

# EXHIBIT D

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**VIA ELECTRONIC MAIL**

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Re: Function Media, L.L.C. v. Google, Inc., Civ. A. No. 2007-CV-279

Dear Joe:

I write in response to your email of August 6 regarding Google's allegations of inequitable conduct.

In your email you contend that Google's pleading does not satisfy Rule 9(b). However, the time for challenging pleadings in this case has long since passed. Function Media waived any challenge to the sufficiency of the inequitable conduct allegations by not moving to dismiss and/or to strike these allegations along with or before its responsive pleading. *See, e.g., U.S. ex rel Lam v. Tenet Healthcare Corp.*, 481 F. Supp. 2d 689 (W.D. Tex. 2007) (quoting *United Nat. Records, Inc. v MCA, Inc.*, 609 F Supp 33, 38-39 (N.D. Ill. 1984)) ("A party who fails to raise a Rule 9(b) objection normally waives the requirement."); *Davsko v. Golden Harvest Prods, Inc.*, 965 F. Supp. 1467, 1474 (D. Kan. 1997) ("[A] rule 9(b) objection is waived unless made as a separate motion prior to or concurrent with the filing of a responsive pleading. Here, defendants answered plaintiff's complaint without raising any objection under rule 9(b). Defendants cannot argue almost a year later that plaintiff failed to plead fraud with particularity."); *Huff v Nationwide Ins. Co.*, 167 B.R. 53, 58 n. 3 (W.D.Pa. 1992) ("Nationwide never brought a motion to dismiss the complaint nor filed a motion for a more definite statement. Accordingly, it waived its right to object to the complaint as failing to satisfy the specificity requirements of Rule 9.").

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Accordingly, your referenced motion to strike would be untimely and without merit. Further, we disagree that Google's pleadings do not satisfy the requirements of Rule 9(b).

In any event, although Google believes its initial response to your interrogatory concerning inequitable is sufficient, we will provide a supplemental response that further details Google's position in the next few days. If Plaintiff still believes that Google cannot present an inequitable conduct defense, then Plaintiff may move for summary judgment, although Google would obviously view any such motion to be meritless. Please contact us with any questions.

Very truly yours,

/s/

Amy H. Candido