UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TEXAS
MARSHALL DIVISION

BRIGHT RESPONSE LLC	§	
	§	
Plaintiff,	§	
	§	
v.	§	Civil Action No. 2:07-cv-371-CE
	§	
GOOGLE INC., YAHOO!, INC., AOL LLC,	§	
and AMERICA ONLINE, INC.,	§	
	§	
Defendants.	§	

YAHOO! INC.'S REPLY IN SUPPORT OF MOTION FOR A LIMITED STAY PENDING THE RESOLUTION OF YAHOO!'S PETITION FOR WRIT OF MANDAMUS TO THE FEDERAL CIRCUIT

This Court should grant Yahoo!'s motion for stay because the prejudice resulting from the improper disclosure of Yahoo!'s Click Protection source code in its entirety cannot be undone after the confidential information has been revealed.[1] Indeed, Yahoo! has already made available to Plaintiff the same information about its Click Protection system that Google provided about its system. Plaintiff has accepted this information from Google and waived its request for the very information it continues to seek from Yahoo!, even though Plaintiff has accused Google's click protection system of infringement and not Yahoo!'s.

Plaintiff's reply brief fails to address why Yahoo! should be exposed to such incurable prejudice. Amongst a rehash of past events in this lawsuit, Plaintiff alleges that production of a

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[1] Plaintiff's counsel and Yahoo!'s counsel have discussed and are scheduled to resume discussions of a possible resolution to the disputes regarding the Click Protection system after Plaintiff's counsel reviews today the source code that Yahoo! has produced. Plaintiff has recently reached an agreement with Google regarding disputes involving its anti-fraud click protection systems, an agreement based on Google's production of basically the same information that Yahoo! has produced. As such, Yahoo!'s counsel is optimistic that the parties will be able to reach a similar agreement regarding Yahoo!'s Click Protection system.

limited portion of Yahoo!'s Click Protection source code should not be stayed because (1) Yahoo! failed to fully raise arguments in response to Plaintiff's motion to compel, and (2) Yahoo! has not provided a specific date for the Rule 30(b)(6) deposition regarding the Click Protection System. Plaintiff's assertions, however, while untruthful, do not address the prejudice that Yahoo! will face if it must produce the entire Click Protection source code before resolution by the Federal Circuit. The fact remains that Yahoo! has been ordered to produce highly business-sensitive and secret aspects of its otherwise highly confidential source code for a system that has not been accused in this case, is not relevant to this case, nor could it lead to the discovery of admissible evidence.

Yahoo!'s Click Protection source code in dispute should never be produced in this lawsuit, and the damage and risk inherent in such production cannot be adequately undone if such production is determined to be improper. Thus, Yahoo!'s motion to stay this Court's order with respect to the production of the remainder of the Click Protection source code pending resolution of Yahoo!'s petition by the Federal Circuit should be granted.

I.   **Yahoo has offered a Rule 30(b)(6) deponent regarding its Click Protection source code.**

Plaintiff's argument that Yahoo! may not provide a deponent for certain aspects of the Click Protection source code fails. Plaintiff inquired on June 21, 2010, at 9:14 p.m. – less than 24 hours before filing its response brief – regarding Yahoo!'s Rule 30(b)(6) deponent on certain aspects of the Click Protection source code. *See* June 22, 2010 Email from A. Weiss to J. White, a true and correct copy which is attached hereto as Exhibit A.   In turn, Yahoo! confirmed the deponent's availability and provided the date, time, location, and name of the Rule 30(b)(6) deponent to Plaintiff by noon of the next day. *Id.*   Thus, Plaintiff's allegation that Yahoo! will not live up to its promises does not hold water.

Yahoo! has complied with this Court's Order by producing portions of the Click Protection source code, producing documents describing the Click Protection system, designating a corporate witness regarding the Click Protection System, and producing reorganized source code that had already been produced to Plaintiff. Yahoo! seeks a stay regarding production of only the remaining limited portion of the Click Protection source code pending resolution of Yahoo!'s petition to the Federal Circuit – the Rule 30(b)(6) deposition regarding certain aspects of the Click Protection source code will go forward should the Plaintiff actually decide to take it. Accordingly, Plaintiff's assertions should be disregarded, and Yahoo!'s motion should be granted.

II. The record supporting Yahoo!'s forthcoming petition to the Federal Circuit is such that the Federal Circuit should grant the requested relief.

Yahoo! fully informed both Plaintiff and this Court of the reasons why Yahoo!'s Click Protection source code is not relevant to this lawsuit. *See* Dkt. Nos. 256, 339, 353, 363 and supporting exhibits and declarations. The motions and supporting briefs, supporting declarations, and supporting exhibits provide the foundation for the relief of mandamus. Indeed, the Federal Circuit has granted mandamus in review of discovery orders.

> Although rare, *it is not impossible* to grant the remedy of mandamus where a matter under review is committed to the district court's discretion. … Specifically, we have granted mandamus review of discovery orders when the petition presented an important issue of first impression or one in which courts have disagreed.

In re Deutsche Bank Trust Co., 2010 WL 2106957, at *2 (Fed. Cir. May 27, 2010) (emphasis added). Although this Court does have discretion in discovery related matters, it is not impossible or implausible for the Federal Circuit to grant Yahoo!'s petition. Indeed, Yahoo!'s petition will raise important issues on the legal standards for balancing between the risk of inadvertent disclosure or competitive use of Yahoo!'s highly-confidential Click Protection

source code and Plaintiff's desire and award of unfettered discovery of irrelevant source code. Further, Yahoo's petition to the Federal Circuit is based upon a sound factual foundation. As such, Yahoo!'s motion to stay pending resolution of Yahoo!'s writ of mandamus to the Federal Circuit should be granted to protect the production of highly-sensitive and confidential Click Protection source code.

III. Yahoo! is continuing to work with Plaintiff to assure that all issues relating to the Click Protection System are resolved.

Plaintiff argues that documents produced by Yahoo! relating to the Click Protection system are not helpful.[2] That the documents attached to the response themselves do not answer all Plaintiff's questions is irrelevant; Yahoo! has produced additional source code and offered a deposition witness that will augment those documents to provide a complete picture of why the Click Protection source code cannot infringe Plaintiff's asserted patent claim. Yahoo! has made available to Plaintiff the same information about its Click Protection system that Google provided about its system. Plaintiff has accepted this information from Google and waived its request for the very information it continues to seek from Yahoo!, even though Plaintiff has accused Google's click protection system of infringement and not Yahoo!'s. Upon learning that Plaintiff had reached agreement with Google, Yahoo!'s counsel reached out to Plaintiff's counsel last week and again early this week in an attempt to resolve this dispute. These discussions are currently ongoing and will resume after Plaintiff inspects Yahoo!'s source code today, and Yahoo! hopes to resolve this issue later this week.

If Yahoo! is required to produce this confidential Click Protection source code before resolution by the Federal Circuit, Yahoo! risks being left without a remedy to cure the improper

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[2] Notably, Plaintiff had not reviewed the Click Protection source code in Dallas at the time of filing its response, nor had it deposed Yahoo!'s offered witness.

disclosure. Further, if this Court is not willing to grant a stay pending the disposition of Yahoo!'s petition to the Federal Circuit, Yahoo! reiterates its alternative request that the Court enter a temporary stay of its order until Yahoo! can separately file a motion to obtain such a stay of the order directly from the Federal Circuit.

For all of these reasons and those stated in Yahoo!'s motion, Yahoo! respectfully requests that this Court grant its motion to stay the production of the remainder of the Click Protection source code pending the filing of a request for stay in the Federal Circuit and pending resolution of a petition for writ of mandamus in the Federal Circuit.

Dated: June 23, 2010

Respectfully submitted,

/s/ Jennifer H. Doan
Jennifer Doan
Joshua Reed Thane
HALTOM & DOAN
Crown Executive Center, Suite 100
6500 Summerhill Rd.
Texarkana, Texas 75503
Tel: 903.255.1002
Fax: 903.255.0800
Email: jdoan@haltomdoan.com
Email: jthane@haltomdoan.com

Jason C. White
Mansi Shah
Scott Sherwin
HOWREY LLP
321 N. Clark, Suite 3400
Chicago, IL 60654
Tel: 312.595.1239
Fax: 312.595.2250
Email: whitej@howrey.com
Email: shahm@howrey.com
Email: sherwins@howrey.com

William C. Rooklidge
HOWREY, LLP
4 Park Plaza, Suite 1700
Irvine CA 92614-2559
Telephone: (949) 721-6900
rooklidgew@howrey.com

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 23, 2010.

/s/ Jennifer H. Doan
Jennifer H. Doan