

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

FUNCTION MEDIA, L.L.C.

Plaintiff,

vs.

GOOGLE INC. AND YAHOO!, INC.

Defendants.

§  
§  
§  
§  
§  
§  
§  
§  
§

Civil Action No. 2007-CV-279

JURY TRIAL DEMANDED

**MOTION TO EXPEDITE CONSIDERATION OF MOTION TO PRECLUDE  
ADMISSION OF UNTIMELY EVIDENCE**

Function Media respectfully requests that this Court expedite briefing and argument in the concurrently-filed Motion to Preclude Admission of Untimely Evidence. As explained in that motion, Google is preparing for a trial by ambush. Five days ago, Google disclosed for the first time that it had just “discovered” 22,000 additional computer files pertinent to one of its prior art references, AdForce. Google now presumably wishes to introduce these late-produced materials at trial. Likewise, on Tuesday, December 22, Google disclosed that it was bringing to trial as a “will call” witness Mr. Ben Lee, a Google employee who was not disclosed during the discovery period.

Google’s last-minute tactics have significantly prejudiced FM in its pretrial preparations. FM requests an immediate resolution of these evidentiary issues so that it can properly get ready for the looming trial. Accordingly, FM requests that Google be required to respond to FM’s

Motion to Preclude within 8 days of its filing, and that the motion be heard at the January 5 pretrial conference.<sup>1</sup> A proposed order is attached.

Respectfully submitted,

/s/ Max L. Tribble, Jr. \_\_\_\_\_

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 Plaintiff

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

---

<sup>1</sup> Google will undoubtedly argue that expediting of this motion would be unfair, because it failed to have its own *Daubert* motion as to Mr. Bratic expedited. The two motions are apples and oranges, however. First, FM's Motion to preclude is a short motion dealing with basic discovery issues, whereas Google's *Daubert* motion spans 15 pages and depended upon simultaneous expert depositions. Second, the problem with timing as to both motions was of Google's own making. Here, Google has forced FM into an expedited posture. But the principal reason that Google felt pressed as to its *Daubert* briefing was that Google had asked for and received delays in the service of the expert reports, which pushed back the expert discovery and briefing schedule.

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 plaintiff have conferred with counsel for Google. Google is opposed to this motion.

/s/ Joseph S. Grinstein  
Joseph S. Grinstein

**CERTIFICATE OF SERVICE**

I hereby certify that all counsel of record, who are deemed to have consented to electronic service are being served this 23rd day of December, 2009 with a copy of this document via the Court's CM/ECF system per Local Rule CD-5(a)(3).

/s/ Joseph S. Grinstein  
Joseph S. Grinstein

