

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 RESPONSE TO
GOOGLE AND AOL MOTION IN LIMINE NO. 3
(DISCOVERY CONDUCT)**

Bright Response, LLC (“Bright Response”) respectfully files this response in opposition to Google and AOL’s (“Defendants”) Motion in Limine No. 3, which seeks to preclude any reference to the discovery conduct in this case. The sole premise for this motion in limine is stated as being that based on review of Plaintiff’s expert reports, Plaintiff may attempt to spend its trial time re-living the discovery disputes in this case. Mtn. at 1 (“Based on Plaintiff’s expert reports and correspondence throughout discovery...”).

On the contrary, language in the expert reports referring to information or to reports that had not been produced as of the date of the report is simply a product of the compressed time frame for expert discovery and ongoing fact discovery in the case. Bright Response also referred to this procedural reality in, for example, its Motions in Limine filed on July 22, 2010 (Dkt. No. 453), which, like the expert reports to which Google refers did, reserved the right to file additional motions in limine based on the ongoing discovery and additional expert reports not yet served. *See* Dkt. No. 453 at 2 n.1.

Indeed, source code was being produced as late as July 13, 2010,¹ even after opening expert reports were served, and expert depositions will continue until after the pre-trial conference on July 28, 2010. It is appropriate then that Plaintiff's expert reports, served at a time at which discovery was ongoing, and depositions of additional fact witnesses underway, would qualify their opinions awaiting any additional information that could still be produced. Defendants themselves, however, have made alleged non-production or inability to secure documents an issue for their defense case, by their reliance on a laches defense,² rendering their request for precluding any reference to non-production of documents at trial disingenuous. Defendants should not be permitted to accuse Plaintiff or taint Plaintiff with any fault in missing documents with regard to that defense, while at the same time seeking this Court's preclusion of Bright Response's ability to point to untimely production issues. Nor should Defendants be able to rely on this motion in limine to foreclose Bright Response's ability to proffer additional expert opinions or arguments based on additional fact discovery and expert discovery that is ongoing.

For the above-stated reasons, Google and AOL's Motion in Limine No. 3 should be denied.

¹ See Dkt. No. 426 at 6 (Plaintiff's Response to Defendants' Motion to Preclude Plaintiff from Submitting an Expert Report That Relied on Infringement Theories Not Adequately Disclosed in Plaintiff's Interrogatory Responses) and Ex. F (correspondence concerning production of source code after Plaintiff served Dr. Rhyne's expert report on July 6). Bright Response incorporates in reference that filing and all exhibits comprising docket number 426.

² See, e.g., Dkt. No. 423 (Defendants' joint response to Bright Response Motion for Summary Judgment) at 25. Bright Response disagrees that any such fact questions should be presented to the jury—much like inequitable conduct.

Dated: July 26, 2010

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that the foregoing Plaintiff's Response to Google and AOL's Motion in Limine was served by the Court's CM/ECF system on this 26th day of July 2010.

\s\ Elizabeth A. Wiley
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