court of yet another problem, this time related to discovery into Yahoo's Click Protection System, including Yahoo's failure to indicate that it would entertain any alternative to production of that source code. Dkt. No. 322 at 1 ("Despite Bright Response's ongoing efforts at compromise, Yahoo has instead now point blank refused to produce source code for a very specific functionality, Yahoo's Click Protection System ("CPS"), and offered no compromise such as a simple stipulation as to CPS's operation."). Because of the imminent deadlines approaching and the August 2, 2010 trial date, the need to inform the Court immediately was critical. Bright Response did so by identifying the specific language in its infringement contentions that implicated the functionality encompassed within the CPS code, as well as a Yahoo document that supported Bright Response's position that certain information implicating the CPS code was relevant. Yahoo's own concept of relevance, Bright Response correctly argued, could not justify Yahoo's withholding relevant evidence. Dkt. No. 322 at 2-3 & Ex. G thereto. Yahoo responded (Dkt. No. 339), arguing primarily (again) that the CPS code was not relevant and that because it was not an accused *instrumentality* it could not

possibly be the subject of any discovery obligation. Bright Response rebutted this argument as a mischaracterization given that Bright Response's infringement contentions, and interrogatory responses, indicated that infringing *functionality* was in fact encompassed within the CPS. Bright Response also pointed out Yahoo's mischaracterization that Bright Response did not accept Yahoo's offer of a 30(b)(6) witness as an alternative. Quite the contrary: Yahoo's own correspondence showed *Yahoo withdrew* that compromise. See Dkt. No. 341 (Bright Response Reply, Ex. D (S. Sherwin email of May 25: refusing to provide witness because "this issue is being addressed by the Court").

On that record, the Court granted Bright Response's motion to compel on June 8, 2010. Dkt. No. 355. Yahoo moved for partial reconsideration of that order on June 15, 2010 (Dkt. No. 363), reiterating the same arguments such as relevance, but also greatly augmenting its earlier arguments and providing the Court with proof never before presented to the Court. Dkt. No. 363. In connection with that motion, Yahoo also moved for a stay of the Court's Order June 8, 2010 Order, pending the Court's review of Yahoo's new arguments and proof in the motion for partial reconsideration. Dkt. No. 364. Bright Response responded to Yahoo's stay motion (Dkt. No. 365), but before Bright Response responded to the motion for partial reconsideration the Court (i) denied Yahoo's motion for partial reconsideration (Dkt. No. 367), and (ii) denied Yahoo's motion for stay pending reconsideration (Dkt. No. 366).¹

II. YAHOO'S RECORD DOES NOT JUSTIFY GRANTING STAY RELIEF.

There are two substantive problems with Yahoo's seeking stay relief to pursue mandamus relief and a stay motion in the Court of Appeals for the Federal Circuit.

First, the arguments on which Yahoo seeks to avoid court compliance were not fully briefed or supported in its Yahoo's original response to Bright Response's motion.

¹ The Court also ordered a modification to the Protective Order (Dkt. No. 368) and then issued its claim construction ruling (Dkt. No. 369).

Yahoo instead used the maligned procedural vehicle of a motion for reconsideration to present those arguments and evidentiary support. A motion for reconsideration is not the proper place to cure omissions in either legal argument or proof—particularly after the Court has ruled after a “long-running” discovery dispute:

A motion [for reconsideration] is not a proper vehicle for “rehashing evidence, legal theories, or arguments ***that could have been offered or raised before the entry of judgment.***” *Templet v. HydroChem, Inc.*, 367 F.3d 473, 478-79 (5th Cir. 2004). . . . To permit such a motion at this point would defeat the purpose of court intervention, which was to obtain finality to a long-running and costly discovery dispute.

Computer Acceleration Corp. v. Microsoft Corp., No. 9:06-CV-140, 2007 WL 2584827, at *1 (E.D. Tex. Aug. 28, 2007) (emphasis added).

Further, such a motion falls far short of presenting the necessary foundation for the extraordinary relief of a writ of mandamus from the Federal Circuit. Yahoo cannot meet its heavy burden to show that the Court’s decision, after months of interaction and oversight over the various long-running disputes, entitles it to a “clear and indisputable right” to mandamus relief. *In re Deutsche Bank Trust Co. Americas*, Misc. No. 920, 2010 WL 2106957, at *2 (Fed. Cir. May 27, 2010) (“The remedy of mandamus is available only in extraordinary situations” A party seeking a writ bears the burden of proving that it has no other means of obtaining the relief desired . . . and that the right to issuance of the writ is “clear and indisputable”). As the Federal Circuit recently confirmed in *In re Deutsche Bank Trust*, it is “rare” to “grant the remedy of mandamus where a matter under review is committed to the district court’s discretion.” *See Allied Chem.*, 449 U.S. at 36, 101 S.Ct. 188 (stating that mandamus is ‘hardly ever’ available in cases where the district court’s decision is a matter of discretion”). Thus, the mere fact that Yahoo must rest its case on belated arguments and proof that it could have made earlier in the briefing process—but did not—provides this Court with ample discretion to find Yahoo’s position as too little, too late: trial is set for August 2, 2010 and expert

reports are due well before then. On the ill-developed record of Yahoo's own making, Yahoo has no such "clear right" to extraordinary relief.

Second, Yahoo urges that stay relief is appropriate in great part by noting that it has done well in (i) producing some limited portion of CPS code;² (ii) producing documents "describing" the CPS system (Dkt. No. 370 at 1), and (iii) designating a Rule 30(b)(6) witness. Hurdles remain that preclude Yahoo from arguing it has done plenty to comply in spirit with the Court's June 8, 2010 Order. The documents that Yahoo claims are descriptive of the CPS system, for example, have proven unhelpful in any meaningful way. It should be a straightforward exercise to produce overview documents that describe how the CPS system works, but Bright Response still has no such information. Further, Yahoo has *not proposed a date* for the 30(b)(6) witness that it argues will be able to produce all the information required to obviate the need to produce the code. *See* Declaration of Andrew D. Weiss. It is not sufficient at this stage of the litigation to make promises without following through on them. This is exactly where the parties are now: Bright Response is left to trust that Yahoo will provide a witness at some unknown date in the future and that this witness will be sufficiently knowledgeable to address Bright Response's questions. Nothing in the past several months of hearings and two motions to compel as to Yahoo has given Bright Response any confidence that this will be case. Yahoo has failed to conduct itself in a way that should justify more delay at this late date, and the Court should deny Yahoo's motion for a partial stay.

CONCLUSION

For the above-stated reasons, the Court should deny the Yahoo's request for a stay.

² Bright Response has provided the notice that it intends to review this source code beginning this Wednesday, June 23, 2010. *See* Wiley Decl. Ex. A (email notice of intent to review code from A. Weiss, counsel for Plaintiff Bright Response, to J. White, counsel for Yahoo). It may well turn out, as it has repeatedly in the past, that Yahoo's production of source code will be incomplete and impossible to adequately review.

Dated: June 22, 2010

Respectfully submitted,

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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 22nd 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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