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

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

**BRIGHT RESPONSE, LLC'S RESPONSE TO DEFENDANTS' JOINT MOTION *IN LIMINE* NO. 6: MOTION TO EXCLUDE EVIDENCE AND ARGUMENT THAT ALLEN DOES NOT DISCLOSE A "NON-INTERACTIVE ELECTRONIC MESSAGE"**

Plaintiff Bright Response, LLC ("Bright Response") respectfully files this response to Defendants' Joint Motion *In Limine* No. 6 seeking to exclude evidence and argument that the Allen patent does not disclose a "non-interactive electronic message."

As disclosed in Dr. Rhyne's report, it is his opinion that "the Allen system is designed to operate interactively with a user." Weiss Decl. Ex. A at ¶ 54. Dr. Rhyne then contrasts the interactive question and answer nature of Allen with the non-interactive system taught by the asserted claims of the '947 patent. *Id.* When the disclosure of the Allen patent is considered as a whole, rather than out of context, Dr. Rhyne opines that "Allen fundamentally describes an interactive system that requires the user or customer service representative to interact with the system to identify the 'best' case." *Id.* at 56. Defendants mischaracterize Dr. Rhyne's opinion and take it out of context (as they do with the Allen patent) to assert that Dr. Rhyne admitted that the Allen patent discloses processing non-interactive electronic messages. Dr. Rhyne never admitted that the Allen system discloses processing non-interactive electronic messages.

Defendants' reliance on *Hewlett-Packard Co. v. Mustek Sys.*, 340 F.3d 1314, 1326 (Fed. Cir. 2003) is also misplaced. The issue in *Hewlett-Packard* was that the prior art "sometimes, but not always, embodies a claimed method." *Id.* It is Dr. Rhyne's opinion, however, that the

Allen patent describes a system that is ***designed*** to be interactive. Weiss Decl. Ex. A at ¶ 53-56. It is Dr. Rhyne's opinion, and Bright Response's argument, that the Allen patent never embodies the non-interactive electronic message element of the asserted claims, not that it only sometimes does.

Furthermore, Defendants requested relief is to exclude any evidence that does not support their argument. Even if Defendants' position regarding Dr. Rhyne's alleged admissions is convincing (which it is not), Bright Response should not be excluded from raising any evidence contrary to Defendants' position. For example, Defendants' expert, Dr. Branting, relied solely on column 9, lines 19-29 of the Allen to support to support his opinion that Allen discloses a non-interactive electronic message. Weiss Decl. Ex. B at ¶ 113, 115; Weiss Decl. Ex. B, Branting Ex. 3 at 1. Mr. Allen, the first named inventor of the Allen patent and Defendants' consultant, however, testified that most of the specification after column 8, line 19 discussed interactivity. Weiss Decl. Ex. C at 56:5-8 ("At this point, you know, I think if we go down beginning at line 19 and column eight, the description switches to talking about ways in which interactivity may occur."). This evidence, and other contradictory evidence and argument, should not be excluded simply because it contradicts with Defendants' theory of the case.[1]

For the foregoing reasons, Defendants' Motion *In Limine* No. 6 should be denied as moot.

Dated: July 26, 2010

Respectfully submitted,

By: /s/ Andrew D. Weiss

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[1] Defendants assert that Bright Response's theory is "legally erroneous." Aside from making this assertion, Defendants provide no argument to support why they facts such as Mr. Allen's testimony are "legally erroneous."

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**CERTIFICATE OF SERVICE**

I certify that on this date, July 26, 2010, I am serving counsel for Defendants, with a copy of this document and the attached exhibits pursuant to Fed. R. Civ. P. 5 by electronic mail.

\s\ Andrew D. Weiss