

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 RESPONSE TO
YAHOO MOTION IN LIMINE NO. 4
(DISCOVERY CONDUCT AND SOURCE CODE PRODUCTION)**

Bright Response, LLC (“Bright Response”) filed this response to Yahoo’s Motion in Limine No. 4, which seeks to preclude any reference to Yahoo’s discovery conduct in this case and, in particular, issues of Yahoo’s source code production that have been before the Court on several occasions. Yahoo purports to be concerned with suggestions in Bright Response’s expert that Bright Response may choose to expend trial time re-litigating source code and other discovery issues from the past year. To the contrary, Yahoo’s well-documented conduct on this subject matter has already required an inordinate amount of Bright Response’s and the Court’s resources.¹ Nevertheless, it was proper to include such qualifications and caveats in Bright

¹ See Dkt. No. 195 (September 1, 2009 Bright Response Motion to Compel Production of Source Code); Dkt. No. 209 (Reply in Support of Motion to Compel Production of Source Code); Dkt. No. 252 (Bright Response Motion to Compel Yahoo to Comply With Court Order of November 5, 2009 and Produce Source Code in Native Format as Maintained in Ordinary Course of Business); *see also* Dkt. No. 258 (Motion for Leave to Supplement Infringement Contentions as to Yahoo, addressing source code production and director structure issues); Dkt. No. 263 (Bright Response Reply in Support of Motion to Compel (Dkt. No. 252) & Decl. of Patrick Anderson concerning directory structure and search issues); Dkt. No. 322 (Bright Response Emergency Supplemental Brief in Support of January 25, 2010 Motion to Compel Yahoo to Comply with Court Order of November 5, 2009 and Produce Source Code in Native Format); Dkt. No. 347 (Court Order granting Bright Response leave to serve supplemental infringement contentions);

Response's expert's report: even as of this filing, expert discovery has continued and fact discovery was continuing as recently as last week. Bright Response should not be prohibited, through the relief Yahoo seeks, from ensuring its technical expert is allowed to address all such documents, reports, and testimony, when such additional testimony is appropriate to his infringement opinion.

Further, it is correct, as the parties' filed stipulation reflects and to which Yahoo refers (Dkt. No. 396), that after at least a year of disputes regarding the timing and manner of Yahoo's source code production, an accommodation was reached on the universe of source code that Bright Response at issue. That does not entitle Yahoo, however, to taint Bright Response in front of the jury with allegations of missing documents such as Yahoo has made concerning its laches defense as to Bright Response. *See* Defendants' Response to Bright Response's Motion for Summary Judgment, Dkt. No. 423, at 25-27. Although there is no evidence—and Defendants produced none in response to Bright Response's Motion for Summary Judgment²—of any unreasonable delay to justify a laches defense as Yahoo frames it, a level playing field is in order. Thus, Bright Response should not be left without the opportunity to raise the issue, where appropriate, of Yahoo's non-production issues over the past year or more. If that requires Yahoo's enduring the consequences of having the jury hear of Yahoo's conduct over the past year regarding source code production, that must be the result. Bright Response should not be the party penalized with no equal opportunity to defend itself against Defendants' analogous

Dkt. No. 355 (Court Order granting Dkt. No. 322 Bright Response Emergency Supplemental Brief in Support of its Motion to Compel).

² *See* Bright Response Reply (Dkt. No. 465) in support of Motion for Summary Judgment at 12-13.

allegations that they could not secure sufficient documents to present their defense case, which, in their view, justifies the affirmative defense of laches.

For the above-stated reasons, Yahoo's Motion in Limine No. 4 should be denied.

Dated: July 26, 2010

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that the foregoing Plaintiff's Response to Yahoo's Motion in Limine No. 4 was filed by the Court's CM/ECF system with notice to the parties on this 26th day of July 2010 andn served by email on counsel of record.

\s\ Elizabeth A. Wiley
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