

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

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 SURREPLY IN OPPOSITION TO DEFENDANTS'  
MOTION FOR SUMMARY JUDGMENT OF INVALIDITY UNDER 35 U.S.C. § 102(b),  
(e), AND § 103(a)**

Plaintiff Bright Response, LLC ("Bright Response") respectfully files this short surreply to address some important mischaracterizations in Defendants' Reply regarding the Allen reference.

First, Defendants assert that Dr. Rhyne agrees that Allen discloses a "non-interactive electronic message" and there is therefore no genuine issue of material fact. Defendants' mischaracterize Dr. Rhyne's opinion. 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 have failed to show by clear and convincing evidence that the Allen patent is enabling regarding the relevant alleged disclosure. *Sanofi-Synthelabo v. Apotex, Inc.*, 550 F.3d 1075, 1082 (Fed. Cir. 2008).

Second, Defendants' argument with respect to classifying the electronic message also must fail because it does not take into account the actual claim language that clearly requires a source (*e.g.*, the "user") and a different human operator. Allen does not disclose assistance from a human operator. Defendants take the new position that Allen at 10:17-23 and 10:32-39 disclose this limitation of Step 28(b1) of the '947 patent. These paragraphs of Allen, however, simply describe the user (*i.e.*, the "source") entering new case data. Indeed, it is unclear that these paragraphs disclose classifying the non-interactive electronic message at all. Defendants also fundamentally mischaracterize Bright Response's position and Dr. Rhyne's opinion. Step 28(b1) can be infringed when, in a particular instance, either subpart (i) or subpart (ii), or both, is met. The Allen patent does not disclose at least Step 28(b1). As discussed above, Allen describes an interactive system, and does not classify a non-interactive electronic message. Also, Mr. Allen, the first named inventor and Defendants' own consultant, clearly and equivocally testified that his patent did not "describe classifying a message for human review." Weiss Decl. Ex. B at 88:19-25.

Third, as shown in the Response, the match table is not optional, and Defendants have no evidence that all cases would be scored if there were no match table. In fact, Mr. Allen testified that the embodiment of his invention that did not have a match table would still only score "those which have attribute value hits," which may be "a subset of the total number of exemplar cases in

the case base." Weiss Decl. Ex. B at 92:14-19. Further, even if the User's Guide for CBR Express 2.0 could be combined with Allen in an obviousness combination, the cited portion of the reference mentions nothing about *scoring* as required by Step 30(b6).

Dated: July 27, 2010

Respectfully submitted,

By: /s/ Andrew D. Weiss  
Marc A. Fenster, CA SB # 181067  
E-mail: [mfenster@raklaw.com](mailto:mfenster@raklaw.com)  
Alexander C.D. Giza, CA SB # 212327  
Email: [agiza@raklaw.com](mailto:agiza@raklaw.com)  
Stanley H. Thompson, Jr., CA SB #198825  
Email: [sthompson@raklaw.com](mailto:sthompson@raklaw.com)  
Adam S. Hoffman, CA SB # 218740  
Email: [ahoffman@raklaw.com](mailto:ahoffman@raklaw.com)  
Andrew Weiss, CA SB # 232974  
Email: [aweiss@raklaw.com](mailto:aweiss@raklaw.com)  
RUSS, AUGUST & KABAT  
12424 Wilshire Boulevard, 12th Floor  
Los Angeles, California 90025  
Telephone: 310/826-7474  
Facsimile: 310/826-6991

Andrew W. Spangler, TX SB # 24041960  
Email: [spangler@spanglerlawpc.com](mailto:spangler@spanglerlawpc.com)  
SPANGLER LAW P.C.  
208 N. Green Street, Suite 300  
Longview, Texas 75601  
Telephone: 903/753-9300  
Facsimile: 903/553-0403

David M. Pridham, R.I. SB # 6625  
Email: [david@pridhamiplaw.com](mailto:david@pridhamiplaw.com)  
LAW OFFICE OF DAVID PRIDHAM  
25 Linden Road  
Barrington, Rhode Island 02806  
Telephone: 401/633-7247  
Facsimile: 401/633-7247

Patrick R. Anderson, MI SB #P68961  
Email: [patrick@prapllc.com](mailto:patrick@prapllc.com)  
PATRICK R. ANDERSON PLLC  
4225 Miller Rd., Bldg. B-9, Suite 358

Flint, Michigan 48507  
Telephone: 517/303-4806  
Facsimile: 248/928-9239

Alan Brooks, TX SB # 24064952  
Email: [alan@alanbrookspllc.com](mailto:alan@alanbrookspllc.com)  
ALAN BROOKS LAW FIRM, PLLC  
1317 California Pkwy, South  
Fort Worth, Texas 76134  
Telephone: 682/521-0692

Elizabeth A. Wiley, TX SB # 00788666  
Email: [lizwiley@wileyfirm.com](mailto:lizwiley@wileyfirm.com)  
THE WILEY LAW FIRM  
P.O. Box. 303280  
Austin, Texas 78703-3280  
Telephone: 512/560-3480  
Facsimile: 512/551-0028

John C. Hueston, CA SB # 164921  
Email: [jhueston@irell.com](mailto:jhueston@irell.com)  
IRELL & MANELLA, LLP  
840 Newport Center Drive, Suite 400  
Newport Beach, California 92660  
Telephone: 949/760-0991  
Facsimile: 949/760-5200

Adam S. Goldberg, CA SB # 250172  
Email: [agoldberg@irell.com](mailto:agoldberg@irell.com)  
IRELL & MANELLA, LLP  
1800 Avenue of the Stars, Suite 900  
Los Angeles, California 90067  
Telephone: 310/203-7535  
Facsimile: 310/203-7199

**Attorneys for Plaintiff**  
**BRIGHT RESPONSE, LLC**

**CERTIFICATE OF SERVICE**

I hereby certify that the counsel of record who are deemed to have consented to electronic service are being served on July 27, 2010 with a copy of this document via the Court's CM/ECF system per Local Rule CV-5(a)(3). Any other counsel of record will be served by electronic mail, facsimile transmission and/or first class mail on this same date.

Dated: July 27, 2010

/s/ Andrew D. Weiss  
Andrew D. Weiss