

EXHIBIT P

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

BRIGHT RESPONSE, L.L.C.

v.

GOOGLE, INC., ET AL.

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§

Civil Action No. 2:07-CV-00371-CE

JURY TRIAL DEMANDED

**REBUTTAL EXPERT REPORT OF DR. V. THOMAS RHYNE
PURSUANT TO RULE 26(a)(2)(B) OF
THE FEDERAL RULES OF CIVIL PROCEDURE
(VALIDITY OF THE ASSERTED CLAIMS OF THE '947 PATENT)**

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3.4 EZ Reader¹² Is Not Prior Art

113. As I noted above, I understand that it is undisputed that the Asserted Bright Response Claims are entitled to a priority date of April 3, 1997, the date when Provisional Application No. 60/042,494 was filed. The EZ Reader project was developed by the inventors of the '947 patent, so it cannot be prior art under 35 U.S.C. § 102(a). Thus, in order to be prior art under 35 U.S.C. § 102(b), the EZ Reader project must have been in public use before April 3, 1996.

114. In my opinion, there is consistent evidence that shows that EZ Reader was not in public use before April 3, 1996. For example, Amy Rice's declaration states that the EZ Reader project was still experimental until at least June 1996. *See* RICE001404 at ¶ 10-11 and the Rice Deposition Transcript at 30:22-31:6. In fact, Ms. Rice testified that the EZ Reader project did not even have the ability to send email until mid-June 1996. Also, on Friday, March 29, 1996, Ms. Rice sent an email to various people at Chase Manhattan Bank expressing pleasure that the EZ Reader project was "now approved for production installation at Chase." *See* RICE001471. Based on my experience with the development of complex software systems, that email indicates to me that as of late March 1996 EZ Reader was not yet installed in Chase's production systems. Given that the message was sent on a Friday afternoon and that it described a schedule for implementation over the next several weeks, I find that email to be consistent with Ms. Rice's testimony.

115. Ms. Rice further testified that, despite the incorrect representation in the AAI EZ Reader article, the EZ Reader project was not actually deployed into public use in that time frame. *See* the Rice transcript at 44:9-45:13 and RICE001405 at ¶ 12. The representation in the AAI EZ Reader article was made with at least the knowledge of one of the chairs of the IAAI program in 1996. *See* the email string forwarded by Julie Hsu to Chuck Williams, copying Amy Rice, dated June 12, 1997.

116. I also find that the deposition testimony of Anthony Angotti is consistent with Ms. Rice's testimony. Mr. Angotti testified that in the first quarter of 1996, a version of the EZ Reader

¹² I understand that Bright Response contends the Defendants have not fully charted the EZ Reader project in their P.R. 3-3 Invalidity Contentions (including any supplementations). To the extent that the Court permits the Defendants to amend their invalidity contentions, I reserve the right to supplement this report to address any such supplementations permitted by the Court.

project was deployed into a production environment to “handle real customer emails” so that it could be legitimized in the minds of the project’s stakeholders. See the Angotti transcript at 65:19-66:19. However, Mr. Angotti never testified that the installed version of the EZ Reader project was, in fact, sending responses to actual customers in the first quarter of 1996. Indeed, in June 2004, Mr. Angotti declared that he did not recall when system was fully deployed such that it was automatically sending emails back to customers. See ANGOTTI000003 at ¶ 7. Another inventor, Ms. Hsu, similarly declared that she did not recall when the EZ Reader project was deployed. See GOOG1689853 at ¶ 6. In fact, although the original draft of the declaration of Ms. Hsu's declaration provided by counsel for Google indicated that the EZ Reader project was deployed in the first quarter of 1996, Ms. Hsu made counsel for Google alter the declaration to indicate that she did not recall the deployment date. See GOOG1689873.

117. Furthermore, Ms. Rice testified that, as far as she knew, the EZ Reader project was never actually deployed to respond to live emails. See the Rice transcript at 30:22-31:6 and RICE001405 at ¶ 12. I also note that the February 5, 1996 version of the EZ Reader User’s Guide and Reference Manual (JPM00313-351 and JPM00001-21) contained the following statement on page 57 (JPM00017):

After quality is initially verified, we envision sending automatic responses directly to customers without human intervention. In order to deliver messages directly back to customer, we need to do a technical assessment of whether the delivery should take place directly from EZ Reader or be done through Lotus Notes.

The statement shows that as of February 1996, the “quality” of the EZ Reader project was yet to be verified, and that the delivery of messages “directly back to the customer” required additional “technical assessment.”

118. I understand that a witness retained by the Defendants, Chuck Williams, has provided testimony that he believes the EZ Reader project was placed in public use between March 29, 1996 and April 3, 1996. Mr. William’s testimony is based in part on an email indicating that Chase’s website was going “live” the weekend of March 30. See the Williams deposition (rough) at 49:5-50:10 and 75:12-79:24; and the email string from Dan Welch to Chuck Williams dated March 28, 1996 (“Actually this weekend they are going to turn on the Chase Web site for the first time”). Mr. Williams provided no clear evidence that turning on the Chase website

is related to the EZ Reader project or more relevantly public use of EZ Reader in this timeframe, and his testimony on this issue is equivocal and inconsistent with the evidence above. Therefore, it is my opinion that there is no clear and convincing evidence that the EZ Reader project is prior art to the '947 patent.

3.5 GREBE and Claim 26

119. Preliminarily, I note that Dr. Branting does not allege that his GREBE legal reasoning system (simply “GREBE” herein) anticipates any of the Asserted Bright Response Claims other than claim 26. I also note that claim 26 is not being asserted against the Defendants on its own.

120. In ¶ 191 of his report, Dr. Branting points to page 61 of his dissertation as support for his assertion that GREBE performs the step of “receiving an electronic message.” I note, however, that Step 26(a) reads as “receiving the electronic message,” (emphasis added), where the use of “the” – rather than “an” as Dr. Branting rewrote that limitation – refers for its antecedent to the “non-interactive electronic message” of the Preamble of claim 26. In rewriting that limitation of Step 26(a), it appears that Dr. Branting does not understand how antecedence is shown in the limitations of a patent claim.

121. With respect to Dr. Branting’s citation to page 61 of his dissertation (*see* the Branting Report at ¶ 193), I note that the cited page refers to the “explanation generator” of the GREBE system. This subsystem is also shown in Figure 3.1 of Dr. Branting’s dissertation. The explanation generator is described on page 61 of the dissertation as “transform[ing] the inference path into a natural language,” a description that emphasizes the “generator” nature of that subsystem.

122. In ¶ 193 of his report, Dr. Branting opines regarding the “retrieving predetermined responses” limitation of Step 26(c) that “GREBE retrieves predetermined responses based on the interpretation of the incoming fact pattern. Specifically, GREBE determines the explanations that apply to the particular fact pattern, then converts those explanations into natural-language equivalents. (Grebe 61.)” *Also see* Exhibit 3 at page 78. I note that Dr. Branting provides no explanation as to how (or if) the GREBE system retrieves predetermined responses from a repository as required by Step 26(c). Moreover, Dr. Branting's statements clearly refer to the explanation generator of the GREBE system. I note, however, that the GREBE explanation