

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

YOUTOO TECHNOLOGIES, LLC,

Plaintiff,

v.

TWITTER, INC.,

Defendant.

Case No. 3:16-cv-00764-N

**TWITTER, INC.'S MOTION TO HOLD YOUTOO TECHNOLOGIES, LLC
IN CONTEMPT AND TO ISSUE SANCTIONS**

I. INTRODUCTION

Defendant Twitter, Inc. (“Twitter”) respectfully moves the Court for an order finding Plaintiff Youtoo Technologies, LLC (“Youtoo”) in contempt of the Court’s May 31, 2017 Order granting a motion to compel filed by Twitter and entering monetary sanctions to deter such further conduct. Despite multiple emails and letters to Youtoo, Youtoo has failed to produce responsive documents on many key issues, including many *specifically-identified and dated* documents which Youtoo must necessarily possess. Indeed, if Youtoo no longer possess these documents, they must have been lost or destroyed during the life of this case.

II. FACTUAL BACKGROUND

This patent infringement litigation was filed against Twitter by Youtoo on March 18, 2016, alleging infringement of U.S. Patent Nos. 8,464,304 (“the ’304 patent”), 8,601,506 (“the ’506 patent”), and 9,083,997 (“the ’997 patent”) (together, the “Youtoo patents”). The Youtoo patents are directed to systems and methods for recording, publishing, sharing, and broadcasting video over the Internet. On November 10, 2016, the Court held that the ’304 and ’506 patents were invalid as being directed to patent-ineligible subject matter, and so only Youtoo’s claims under the ’997 patent persist in this case. *See* ECF No. 39 at 6. Twitter served requests for production on October 2016, and served numerous document subpoenas over the four month-period between December 2016 and March 2017. On March 31, 2017, Twitter filed a Motion to Compel Document Production (the “Motion to Compel”) against Youtoo.

On May 31, 2017, the Court granted the Motion to Compel and issued an order requiring Youtoo to “produce all documents responsive to Twitter’s discovery requests in accordance with [the] Order within fourteen (14) days”—that is, by Wednesday, June 14, 2017. ECF No. 95, at 5. Thus, Youtoo was required to produce the documents that Twitter requested, including but not limited to documents relating to the ’304 patent and the ’506 patent; documents and

communications with AQUA Licensing LLC (“AQUA”); patent encumbrance and ownership information; and documents relating to Youtoo’s patent licensing, product marking, and commercial success. *See, e.g.*, ECF No. 82, at 15.

A. Youtoo Produced 36 Documents in Response to the May 31 Order.

Youtoo’s court-ordered June 14 production consisted of only 36 documents. *See* Declaration of James S. Tsuei (“Tsuei Decl.”) ¶ 2. Seven of those documents are scans of pages with only labels or the outside covers of manila folders. *Id.* ¶ 3. Eight of those documents are excerpts from publicly-available patent prosecution file histories. *Id.* ¶ 4. At least four of the documents are duplicates of other documents in the production. One document is completely illegible. *See id.* ¶ 5. The remaining 16 documents fall into a narrow range of categories, including a 2013 valuation of Youtoo, a patent monetization agreement with Aqua Licensing, a handful of marketing materials from both Aqua Licensing and Youtoo, a set of claim charts created by Aqua Licensing, and a single (unexecuted) agreement with one of Youtoo’s lenders. *Id.* ¶ 7.

Following the June 14 production, Youtoo produced another 48 documents on June 22, 2017, without providing an explanation for the delay. *Id.* ¶ 10. According to Youtoo, these documents relate to the “commercial success” of the patents-in-suit. App. 039 (Ex. D).¹

B. Twitter Repeatedly Attempted a Meaningful Meet-and-Confer Process, But to No Avail.

On June 15, 2017, the day after Youtoo was ordered to comply with the Court’s Order, Twitter sent Youtoo a letter specifically identifying the categories of documents it believed were missing from Youtoo’s production and requested the production of those documents by June 19,

¹ All “App. ____” citations are to the Appendix in Support of Twitter, Inc.’s Motion to Hold Youtoo Technologies, LLC In Contempt and To Issue Sanctions.

2017. Tsuei Decl. ¶ 9 & App. 030 – App. 034 (Ex. C). In addition to the missing categories, Twitter also provided citations and identified specific documents by name that were responsive but not produced by Youtoo. Many of those documents were produced or referenced by Youtoo, Youtoo’s principals, and Youtoo’s controlling shareholder in other litigation pending in this District and in Oklahoma state court. *See* Tsuei Decl. ¶ 9.

On June 21, 2017, Youtoo responded to Twitter’s June 15 letter, stating:

In response to your June 15, 2016 [sic] letter, we have complied with the Court’s May 31, 2017 Order to produce documents in Youtoo’s possession. We are not withholding documents related to the ’304 and ’506 Patents, and we produced responsive documents in Youtoo’s possession relating to AQUA, rights and encumbrances on the ’997 Patent, and commercial success. . . . Youtoo does not have any patent license agreements regarding the ’997 patent or related patents.

App. 039 (Ex. D). In that same June 21 email, Youtoo offered to meet and confer on June 23, June 26, or June 27, 2017. *Id.*

Youtoo subsequently stated in a separate email chain on June 22: “***Youtoo has complied with the Court’s May 31, 2017 Order.***” App. 042 (Ex. E) (emphasis added). Youtoo offered no response to the questions raised by Twitter and no explanation for the documents that Twitter had identified that must exist but which Youtoo did not produce. Nonetheless, on June 22, 2017, Youtoo produced additional documents that it claimed related to “commercial success.” Tsuei Decl. ¶ 10 & App. 039 (Ex. D). On that same day, Twitter’s counsel wrote back, noting that Youtoo’s responses “did not address the numerous specific categories and inconsistencies we identified in our June 15 correspondence, let alone Youtoo’s failure to produce documents in response to each of Twitter’s requests and the Court’s order.” App. 038 (Ex. D). Twitter agreed to meet and confer with Youtoo on June 26, 2017, at 10:30 a.m. Pacific / 12:30 p.m. Central. *Id.*

On June 25, 2017, Twitter emailed Youtoo again, noting that because Youtoo had not provided a substantive written response to Twitter’s June 15 letter, Twitter had arranged for a

court reporter to transcribe the anticipated meet-and-confer but, given the short notice, the meet-and-confer would need to be June 27, 2017 (a date which Youtoo had previously indicated was available), at 11:00 a.m. Pacific / 1:00 p.m. Central. App. 037 – App. 038 (Ex. D). Twitter’s counsel also requested that Youtoo’s counsel let Twitter know immediately if that time was not convenient. The evening before the scheduled meet-and-confer call, Youtoo sent a 13-page letter once again asserting that Youtoo’s production was “complete,” but without addressing the specific issues raised in Twitter’s June 22 letter. App. 047 (Ex. F). Youtoo’s letter then went on to raise purported problems with Twitter’s document productions—issues that the parties had discussed months before and for which Youtoo had not raised since—and appeared to condition Youtoo’s participation in the scheduled meet-and-confer on Twitter’s agreement to discuss those issues on the same call, despite the fact that Youtoo was raising them less than 24 hours before the parties were scheduled to talk. App. 059 (Ex. F). Twitter immediately asked Youtoo to confirm that it still intended to participate in the scheduled meet-and-confer:

[T]he conclusion of your letter states “As it will be more efficient to address the issues raised in your June 15 letter and the issues raised above on one call, we will be ready to meet and confer with your court reporter on the line when you are prepared to address the state of Twitter’s deficient and/or noncompliant responses to each of the discovery requests above.” We trust that you are not conditioning your participation in the meet and confer (on the issues we have been raising for months and your failure to comply with the Court’s Order) on Twitter’s agreement to confer on purported issues you are raising the evening before the call.

App. 037 (Ex. D). Youtoo’s response came just 27 minutes before the scheduled meet-and-confer. App. 036 (Ex. D). Youtoo canceled the meet-and-confer, claiming that it was “not available for a meeting at the time you requested,” despite the fact that the call had been scheduled for days, Youtoo had previously offered its availability that day, and Youtoo’s letter on the eve of the call indicated that it was available and prepared to participate. *Id.* & App. 039 (Ex. D). Twitter followed up yet again, detailing Twitter’s

repeated attempts to discuss Youtoo's deficient document production, and Youtoo's continued failure to engage substantively with the issues that Twitter raised. App. 147 – App. 150 (Ex. O). Youtoo's response again did not address any of the specific issues raised in Twitter's numerous letter and emails, nor did it explain why Youtoo waited until the last minute to cancel the call scheduled for June 27, 2017. App. 147 (Ex. O).

* * *

Since Youtoo's failure to comply with the Court's May 31 Order, Twitter has repeatedly attempted to resolve this issue without the Court's involvement, providing Youtoo with multiple opportunities to cure the deficiencies in its document production. Youtoo has refused to engage substantively with Twitter's correspondence and instead continued its tactics of delay and obstruction.² As a result, Twitter has no choice but to once again ask for the Court's intervention.

III. ARGUMENT

A. Legal Standard

“In a civil contempt proceeding, the party seeking an order of contempt need only establish (1) that a court order was in effect, and (2) that the order required certain conduct by the respondent, and (3) that the respondent failed to comply with the court's order.” *F.D.I.C. v. LeGrand*, 43 F.3d 163, 170 (5th Cir. 1995). A court “simply asks whether the respondent has produced the documents,” and “[i]f he has not, the burden shifts to the respondent to rebut this conclusion, demonstrate an inability to comply, or present other relevant defenses.” *Id.*

² Relatedly, Youtoo's counsel is also representing a number of third parties from whom Twitter seeks highly relevant discovery in this lawsuit. Twitter has been forced to file motions to compel against those entities due to similar conduct.

In addition to the sanction power under Fed. R. Civ. P. 37, the Court also has authority to enter sanctions under its “inherent power ‘to manage [its] own affairs so as to achieve the orderly and expeditious disposition of cases.’” *Fuqua v. Horizon/CMS Healthcare Corp.*, 199 F.R.D. 200, 204 (N.D. Tex. 2000). Furthermore, the Court is empowered to enter a cost and attorneys’ fee award as a sanction pursuant to 28 U.S.C. § 1927, which provides: “Any attorney or other person admitted to conduct cases in any court of the United States . . . who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys’ fees reasonably incurred because of such conduct.”

B. The Court Should Find Youtoo in Contempt of the May 31, 2017 Order.

The Court’s May 31 Order required Youtoo, by June 14, to “produce *all documents* responsive to Twitter’s discovery requests” with respect to the categories of documents expressly identified in Twitter’s Motion to Compel: “documents relating to the ’304 and ’506 Patent [sic], Youtoo’s retention of AQUA Licensing, LLC [] to assess and sell Youtoo’s patent portfolio, the right and encumbrances on the ’997 Patent, and patent licenses, product marking, and commercial success in connection to the ’304, ’506, and ’997 patents.” ECF No. 95, at 3–4 (emphasis added). Youtoo has not done so.

To date, Youtoo’s document production lacks even the most basic documents much less the documents that are critical to issues in this litigation and which Twitter has repeatedly identified to Youtoo in written correspondence and phone calls. *See* App. 029 – App. 045 (Exs. C, D & E). For purposes of this motion Twitter, addresses several high-priority topics broken into the categories specified in the Court’s May 31 Order below.

1. Documents Relating to the Rights and Encumbrances on the '997 Patent.

a. Youtoo's Production Lacks Documents Relating to the Ownership and Security Interests in Youtoo's Patents.

In its Motion to Compel, Twitter explained that its investigation in this case had led it to identify multiple third-party financiers who loaned Youtoo money in exchange for security interests on Youtoo's patent portfolio—a fact that had not been reflected in any of Youtoo's pleadings or document productions—and so Twitter requested those documents from Youtoo. Indeed, Twitter has come to believe that Youtoo may not have had standing to bring this lawsuit, but absent proper discovery from Youtoo, Twitter cannot demonstrate this to the Court.

Twitter explained in letters, emails, in the March 30, 2017 meet-and-confer, and finally in its previous Motion to Compel, that an October 1, 2015 declaration signed by Mr. Wyatt, filed as ECF No. 12-7 (hereinafter the "Wyatt Declaration") in *Mansour Bin Abdullah Al-Saud v. Youtoo Media, L.P. et al.*, Case No. 3:15-cv-03064-C in the Northern District of Texas (hereinafter the "Mansour Litigation"), revealed that Youtoo's patents were held as collateral for nearly \$12 million of debt by various lenders, including Heartland Bank ("Heartland"), Covenant Global Alpha Fund, L.P. ("Covenant"), and Strategic Gaming Management LLC ("SGM"). ECF No. 83-1 at App. 122 – App. 123 (Wyatt Decl.) ¶¶ 15–17.

In the Wyatt Declaration, Mr. Wyatt swears that Youtoo "assigned its patents to Heartland [Bank] for the purpose of perfecting Heartland's security interest" and that, as of October 2015, Youtoo owed more than \$7.7 million to Heartland. *Id.* at App. 122 (Wyatt Decl.) ¶ 15. The assignment conveyed from Youtoo to Heartland all substantial rights under Youtoo's patents, including:

(g) any and all claims and causes of action, with respect to any of the foregoing, whether accruing before, on and/or after the date hereof, including all rights to and claims for damages, restitution and injunctive and other legal and equitable relief for past, present and future infringement, dilution, misappropriation, violation, misuse, breach or default, with the right but no obligation to sue for such legal and equitable relief and to collect, or otherwise recover, any such damages.

See App. 118 (Ex. L). When Heartland called in its debt, Youtoo negotiated the signing of a Forbearance Agreement with Heartland that required Youtoo to sell its patents and use the proceeds to pay its debt. App. 129 – App. 130 ¶ 7 (Ex. M). In return Heartland agreed to not exercise its rights under the assignment agreement (e.g., officially recording the assignment with the USPTO) until December 24, 2015. App. 129 ¶ 3.

Twitter informed Youtoo multiple times, including during the March 30, 2017 meet and confer, that it expected Youtoo to possess due diligence and negotiation documents relating to the valuation, assessment, and analysis of Youtoo’s patents that presumably would have been generated in the course of the negotiations for the loans. App. 032 – App. 033. It’s exactly these documents that Twitter sought the Court to compel Youtoo to produce (ECF No. 82 at 10)—and the Court ordered their production by June 14. ECF No. 95 at 3–4.

Yet, as of the date of this filing, there is nothing in Youtoo’s document production relating to those loans or third-party financiers except for a single document: an undated, partially-executed version of a document titled “Intellectual Property Assignment Agreement” contemplating an agreement for Youtoo to assign its intellectual property to Heartland. *See* App. 019 – App. 028 (Ex. B). Yet, a fully-executed version of that same document, dated May 14, 2014, was attached to the Wyatt Declaration. *See* App. 116 – App. 125 (Ex. L). There can be no question that this particular document should have been produced by Youtoo yet, without any explanation, it remains unproduced even after the Court’s Order. And what of the related documents such as the “Loan Agreement dated as of August 22, 2012” mentioned in the May 14,

2014 agreement between Heartland and Youtoo, or *any* of the due diligence documents generated in the normal course of such a transaction (which, in this case, would almost certainly be reflective of efforts to assess the value of Youtoo's patents)? Again, there can be no legitimate dispute that those should have been produced but were not.

As Youtoo must now well know, “[i]f a patentee assigns its rights to the patent, the assignee is deemed the patentee and thus has sole standing to sue for patent infringement.” *Resonant Sensors Inc. v. SRU Biosystems, Inc.*, 651 F. Supp. 2d 562, 568 (N.D. Tex. 2009). And the necessary standing to sue “*must be present at the time the suit is filed*,” lest a plaintiff's claims be dismissed for lack of Article III subject-matter jurisdiction. *Id.* (emphasis added). In other words, if Youtoo did not have standing to assert its patent infringement claims when it filed its complaint against Twitter on March 18, 2016, then Youtoo's claims must be dismissed for lack of subject-matter jurisdiction. As with the inequitable conduct issue described above, Twitter intends to brief this Article III standing issue for the Court, but presently cannot given Youtoo's deliberate obstruction.

2. Documents Relating to Patent Licenses, Product Marking, and Commercial Success in Connection to the '304, '506, and '997 Patents.

a. Youtoo's Production Lacks Documents About Commercial Embodiments of the Claimed Technology: the DRC System and Godtube.com.

In the Fall of 2016, Twitter's counsel uncovered evidence suggesting that Mr. Wyatt, Youtoo's then-CEO and a named inventor, was offering for sale and actually selling products and services covered by the claims of the patents-in-suit more than one year before the filing date. *See* Tsuei Decl. ¶ 18. Not only do documents about these systems bear on the question of commercial success—plainly within the scope of the Court's May 31 Order—these documents are particularly relevant as they go to the question of whether the patents-in-suit are invalid

under 35 U.S.C. § 102(b)'s on-sale bar. *Merck & Cie v. Watson Labs., Inc.*, 822 F.3d 1347, 1350 (Fed. Cir. 2016) ("Our patent laws deny a patent to an inventor who applies for a patent more than one year after making an attempt to profit from his invention by putting it on sale.").

On December 5, 2016, Twitter served five third-party subpoenas which sought, among other things, relevant knowledge and documents related to video-sharing systems and services sold by Mr. Wyatt before the priority dates of Youtoo's patents. *See* Tsuei Decl. ¶ 19. Twitter subsequently obtained source code and documents from the third-parties, and determined that Mr. Wyatt had, as early as October 2007, used, marketed, and sold Internet video sharing and broadcasting services built on "turnkey" packages of pre-programmed and pre-arranged scripts—one of these projects was the widely-known Godtube.com website, the "Christian answer to Youtube." *See id.* ¶¶ 20.

Throughout January and February 2017, Twitter's investigation continued. From the third-party document productions and source code, Twitter discovered that Mr. Wyatt's Godtube.com website was built on a video sharing, editing, and broadcasting platform which Mr. Wyatt called the "Digital Resource Center" (the "DRC system"). *See* Tsuei Decl. ¶ 21. Twitter also discovered that Mr. Wyatt, through one of his other companies named "Big Jump Media", had sold the use of the DRC system to the Heritage Foundation in early 2007, which the Heritage Foundation used to add video sharing and live broadcasting features to the Heritage Foundations' website. *See id.* Twitter's investigation led it to old, archived news articles as well as to hours-long review of countless webpages kept by the Internet Archive. *See id.* In the course of this case, Twitter has timely produced to Youtoo every document it has uncovered relating to Mr. Wyatt's work on the DRC System and Godtube.com, whether obtained from public sources or through third-party discovery. *Id.*

Yet, aside from a handful of documents, Youtoo has not produced documents detailing the DRC System or describing any of its commercial embodiments that are known to have existed. There are no documents at all in Youtoo's production that appear to relate to Godtube.com. Such documents would confirm (or refute) Twitter's suspicion that Mr. Wyatt made commercial use of the purported inventions of the Youtoo patents in a way that would invalidate the Youtoo patents. To date, Youtoo has neither confirmed nor denied the existence of such additional documents, despite multiple letters from Twitter asking for such a response.

Youtoo's intransigence about Twitter's discovery into Mr. Wyatt's prior commercial use of the alleged inventions of the Youtoo patents extends beyond mere document production issues. On February 27, 2017, Twitter sent a five-page letter to Youtoo detailing its investigation and on-sale bar contention, complete with citations to evidence and with a request that Youtoo withdraw its claims of patent infringement. *See* App. 061 – App. 065 (Ex. G). Attached to that February 27 letter was an 11-page claim chart mapping the DRC system and Godtube to each element of the primary asserted claim of the '997 patent. *See* App. 066 – App. 076. Youtoo *never responded* to Twitter's February 27 letter. *See* Tsuei Decl. ¶ 22.

Even today, after multiple requests for information on the DRC System and Godtube.com, Youtoo has (for some reason) declined to respond in writing to address *any* of Twitter's requests concerning the DRC System or Godtube.com, despite having separately written Twitter several times regarding other discovery disputes (sometimes responding to the very letters in which Twitter raised the DRC System and Godtube.com issues). Twitter intends to address the on-sale bar issue for the Court, but presently cannot do so given Youtoo's decision to avoid discussion and discovery on this issue.

b. Youtoo's Production Lacks Marking Documents.

The Court's May 31 order expressly directed Youtoo to produce documents relating to

product marking. ECF No. 95 at 3–4. Yet Youtoo’s June 14 document production lacked a single document reflecting any marking of any product or system in connection with Youtoo’s patents. Tsuei Decl. ¶ 8. Twitter identified this deficiency for Youtoo in its June 15 letter, and noted: “Youtoo cannot credibly contend that no such [marking] documents exist. *See, e.g.*, <http://youtootech.com/patents-2/> (listing patent numbers) (visited on June 14, 2017).” App. 032 (Ex. C).

Youtoo delayed in responding until June 21, 2017, when it claimed: “In response to your June 15, 2016 letter, we have complied with the Court’s May 31, 2017 Order to produce documents in Youtoo’s possession.” App. 039 (Ex. D). But recognizing that it had in fact failed to produce a single marking document when *Youtoo’s own public website contained a webpage for marking Youtoo’s products*, Youtoo backed down and said that it had “recently discover[ed] additional documents relating to commercial success” and that it would produce documents “consistent with our ongoing discovery obligations in this case.”³ *Id.*

On June 22, 2017, Youtoo served a production containing three documents, which contained 10 images of what appear to be mockups of commercial embodiments of the Youtoo patents from 2014. Each of those 10 images had patent marking portions of the mockups blown up with the integrated image editing software in Microsoft Word. *See* Tsuei Decl. ¶ 11. A representative example:

³ Youtoo, of course, ignores how that the Court’s May 31 Order required it to produce documents *by June 14, 2017*. ECF No. 95 at 5. The May 31 Order did not say that Youtoo could produce the requested documents on a rolling basis of indefinite duration.

Buscando mi Ritmo on Telemundo – a division of NBC-Universal



Id.

The entire three-document production appears to be either mockups, or Microsoft Word documents containing edited mockups that Youtoo created for purposes of this litigation, relating to commercial embodiments dating from 2014. Missing from Youtoo's document production are any other documents relating to the marking of Youtoo's *current* products. Youtoo's own website at <http://youtootech.com/patents-2/> claims that "Youtoo's technology is used in products and services offered by the company and products and services offered by its commercial partners," which is followed by a list of patent numbers including the '304 and '506 patents as well as U.S. Patent No. 8,311,382 and U.S. Patent Publication No. 2013/0302005 (which respectively are parent and child to the application that issued as the '997 patent). *See* Tsuei Decl. ¶ 23:



Youtoo Technologies, LLC is a provider of social and interactive television and Internet-based products and services. Youtoo's technology is used in products and services offered by the company and products and services offered by its commercial partners. The following products and services are protected by patents in the U.S. and elsewhere. This website is provided to satisfy the virtual patent marking provisions of various jurisdictions including the virtual patent marking provisions of 35 U.S.C. § 287(a).

U.S. PATENT NUMBER	PATENT DESCRIPTION
U.S. PAT. NO. 8,311,382	Recording & Publishing Content on Social Media Websites
U.S. PAT. NO. 8,413,206	Participating in Television Programs
U.S. PAT. NO. 8,464,304	Content Creation & Distribution System
U.S. PAT. NO. 8,601,506	Content Creation & Distribution System
U.S. PAT. NO. 20130302005	Recording & Publishing Content on Social Media Websites

There are no documents at all in Youtoo's production that appear to relate to any of the products or services currently identified on Youtoo's own website. What of Youtoo's "***Premium Sweepstakes Engine***," which Youtoo says is a "***patented [] technology***" that legally enables viewers to 'pay-to-play' at home with game shows, reality shows, sports programming, live events, etc."? See App. 078 (Ex. H) (emphasis added). What about documents relating to or reflecting Youtoo's "***patented HD video recording technology***" and its implementation of a "***custom experience on CBS.com***" using that "***patented***" technology? App. 091 (Ex. I). Those documents should have been produced.

Moreover, Youtoo's agent, AQUA Licensing, distributed public marketing materials that admitted the existence of multiple "product" licenses for Youtoo's patents—what of the marking on those products? See *Youtoo Techs., LLC v. Twitter, Inc.*, No. 3:17-mc-80006-JSC (N.D. Tex. Jan. 19, 2017), ECF No. 6-11. And what of the product licenses themselves? At minimum, documents relating to these things should have been produced, and they were not.

c. Youtoo's Production Lacks Documents About Commercial Embodiments of the Claimed Technology: Premium Sweepstakes Engine.

Likewise, Youtoo has not produced documents about the “patented” Premium Sweepstakes Engine which it markets on its website. For instance, what about documents relating to Youtoo's allegedly successful application for a license from the Nevada Gaming Control Board to utilize the Premium Sweepstakes Engine with Nevada operators? *See* App. 100 (Ex. J) (“With the recent approval by the Nevada Gaming Control Board, Youtoo is licensing the PSE to casinos beginning with Nevada operators.”). Where are the applications, the correspondence, and the necessary disclosures Youtoo provided to state regulators about its patented products? What about documents relating to Youtoo's efforts to “spen[d] over \$1 million with legal council [sic] to ensure the Youtoo Premium Sweepstakes Engine (PSE) complies with sweepstakes regulations in 44 states in the US and in most advanced nations,” during which, Youtoo says, it “*created a valuable patent portfolio that includes five issued patents*”? App. 113 (Ex. K). Those documents should have been produced.

3. Documents Relating to Youtoo's Retention of Aqua Licensing, LLC.

a. Youtoo's Production Lacks Documents Provided to and Received from AQUA Licensing.

In the Mansour Litigation, Mr. Wyatt submitted a declaration averring that “public information about the Sale Patents has been widely distributed to about 90 potential bidders that include the world's largest technology firms and confidential information has been shared with approximately 37 bidders.” *See* ECF No. 83-1 at App. 124 (Wyatt Decl.) ¶ 20. Yet, nothing in Youtoo's document production reflects any communication or transfer of information to any of these “90 potential bidders” or the “37 bidders” who purportedly received confidential information. Those documents should have been produced.

4. Youtoo's Production Lacks Specific Responsive Documents Known by Twitter to Exist.

Not only does Youtoo's production lack the categories of documents it was ordered to produce, Twitter knows of the existence of numerous *specific* unproduced documents that fall within the scope of the Court's May 31 Order. Many of these documents were filed or referenced in separate litigations involving Youtoo, its affiliates, and corporate parents or controllers, such as in the Mansour Litigation or in *Robert F. Browne Family LLC et al. v. Stephen Shafer et al.*, Case No. CJ-2016-4937 (District Court of Oklahoma County) (the "Oklahoma Litigation")—the latter of which involves claims brought by shareholders against Covenant Global Alpha Fund, L.P. ("Covenant"), the entity that controls Youtoo.

Below is a non-exhaustive list, in chart form, listing the (1) name or description of the document; (2) exemplary listing of Requests for Production served by Twitter under Fed. R. Civ. P. 34 which would call for production; and (3) the basis for Twitter's belief that the document exists and is in Youtoo's possession.

No.	Document/Title	Request	Basis of Twitter's Belief	May 31 Order Category
1	Fully-executed 5/14/2014 Intellectual Property Assignment Agreement with Heartland	RFPs 15, 16, 25, 33, 34, 58	Publicly filed by Youtoo in the Mansour Litigation. <i>See</i> ECF 12-7, 3:15-cv-03074-C (N.D. Tex.).	"[T]he right and encumbrances on the '997 Patent."
2	8/22/2012 Loan Agreement with Heartland	RFPs 15, 16, 25, 33, 34, 58	Publicly filed by Youtoo in the Mansour Litigation. <i>See</i> ECF No. 12-6, 3:15-cv-03074-C (N.D. Tex.).	"[T]he right and encumbrances on the '997 Patent."
3	5/1/2015 Patent Security Agreement with Covenant	RFPs 15, 16, 25, 33, 34, 58	Publicly filed by Youtoo in the Mansour Litigation. <i>See</i> ECF No. 12-8, 3:15-cv-03074-C (N.D. Tex.).	"[T]he right and encumbrances on the '997 Patent."
4	7/14/2015 Promissory Note with Strategic Gaming Management, LLC ("Strategic	RFPs 15, 16, 25, 33, 34, 58	Publicly filed by Youtoo in the Mansour Litigation. <i>See</i> ECF No. 13-1, No. 3:15-cv-03074-C (N.D. Tex.).	"[T]he right and encumbrances on the '997 Patent."

No.	Document/Title	Request	Basis of Twitter's Belief	May 31 Order Category
	Gaming"))			
5	2/26/2015 Promissory Note with Trestle Creek Properties ("Trestle")	RFPs 15, 16, 25, 33, 34, 58	Publicly filed by Youtoo in the Mansour Litigation. <i>See</i> ECF No. 13-2, No. 3:15-cv-03074-C (N.D. Tex.).	"[T]he right and encumbrances on the '997 Patent."
6	7/14/2015 Forbearance Agreement with Heartland	RFPs 15, 16, 25, 33, 34, 58	Publicly filed by Youtoo in the Mansour Litigation. <i>See</i> ECF 13-4, 3:15-cv-03074-C (N.D. Tex.).	"[T]he right and encumbrances on the '997 Patent."
7	BVA Group Youtoo Technologies Valuation Report and supporting documents	RFP 57	Referenced in 5/10/2017 filing by Covenant in the Oklahoma Litigation. <i>See</i> App. 139 (Ex. N).	"[T]he right and encumbrances on the '997 Patent" and "commercial success."
8	Product licensing agreements relating to the Youtoo patents	RFPs 15, 17, 16, 25, 33, 34, 46	Existence disclosed in materials prepared by AQUA. <i>See</i> ECF No.6-11 at 11, 3:17-mc-80006-JSC (N.D. Tex.).	"Patent licenses" and "Youtoo's retention of AQUA Licensing, LLC."
9	AQUA presentation named "Record video anywhere; publish anywhere – Recording & distributing video on social media, Internet, mobile and TV– Patent Portfolio Sale Offering – July 2015"	RFPs 2, 12, 15, 16, 25, 26, 33, 34, 58	Discovered by Twitter counsel in its investigation. <i>See</i> ECF 6-11, 3:17-mc-80006-JSC (N.D. Tex.).	"Youtoo's retention of AQUA Licensing, LLC."
10	AQUA document named "Record anywhere, publish anywhere – Recording & distributing video on social media Internet, mobile and TV – Patent Portfolio Sale Offer"	RFPs 2, 12, 15, 16, 25, 26, 33, 34, 58	Discovered by Twitter counsel in its investigation. <i>See</i> ECF No. 6-12, No. 3:17-mc-80006-JSC (N.D. Tex.).	"Youtoo's retention of AQUA Licensing, LLC."

The above chart is intended to only be a list of documents which Twitter knows with certainty exist and should have been produced. The chart does not even include documents that are **highly likely** to exist and yet are missing from Youtoo's document production—such as the due

diligence and transaction documents or the documents about Youtoo's embodying products discussed in Section III.B.1.a, *supra*. Nor does the chart include whichever document caused Heartland to convey the Youtoo patents back to Youtoo—if indeed such a document exists. (If it does not, then Youtoo has no standing to maintain its claims against Twitter).

* * *

Were Youtoo's document production to be deficient to only one or two of the above-identified issues, Twitter would find it believable that Youtoo merely overlooked those certain documents but nonetheless attempted in good faith to comply with the May 31 Order. But Youtoo's document production and the conduct of its attorneys, Carrington, Coleman, Sloman & Blumenthal, LLP ("CCSB")⁴ in response to the May 31 Order is so fundamentally deficient and lacks so many documents which *must exist* that it appears Youtoo did not reasonably search for, collect, and produce responsive documents in the first place. Youtoo's refusal to confer with Twitter to address these issues or explain why the above categories are missing only exacerbates that concern.

Accordingly, Twitter requests that the Court hold Youtoo in contempt for failing to abide by the May 31 Order and order Youtoo to explain, via sworn declaration signed by a Youtoo employee, the document collection and production efforts in connection to the May 31 Order.

C. The Court Should Enter Sanctions for Youtoo and CCSB's Conduct.

Under Fed. R. Civ. P. 37, the Court, upon a finding that a party has failed to obey an order to provide discovery, "must order the disobedient party, the attorney advising that party, or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the

⁴ CCSB is representing six third parties from whom Twitter seeks discovery. In stark similarity to the actions of CCSB for Youtoo, the third parties have in almost identical fashion to Youtoo failed and refused to produce relevant discovery forcing Twitter to file motions to compel against each of them.

failure was substantially justified or other circumstances make an award of expenses unjust.” In addition, the Court also has authority to enter sanctions under its “inherent power ‘to manage [its] own affairs so as to achieve the orderly and expeditious disposition of cases.’” *Fuqua*, 199 F.R.D. at 204.

Twitter does not take a request for sanctions lightly. But this case has reached a point where Twitter, and the Court, must seriously question whether Youtoo has intentionally obstructed Twitter’s discovery efforts. Throughout this case, Youtoo’s conduct has populated a “clear record of delay or contumacious conduct.” *Id.* Youtoo has “consistently attempted to thwart” Twitter’s “efforts to obtain discovery at almost every turn.” *Id.* Indeed, Twitter has been “forced to seek court intervention to obtain responses to discovery requests, and even court orders compelling discovery [] have been met with sluggishness” by Youtoo. *Id.* Indeed, like in *Fuqua*, Youtoo has engaged in “dilatory and obstructive conduct” in a way that amounts to “secreting potentially relevant and damning documents” from Twitter, thus “forcing [Twitter] to attempt to obtain evidence in support of their claims through other means.” *Id.*

Youtoo has not once explained why its document production has lacked any documents on so many issues about which it must have documents, nor has it explained why it has failed to produce specifically-identified documents that Twitter knows to exist. In light of the nature of Youtoo’s conduct, Twitter believes that monetary sanctions are appropriate and therefore requests an amount reflecting the fees and costs expended by Twitter in connection with its previous Motion to Compel and this Motion.

IV. CONCLUSION

Youtoo has failed to abide by the Court’s May 31, 2017 Order. Twitter therefore respectfully requests the Court find Youtoo in contempt for failing to heed the May 31 Order, impose a monetary sanction of \$63,158.20, consistent with Fed. R. Civ. P. 37, and order Youtoo

to comply with the Court's prior order. As set forth in the concurrently-filed Tsuei Declaration, the requested monetary sanction reflects the fees and costs incurred by Twitter to file its prior Motion to Compel and the instant Motion. *See* Tsuei Decl. ¶¶ 31–33. Twitter also requests the Court's leave to submit an additional request for fees and costs incurred for preparing the reply brief in connection with this Motion, which Twitter currently estimates will be approximately \$8,000-\$10,000. *Id.*

Dated: July 11, 2017

DURIE TANGRI LLP

By: /s/ Sonal N. Mehta

SONAL N. MEHTA (*Pro Hac Vice*)

smehta@durietangri.com

LAURA E. MILLER (*Pro Hac Vice*)

lmiller@durietangri.com

JAMES S. TSUEI (*Pro Hac Vice*)

jtsuei@durietangri.com

217 Leidesdorff Street

San Francisco, CA 94111

Telephone: 415-362-6666

Facsimile: 415-236-6300

David L. McCombs

Charles M. Jones II

HAYNES BOONE LLP

2323 Victory Avenue, Suite 700

Dallas, TX 75219

United States of America

Telephone: 214.651.5000

Facsimile: 214.651.5940

Attorneys for Defendant

TWITTER, INC.

CERTIFICATE OF SERVICE

On July 11, 2017 I electronically submitted the foregoing document with the clerk of court for the U.S. District Court, Northern District of Texas, using the electronic case filing system of the court. I hereby certify that I have served all counsel and/or *pro se* parties of record electronically or by another manner authorized by Federal Rule of Civil Procedure 5(b)(2).

/s/ Sonal N. Mehta
SONAL N. MEHTA

CERTIFICATE OF CONFERENCE

As set forth in the concurrently-filed Declaration of James S. Tsuei, counsel for Twitter attempted several times to meet and confer telephonically with Youtoo regarding the relief sought in this Motion but was unsuccessful. Based on the letter and email correspondence between Twitter and Youtoo, Twitter understands that Youtoo opposes the relief requested in this motion.

/s/ Sonal N. Mehta
SONAL N. MEHTA