

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

BRIGHT RESPONSE, LLC,	§	
Plaintiff,	§	
	§	
v.	§	Civil Action No. 2:07-cv-371-ce
	§	
GOOGLE, INC., et al.,	§	
	§	JURY TRIAL DEMANDED
Defendants.	§	
	§	

**BRIGHT RESPONSE, LLC'S EMERGENCY MOTION TO STRIKE PORTIONS OF DEFENDANTS' INVALIDITY EXPERT'S REPORT AND DEFENDANTS' SUMMARY JUDGMENT BRIEFING AND REQUEST FOR EXPEDITED BRIEFING**

Plaintiff Bright Response, LLC (“Bright Response”) files this motion to strike certain prior art references and combinations relied on in the July 6, 2010 report of Defendants’ invalidity expert, Dr. Karl Branting, as well as in Defendants' Motion for Summary Judgment of Invalidity Under 35 U.S.C. § 102(b), (e), and § 103(a) (D.I. 392). Bright Response also files this motion to strike Yahoo's Motion for Summary Judgment of Invalidity For Failure To Satisfy The Written Description Requirement Of 35 U.S.C. § 112¶1 (D.I. 387). The references and theories that Bright Response moves to strike are ones that Defendants never disclosed in their operative Invalidity Contentions and never produced to Bright Response. In advance of the parties’ July 9, 2010 meet and confer, Bright Response identified *eighteen* prior art references from Dr. Branting’s report that had never been disclosed or produced to Bright Response. Bright Response has only continued to identify undisclosed theories which Defendants are relying on, including an undisclosed obviousness theories and a written description motion for summary judgment based on the written description of "non-interactive electronic message." Although Defendants produced most of the missing references on Friday night July 9, 2010 and Saturday morning July 11, 2010—after Bright Response identified the omissions—this timing does not

alleviate the extreme, incurable prejudice in responding to Defendants' motion for summary judgment, preparing a rebuttal report for July 17, 2010,<sup>1</sup> the deposition of Dr. Branting on July 23, 2010 and Bright Response's trial preparations. Moreover, Bright Response still does not have one of the references that it identified as missing and never-before identified.<sup>2</sup>

Defendants have countered, in suggesting Bright Response has no basis to move to strike, that Bright Response has not adequately demonstrated any prejudice. The suggestion is ludicrous. Defendants cannot shirk their obligations under P.R. 3-3 and then simply avoid the consequences by asserting that there is no prejudice only weeks before trial. Despite various supplementations of their invalidity contentions, including just over 1 month ago, Defendants have never identified in their contentions or produced more than a dozen references and other bases for Defendants invalidity contention in this case. Yet Bright Response is expected to analyze and determine how and whether the new references fit within the framework of Defendants' operative contentions, while preparing a rebuttal report, preparing for deposition, and preparing for trial—all in the next two weeks. The prejudice is not only apparent on the face of the record. It also is well recognized within this District's precedent as a burden on plaintiff's counsel to change course late in the litigation. *Finisar Corp. v. DirecTV Group, Inc.*, 424 F. Supp. 2d 896, 897 (E.D. Tex. 2006). That is why courts exclude the late-produced or never-produced information, and that is why the Court should do so here.

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<sup>1</sup> Defendants are currently negotiating new deadlines for rebuttal expert reports that would likely make expert reports due July 20, 2010. This does not alter the incurable prejudice felt by Bright Response as a result of Defendants failure to comply with PR 3-3.

<sup>2</sup> One of the references (Hosmer) was received just on Monday July 12, 2010, and Defendants have made promises that they will produce the Rosenblatt reference on Tuesday July 13, 2010 at some point. Exhibit A-2 to the Wiley Declaration comprises Exhibit B to Defendants' operative invalidity contentions and lists all Defendants' prior art references, and based on that chart it could be determined what was missing—as apparent from Defendants' later production of those references.

Therefore, Bright Response seeks emergency relief and expedited briefing on this Motion. Bright Response was prepared prepare to file this motion even earlier, but engaged on these issues in good faith with Defendants—who as late as Tuesday July 13, 2010, however, still took the position that no full meet and confer has occurred on these issues. Bright Response can wait no longer in what is now most obviously a delay game. Determining the universe of references and arguments on which Defendants may rely at trial and for summary judgment is a critical issue in preparing this case for trial, given the very compressed schedule with the August 2, 2010 trial date, and any further delay in addressing this issue would severely prejudice Bright Response. Bright Response therefore requests that the Court order an expedited briefing schedule on this issue. Although even with expedited briefing there will not be enough time for a ruling on this issue before summary judgment responses are due (July 15, 2010), Bright Response believes that expedited briefing is appropriate so that this issue is decided in advance of the validity-related experts and the final pre-trial conference. Further Defendants are well aware of all these issues in light of the communications in the meet and confer process in advance of this motion Bright Response requests that Defendants for their Motion for Summary Judgment on Invalidity—which relies on the EZ Reader as a *system* rather than the EZ Reader AAAI publication—cannot rely on any arguments involving the system because by this Motion Bright Response also moves to strike that never-before disclosed reference that is nowhere in Defendants’ operative invalidity contentions.

## **I. FACTUAL BACKGROUND**

Defendants served their operative invalidity contentions on May 24, 2010 and added a number of prior art references and charts, including a thesis authored by Dr. Branting, whom

Bright Response now knows is Defendants' invalidity expert.<sup>3</sup> Wiley Decl. Ex. A (Defendants' Joint Supplemental Invalidity Contentions; Wiley Decl. Ex. A-1 (chart A-70 for Branting dissertation). The Court granted Defendants' motion for leave to serve their supplemental invalidity contention on June 1, 2010. Dkt. No. 347 (Order granting Motion at Dkt. No. 342, *Unopposed Motion for Leave to File Defendants' Unopposed Motion for Leave to Amend Their Invalidity Contentions by AOL, LLC., Google Inc., Yahoo!, Inc.*).

Defendants served their opening expert report on invalidity on Tuesday, July 6, 2010, the same date that Bright Response served its opening report on infringement.<sup>4</sup> Dr. Branting's invalidity report, as well as Defendants' motion for summary judgment related to prior art (Dkt. No. 362), show that Defendants at this late date intend to rely on completely new prior art references and systems that were never before disclosed and charted in their invalidity contentions. *See* Wiley Decl. Exs. A; A-2 (exhibit B to contentions listing all references). The undisclosed and not-produced references include the following:

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<sup>3</sup> Notably, although Defendants identify the other prior art authors on their invalidity contentions, Defendants failed to disclose Dr. Branting as a witness with relevant knowledge. *E.g.*, Wiley Decl. Ex. E (Yahoo supplemental disclosures showing Dr. Branting only as expert witness). Presumably, this was because Defendants intended to use Dr. Branting as their expert. Defendants' future use of Dr. Branting as an expert, however, does not change their duty to disclose Dr. Branting as a possible percipient witness. Bright Response reserves the right to address this issue if Defendants do in fact use Dr. Branting as a witness with relevant factual knowledge, such as to provide factual testimony related to his thesis, which forms a basis for Dr. Branting's opinion related to invalidity. *See* Wiley Decl. Ex. B at, *e.g.*, pp. 41-43 (¶¶87-94), 81-83 (¶ 189-194), 85 (¶201), 89 (¶ 209); 90 (¶210); 97 (¶227), ¶¶ 241 & 252 (portions of report relying on dissertation describing GREBE). It should be noted that the highlighting in the Branting Report in ¶¶ 241-242 are in the original.

<sup>4</sup> This deadline was changed from the July 3, 2010 deadline in the Amended Docket Control Order (Dkt. No. 385) by informal agreement of the parties. The change, and the informal agreement, was necessary to accommodate the unexpected occurrence of Bright Response's infringement expert's hospitalization late July 2, 2010/early July 3, 2010 with a blocked artery and a remedial surgical procedure, angioplasty, performed on July 3, 2010. Dr. Rhyne therefore could not complete his report for July 3, 2010, which Defendants recognized. It was agreed among the parties to exchange opening reports on July 6, 2010.

	REFERENCE	Exemplary Citation to Branting Expert Report (Wiley Decl. Ex. B) <sup>5</sup>
1	EZ Reader system <sup>6</sup>	¶ 72 (and Defendants' motion for summary judgment)
2	The Proceedings of the DARPA Workshop on Case-Based Reasoning, Pensacola Beach, FL, May 31-June 2 1989 (Morgan Kaufmann, San Mateo, CA)	¶ 44
3	The Proceedings of the DARPA Workshop on Case-Based Reasoning, Washington, D.C., May 8-10, 1991 (Morgan Kaufmann, San Mateo, CA)	¶ 44
4	The Proceedings of the DARPA Workshop on Case-Based Reasoning, Clearwater Beach, FL, May 10-13 1988 (Morgan Kaufmann, San Mateo, CA)	¶ 44
5	Bergmann, R., Kolodner, J., and Plaza, E. 2005. Representation in case-based reasoning. <i>Knowl. Eng. Rev.</i> 20, 3 (Sept. 2005), 209-213 (citing examples from the early 1990's of each type of case representation).	¶ 45
6	Buchanan, B. G. and Shortliffe, E. H. 1984 <i>Rule Based Expert Systems: the Mycin Experiments of the Stanford Heuristic Programming Project</i> (The Addison-Wesley Series in Artificial Intelligence). Addison-Wesley Longman Publishing Co., Inc.	¶ 46

<sup>5</sup> By referring to these particular paragraphs as exemplary ones, Bright Response does not argue that the Court should not strike any other mention to the late-disclosed and late-produced reference. These paragraphs show the primary mentions of the references and amply demonstrate the scope of Dr. Branting's reliance on them. Reliance on any of these references for any purposes, even when cited in addition to other properly disclosed and produced references, is improper and the subject of this Motion to Strike.

<sup>6</sup> Although Defendants' invalidity contentions chart an EZ Reader AAAI *article*, this is a new and different invalidity theory on which Dr. Branting relies by using the *system*, not just an article, as a prior art reference. In doing so, Dr. Branting relies on evidence beyond the article, such as the user guide and reference guide for EZ Reader.

7	L. Karl Branting and B. Porter, "Rules and Precedents as Complementary Warrants," Proceedings of the Ninth National Conference on Artificial Intelligence 1991 (AAAI-91) pp. 3-9.	¶ 48
8	M. Goodman, Prism: a case-based telex classifier, Proceedings of IAAI-90, p. 25-37 (1990).	¶¶ 95 - 100
9	Marc Damashek, Gauging Similarity with n-Grams: Language-Independent Categorization of Text (10 February 1995) Science 267 (5199), 843	¶ 214 n.22
10	Dietrich Wettschereck, David W. Aha, Weighting Features. ICCBR'95 347-358 (1995).	¶ 214 n.23
11	Tversky A, Features of Similarity. Psychological Review 84, 327-352 (1977). See <a href="http://www.scholarpedia.org/article/Similarity_measures">http://www.scholarpedia.org/article/Similarity_measures</a> .	¶ 215 n.24
12	Klaus-Dieter Althoff, Evaluating Case-based reasoning systems, in Aamodt, A., Althoff, K.-D., Magaldi, R. & Milne, R., Case-Based Reasoning: A New Force In Advanced Systems Development. Tutorial, London, Unicom Seminars & AI Intelligence, UK (1995).	¶217
13	M. Feret and J. Glasgow, Hybrid case-based reasoning for the diagnosis of complex devices, AAAI-93 proceedings, 168-175 (1993).	¶ 219
14	Richard Tansey, Michael, White, Rebecca G. Long, Mark Smith, A comparison of log linear modeling and logistic regression in management research, Vol. 22, No. 2, 339-358 (1996)).	¶ 271
15	Hosmer, D.W., & Lemeshow, S., Applied Logistic Regression, New York: Wiley, (1989)	¶ 271
16	Duda, R. O. and Hart, P. E. (1973) Pattern Classification and Scene Analysis, Wiley, pp. 140-141	¶ 272

17	P.Baldi, Gradient descent learning algorithm overview: a general dynamical systems perspective, IEEE Transactions on Neural Networks, 6:1 January 1995, pp. 182-195	¶ 272
18	Rosenblatt, F., Principles of Neurodynamics, New York: Spartan Books (1962)  <i>Still not received as of the Motion's filing</i>	¶ 272
19	Nguyen and Watson combination	¶¶ 235-238

A copy of the Branting Report is attached as Exhibit B to the Wiley Declaration. Wiley Decl. Ex. B. References 2 through 18 were referenced nowhere in the Defendants' operative invalidity contentions, and the references were not produced until Friday, July 9, 2010. See Wiley Decl. Ex. D (emails accompanying production of references).

Dr. Branting, as well as Defendants' motion for summary judgment regarding prior art, also rely on the EZ Reader system. Defendants' invalidity contentions, however, only refer to the "EZ Reader reference" "which was submitted to the PTO as provisional application No. 60/042,494 on April 3, 1997." Wiley Decl. Ex. A (Supplemental Invalidity Contentions) at 27. The EZ Reader reference is the article entitled "EZ Reader: Embedded AI for Automatic Electronic Mail Interpretation and Routing" written by Amy Rice, *et al.* that was published by the AAI. The title for Chart A-4, which addresses Defendants' EZ Reader disclosure, is reproduced below:

**Chart A-4**  
Claim Chart of "EZ Reader: Embedded AI for Automatic Electronic  
Mail Interpretation and Routing" ("EZ READER")  
as prior art to  
Asserted Claims of U.S. Patent No. 6,411,947 ("947 Patent")

As can be seen, it refers only to the article and not to the EZ Reader system or any other documentation regarding the EZ Reader system. Wiley Decl. Ex. A-4. Furthermore, although Defendants' original invalidity contentions served on August 7, 2008 do refer to the EZ Reader

system as potentially invalidating, Defendants removed this contention from subsequent invalidity contentions. Wiley Decl. Ex. A-3 (original contentions) at 8 (listing EZ Reader as authored), 14 (mentioning “EZ Reader”). Until Defendants’ recent filings, to the extent the EZ Reader as a system was ever properly asserted as prior art, Bright Response believed that this reference was removed because Defendants were no longer making this assertion. Furthermore, like the operative contentions, Defendants’ original invalidity contentions only refer to the EZ Reader article in the attached claim chart. *E.g.*, Wiley Decl. Ex. A-3 at 14; *see also* Ex. A-4 (supplemental contentions; chart).

The operative invalidity contentions disclose that asserted claim 26 of the '947 patent is invalid pursuant to 35 U.S.C. § 112 ¶ 1 for lack of written description with respect to the term "case base knowledge engine." Wiley Decl. Ex. A at 25-26. The operative invalidity contentions do not disclose a lack of written description theory based on the "non-interactive electronic message" term.<sup>7</sup> Yahoo's Motion for Summary Judgment of Invalidity For Failure To Satisfy The Written Description Requirement Of 35 U.S.C. § 112 ¶1 (D.I. 387) is based solely, however, on the alleged failure of the '947 patent to provide an adequate written description of "non-interactive electronic message."

Bright Response, after beginning to review of the Branting report and verifying non-production of the references at issue, alerted Defendants to the omissions on Friday July 9, 2010, and some of the missing references were produced for the first time late Friday night July 9, 2010 and Saturday morning July 10, 2010—just one week before Bright Response’s rebuttal report is due. *See* Wiley Decl. Ex. C; Wiley Decl. Ex. D (series of four emails from Google counsel A. Roberts, counsel for Google, sending references). However, the Friday night/Saturday

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<sup>7</sup> Defendants only disclose that non-interactive electronic message is indefinite. Wiley Decl. Ex. A at 22.



morning production was only a partial one. Bright Response at the time of filing this motion still has not received the Rosenblatt reference—further demonstrating that Defendants’ use of the meet and confer process is indeed a strategic maneuver for delay.

## II. ARGUMENT

### **A. Failure to Disclose Prior Art References And Theories In Their Invalidity Contentions Requires Striking The Portions Of Dr. Branting’s Expert Report Relying On Those References.**

Local Patent Rule 3-3 requires a party opposing a claim of patent infringement to serve Invalidity Contentions that identify “each item of prior art that allegedly anticipated each asserted claim or renders it obvious.” P.R. 3-3(a); *see also Finisar Corp. v. DirecTV Group, Inc.*, 424 F. Supp. 2d 896, 897 (E.D. Tex. 2006) (citing rule). Failing to comply with this notice requirement “is *grounds for prohibiting introduction of evidence of the prior art.*” *Finisar*, 424 F. Supp. 2d at 899 (emphasis added) (citing *Ferguson Beauregard/Logic Controls v. Mega Sys., L.L.C.*, 350 F.3d 1327, 1347 (Fed. Cir. 2003)); *see also id.* at 901-02 (“Invalidity is an affirmative defense, and the party which does not properly investigate applicable prior art early enough to timely meet disclosure requirements *risks exclusion of that evidence.* *Mega Sys.*, 350 F.3d at 1347.”) (emphasis added).

The Court has “the inherent power to enforce its scheduling orders and to impose sanctions,” *Finisar*, 424 F. Supp. 2d at 899, and may consider certain factors to determine what relief is appropriate for late disclosure of critical evidence—such as prejudice to the opposing party, the reason for delay, the importance of the evidence, and whether a lesser sanction than preclusion is appropriate.<sup>8</sup> But at this late date, and given Defendants’ delays in determining

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<sup>8</sup> *Finisar*, 424 F. Supp. 2d at 900-01 (noting non-exclusive list of factors as: “1. The danger of unfair prejudice to the non-movant; 2. The length of the delay and its potential impact on judicial proceedings; 3. The reason for the delay, including whether it was within the reasonable control of the movant; 4. The importance of the particular evidence, and if vital to the case, whether a lesser sanction would adequately

whether even adequate discussion has occurred, there is no appropriate remedy except to foreclose Defendants from relying on any of the new references at trial. The objectionable portions of Dr. Branting's report and Defendants' motion for summary judgment must therefore be struck to preclude any reliance on these references and other undisclosed matters—combinations and arguments—that appear nowhere in Defendants' invalidity contentions. No reason could justify withholding prior art references or arguments, information solely within the control of Defendants, to just three weeks before trial when Defendants just recently supplemented their invalidity contentions.

Late disclosure creates obviously significant prejudice to Bright Response and should control the Court's inquiry, as it did in *Finisar*, where the court recognized that “[e]xtensive additional research would be needed” to address the new references, and “[o]bviously there would be the additional expense as the experts and [the patentee's] attorneys reviewed the references and determined how they fit into [Defendants'] asserted defenses.” *Id.* at 902. Granting a continuance to cure such an egregious and prejudicial delay and withholding of information is inadequate: “Enough time and money will eventually cure any prejudice caused by late disclosure of information, but that will not result in the ‘just, speedy, and inexpensive determination of every action.’” *Id.* (quoting FED. R. CIV. P. 1). Accordingly, there is no appropriate remedy at this late date except to (i) strike these references from Dr. Branting's report and (ii) prohibit Defendants from relying on any of the undisclosed references for any purpose. This same consequence applies to Defendants' summary judgment briefing.

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address the other factors to be considered and also deter future violations of the court's scheduling orders, local rules, and the federal rules of procedure; and 5. Whether the offending party was diligent in seeking an extension of time, or in supplementing discovery, after an alleged need to disclose new evidence became apparent.”).

Defendants may not rely on the undisclosed EZ Reader system, identified on the table above, for their Motion for Summary Judgment on Invalidity. *See* Dkt. No. 392.<sup>9</sup>

As Bright Response has explained to Defendants regarding the EZ Reader system reference in the communications that preceded the filing of this Motion, Defendants never produced a claim chart specifically listing how the EZ Reader system invalidates the '947 patent. As noted above, Defendants' chart, in both their August 2008 invalidity contentions and the currently operative invalidity contentions, is based on the AAI article only. This fact is emphasized by the fact that Dr. Branting and Defendants' motion for summary judgment base their assertions regarding the EZ Reader system on other references such as the EZ Reader user guide and reference guide. Defendants' chart for the AAI article neither refers to such references nor indicates in any way that Defendants are accusing the EZ Reader system itself. A party may not rely on merely a conclusory statement that a specific product invalidates a claim without a chart substantiating that assertion. Otherwise the disclosure is insufficient. Defendants therefore have never properly disclosed their intention to rely on the EZ Reader *system* as opposed to simply the AAI *article*.

**B. Undisclosed Combinations—The Nguyen-Watson Combination (Branting Report ¶¶ 235-238)—Must Be Struck.**

For the same reasons of fairness and compliance with the local patent rules as set forth in

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<sup>9</sup> Defendants have recently filed motions to strike parts of the expert reports of Bright Response's damages expert, Stephen Becker, on the basis of allegedly late disclosure of materials on which Dr. Becker relies. Bright Response will elucidate in detail in its oppositions to Defendants' motions the reasons Defendants' conduct, and the resulting prejudice, addressed herein is wholly distinguishable from that addressed in Defendants' motions. Among these reasons: whereas Defendants completely disregarded Local Patent Rule 3-3, Bright Response has adhered scrupulously to the discovery rules, and disclosed all opinions and materials in a timely manner; and whereas Defendants have available to them not only the materials about which they complain, but deposition testimony specifically addressing these materials, no such discovery materials exist for most of the invalidity references that Defendants failed to disclose.

*Finisar*, such as the recognition of the resources required to analyze a new prior art reference, a new combination also cannot be disclosed at such a late date without the same consequence: precluding Defendants from relying on that combination for any purpose. Insofar as Defendants may seek a safe harbor in reservations they made in the Joint Supplemental Invalidity Contentions, reserving the right to amend or supplement, this District rejects that practice as a basis to hold back invalidity defenses. *See Realtime Data, LLC v. Packeteer, Inc.*, Civil No. 6:08-cv-144-LED-JDL, 2009 WL 4782062, at \*3 (E.D. Tex. Dec. 8, 2009) (“Language preserving a defendant an opportunity to later rely upon undisclosed combinations does not “clearly suggest” the combination in the manner required by Patent Rule 3-3.”); *Cummins-Allison Corp. v. SBM Co.*, No. 9:07-CV-196, 2009 WL 763926, at \*4 (E.D. Tex. Mar. 19, 2009) (“The purpose of the Patent Local Rule 3-3 is to place the Plaintiff on notice of potentially invalidating art that Defendants will assert in their case and at trial. Mere ‘suggestion’ does not suffice. Defendants are required to submit Invalidity Charts to provide notice of how each claim element is met. Failure to provide the specific reference that allegedly reads on a claim limitation of the ‘806 Patent does not place Plaintiff on sufficient notice.”); *see also* Wiley Decl. Ex. A at 2-4 (“II. RESERVATIONS”).

**C. Theories Never Disclosed In Defendants’ Invalidity Contentions Also Must Be Struck (Branting Report ¶¶ 270-275).**

Likewise, nowhere in the invalidity contentions do Defendants include the new argument disclosed at Paragraphs 270-275 of Dr. Branting’s report regarding gradient descent algorithms and logistic regression. Wiley Decl. Ex. B (report); Wiley Decl. Ex. A (operative contentions); Ex. A-2 (Defendants’ Exhibit B to operative invalidity contentions). Although reservation of a right to amend later is itself ineffective to constitute putting the plaintiff “on sufficient notice” of an invalidity defense (*Cummins-Allison*, 2009 WL 763926, at \*4), such a reservation is

completely ineffective here to cure such late disclosure. Such a late, de facto proposed supplement cannot be condoned with the current deadlines of Bright Response's rebuttal report due on July 20; Dr. Branting's deposition on July 22, 2010; pre-trial conference on July 28, 2010; and trial starting on August 2, 2010.

**D. Yahoo's Motion for Summary Judgment of Invalidity For Failure To Satisfy The Written Description Requirement Of 35 U.S.C. § 112¶1 (D.I. 387) Must Be Struck.**

Yahoo filed a motion for summary judgment on a theory that was not disclosed in its invalidity contentions, the failure to provide adequate written description of "non-interactive message." Although this motion has no merit, it cannot be disputed that Defendants failed to assert this theory in their operative invalidity contentions. The only lack of written description theory asserted by Defendants was related to "case based knowledge engine." Wiley Decl. Ex. A at 26-27. For the same reasons discussed above, Yahoo's entire motion should be struck as an undisclosed invalidity theory. Dr. Branting's two-paragraph, conclusory opinion on this topic would also be struck. Wiley Decl. Ex. B at ¶¶ 276-77.

**III. CONCLUSION**

For the reasons stated above, Bright Response requests that the Court order that (1) all of the above-referenced exemplary paragraphs in the Branting Report that rely on undisclosed prior art references or combinations or arguments or theories be struck, including all other paragraphs that refer or rely in any way on those references; (2) Defendants be precluded from relying on any of the undisclosed references, combinations, or arguments at trial—or in their summary judgment briefing—for any purpose; and (3) Yahoo's Motion for Summary Judgment of Invalidity For Failure To Satisfy The Written Description Requirement Of 35 U.S.C. § 112¶1 (D.I. 387) should be struck. Bright Response reserves the right to make additional arguments,

through, for example, motions in limine, where necessary and appropriate, concerning the untimely disclosures, arguments, and combinations on which Dr. Branting's report relies.

Dated: July 14, 2010

Respectfully submitted,

By: /s/ Elizabeth A. Wiley

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## CERTIFICATE OF CONFERENCE

I hereby certify that the meet and confer requirement of this District has been complied with as follows.

On July 9, 2010, counsel for Bright Response alerted counsel for Defendants by multiple pieces of correspondence that it intended to move to strike certain references in the report of Defendants' invalidity expert Dr. Branting Report and requested to add this issue to an already scheduled meet and confer telephonic conference set for July 9, 2010. I attended the teleconference as lead and local counsel for Bright Response that did occur that same day. The parties addressed this issue of undisclosed and unproduced prior art references, and at Defendants' request provided additional information on the list of missing references. Counsel for Google sent unproduced prior references late Friday night, July 9, 2010 and Saturday morning July 10, 2010 as the proof in support of this motion demonstrates. Attending this meet and confer was David Perlson (lead counsel for Google and AOL Defendants), Andrea Roberts, and Jennifer Ainsworth (local counsel). Attending for Yahoo were Bill Rooklidge, Jason White, and Jennifer Doan (lead and local counsel). The parties had an open discussion in which each party was allowed to express and compare views and the merits of their respective positions, with Bright Response indicating its position that the prejudice to it for no notice of new references and the late date of their production, even if the references were produced, could not be cured by a late production in light of the trial setting and the deadline for Bright Response's rebuttal report to Dr. Branting's invalidity report. Google and Yahoo did not agree to strike Dr. Branting's report as to these issues. In addition, Bright Response made clear that it intended to strike other portions of Dr. Branting's report (regarding gradient descent algorithms and logistic regression) as well as the combination of Nguyen and Watson as these bases for invalidity were not disclosed in Defendants' operative invalidity contentions. Subsequent to that notice the parties continued to discuss these issues but could not reach any resolution. Defendants have taken the position that the present motion cannot be filed - despite the deadline a mere 3 days away - as a clear attempt to use the local rules for the meet and confer process as a litigation tactic to prolong and delay the filing of the motion. Such conduct reflects bad faith conduct pursuant to Local Rule CV-7.

In summary, the parties have shared numerous pieces of correspondence and have had at least one full meet and confer regarding at least Bright Response's request to strike Dr. Branting's report for relying on undisclosed prior art - to which Defendants do not agree. Accordingly, the parties are at an impasse, leaving an open issue for the Court to resolve.

Dated: July 14, 2010

/s/ Andrew W. Spangler  
Andrew W. Spangler

**CERTIFICATE OF SERVICE**

I certify that counsel of record who are deemed to have consented to electronic service are being served this 14th day of July, 2010, with a copy of this document via the Court's CM/ECF systems per Local Rule CV-5(a)(3). Any other counsel will be served electronic mail, facsimile, overnight delivery and/or First Class Mail on this date.

\s\ Elizabeth A. Wiley  
Elizabeth A. Wiley