

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
MARSHALL DIVISION**

Bright Data Ltd.,

Plaintiff,

v.

**Teso LT, UAB, Oxysales, UAB, and
Metacluster LT, UAB,**

Defendants.

**Civil Action No.
2:19-cv-00395-JRG**

**JOINT MOTION FOR ENTRY OF
POST-VERDICT SCHEDULING ORDER**

Plaintiff Bright Data Ltd. (“Plaintiff”) and Defendants Teso LT, UAB, Oxysales, UAB, and Metacluster LT, UAB (collectively, “Defendants”) hereby move the Court for entry of a proposed post-verdict Scheduling Order.

I. INTRODUCTION

Pursuant to the Court’s September 21, 2022 Order (ECF No. 601), the parties met and conferred regarding the post-verdict schedule and jointly submit this motion for a proposed post-verdict scheduling order.

Date Provided by the Court	Plaintiff's Proposed Date	Defendants' Proposed Date	Event
TBD	14 Days After Service of Requested Financials per Discovery Motion (ECF 607), including expert declaration, with response, replies, and surreplies due according to Local Rules	N/A; if the Court enters the motion, 30 days for response, 14 days for reply and 14 days for sur-reply	Bright Data files Motion for Compensation for Ongoing Infringement
TBD	14 Days after Court Order addressing Bright Data Post-Verdict Discovery Motion (ECF 607)	N/A (Defendants respectfully suggest that the Court deny this motion)	Subject to Court Ruling on Pending Motion for Post-Verdict Discovery (ECF No. 607), Defendants produce updated financials
TBD	October 21, 2022	28 days after any entry of Judgment as provided for in Federal Rules. <i>See</i> Fed. R. Civ. P. 50(b); Fed. R. Civ. P. 59(b).	Parties file Rule 50(b) and 59 Motion for New Trial, with responses, replies and surreplies due according to Local Rules
TBD	October 19, 2022	N/A; the Court will enter any judgment on the Court's own schedule, not Bright Data's schedule	Entry of Judgment
TBD	October 10, 2022	October 10, 2022	Defendants file Response to Motion for Updated Financials (ECF No. 607)
September 28, 2022	Already set by Court	Already set by Court	Defendants file Response to Bright Data's Motion for Enhanced Damages and Exceptional Case (ECF No. 541), with replies and surreplies due according to Local Rules

TBD	N/A; there is no basis for any such deadline limiting the potential enforcement of any judgment	30 days after the final disposition of all post-trial motions in this Court	Any potential enforcement of any judgment
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II. THE PARTIES' POSITIONS ON DISPUTED ISSUES

The parties' positions regarding their proposals on disputed issues are set forth as follows:

A. Bright Data's Position:

Bright Data requests an expedited schedule to bring this action to a judgment, and if necessary, any appeal. Within days of the November 5, 2021 jury verdict, Defendants announced on their website that "Oxylabs is legally entitled to continue providing the accused services" and "Oxylabs continues to offer its services in an uninterrupted manner." ECF 541-26 at 5 (<https://oxylabs.io/legal-timeline>). Despite openly continuing their willful infringement, Defendants have refused to produce updated and supplemental financials to allow Bright Data to calculate compensation for Defendants' ongoing infringement, including supplemental damages following the jury verdict. By forcing Bright Data to file a motion to compel narrowly tailored post-verdict discovery (ECF 607), Defendants seek to further hinder and delay the filing of Bright Data's anticipated motion for compensation for ongoing infringement in the hopes of further delaying the entry of judgment and any subsequent appeal.

Disregarding the jury verdict that found willful infringement and awarded Bright Data its lost profits, Defendants have taken the position that they can freely infringe Bright Data's patents without any compensation for their ongoing infringement. Such position is meritless. 35 U.S.C. § 284 provides that "upon finding for the claimant the court shall award the claimant damages adequate to compensate for the infringement, but in no event less than a reasonable royalty for the

use made by the infringer...” and “[w]hen the damages are not found by a jury, the court shall assess them.”

As briefed in Bright Data’s motion for discovery (ECF 607) and Defendants are already aware, *Promega* and *Whitserve* are inapposite. That case was about past damages – not compensation for post-trial ongoing infringement. *Promega Corp. v. Life Techs. Corp.*, 875 F.3d 651, *666 (Fed. Cir. 2017). The Federal Circuit held that Promega was not entitled to any past damages, because Promega expressly waived any reasonable royalty and “there was no evidence to support a lost profits damages calculation under the narrow damages theory Promega crafted over the course of litigation.” *Id.* at *664; see also 660 and 662. In contrast, Bright Data is seeking compensation for Defendants’ continuing post-trial infringement, which is equitable relief not subject to a jury trial. Similarly, Defendants imply that the Federal Circuit case of *Whitserve, LLC v. Computer Packages, Inc.* supports waiver of an ongoing royalty, but this is not true. As explained in *Erfindergemeinschaft*, the Federal Circuit in *Whitserve* “held that the district court abused its discretion by denying the request for prospective relief (i.e., an injunction or an ongoing royalty), and forcing the plaintiff to ‘resort to serial litigation’ to obtain compensation for the post-verdict period.” *Erfindergemeinschaft UroPep GbR v. Eli Lilly & Co.*, No. 2:15-CV-1202-WCB, 2017 U.S. Dist. LEXIS 111425, at *8 (E.D. Tex. July 18, 2017). Any delay in calculating compensation for Defendants’ ongoing infringement has been caused solely by Defendants’ own obstruction and refusal to produce updated financials (documents which it previously produced in discovery). Defendants have no basis for asking the Court to allow Defendants to continue their infringement indefinitely without compensation to Bright Data.

As addressed in the August 31, 2022 Joint Status Report (ECF 594), Defendants have no basis to further delay briefing. The jury reached a verdict eleven months ago.¹ Instead of focusing on settlement, Defendants have used the subsequent eleven months to (1) file 9 IPR/PGR petitions against Bright Data patents, including 4 against the '319 and '510 Patents found not invalid in the November 5, 2021 jury verdict, and (2) file a new patent infringement complaint against Bright Data entitled *Metacluster LT, UAB v. Bright Data Ltd.*, Case No. 2:22-cv-11.² Defendants have had eleven months to prepare their much anticipated and much touted JMOL and new trial motions, but request that they not be due until 28 days after entry of Judgment. Defendants do not need to wait for entry of the judgment to file their Rule 50(b) and 59 Motions and have had almost a year to prepare.

Accordingly, Bright Data respectfully requests expedited resolution of Bright Data's pending discovery motion (ECF No. 607) and entry of judgment in this matter along with the other deadlines proposed above. With regard Defendants' request that any potential enforcement of the judgment be filed within 30 days of final resolution, Bright Data is aware of no basis for such a requirement. Defendants cannot dictate how long a Court's judgment may be enforced and such request should be denied.

B. Defendants' Position:

¹ Defendants originally moved for the stay on December 1, 2021 arguing that "Bright Data will not suffer any prejudice by a brief stay of several weeks, as the mediation will occur early in the New Year and briefing can continue on Bright Data's motions in the New Year if the mediation is not successful." *Teso* Action, ECF No. 534 at 2.

² Oxylabs widely publicized its new complaint including through a press release and its own webpage touting its litigation against Bright Data. *See, e.g.*, <https://markets.businessinsider.com/news/stocks/oxylabs-sues-bright-data-in-patent-infringement-case-1031088447>, <https://www.yahoo.com/now/oxylabs-sues-bright-data-patent-144400197.html> and <https://oxylabs.io/legal-timeline>.

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