

Exhibit 1

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

FUNCTION MEDIA LLC	§	Civil Action No. 2007-CV-279
	§	
Plaintiff,	§	
	§	
vs.	§	
	§	
GOOGLE INC. AND YAHOO!, INC.	§	
	§	
Defendants.	§	Jury Trial Demanded

**PLAINTIFF’S OPPOSITION TO DEFENDANTS’ JOINT MOTION FOR LEAVE TO
FURTHER SUPPLEMENT THEIR P. R. 3-3 AND 3-4 DISCLOSURES**

Plaintiff Function Media LLC hereby opposes Defendants’ Joint Motion for Leave to Further Supplement their P.R. 3-3 and 3-4 Disclosures. Function Media has indulged numerous requests by Defendants for delay and for relief from the disclosure rules. At this point, however, Function Media believes that Defendants must be held to the schedule to which they agreed. As Defendants have not established “good cause” for another supplementation of their Invalidity Contentions, Function Media requests that the Court deny their motion for leave.

A. Background

Discovery in this case has been marked by repeated requests for delays and extensions from Defendants—all of which Function Media, in the spirit of collegiality, has indulged:

- Defendants’ Invalidity Contentions were originally due May 30, 2008—approximately three months after Function Media served its Infringement Contentions and eleven months after Function Media filed this lawsuit. *See* Docket Nos. 1, 44. Despite the generous schedule negotiated by the parties, Defendants requested additional time to serve and chart certain prior art. Function Media consented. *See* Exhibit A.
- Documents were due to be produced on June 30, 2008. *See* Docket No. 44. Defendants claimed they needed an additional 30 days, and Function Media consented. *See* Docket Nos. 58-59. July 30 came and went months ago, and Defendants are still producing documents. *See* Exhibits B and C (production letters dated October 17, 2008 and November 7, 2008).

- Privilege logs were due June 30, 2008. *See* Docket No. 44. Defendants claimed they needed until July 30, and Function Media consented. *See* Docket Nos. 58-59. Despite the July 30 deadline, Google did not produce its final “supplemental log” until September 17. *See* Exhibit D. And Yahoo! did not produce a complete log until October 31—three months after this Court’s (extended) deadline for doing so. *See* Exhibit E.
- Yahoo! still has not produced any source code in this case, and Google is delaying both the production of supplemental source code (which has been promised orally for almost two months) and the production of summary financial information (which has been promised orally for over three months).

In short, Function Media has bent over backwards to accommodate Defendants’ multiple requests for extensions, and (for their part) Defendants continue to delay. Function Media was even willing to consent to Defendants’ latest proposed supplementation, so long as Defendants would agree that their third round of Invalidity Contentions would be their last. But Defendants refused to meet Function Media halfway and opted instead to press forward unilaterally—confident that the Court would allow yet another supplementation, some fifteen months into the lawsuit and without assurance of any end in sight.¹

B. Defendants Have Not Shown “Good Cause”

A party seeking leave to supplement its contentions must show “good cause” for doing so. P.R. 3-6(b); Fed. R. Civ. P. 16(b). “The ‘good cause’ standard requires the party seeking relief to show that the deadlines cannot reasonably be met despite the diligence of the party needing the extension.” *STMicroelectronics, Inc. v. Motorola, Inc.*, 307 F. Supp. 2d 845, 850

¹ Defendants’ assertion that Function Media has somehow changed positions in light of its initial willingness to consent to the requested supplementation in exchange for a consented-to supplementation of the Infringement Contentions is misleading. *See* Mot. at 4-5. That is only half the story. While Defendants note in their motion that Google was prepared to consent to a mutual supplementation, *see id.* at 4, they neglect to mention that counsel for Yahoo! subsequently informed counsel for Function Media by telephone that Yahoo! would object to Function Media’s proposed supplementation. So it is simply not tenable for Defendants to accuse Function Media of changing positions when Defendants collectively were never prepared to agree to the premise of mutual supplementation in the first place.

C. Requested Relief

Function Media requests that the Court deny the Defendants' motion for leave. A proposed order is attached.

Dated: November 13, 2008

Respectfully submitted,

/s/ Max L. Tribble, Jr.

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CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing has been served via ECF and email on counsel of record, this 13th day of November, 2008.

/s/ Jeremy J. Brandon

Jeremy J. Brandon