

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 EMERGENCY MOTION TO ALLOW
BRIGHT RESPONSE COUNSEL MR. DAVID PRIDHAM ACCESS
TO EXPERT REPORTS ON DAMAGES AND ALL DOCUMENTS RELIED UPON IN
THOSE REPORTS TO SUPPORT A REASONABLE ROYALTY ANALYSIS,
INCLUDING ACCESS TO PRETRIAL PREPARATION MATERIALS AND
DEMONSTRATIVE EXHIBITS IN SUPPORT OF PREPARING
BRIGHT RESPONSE'S DAMAGES CASE**

Plaintiff Bright Response, LLC (“Bright Response”) files this motion pursuant to the Court’s June 2, 2010 Order modifying the Protective Order. In ordering that Bright Response’s counsel Mr. Pridham be barred from reviewing any documents marked by Defendants as Confidential and/or Attorneys Eyes Only (Dkt. No. 349), the Court noted a good cause exception. The Court held:

Bright Response, LLC may, however, petition the court on a case-by-case basis to share limited information with Mr. Pridham that would otherwise be prohibited by this order. The court will then consider allowing Mr. Pridham to view such information on a showing of adequate need and after determining that such access would not tend to undermine the orders issued in *Hyundai* and *ST Sales*.

Dkt. No. 349.

Bright Response now invokes this provision to avoid any undue prejudice to Bright Response. Bright Response requests that Mr. Pridham be allowed to view, in assisting Bright Response in its trial preparations: (i) the expert reports on damages; (ii) any document expressly relied upon in support of the damages analysis that is marked as confidential and/or Attorneys’

Eyes Only that Mr. Pridham otherwise is not permitted to view pursuant to the Court's June 2, 2010 Order identified above; and (iv) any documents (including demonstrative exhibits) prepared by the parties in preparation for trial.¹ As no agreement has been reached with Defendants on this issue, yet pre-trial preparations are compressed with expert discovery are underway, Bright Response requests expedited briefing and relief given the compressed deadlines.

In support of showing adequate need and how fairness to all parties is achieved with this request, Bright Response notes the following: First, this is a narrowly crafted request for relief that makes a clear demarcation and does not implicate the issues in, for example, *ST Sales Tech*,² about Mr. Pridham's documented role in those cases concerning patent acquisition. There is nothing in financial information that includes technical information about how a particular technology for a particular patent or portfolio of patents in a particular technology area works. Therefore, there is no reasonable concern that any information learned in this case about Yahoo's and Google's revenues, for example, could be inadvertently disclosed (per the competitive decisionmaker analysis) and inadvertently used while investigating other opportunities for other patents with similar technology.³ Access to expert reports on damages, and the documents used

¹ Bright Response has received a request from the defendants to seal the courtroom and has sought clarification as to whether the Defendants would be (as part of this request) seeking to preclude Mr. Pridham from attending parts of the trial in this matter. This would be highly prejudicial to Bright Response's ability to litigate this case, and Bright Response reserves the right to raise this issue to the extent the Defendants seek to bar Mr. Pridham from access to the court room.

² *ST Sales Tech Holdings, LLC v. Daimler Chrysler Co LLC*, No. 6:07-cv-346, 2008 WL 5634214 (E.D. Tex. Mar. 14, 2008) ("*ST Sales Tech*"); see also *Hyundai Motor America v. Clear With Computers, LLC*, No. 6:08-cv-302-LED, Dkt. No. 71 (E.D. Tex. May 11, 2009) ("*Hyundai*").

³ Bright Response vigorously disputes there is any type of risk in this case but respects the Court's Order. The fact that Bright Response is seeking a good cause modification on this

to develop a reasonably royalty analysis model applying the *Georgia Pacific* factors, will not disclose the operative details of a defendant's intellectual property that could be used, as alleged, to seek out other patent technology that could read on Defendants' proprietary technology. Thus, the concerns articulated based on the record in *ST Sales Tech* and *Hyundai* are not triggered for the disparate realm of expert report concerning damages.

Second, Mr. Pridham's expertise lies in the financial analysis required for complex damages calculations. *See, e.g.*, Dkt. No. 359 (letter of Mr. David Pridham); Dkt. No. 360 (notice of filing). He has been reviewing and analyzing such documents for developing this case for trial since the case's inception, and up until the moment of the Court's Order of June 2, 2010. *See generally id.* To lose the benefit of that expertise and institutional knowledge for Bright Response's behalf, just two months from trial, is the very type of circumstance a good cause exception to such bars should consider in the interest of fairness to all parties.

Lastly, Bright Response is asking only for a very narrow exception limited to a finite universe of documents: the expert reports on damages and documents cited therein. Bright Response is not requesting any type of access to any type of document concerning operative details of Defendants' technology. This request is limited only to the damages reports and the documents used for the experts' opinions on a reasonable royalty in this case.

Bright Response therefore respectfully requests that the Court enter an order allowing the narrow relief requested:

narrow realm of documents, and arguing that this realm of documents does not raise an *ST Sales Tech* or *Hyundai* issue, should not be construed as a concession that the record supports the competitive decision maker finding under the different record of this case.

- (1) Mr. Pridham is allowed to have access to and review all expert reports on damages and any information on which the experts' analysis depends in reaching their opinions of a reasonably royalty in this case;
- (2) Mr. Pridham is allowed to have access to all pre-trial preparations concerning damages issues, including the preparation and review of demonstrative exhibits.

Dated: July 23, 2010

Respectfully submitted,

By: /s/ Elizabeth A. Wiley
Elizabeth A. Wiley

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CERTIFICATE OF CONFERENCE

I hereby certify that the meet and confer requirement of this District has been complied with as follows:

On July 14, 2010, the parties met and conferred by a telephonic conference in which I, as local and lead counsel for Bright Response, addressed the specific topic with the counsel for Defendants present at that call of what documents Mr. Pridham could and could not see to ensure no violation of the Court’s Order occurred. Also on this call was David Perlson, lead counsel for Google and AOL, as well as Jennifer Doan, lead and local counsel for Yahoo and Jennifer Ainsworth as local counsel for Google. Although the parties resolved certain outstanding issues confirming that because the invalidity report of Defendants’ invalidity expert Dr. Branting was not marked confidential, on any page, what issues Defendants could have if and when by chance some document on which the expert relied in his not-confidential report, was confidential, would Defendants claim this a material or knowing breach of the Protective Order. As to the specific issue of damages documents, however, and the relief requested herein, there was no agreement..

Dated: July 23, 2010

/s/ Andrew W. Spangler
Andrew W. Spangler

CERTIFICATE OF SERVICE

I certify that counsel of record who are deemed to have consented to electronic service are being served this 23rd day of July, 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
Elizabeth A. Wiley