

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 REPLY IN RESPONSE TO PLAINTIFF'S EMERGENCY  
MOTION TO STRIKE PORTIONS OF DEFENDANTS' INVALIDITY EXPERT  
REPORT AND DEFENDANTS' SUMMARY JUDGMENT BRIEFING**

Plaintiff Bright Response, LLC ("Bright Response") respectfully files this reply in support of its motion to strike portions of Defendants' invalidity expert report and Defendants' summary judgment briefing.

**I. DEFENDANTS ADMIT THAT EZ READER AS A SYSTEM WAS NEVER CHARTED AND SHOULD THEREFORE BE STRUCK.**

Although Defendants argue at length as to the discovery efforts they have taken to show that the EZ Reader project was in public use one year prior to the April 3, 1997 priority date for the '947 patent, Defendants never charted the EZ Reader project as a reference pursuant to P.R. 3-3(c) nor did it offer any explanation for its failure to comply with Court rules. Defendants' justification for their reliance on the uncharted EZ Reader project reference does not excuse their failure to comply with the Court's local patent rules. For this reason alone, Defendants' reliance on the EZ Reader project in their motion for summary judgment as well as the opinion of Dr. Branting should be struck.

Furthermore, Defendants' stated justification that Bright Response was on notice of Defendants' assertion that the EZ Reader project invalidates the '947 patent are misplaced. Bright Response does not dispute that Defendants sought some discovery to develop evidence

that the EZ Reader project was in fact publicly deployed prior to April 3, 1996. But Defendants were never able to do so. Although Defendants' Response implies that Defendants were able to gather evidence supporting their position, the evidence cited by Defendants does not do so. For example, Ms. Hsu expressly declared that she did "not recall when the EZ Reader application was deployed." Roberts Decl. Ex. H at ¶ 6.<sup>1</sup> Mr. Klahr's declaration is similarly unhelpful to Google because among other things at deposition, Mr. Klahr testified that he does not have any personal knowledge regarding the EZ Reader project. Weiss Decl.<sup>2</sup> Exhibit B at 21:18-20. Because Defendants failed to gather the clear and convincing evidence they needed to show that the EZ Reader project was actually in public use and Defendants supplemented their invalidity contentions on other prior art, but not the EZ Reader project, Bright Response reasonably believed that Defendants had no intent to rely on the EZ Reader project.<sup>3</sup> Indeed, Dr. Branting apparently felt so uncomfortable about Defendants' position regarding the EZ Reader project, he simply assumes that the EZ Reader project was deployed and considered none of the evidence related to the issue. Weiss Decl. Exhibit A at ¶ 15.

Thus, while Defendants chart the EZ Reader article, the charts attached to Defendants' invalidity contentions clearly and explicitly charted the EZ Reader article only. Defendants'

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<sup>1</sup> Counsel for Google asked Ms. Hsu to sign a declaration actually supporting Defendants' argument regarding the deployment of the EZ Reader project, but Ms. Hsu refused: "I do not remember when it was deployed, and none of the documentation I have states the exact date and given the fact that Amy Rice claims it wasn't deployed then, I cannot say for certain that it was deployed during the 1st quarter.... It could have been that we submitted the paper and the application was scheduled to be deployed in the 1st quarter, but then got delayed into 2nd quarter." Weiss Decl. Exhibit C at GOOG1689873.

<sup>2</sup> "Weiss Decl." refers to the Declaration of Andrew D. Weiss in support of Reply in Response to Plaintiff's Emergency Motion to Strike Portions of Defendants' Invalidity Expert Report and Defendants' Summary Judgment Briefing, filed concurrently.

<sup>3</sup> Defendants' citation to the their amended answers served in May have no bearing on this analysis. First, Defendants supplemented their invalidity contentions after the filing of their amended answers. Second, using the EZ Reader project as the basis of an inequitable conduct claims, among 3 other alleged bases for inequitable conduct, does not change the fact that Defendants never specifically charted the EZ Reader project in their invalidity transactions.

invalidity contentions do not chart the EZ Reader project, nor do they chart the EZ Reader project using multiple references including the EZ Reader article and EZ Reader User's Guide and Reference Guide. Bright Response has been prejudiced by Defendants' failure to comply with P-R 3-3(c), and Defendants' reliance on the EZ Reader project should be struck.<sup>4</sup>

**II. THE OTHER SEVENTEEN UNPRODUCED REFERENCES AND THE NGUYEN-WATSON COMBINATION SHOULD ALSO BE STRUCK.**

Again, Defendants do not dispute that they have failed to produce numerous references and the Nguyen-Watson combination on their various invalidity contentions. Instead, Defendants seek to minimize their failure by asserting that the references are merely for background, or cited in passing. One of the unproduced references, however, is cited by Dr. Branting as an "Exemplary Prior Art Reference." Weiss Decl. Exhibit A at TOC. While Bright Response agrees that Dr. Branting may not rely on any references in his "background sections," Dr. Branting should not be allowed to rely on these undisclosed references for any reason whatsoever, including as background.

The same arguments apply to Dr. Branting's reliance on the combination of the Nguyen and Watson references. Defendants notably do not indicate that Dr. Branting will not be relying on this combination at trial. The combination was undisclosed and should be struck.

**III. THE GRADIENT DESCENT ALGORITHMS AND LOGISTIC REGRESSION OPINION OFFERED BY DR. BRANTING IS NOT MOOT.**

Although Defendants claim that Dr. Branting's opinion in Section IX will be withdrawn, Defendants have not done so. Defendants should be ordered to withdraw this section immediately.

**IV. BRIGHT RESPONSE DID NOT FAIL TO MEET AND CONFER.**

Defendants' representations that Bright Response did not meet and confer in good faith with Defendants on these issues is simply false. Bright Response raised these issues prior to a

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<sup>4</sup> Defendants' complaint that Bright Response did not move fast enough in filing its motion to strike the EZ Reader project in footnote 3 of its Response is irrelevant. Furthermore, it is ironic to note that Bright Response did not move fast enough in raising this issue but should have waited, to Bright Response's prejudice, before filing its motion.

telephonic meet and confer and Defendants refused to take a position or commit to a timeline to take a position. Instead, Bright Response made its position clear, and Defendants continued to refuse to take a position. Roberts Decl. Ex. P. Given the extremely short deadlines in this case and the continued harm that Bright Response has suffered as a result of Defendants' failure to comply with the Court's rules, Bright Response had no choice but to go ahead and file its motion. Given Defendants' response to Bright Responses motion, it is clear that further delay in filing the motion would not have resolved the issues.

## V. CONCLUSION

For all these reasons and the reasons in the Bright Response's motion on this issue, the Court should grant Bright Response's motion to strike portions of defendants' invalidity expert report and defendants' summary judgment briefing.

Dated: July 27, 2010

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I certify that on this date, July 27, 2010, I am serving counsel for Defendants, with a copy of this document via ECF.

\s\ Andrew D. Weiss  
Andrew D. Weiss