

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

FUNCTION MEDIA, L.L.C.	§	
	§	
Plaintiffs,	§	Civil Action No. 2007-CV-279
	§	
vs.	§	
	§	
GOOGLE, INC. AND YAHOO, INC.	§	
	§	
Defendants.	§	JURY TRIAL DEMANDED

**EMERGENCY MOTION TO SET DEADLINE FOR GOOGLE TO COMPLETE
PRODUCTION AND RELIEF FROM MEET AND CONFER**

Function Media brings this Motion so that Google can finish its production sufficiently in advance of the discovery deadline for Function Media to review documents and take depositions before the close of discovery on September 18 and the deadline for expert reports 15 days after this Court issues its *Markman* Order. Function Media requests that this Court order Google to finish production so that Function Media has it no later than September 1, 2009. Function Media has requested a meet and confer on this point, but Google has stated that it is unavailable for a meet and confer this week – despite the fact that such a meet and confer should not take very long given the discreteness of the issue. This failure to meet and confer is yet another example of how Google has stalled on production since April.

As discussed briefly at the hearing and extensively in the briefing on the Motion to Compel and Motion for Protective Order (attached as Exhibits A (Response to Protective Order), B (Motion to Compel), C (Reply to Protective Order), and D (Surreply on Motion to Compel) (filed under seal separately)), Google has slow-rolled production since April. Immediately before the hearing on Tuesday, August 25, counsel for Google and Function Media agreed on many of

the outstanding production issues – with only a few still pending that are the subject of the motions to compel already in front of this Court. A copy of the notes from this meeting is attached as Exhibit E. Moreover, the Monday before the hearing, Google had promised Function Media a couple weeks ago that it had completed production of other relevant categories of documents, such as financial and revenue information, by the end of last week. *See* Exhibit F (letter from Google counsel, August 24, 2009). When Function Media reviewed the production, however, vast swaths of information agreed to be produced was still missing.

Function Media issued a 30(b)(6) deposition notice related primarily to damages issues in April. Google has stated it will present four witnesses in response to this notice. None of these depositions have occurred, however, because Google has not produced the documents necessary for these depositions.

Immediately upon reviewing the incomplete production – on Wednesday, August 26 – Function Media asked Google to complete production by a week later – Tuesday, September 1. *See* Exhibit G (email from Justin Nelson, August 26). Function Media also asked for a meet and confer on August 27 on this issue, to which Google responded that neither its lead nor local counsel were available on August 27, and that its local counsel was not available for the remainder of this week. *See* Exhibit H (email from Amy Candido, August 27). Counsel for Function Media asked to confirm that Google’s lead counsel did not even have five minutes for a conference call over the next two days, and received no response. *See* Exhibit I.

Google has used this same slow-roll strategy repeatedly over the past few months. Indeed, for prior art witnesses, Google routinely has produced documents literally on the eve of deposition despite outstanding document subpoenas that Function Media issued over seven months ago. In one instance, Google did not even give the subpoena to the witness it represented

until right before the deposition. *See* Exhibit J (deposition of Christopher Evans (rough draft) pp. 15-16); *see also* Exhibit K (cover email from Google producing documents the night before the deposition); Exhibit L (cover email from Google producing documents the night before another deposition where it represented the party).

Thus, Function Media requests that this Court order Google to finish its agreed production by no later than September 1 and for relief from complying with the meet and confer requirement in this particular case. In addition, Function Media requests that this Court order Google to complete the corporate deposition on revenue and margin information by no later than September 10, and the corporate deposition on acquisitions by no later than September 15.

Function Media is available for any expedited hearing (either in-person or telephonically) at the Court's discretion, and is filing this Motion in lieu of any call to the discovery hotline.

Respectfully submitted,

/s/ Justin A. Nelson
Max L. Tribble, Jr.
State Bar No. 20213950
Email: mtribble@susmangodfrey.com
SUSMAN GODFREY LLP
1000 Louisiana, Suite 5100
Houston, Texas, 77002
Telephone: (713) 651-9366
Facsimile: (713) 654-6666

Lead Attorney for Plaintiffs

OF COUNSEL:
Justin A. Nelson, State Bar No. 24034766
SUSMAN GODFREY L.L.P.
1201 Third Avenue, Suite 3800
Seattle, Washington 98101-3000
Telephone: (206) 516-3880
Facsimile: (206) 516-3883
jnselson@susmangodfrey.com

Joseph S. Grinstein, State Bar No. 24002188
Aimée Robert, State Bar No. 24046729
SUSMAN GODFREY L.L.P.
1000 Louisiana Street, Suite 5100
Houston, Texas 77002-5096
Telephone: (713) 651-9366
Fax: (713) 654-6666
Email: jgrinstein@susmangodfrey.com
Email: arobert@susmangodfrey.com

Jeremy Brandon, State Bar No. 24040563
SUSMAN GODFREY L.L.P.
Suite 5100
901 Main Street
Dallas, Texas 75202-3775
Telephone: (214) 754-1900
Fax: (214) 754-1933
Email: jbrandon@susmangodfrey.com

CERTIFICATE OF CONFERENCE

Counsel for plaintiffs have not properly conferred with counsel for defendants as described in the Motion. Function Media requests relief from this requirement for the reasons described in the Motion.

/s/ Justin A. Nelson
Justin A. Nelson

CERTIFICATE OF AUTHORIZATION TO FILE UNDER SEAL

This is to certify that Exhibits A through D are being filed under seal separately because they contain material covered by the protective order.

/s/ Justin A. Nelson
Justin A. Nelson

CERTIFICATE OF SERVICE

I hereby certify that the foregoing documents have been served on all counsel of record via ECF/PACER this 27th day of August, 2009.

/s/ Justin A. Nelson
Justin A. Nelson