

## **Exhibit 10**

## Jason Wolff

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**From:** Jason Wolff  
**Sent:** Wednesday, September 17, 2008 4:27 PM  
**To:** Jeremy Brandon  
**Cc:** Thomas Walsh; Joseph S. Grinstein; Max L. Tribble; doug.lumish@weil.com; jeff.homrig@weil.com; jason.lang@weil.com; Lorraine Morton  
**Subject:** RE: Function Media

Jeremy,

With regard to your email below:

1. Your proposal is acceptable, provided Yahoo agrees to the same extension until November 17 for the parties to inform the Court whether there are any privilege log disputes. Can you please provide a set of available dates for Ms. Pimentel's deposition? We had proposed our office in Silicon Valley for Nancy Pimentel's deposition, if this doesn't work, please also let us know.
2. As for supplementing Defendants' invalidity contentions, we believe we are entitled to do so under local patent rule 3-6(b)'s good cause standard. To put it quite simply, the information Defendants propose to supplement was not in their possession at the time the previous P.R. 3-4 invalidity contentions were due. Stated another way, it is the materials received after June 30, 2008, which Defendants seek to supplement. We believe this fact alone satisfies the good cause standard and we are confident that the Court will allow the supplementation, particularly when there is no prejudice to Function Media by allowing us to supplement. The case is in its early stages, with no depositions having been taken and the claim construction process set forth under the local patent rules not yet underway. Trial is not set until November 2009.

Nevertheless, for your convenience, set forth below in more detail I have identified the materials which will be the primary focus of Defendants' supplemental invalidity contentions, along with relevant dates:

- A. MediaSpan materials (AdManager Pro, ClassManager Pro, and related materials): Google subpoenaed MediaSpan on April 24, 2008, requesting documents by May 8, 2008. Understandably, given the age of the materials at issue, they were not timely received by Defendants, but rather received over the course of two productions on June 16, 2008 (the first production being largely non-responsive) and July 1, 2008. (I will note that the materials in Defendants' possession before June 30, 2008 were charted by June 30, 2008.). The materials received after June 30, 2008 (AdManager Pro and ClassManger Pro materials) could not have been charted by Defendants, because they were not timely produced by MediaSpan and thus not in Defendants possession by the June 30, 2008 deadline. Nevertheless, Plaintiff was sent copies of invalidity charts for the three of the four patents asserted in this case within 30 days after receipt of the MediaSpan materials (see the reexamination materials previously sent to you). Defendants wish to formally supplement their contentions for all of the asserted patents in view of these newly received materials.
- B. 24/7 Real Media (Open AdStream and related materials): Google finally reached in-house counsel at WPP's subsidiary 24/7 Real Media on April 29, 2008. 24/7 Real Media agreed to provide materials to Defendants without a formal subpoena, but requested additional time given the difficulty in locating them predominantly due to their age. Defendants diligently followed up with counsel for 24/7 Real Media to timely obtain materials, but did not begin to receive materials until July 7, 2008 (these materials had little if any date information) and did not receive the complete set of materials until August 27, 2008 (which had the date information). (I will note that the materials in Defendants' possession before June 30, 2008 were charted by June 30, 2008 deadline.) Because the additional materials were not timely received from 24/7 Real Media by the June 30, 2008 deadline, and thus were not in Defendants' possession by such date, it could not have been charted by Defendants.
- C. Eclipse Services (AdPro and related materials): Eclipse Services is a very small company in Pennsylvania with limited resources. Eclipse Services agreed to provide materials without a subpoena as it had a substantial hardship complying with the request and locating the materials in the time frame sought. Google received some materials from Eclipse Services prior to June 30, 2008 and these materials were charted and served with our initial P.R. 3-4 contentions. After substantial effort to locate

additional files from approximately 12 years ago, Eclipse finally provided the additional materials on July 23, 2008. Because the additional materials were not timely received from Eclipse Services by the June 30, 2008 deadline and thus were not in Defendants' possession by that date, it could not have been charted by Defendants.

D. Seligman materials (NetGravity, DoubleClick, and related materials): Defendants substantial efforts to locate archived materials and former employees of NetGravity and DoubleClick turned up a former employee of NetGravity and DoubleClick named Russ Seligman on June 28, 2008, two days before contentions were due. Mr. Seligman was able to comb through archived materials from over 12 years ago and locate a substantial body of materials pertaining to NetGravity, DoubleClick and some other prior art systems (e.g. ClickOver). These materials were turned over to Defendants on September 3, 2008 and supplement the earlier production of NetGravity and DoubleClick materials that Defendants have charted already. In any event, because the additional materials were not timely received from Mr. Seligman by the June 30, 2008 deadline, they were not in Defendants' possession by that date and thus could not have been charted by Defendants by the prior deadline to do so.

E. Discovery has also turned up another prior art book describing the state of the art at the time of the alleged invention, which discusses the use and purpose of several prior art systems and techniques, including those materials earlier produced and charted by Defendants and newly received materials since the June 30, 2008 deadline. This book, entitled *What Makes People Click: Advertising on the Web*, by Jim Sterne, was received after the June 30, 2008 deadline. Because this book was not received until after June 30, 2008, it was not in Defendants' possession by the deadline and it could not have been charted before then.

Please promptly let us know if you intend to oppose our motion for leave to supplement so that we may note your position in our Certificate of Conference accompanying our motion.

Regards,  
Jason

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**From:** Jeremy Brandon [mailto:jbrandon@SusmanGodfrey.com]  
**Sent:** Friday, September 05, 2008 3:30 PM  
**To:** Jason Wolff  
**Cc:** Thomas Walsh; Joseph S. Grinstein; Max L. Tribble  
**Subject:** Function Media

Howdy, Jason.

1. Re the Pimentel deposition: as we discussed a couple of days ago, Nancy Pimentel has told me that -- due to work and travel commitments -- she is not available for deposition until the last week of October. As Mrs. Pimentel is a non-party, I think it's important that we try to accommodate her schedule. And I appreciate your willingness to do so. In light of your statement that this deposition could perhaps shed some light on privilege-related issues, we'll agree to extend to November 17 the current September 29 deadline for the parties to inform the Court whether there are any privilege-log disputes. Deal? We'll obviously want to get Yahoo! on board with this extension, but I don't think that'll be a problem given that I still don't have a complete log from Yahoo!.

2. Re your request to supplement: I guess we just don't understand what's going on here. In the spirit of cooperation, we've already given you one unopposed opportunity to supplement your invalidity contentions after the deadline. But now y'all are wanting to go back to the well -- some six months after we served our asserted claims and infringement contentions. Could you please explain in a letter or something why you think Google should be entitled to another amendment and when you think this is going to stop? If there's a good reason, we'll consider it.

Thanks.

jeremy  
214.754.1938

10/13/2008