

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 FOR JUDGMENT AS A MATTER OF LAW
THAT THE RICE PATENT IS NOT INVALID**

Plaintiff Bright Response, LLC (“Bright Response”) files this Motion for Judgment as a Matter of Law (“Motion”) as a supplement to its earlier pre-verdict rule 50(a) Motion presented to the Court on August 7, 2010, before the Court submitted the case to the jury.

I. PROCEDURAL BACKGROUND

The Court expressly permitted the parties to file written submissions to supplement the parties’ Rule 50(a) arguments made before the Court submitted the case to the jury.¹ Bright Response therefore files this written submission, which reiterates and supplements its grounds for judgment as a matter of law made on the record in open court on Saturday, August 7, 2010. *See* Trans. (8/7/10 am) at 4:2-5:1; Trans. (8/6/10 pm) at 175:11-16, 21-25; 176:1 (noting parties could supplement oral motions with later written submissions; no new grounds or arguments permitted). Bright Response files this as to Defendants’ failure of proof on EZ Reader and obviousness.

¹ Accordingly, Bright Response objects to each of the Defendants’ “supplemental” pre-verdict Motions for JMOL insofar as their scope exceeds the issues presented in their in-Court rule 50(a) JMOL motions. The Court prohibited new arguments or grounds when it allowed the parties to file later written submissions.

II. ARGUMENT

A. No Expert Testimony Supporting EZ Reader System As Prior Art.

Bright Response moves for judgment as a matter of law that there is no evidence as to support Defendants' defense and counterclaim that the claims of the Rice patent are invalidated by the EZ Reader system. Dr. Branting admitted that the basis for his anticipation analysis assumed that the system was in public use prior to the critical date and he did not have an expert opinion regarding whether the EZ Reader system was in public use prior to the critical date. Trans. (8/6/10 am) at 112:14-113:6.

Bright Response further moves for judgment as a matter of law that Defendants have presented no evidence that, other than EZ Reader, no other prior art reference anticipates the asserted claims.

B. No Clear And Convincing Evidence To Support Defendants' Obviousness Defense.

Defendants have asserted that the Rice patent is obvious in light of the combination of the Allen patent and the CBR Express manuals. Defendants' argument fails for several reasons:

First, with respect to the preamble of claim 26, Dr. Branting only asserted that the Allen patent disclosed automatically processing a non-interactive electronic message. See Trans. (8/6/10 am) at 97:6-19. Dr. Branting made no showing that the message referred to in the Allen patent is non-interactive.

Second, with respect to Step 28(b1)(ii), Defendants' expert provided nothing but a bare opinion that one of ordinary skill in the art would find it obvious to classify as required by claim 28. Dr. Branting only testified that the claim element is obvious because the Allen reference is a case-based reasoning system and therefore classifying as being able to be responded to automatically or not and classifying as requiring human assistance or not would simply have been

obvious. Dr. Branting provided no support for his opinion, however. Trans. (8/6/10 am) at 99:17-100:25. Mere opinion testimony without a factual foundation leaves Defendants with no probative evidence: An expert's opinion must be supported to provide substantial evidence—bare opinion such as this will not suffice. *See Guile v. U.S.*, 422 F.3d 221, 227 (5th Cir. 2005); *see also id.* (“A claim cannot stand or fall on the mere ipse dixit of a credentialed witness.”).

Third, with respect to Step 30(b6), Defendants assert that Allen anticipates and renders the claim element obvious. Dr. Branting provided no evidence, however, that Allen anticipates the limitation in Step 30(b6) requiring that all compared cases be scored. In fact, the testimony provided by Dr. Branting only refers to Allen disclosing weights associated with matches. *Id.* at 103:25-104:15. Dr. Branting did not provide any testimony as to how Allen discloses scoring compared cases, as required by Step 30(b6).

Fourth, Defendants' also failed to meet their burden because Dr. Branting provided no testimony establishing that the CBR Express manuals disclose scoring each compared case model, as required by Step 30(b6). *Id.* at 106:5-15. Dr. Branting has, however, pointed only to a portion of the CBR Express manuals that describe scoring the question, or interactive, portion of the CBR Express manuals. Defendants cannot, for the purposes of non-interactive electronic message, ignore the interactive questions disclosed by Allen and the CBR Express manuals. As a matter of law, Defendants' cannot ignore the questions for the purposes of claim 26 and then point to question scoring to render Step 30(b6) obvious.

Lastly, Defendants' also failed to show by clear and convincing evidence that the combination of Allen and the CBR Express manuals disclose the normalization of claim 33. Similar to 30(b6), Dr. Branting again points to scoring and normalization for the questions to support his opinion. *Id.* at 108:6-14.

III. CONCLUSION

Defendants' invalidity arguments premised on Allen and the CBR Express reference manuals should be given little weight in light of the reexamination proceedings. Those proceedings not only confirmed these claims but then rejected even taking yet another look, again, once Yahoo presented this identical prior art—Allen and the CBR Express manuals—to the United States PTO as a basis for reexamination. Nevertheless, on the record in this case alone, the anticipation/public use and obviousness arguments fail for lack of proper expert testimony or opinion or no opinion at all.

Dated: August 9, 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 9th day of August, 2010, 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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