

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 MOTION TO STRIKE GOOGLE INC.'S WITNESSES
WHEARLEY AND WAGNER DISCLOSED ON AUGUST 1, 2010**

Bright Response, LLC files this motion to strike both of the newly-disclosed witnesses Google identified the day before trial, on Sunday August 1, 2010. As already set forth in Bright Response's response to the Google Motion for Continuance, which Bright Response incorporates by reference, Bright Response received from Google August 1, 2010, supplemental disclosures. In those disclosures Google identified, for the first time, two never-before-disclosed witnesses. Neither of them is new and undiscovered. One of them is Google's damages expert from the *Function Media* trial, Mr. Wagner. *See Function Media, L.L.C. v. Google Inc.*, 2010 WL 272409, at *2 (E.D. Tex. Jan. 15, 2010). The other, Mr. Whearley, is a co-worker of one of the inventors, Amy Rice, whom Ms. Rice identified in her deposition almost five months ago—in March 2010.¹ Because the prejudice from disclosing new witnesses on the eve of trial is readily apparent and significant, there is no adequate remedy except to strike the witnesses and preclude Google from calling these witnesses for trial. *See Fed. R. Civ. P. 37(c)(1)*. Accordingly, Bright

¹ Bright Response also incorporates by reference the exhibits that Bright Response filed in support of its response to the motion to continuance, which demonstrate Google's knowledge of these witnesses, including the excerpt from Ms. Rice's deposition and the supplemental disclosures.

Response requests that the Court enter an order precluding Google from calling or relying on these witnesses in any way.

Dated: August 2, 2010

Respectfully submitted,

By: /s/ Elizabeth A. Wiley

Elizabeth A. Wiley

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CERTIFICATE OF CONFERENCE

I hereby state that the local rules of this District were complied with as follows. I asked for a meet and confer with counsel for Google, Mr. David Perlson, and discussed the issue on Sunday August 1, 2010. I asked that Google withdraw the newly disclosed witnesses. He did not agree, as set forth as well in the text of Bright Response's Response to the Motion for Continuance. Therefore, no agreement was reached on this issue of withdrawing the newly disclosed witnesses, presenting an issue for the Court.

/s/ Andrew W. Spangler
Andrew W. Spangler

CERTIFICATE OF SERVICE

I certify that counsel of record who are deemed to have consented to electronic service are being served this 2nd 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
Elizabeth A. Wiley