

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 MOTION FOR CONTINAUNCE

At 11:12 a.m., Sunday, August 1, 2010, and less than 24 hours before trial, Google served Bright Response with supplemental disclosures. In those disclosures, Google identified, for the first time, two never-before-disclosed witnesses.¹ Neither is newly discovered. One is Google's damages expert from the *Function Media* trial, Mr. Wagner.² The other is a co-worker of an inventor, Amy Rice, whom Ms. Rice identified in her deposition almost five months ago—in **March 2010**.³ Part of the reason for the eve-of-trial disclosure became clear just a few hours later. In early afternoon, Defendants informed Bright Response that they planned to move for a continuance of the trial and more trial time. It was Google alone – Yahoo did not join in the motion - that finally did so, at approximately 5:45 p.m. Google asserts that it is so prejudiced from the Angotti Declaration that it needs a continuance while Yahoo believes the case can – and should—be tried as it stands now. Google's motion is not about prejudice. It is about Google's failure to prepare its case. Bright Response should not be penalized for what Google failed to

¹ Wiley Decl. Ex. A (email showing time).

² Wiley Decl. Ex. B (supplemental exhibits list); Ex. C.

³ Wiley Decl. Ex. D (excerpt Amy Rice depo).

do. Google actions belie the truth – namely that Google simply is not ready to try its case before a jury.

Google asserts two reasons - on the eve of trial – for why a continuance is necessary. Google bases its arguments for a continuance on the reasons set forth in the Motion for Sanctions filed earlier this week and heard at the July 28, 2010 pre-trial conference. To support its request for extra time to try this case, Google’s arguments are that the Yahoo and Google cases are “very different” and that the “precise parameters of this case remain uncertain.” Either way, Bright Response can only question the motive behind Google’s timing. Nevertheless, as to the former, any such issue of a continuance could have been raised in open court at the pre-trial conference, the day after the pre-trial conference, or two days after the pre-trial conference—Friday, the last business day before the start of trial. Google waits to the eve of trial, when Bright Response counsel should be focused on opening statements to the jury and putting on its first witness.

Google could have even filed the motion on Saturday but it chose not to. And not only did Google not file the motion – it did not bother to inform Bright Response that intended to seek relief. The fact that this was purposeful can be clearly seen from Google’s own motion that states that trial was two days away (Motion at 2) – proving that Google knew it was going to file, and had even begun drafting, a motion for continuance.

As to the latter reason, that the parameters of the case are “uncertain” based on the Court’s summary judgment rulings, is simply untrue and reflects yet again that Google is not prepared to try this case. Google should have been preparing to try their entire non-infringement case against Bright Response in any event, which included doctrine of equivalence theories. Moreover, the notion of a “very different case” against Google and Yahoo is stripped of all merit if Bright Response prevails on its motion for reconsideration. Indeed, if the theories as to

Google and Yahoo do coincide again—if the Court’s grants Bright Response’s Motion—Google’s "very different" becomes meritless. The case becomes, by Google’s own admission, only more efficient with the exact same theories as to both Yahoo and Google.

Any uncertain parameters are of Google’s own making and uncertainty about its own case. Bright Response, by contrast, has actually made the parameters for trial must *less* uncertain. Bright Response has dismissed one defendant, AOL, meaning that the same counsel for Google defending AOL no longer must expend resources on that front. Bright Response has dropped two claims. Bright Response, as part of exhaustive meeting and conferring, has drastically narrowed its deposition designations. Now, upon sharing all this information with Google, Google knows how Bright Response is planning to try its case—very efficiently with a focus on key issues.

Google is not allowed a do-over at this late date. The fact that Google is not ready, and does not know its case well enough to focus on key issues to try it efficiently, must not prejudice Bright Response. And the prejudice to Bright Response in granting a continuance at this late date is tremendous.

I. The Prejudice of Granting A Continuance Is Significant, With Consequences Even for Other Cases And Other Parties.

A. Financial Prejudice: Counsel, Staff, Experts and Other Witnesses.

To say that a continuance would result in serious financial prejudice to Bright Response would be an incredible understatement. As the Court is aware, patent trials require vast resources that require large capital investments. The vast majority of those investments are no longer recoverable. For example, Bright Response has assumed the cost of flying attorneys from Irell & Manella, LLC and Russ August & Kabat from Los Angeles, California. Mr. David Pridham traveled from Rhode Island. Numerous support staff traveled from Dallas, Texas.

Bright Response's Manager, Mr. Brad Sheafe, traveled from Illinois, and one of the inventors of the '947, Mrs. Amy Rice, traveled from Connecticut. All of this travel was at the expense of Bright Response.

Hard, non-recoverable travel costs are not limited to planes and automobiles. They extend further and have far-reaching ramifications. Bright Response has had attorneys and staff from all across the country in hotel rooms for nearly a week in preparation for the pre-trial conference and trial. Bright Response has arranged for food, lodging, and other miscellaneous expenses throughout the entire time they have been working on trial preparation. All of these costs are not recoverable.

Further, technical experts in patent cases do not come cheap. Bright Response has arranged for travel, food, and lodging for its experts as well. The costs associated with these persons includes billing rates for numerous hours every day. These costs also are not recoverable. In sum, Bright Response has incurred approximately **\$250,000** in costs, fees, expenses and attorney time over the past few days. Almost all of this amount is not recoverable. The whole process will need to start again were the trial to be continued. The fact that *Yahoo opposes the continuance*—and Google alone wants the continuance—does not lessen the prejudice to Bright Response.

B. Scheduling Prejudice: Other Parties, Other Litigation Affected.

Bright Response is not the only party that would be prejudiced. In other cases, for example *The PACid Group, LLC v. Apple, Inc. et al.*; No. 6:09-cv-00143 (E.D. Tex.) (Tyler Division), the exact same trial team as the one before the Court for Bright Response is involved. *See* Wiley Decl. Ex. Knowing the Court's schedule, the trial team approached the defendants in the PACid litigation—which include Intel, Broadcom, Marvell, and Atheros - for modifications of the DCO.

Wiley Decl. After much negotiating, the parties were able to agree with opposing counsel respecting the demands that trial preparation places on counsel. *Id.* The modifications – and extensions – were *based almost exclusively* on the trial before the Court. For example, because Bright Response’s damages expert in this case is also in the PACid litigation, Dr. Becker could not be preparing for and testifying at trial in this case while at the same time finishing his expert report in the PACid case, which is August 27, 2010. A continuance now will result in expert report deadlines, summary judgment briefing deadlines, and deposition deadlines taking place very near – or even at the exact same time - as this trial. This works an unbelievable hardship on not only Bright Response’s counsel but also its client.

II. No Justification For More Trial Time—The Case Is Far More Narrowed And Simplified—Even For Google.

Having addressed Google’s unwarranted request for a continuance, Bright Response turns to Google’s request for additional time. Google’s request is ostensibly based on the volume of witnesses and the difference between direct infringement and infringement by way of doctrine of equivalents.

First, as to the witnesses, Google says it needs more trial time because there are fourteen live witnesses and eleven witnesses by deposition. Google does not need more time - it just needs to know its case. This Court has seen numerous patent trials with far more truly contested issues than the narrow ones in this case. It is not uncommon for a party to put on a corporate witness, one to two liability experts, and a damages expert. This would reduce the number of live witnesses to 7 to 8 – not 14. The fourteen witnesses is not a function of actual need. It is a function of Google’s inability to focus its case on the merits and the issues that really matter. Had Google not taken the approach of throwing everything possible at the wall to see what

would stick in the end, it would easily be able to try its case within the time limits the Court has provided.

Bright Response must prove up its case against two Defendants with two different products and two different damages' calculations. Bright Response represented it could present its case in 13 hours. It stands by that statements and hereby announces ready. If Bright Response can prepare its case against both Defendants, then it is not unreasonable to expect Google to defend its case in the same manner.

The second reason Google asserts warrants extra time is that Yahoo has direct infringement claims and Google has doctrine of equivalents issues. The idea that these facts give rise to "very different cases" is ingenious but simply untrue. The only issue regarding doctrine of equivalence relates to a single claim element. Google's assertion that proving infringement by doctrine of equivalents for one claim element only warrants more time is untenable.

The events leading up to the filing also reflects a purposeful attempt to prejudice Bright Response. After numerous phone calls and correspondence, the parties reached agreement regarding the dismissal of AOL, Inc. After numerous phone calls and correspondence, the parties reached a stipulation regarding Claims 28 and 38 – and the dropping of them from the case. After all of this work – and not five minutes after the filing regarding each, Google files its motion. Thus, after dropping one party and two claims, which narrows the case, Google asks this Court to expand the case.. Such conduct should not be rewarded.

More telling is Google's own representations and positions in the related and earlier case *nXn Tech, LLC v. Google Inc., et al.*, at a March 1, 2010 pre-trial hearing in Washington D.C., before Judge Rader. This is the same pre-hearing on which Google counsel relied, at the July 28, 2010 pre-trial hearing in this case, for statements on the record that Judge Rader made. Judge

Rader allowed the parties **four trial days** for that case, and denied Yahoo's and Google's Motions for Bifurcation to allow each case to proceed separately against Yahoo and Google. *See* Wiley Decl. There was no concern expressed there before Judge Rader as to inadequate trial time; Judge Rader recognized that the timing would be challenging, but urged all counsel to cooperate to get the trial done in that finite time.

III. Defendants Have Been Wasting Bright Response's Time And Resources When They Could Be Focused On Narrowing Their Own Case for Trial.

Over the past few days, Defendants have done everything possible to keep Bright Response from preparing the case it wants to try. First, less than 48 hours before trial, Google began to designate – with no warning – exhibits with the name “SmartASS” redacted. Google's basis is that the Court would not appreciate the use of the term in the Courtroom. Although Bright Response believes that disclosure of the name to the jury is appropriate so that the jury understands Google's irreverent mindset, Bright Response wishes to respect the integrity and preferences of the Court and will proceed accordingly.

However, Google raised this issue at the last second only *after* the pre-trial conference. Google cannot stand before this Court and credibly argue that it did not know SmartAss has been accused in this case for years. Rather than raise the issue while exhibits were being gathered and designated, Google waits until after objections have been made, discussed, withdrawn, *etc.* before sending redacted copies. Moreover, Google has stated it cannot even complete its redaction for Bright Response review until *midnight* – or less than 8 hours before trial.⁴ To say this requires a transfer of resources would be an understatement.

⁴ Bright Response will give credit where it is due. Google produced the new exhibits by 10:00 p.m. rather than midnight.

But it does not end there. As set forth in the introduction above, Google provided a brand new set of “initial” disclosures less than 24 hours before trial. In those disclosures, Google identifies two brand new witnesses: Mr. Whearly and Dr. Wagner. Wiley Decl. Exh B, C. Google provided no explanation for these surprise witnesses until Bright Response demanded a meet and confer on the issue. To be clear, neither witness had been disclosed before; neither had been deposed; and neither had produced documents. After finally having a meet and confer on Sunday afternoon, August 1, 2010, counsel for Google, Mr. David Perlson stated to Bright Response counsel Andrew Spangler that the names were added because:

- (1) Google had learned Mr. Whearly’s contact information “a few days ago” and he might be able to appear even though Google had not talked with him before; and
- (2) Dr. Wagner was somehow relevant because Bright Response had made him relevant after the pre-trial.

Google refused to withdraw those witnesses. *Id.* Bright Response has no choice but to raise this issue with the Court and reveal more of Google’s conduct.⁵

The gamesmanship in this regard is astounding. It is curious indeed that although both Defendants opposed the reconsideration motion that Bright Response filed concerning the admission of the reexamination proceedings, the parties were able to work out this same issue by stipulation over the weekend. The eagerness of Google to finalize a stipulation that would simplify the case—and its invalidity case—is very much at odds with its arguments in its Motion. Indeed, Google was hurrying Bright Response to get the stipulation on file concerning Bright Response’s dropping claims 28 and 38 (and greatly simplifying the case), Google was putting the finishing touches on the motion for continuance complaining that the case was too

⁵ Bright Response will request that the Court strike these new disclosures at the evidentiary hearing following voir dire on August 2, 2010.

complex and too time-intensive to justify the current trial schedule. Email exchanges with Mr. Pridham confirm this. For example, the email exchange shows that the parties had agreed to resolve this issue with stipulation, and Mr. Pridham has emailed opposing counsel a proposed version at 4:37 p.m. Wiley Decl. Ex. E (series of emails). Mr. Perlson followed up at 5:21 to ask if everyone agreed. He stated if he did not receive an answer soon, Google would just proceed with filing a response. Phone calls continued, and, all the while, Google was just waiting to file the motion after the stipulation was on file.

From: David Perlson <davidperlson@quinnemanuel.com>
To: Marc Fenster; 'Rooklidge, William' <RooklidgeW@howrey.com>; David Pridham
Sent: Sun Aug 01 16:26:55 2010
Subject: stipulation re claims 28 and 38.DOC

I have not heard back from Yahoo! yet, but to move the process along I have accepted David's changes (and set up for signature). Per my discussion with David, Plaintiff does not seek through the addition of the "when relevant" language to preclude Defendants from using the reexamination for purposes relevant to its case and in particular the findings regarding Claims 26 and 28.

Do I have everyone's ok? If so, we can file.

David

And file Google did. But it was a Motion for Continuance it filed, just four minutes after the stipulation was on file, and the afternoon before trial.

CONCLUSION

Bright Response respectfully requests that the Court deny Google's request for a continuance and for more trial time.

Dated: August 1, 2010

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that counsel of record who are deemed to have consented to electronic service are being served this 1st day of August, with a copy of this document via the Court's CM/ECF systems per Local Rule CV-5(a)(3). Any other counsel will be served electronic mail, facsimile, overnight delivery and/or First Class Mail on this date.

\s\ Elizabeth A. Wiley
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