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ORIGINAL

**IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF TEXAS  
FORT WORTH DIVISION**

FILED  
U.S. DISTRICT COURT  
NORTHERN DIST. OF TX.  
FT. WORTH DIVISION

2009 NOV 12 PM 4:21

CLERK OF COURT

AMERICAN AIRLINES, INC.,

Plaintiff,

-v.-

YAHOO! INC. and OVERTURE SERVICES, INC.  
d/b/a YAHOO! SEARCH MARKETING,

Defendants.

No. 4:08-CV-626-A

**PLAINTIFF AMERICAN AIRLINES, INC.'S MOTION FOR  
LEAVE TO SUPPLEMENT THE RECORD IN SUPPORT OF  
AMERICAN'S MOTION FOR SANCTIONS FOR FAILURE TO  
PRODUCE AND PRESERVE DOCUMENTS AND BRIEF IN SUPPORT**

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*Attorneys for Plaintiff American Airlines, Inc.*

Plaintiff American Airlines, Inc. ("American") hereby respectfully submits this Motion to Supplement the Record in Support of American's Motion for Sanctions for Failure to Produce and Preserve Documents. American seeks to supplement the record with the attached excerpt of the testimony of Nam Nyugen, an employee of Defendant Yahoo!, Inc. ("Yahoo"). Mr. Nyugen, a Yahoo employee, was presented by Yahoo for his deposition after American filed its Reply in support of the instant motion. Mr. Nyugen provides testimony that contradicts Yahoo's assertions in its sur-reply. Yahoo opposes this motion to supplement the record

In its Motion For Sanctions for Failure to Produce and Preserve Documents, American sought sanctions for, *inter alia*, Yahoo's failure to produce "Page Impressions," and "Page Impressions Data." Dkt. 100 at 5. American defined "Page Impressions" as "the actual image of the entire page that Yahoo displays to an Internet user in response to the user's search engine query." *Id.* American defined "Page Impressions Data" as "data that can be used to replicate Page Impressions (including data about the algorithmic results and Ad Impressions displayed together on the Page Impression, the location of Ad Impressions on a given Page Impression, and other HTML or Java code)." *Id.*

Yahoo conceded in its Opposition that it does not retain Page Impressions. See Dkt. 121 at 12 ("Yahoo! does not capture, and has never captured, such screenshots in the ordinary course of business."). In its sur-reply, it went further, claiming that "[u]nder American's approach, Yahoo! would be obligated to re-design its data processes and infrastructure to create a type of data record that it has never routinely generated in its business." Dkt. 174 at 6.

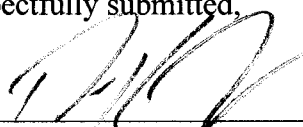
On November 5, 2009, after American had submitted its reply brief in support of its motion for sanctions, Yahoo presented for deposition, Mr. Nam Nyugen, the Senior Director of Engineering at Yahoo who is responsible for the systems whereby Yahoo displays search engine

results pages to users.<sup>1</sup> Appendix in Support of Plaintiff's Motion for Leave to Supplement the Record ("Supp. App.") 2. In the attached excerpt, Mr. Nguyen confirms that Yahoo has possession, custody and control of the Page Impressions Data, Supp. App. 5, but that it does not retain copies of this data. Supp. App. 6. Mr. Nguyen further testified that he is not aware of any technical impediments to retaining this data, Supp. App. 14-15, and that nobody has ever asked him if it would be possible to retain this data. Supp. App. 7-8.

Mr. Nyguen's testimony reveals but one example of the misdirection and incomplete information set forth in Yahoo's papers.<sup>2</sup>

Dated: November 12, 2009

Respectfully submitted,



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<sup>1</sup> Yahoo first produced Mr. Nguyen's documents on October 30, 2009, with the balance produced on November 9, 2009.

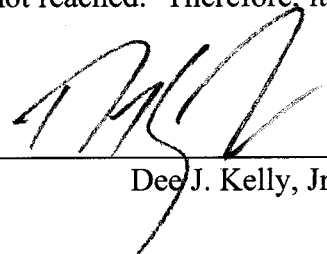
<sup>2</sup> If the Court wants further explanation, American stands ready to explain that Yahoo's sur-reply does not correctly state the record as to: (a) Yahoo's productions since August 28, 2009, which are largely responsive to American's February 23, 2009 Requests for Production rather than subsequent Requests for Production, despite the Court's August 4 and August 17 Orders; (b) Yahoo's failure to produce the relevant "Ad Impressions Data" showing the number of times that Yahoo has published particular Sponsor Result advertisements by advertisements (as opposed to the overall number of advertisements); and (c) Yahoo's continuing failure to produce data and documents underlying its study of consumer reactions to its Sponsor Results advertisements, the existence of which is evidenced by the sudden "discovery" of a small subset of such long-sought information.

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**CERTIFICATE OF CONFERENCE**

I certify that counsel for Plaintiff has conferred with counsel for Defendants, but agreement as to the relief requested in this motion was not reached. Therefore, it is presented to the Court for determination.



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Dee J. Kelly, Jr.

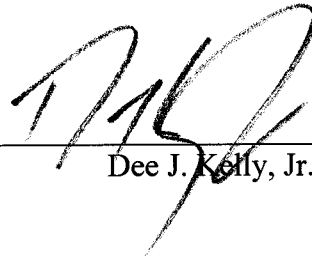
**CERTIFICATE OF SERVICE**

I certify that a true and correct copy of the foregoing was delivered on November 12, 2009 to Defendant's counsel, as follows, in accordance with the Federal Rules of Civil

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