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FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISIONFILED
U.S. DISTRICT COURT
NORTHERN DIST. OF TX
FT. WORTH DIVISION

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CLERK OF COURT

AMERICAN AIRLINES, INC.,

Plaintiff,

-v.-

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

Defendants.

Case No. 4:08-CV-626-A

**DEFENDANTS' SUR-REPLY TO AMERICAN AIRLINES'
REPLY TO YAHOO!'S FURTHER STATEMENT CONCERNING ESI**

Defendants Yahoo! Inc. and Overture Services, Inc. d/b/a Yahoo! Search Marketing (collectively "Yahoo!") submit this sur-reply to clear up inaccuracies in American Airlines Inc.'s ("American") September 1, 2009, Reply – inaccuracies that distort what this Court ordered the parties to do and what Yahoo! did to comply with that order.

On August 11, 2009, this Court ordered Yahoo! to provide a declaration that detailed the issues with restoring back-up data from a huge and complex source, and for "a cooperative effort in defining what should be in the declaration." (Aug. 11, 2009 Transcript at 11:7-11.) That is exactly what happened. American sent a list of questions to Yahoo! and Yahoo!'s declaration answered every one of them.

This Court also ordered the parties to meet and discuss the technical issues with the restoration. American told this Court on August 11, 2009, that it would retain an expert who would attend the in-person meeting of the parties "to discuss that declaration with Yahoo! and to test what they say, whether it's correct or incorrect or whether there could be a different point of

view.” (Transcript at 10:17-20.) Yahoo! came prepared to do exactly that and believed the declaration that it prepared – given that it was built around American’s questions – would serve as the framework for the meeting. The agenda American provided at the outset of the meeting was unexpected but did not change Yahoo!’s view that the declaration would (and should) remain the focus of the meeting.

Moreover, the focus had to remain on the declaration, given the limited availability of American's experts. Unexpectedly, it was the availability of American’s experts (Daticon EED) that controlled the location and timing of the meeting. Daticon had limited availability and its availability ruled out meeting in Los Angeles (where Yahoo!’s declarant works) or San Francisco (where lead counsel work). American suggested that the meeting start at 2:00 p.m. in Seattle, Washington to accommodate another Daticon meeting, nevertheless, Yahoo! informed American that Yahoo! would be available to begin the meeting earlier in the day should Daticon free up, but that the meeting would still need to be completed by 4:30 p.m. in order for Yahoo! to catch return flights. American’s representation that Yahoo! just up and left a meeting does not tell even half the story.

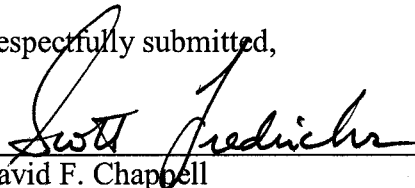
Finally, the record is clear that the Court-ordered declaration and meeting are tied to American's motion to compel production of the 2007 data that Yahoo! is restoring, which was the subject of part IV (A) of American’s motion to compel. Other allegedly “missing” data was the subject of part IV (C) of American’s motion, about which Yahoo! had agreed that American could take additional discovery (interrogatories and depositions), notwithstanding the information its representative provided at a May 29, 2009, Rule 30(b)(6) deposition.

In sum, the parties had clear directions from this Court and Yahoo! complied with those directions. The parties continue to disagree on how soon the restoration can be completed,

though American has backed away from its untenable position at the telephonic hearing that the restoration could be completed in just two weeks. (Transcript at 5:8-14.) In its Response filed August 28th, Yahoo! proposed measures (a cooperative meet-and-confer and/or appointment of an independent technical expert) to help the exchange and analysis of information about the restoration. American refused to respond to Yahoo!'s suggestion that a cooperative discussion between the parties take place, and claimed that an independent expert's view of the matter would simply "bog down the litigation." If an independent expert (without a stake in this proceeding) can assist the parties and court in finding a reasonable restoration process, Yahoo! continues to welcome it.

American's motion to compel demanded that Yahoo! do what even American's own technicians now admit is impossible – restore and produce the data *in 11 days*. American's continued refusal to cooperatively discuss the technical feasibility or monetary practicality of restoring this enormous set of data on American's unilateral timetable demonstrates that American is more interested in using discovery in this case as a sword rather than a tool to litigate the merits of its claims.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing was served on Plaintiff's counsel, as indicated below, on the 2nd day of September 2009:

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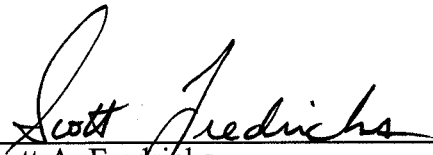
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