

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

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

**BRIGHT RESPONSE, LLC'S MOTION FOR VERBAL REPRIMAND TO YAHOO  
COUNSEL FOR CONTINUED AND VEXATIOUS CONDUCT WITH RESPECT TO  
MR. DAVID PRIDHAM AND REQUEST FOR COURT ORDER  
ALLOWING MR. PRIDHAM TO PARTICIPATE IN AND REVIEW PRE-TRIAL  
PREPARATION MATERIALS**

Plaintiff Bright Response, LLC files this motion with great indignation—and only after Bright Response has been subjected to repeated insinuations from Yahoo counsel regarding Bright Response’s counsel, with no factual or legal basis, of improper conduct. Yahoo counsel’s not-so-subtle attempts to raise the specter of ethical misconduct concern the Court’s Protective Order and the Court’s June 2, 2010 Order requiring a modification of that longstanding Protective Order: specifically, after the date of that Order, Bright Response counsel Mr. David Pridham could not receive, review, or handle confidential or Attorneys Eyes Only (“AEO”) materials. Bright Response opposed the belated relief that Yahoo sought, which abruptly sought such relief despite years of Yahoo’s sending Mr. Pridham confidential, AEO materials in preparing this case for trial, just as it sent such documents to all other Bright Response counsel. Although Bright Response opposed that relief, it respects and has respected the Court’s June 2, 2010 Order. Indeed, it was Bright Response that took the initiative to prepare and submit a revised Protective Order promptly after the Court issued its June 2 Order, and had to wait until

the 11<sup>th</sup> hour for any response from Yahoo or Google to cooperate in that regard. *See* Dkt. No. 356 (opposed motion for entry of protective order).

Additionally, Mr. Pridham, although he too indicated to the Court emphatically why Yahoo's conduct undermined its arguments (Dkt. No. 360 (Notice of Filing of Letter from Mr. David Pridham to Judge Everingham)), also respects the Court's Order, just like any attorney is bound to follow and abide by all Court Orders. Bright Response has no duty—and the Court imposed none—that requires Bright Response to update Yahoo with what Mr. Pridham is doing on a daily basis in this matter in assisting his client in preparing this case for trial. Nothing in the Protective Order as amended requires an officer of the Court to represent to opposing counsel what the Court and the judicial system expects and assumes of counsel: that attorney compliance is in effect. Yahoo may not assume the role of policing opposing counsel's conduct. Yahoo may not usurp the role of this Court, which alone has exclusive authority to determine or question compliance with Court Orders.

Whatever end game Yahoo has in mind by continuing to focus on Mr. Pridham's activities—and doing so by setting up Bright Response and Mr. Pridham by requiring compliance with terms and conditions that simply do not exist in the Court's Protective Order—the game must stop now. Yahoo's accusations have been aimed at Mr. Pridham personally, implicitly impugning his integrity as an officer of the court, with no other goal it would seem than to prejudice Bright Response, its credibility, and its trial counsel in front of this Court. Bright Response now seeks Court intervention to end the underhanded accusations that border on harassment at a critical time in trial preparations.

## **PROCEDURAL BACKGROUND SUMMARY**

### **A. Yahoo's Unfounded Accusations Cannot Erase The Documented Record Of Yahoo Discovery Misconduct.**

Despite Yahoo's earnest attempts to create a record on which it no doubt seeks to establish improper litigation conduct by Bright Response, the record is against Yahoo to begin with. Yahoo cannot regain the credibility it has already lost, by its documented improper conduct during discovery, by unfounded suggestions of impropriety aimed at Mr. Pridham and Bright Response by association. The Court has before it an extensive record of Yahoo's own patterns of litigation misconduct including: repeated violations of Discovery Orders, repeated violations of Protective Orders, and repeated improper and incomplete source code productions. Recognizing that its gamesmanship was now out of the proverbial bag, however, Yahoo has now launched a collateral attack on Bright Response in attempt to distract the Court from Yahoo's prior, and ongoing, discovery misconduct.

### **B. Yahoo Sent Mr. Pridham AEO And Confidential Information For Several Months At Least Before Changing The Status Quo—But Bright Response And Mr. Pridham Respect, And Have Always Respected, Court Orders And Sought Prompt Protective Order Modification To Comply With The Court's June 2, 2010 Order.**

As the record before the Court already shows, after one and a half years of document production, Yahoo sought an order barring Mr. Pridham from viewing confidential information in this litigation. *See, e.g.*, Dkt. No. 305 at 1-2. Yahoo provided no explanation for its delay in bringing the emergency relief. After the Court granted Yahoo's motion, however, Bright Response and its counsel, including Mr. Pridham, respected that Order. The Court then ordered the parties to submit an Amended Protective Order memorializing the Court's Order. Dkt. No. 349 (Order of June 2, 2010). Despite the fact that it prevailed on the motion, Yahoo failed to engage in any efforts to craft an amended order until after repeated correspondence from Bright

Response. In fact, Yahoo did not even provide a copy of its proposal until the day before the Amended Order was due and attempted to use the Court's Order to insert new, sweeping provisions in the Protective Order. *See generally* Dkt. No. 356 (Plaintiff's Opposed Mtn. for Entry of Amended Protective Order).

After the Court entered its Amended Protective Order, the Court made clear that Mr. Pridham could not review confidential materials but could assist in the prosecution of the litigation based on information he had already learned during the two years of litigation. Mr. Pridham has complied, and is continuing to comply, with that Order. Yet, despite some 18 months of discovery disputes, beginning with Bright Response's resort to a motion to compel before Yahoo would produce any source code (Dkt. No. 195), Bright Response has been able to serve its preliminary report against Yahoo from its technical expert, Dr. Thomas Rhyne ("Yahoo Rhyne Report"), and its damages expert, Dr. Stephen Becker ("Yahoo Becker Report").

## **THE CURRENT DISPUTE: YAHOO'S ONGOING, UNFOUNDED ALLEGATIONS**

### **A. Bright Response Has Served Expert Reports And Is Focusing On Expert Discovery, Yet Yahoo Continues Its Allegations Against Mr. Pridham And Threats For Violation Of Protective Order Terms That Do Not Exist.**

Even as expert discovery is underway, and the August 2, 2010 trial date imminent, Yahoo began recently to divert focus from the merits and trial preparation and again focus pointedly on Mr. Pridham. Specifically, Yahoo began a pattern of demanding that Bright Response disclose whether or not Mr. Pridham reviewed the Yahoo Rhyne Report and/or the Yahoo Becker Report. Yahoo's initial basis was that there was a group email distribution list called "BrightResponse@raklaw.com," and that Yahoo assumed that Mr. Pridham was on that email distribution. Yahoo then demanded that Bright Response confirm whether or not Mr. Pridham received the Yahoo Becker Report or the Yahoo Rhyne Report.

It is Bright Response's position that Yahoo should never have asked such a question of opposing counsel. The failure to answer that question—that for reasons of policy and the judicial system should not have been asked in the first place—demeans the professionalism of counsel. Opposing counsel should not be allowed to unilaterally assume the role of policing opposing counsel, monitoring counsel's conduct. It is simply inappropriate to assume the worst of opposing counsel when there is no basis to do so. There is no history of Mr. Pridham violating any orders of this Court, and no Court order permits Yahoo to assume a monitoring role. Moreover, Bright Response made clear numerous times that it and its counsel, including Mr. Pridham, had complied with the Court's Protective Order.

For example, on July 7, 2010, Yahoo counsel, Mr. Steven Yovitz, stated:

Finally, it appears that the Bright Response group email address was cc'd when Bright Response served the Becker report (as well as the Rhyne report). We understand that Mr. Pridham is included in that group email address, but he should not have access to these reports under the Amended Protective Order. Please let us know when you are available for a meet and confer on this issue tomorrow.

Spangler Decl. Ex. A.

That same day, Bright Response counsel, Mr. Andrew W. Spangler made clear that Bright Response and all of its counsel comply with the Court's orders and that allegations even hinting in such a direction would not be accepted.

Your accusations about Mr. Pridham need to end immediately.... Bright Response and its counsel follow Court orders. Period. If you have some evidence to support your allegation that Mr. Pridham is still on the Bright Response distribution list than provide it now. Neither Bright Response nor Mr. Pridham owe you any explanation or any affirmative representation that he is - or is not - on that email distribution list.

Spangler Decl. Ex. A.

Other counsel for Bright Response, Mr. Adam Hoffman also responded:

In regard to Mr. Pridham, Bright Response respects court orders and has followed them and will continue to follow them. We have no intention of discussing this compliance. ***However, you should know that, should you wish to contact Mr. Pridham, you will not be able to do so by sending an e-mail to the [BrightResponse@raklaw.com](mailto:BrightResponse@raklaw.com) address.***

Spangler Decl. Ex. B.

That should have ended the matter. In fact, Bright Response believed that it had provided more information than necessary as Yahoo was essentially demanding that Mr. Pridham confirm whether he was abiding by the Amended Protective Order. Moreover, given that the foundation for Yahoo's allegations was, at best, confusion over the email distribution list—at worst, nefarious assumptions and innuendoes about a Court violation—Bright Response directly addressed that issue by confirming Mr. Pridham was not on that email list.

Notwithstanding this representation from Bright Response counsel, Mr. Yovitz responded with another request that Bright Response confirm that Mr. Pridham had not received the Yahoo Becker Report or the Yahoo Rhyne Report. At this point, counsel for Bright Response responded succinctly: "I will confirm Mr. Pridham has not violated the Protective Order." Spangler Decl. Ex. A (email dated July 7, 2010; 9:43 p.m.). Yet, despite repeated statements from Bright Response that ***no Order had been violated*** and disclosure of the fact that the email distribution list ***did not include Mr. Pridham***, Yahoo continued its demands.

On the following day, July 8, 2010, Yahoo responded to Mr. Spangler's clear representation:

Has Mr. Pridham received the Becker and Rhyne reports? Please give us a yes or no answer, or indicate that you refuse to answer if that is your position.

Spangler Decl. Ex. A (email dated July 8, 2010; 12:11 p.m.).

Believing Yahoo to simply playing games at this point, which, admittedly, can and does occur occasionally in patent infringement litigation, Bright Response counsel did not respond

immediately. The same day, Mr. Yovitz sent yet another email, this time stating that if Bright Response *did not respond that day* Yahoo would request a hot-line call. Spangler Decl. Ex. A (email dated July 8, 2010, 3:57 p.m.).

Again, believing this to be more machinations and posturing from Yahoo to distract as the parties prepare rebuttal reports, Bright Response did not engage. At this point, Bright Response had made its position clear and did not believe anything further needed to be said.

**B. The Parties Confer On July 9, 2010 On Many Outstanding Issues—Yahoo Never Mentioned Its Emails Seeking Updated Information From Mr. Pridham As To Whether He Had Violated The Protective Order—But Then Raises The Issue Again Suddenly And States Its Intent For A HotLine Call.**

On Friday, July 9, 2010, Bright Response, Google and Yahoo had an omnibus meet and confer on outstanding issues. Spangler Decl. ¶ 2. The parties all had the opportunity to raise any issues they believed were pending and needed addressing. At the end of the call, Bright Response counsel *specifically asked*: "Does anyone have anything else?" *Id.* Yahoo never said anything and made no mention of the alleged Protective Order violations regarding Mr. Pridham. *Id.* Bright Response felt, reasonably and rightfully so, that Yahoo, whose counsel said nothing about this issue at the meet and confer, had finally accepted Bright Response's representation and let the issue go. Yahoo's silence confirmed Bright Response's trial counsel initial impression: the continued requests for updates, despite Bright Response's representations resolving the issue, was litigation posturing and gamesmanship seeking to engage Bright Response counsel on a tangential issue while intensive trial preparations are at a critical phase.

Instead, three days later, on Monday July 12, 2010 Yahoo suddenly brings the issue up yet again. This time, however, Mr. Yovitz has his local counsel, Mr. Josh Thane, sent another piece of correspondence asking Bright Response about Mr. Pridham.

We still have not received a response to Mr. Yovits' emails below. Please confirm whether or not Mr. Pridham received the Becker and Rhyne expert reports. If you cannot confirm that Mr. Pridham has not received the Becker and Rhyne reports, then please provide a time that you are available this afternoon for a call with the Court. As previously stated, we would accept your representation and drop the matter once you give your confirmation that Mr. Pridham has not received such expert reports.

Spangler Decl. Ex. A (email dated July 12, 2010, 2:18 p.m.).

Bright Response responded:

I copy what I put below. I have no obligation – nor does Mr. Pridham – to answer your question. It is offensive. Mr. Pridham has complied with the terms of the Amended Protective Order. ...

And you can ask again on other reports and other briefing, etc. and the answer will be the same each time: “Mr. Pridham has complied with the terms of the Amended Protective Order” because – unlike your client – he has.

Spangler Ex. A (email dated July 12, 2010; 4:31 p.m.).

Rather than consider the matter closed with this repeated affirmation and representation, Yahoo again asked for an *affirmative* representation from Bright Response to report to Yahoo about whether its attorneys were complying with a Court Order, and stated that it would seek Court relief if Bright Response refused to answer. Bright Response did refuse. Bright Response stated it would participate in a meet and confer anytime between 8 and 10 a.m. on Tuesday on July 12, 2010. Spangler Decl. Ex. C. Further, Bright Response made clear it would be filing the present motion and would seek relief against Yahoo counsel personally.<sup>1</sup> *Id.*

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<sup>1</sup> Mr. Spangler, counsel for Bright Response, and author of the email, re-reviewed all the correspondence and determined that Mr. Yovitz led the charge on this conduct. Accordingly, the relief is directed solely as to him.



## **ARGUMENT**

### **A. Requiring Counsel to Make Affirmative Representations Regarding Compliance with a Protective Order Is Contrary To The Letter And Spirit Of Any Court Order In This Case Or Any Court Order Generally And Sets A Dangerous Precedent.**

The framework for this dispute, and Bright Response's counsel reasonable offense at requiring to report to opposing counsel when no Court Order or other obligation requires it do so, lies in the rules governing attorney conduct. Bright Response relies on the rules in this District, and the Court's authority under these rules, to determine that a relatively mild sanction of a verbal reprimand is necessary as to Mr. Yovitz.<sup>2</sup> At a fundamental level, Yahoo's demand for Bright Response to make affirmative representations about the actions of its counsel sets a dangerous precedent. If required to do so once, then it can be required of opposing counsel repeatedly. The rules of this district requires that attorneys conduct themselves with the highest standards of integrity. Allowing Yahoo to become judge and jury of that process for its own gratuitous purposes in litigation offends this basic assumption on which the adversary system functions. For example:

#### **LOCAL RULE AT-3 Standards Of Practice To Be Observed By Attorneys**

Attorneys who appear in civil and criminal cases in this court shall comply with the following standards of practice in this district:

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#### <sup>2</sup> **LOCAL RULE AT-2 Attorney Discipline**

(d) Disciplinary Action Initiated in This Court.

(1) Grounds for Disciplinary Action. This court may, after an attorney has been given an opportunity to show cause to the contrary, take any appropriate disciplinary action against any attorney:

(A) for conduct unbecoming a member of the bar;

(C) A lawyer owes, to opposing counsel, a duty of courtesy and cooperation, the observance of which is necessary for the efficient administration of our system of justice and the respect of the public it serves.

(D) A lawyer unquestionably owes, to the administration of justice, the fundamental duties of personal dignity and professional integrity.

(K) Effective advocacy does not require antagonistic or obnoxious behavior and members of the Bar will adhere to the higher standard of conduct which judges, lawyers, clients, and the public may rightfully expect.

Absent some evidence to the contrary, one party should not require an opposing lawyer to disclose what actions the attorney has taken. Because Mr. Pridham is now not permitted to view confidential documents, Yahoo is of the opinion that the treatment of Mr. Pridham should be different. It should not. Absent a showing to the contrary, attorneys should be accorded respect and a belief in the other's professional conduct. Bright Response made clear numerous times its counsel has complied with the terms of the Protective Order. Spangler Decl. Ex. A. Nothing further need be said. Yahoo's response will surely be that "all he had to do is say yes or no and that would have been the end of it." What Yahoo misses is that Bright Response should not have had to make any representation at any time. Indeed, all attorneys are bound by the Protective Order, yet no demand has been made that any other counsel represent to any other counsel that they comply, on a daily basis, with the Court's Orders.

**B. Yahoo Has Attempted This Verification Process In Other Litigation But Realized The Impropriety Of Demanding Such A Provision.**

During Yahoo's briefing regarding its request to modify the Protective Order to bar Mr. Pridham from any continued access to confidential materials, Yahoo discussed other litigation in which Mr. Pridham was involved: *API Technologies, LLC v. Google Inc. and Yahoo! Inc.* That case is instructive. In that case, Yahoo sought a specific requirement in the Protective Order that counsel provide lists of attorneys who worked on prosecution activities so Yahoo could "verify"

that API counsel were not violating the Protective Order. That provision does not appear in the final version of the Protective Order in that case. Counsel for API Technologies, Andrew W. Spangler, made clear that API would not agree to any provision that would provide counsel the right to make opposing counsel "verify" compliance with a Protective Order. *See* No. 2:09-CV-00147, Dkt. No. 179 (Protective Order).

**C. Yahoo's Demands And Innuendoes Regarding Mr. Pridham Are Personal And Purposefully Prejudicial.**

Over the past couple of months Yahoo has sought to shift attention away from the merits and onto Mr. Pridham individually and personally. Bright Response complied with its professional obligations and represented that Mr. Pridham complied with the Protective Order and made clear that Mr. Pridham was not on the email distribution list that was the subject of Yahoo's original motion. Spangler Decl. Ex. A. Yet Yahoo continued to revisit this issue, repeatedly, as set forth above, and again demand that Mr. Pridham make certain representations to Yahoo so Yahoo could police for itself whether Mr. Pridham was in fact complying with the Protective Order. That Yahoo did not even raise the issue on the recent meet and confer with all parties present and when all parties were directly asked if, with all counsel on the telephone, any remaining issues had to be addressed. Yahoo said nothing, proving Bright Response correct: these emails have been sent with the intent to divert focus and harass. They were not sent in good faith. They were used as a litigation tactic.

**5. Bright Response Requests An In Camera Session.**

To the extent the Court would like to know any details concerning the role Mr. Pridham has played in the litigation since entry of the Amended Protective Order, Bright Response welcomes the opportunity to share the information with the Court. Bright Response will gladly make itself available in this regard and can have its lead and local counsel in chambers by 8 a.m.

Wednesday, July 14, 2010. Bright Response intends to convey to the Court by whatever means possible its firm conviction in the obligation to comply with Court Orders and will evidence that to the Court.

**D. Because Bright Response's Trial Preparation Is Hindered By Yahoo's Demands And Allegations, Bright Response Requests a Specific Court Order Allowing Mr. Pridham To Participate And Review Pre-Trial Preparation Materials.**

Mr. Pridham should be allowed, as any other counsel in this case, to continue to represent his counsel while still complying with the Protective Order. Indeed, the Court recognized that in some cases for good cause even the modified Protective Order may be modified to allow Mr. Pridham access to confidential materials. Mr. Pridham should not have to continually doubt and err on the side of caution in what he can and cannot permissibly do in preparing this case for trial. Yahoo's allegations and insistence on verification and monitoring cannot but undermine and undercut an attorney's focus on trial preparations. Thus, Bright Response requests that as part of the Court's Order in this case, that the Court expressly order that Mr. Pridham may and can review, without questions and interference from Yahoo, pre-trial preparation materials that the parties can and must exchange pursuant to the Docket Control Order.

**RELIEF REQUESTED**

Bright Response has had to address repeated discovery violations, litigation games and misrepresentations. Bright Response never sought relief against individual counsel for Yahoo. Instead, Bright Response has been careful to ensure the focus was on *Yahoo*—not its counsel. However, in this case, at this juncture, there can be no question that the conduct at issue in this Motion is not a function of Yahoo but that of its lawyers – specifically, Mr. Yovitz, based on the communications filed in support of this Motion. Bright Response respectfully requests, that because of this record of conduct, that the Court issue an order in which Mr. Yovitz is

reprimanded for (i) conduct falling short of the professionalism that this District requires, (ii) choosing to pursue an end for a client's potential gain instead of respecting the judicial system at large and expectations of counsel as officers of the Court; and (iii) choosing to engage in such conduct for no other purpose than as an improper stratagem to divert opposing counsel from trial preparations and secure an advantageous litigation posture.

Dated: July 13, 2010

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Respectfully submitted,

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### **CERTIFICATE OF CONFERENCE**

On July 7, 2010, counsel for Yahoo contacted counsel for Bright Response regarding the issues discussed in this motion. The parties exchanged numerous pieces of correspondence over the next few days. On July 9, 2010, after Yahoo counsel had repeatedly asked for Bright Response to describe conduct of its attorneys, Yahoo did not raise the issue on a meet and confer. Attending that meet and confer were numerous attorneys for Bright Response, including myself as lead and local counsel. Attending on behalf of Yahoo was Bill Rooklidge, Jason White and Jennifer Doan (lead and local counsel). Subsequent to that meet and confer Yahoo sent more correspondence regarding the issues contained in the present motion. Yahoo made clear it would be seeking a hot-line call on the issues raised herein. Bright Response requested that counsel for Yahoo spend at least one minute discussing the issue to which Yahoo never responded. In light of impending deadlines and Yahoo's intent to seek a hot-line call, the parties are at a complete impasse and require Court intervention to resolve the dispute.

\s\ Andrew S. Spangler  
Andrew W. Spangler

### **CERTIFICATE OF SERVICE**

I certify that a true and correct copy of this motion has been served or will be on counsel of record on this 13th day of July 2010 by using the Court's CM/ECF system. A courtesy copy also is being sent to the Court by facsimile with service to opposing counsel by email.

\s\ Elizabeth A. Wiley  
Elizabeth A. Wiley