

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  
ON INFRINGEMENT AS TO DEFENDANT GOOGLE INC.**

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 what was argued in Court before the case was submitted to the jury.<sup>1</sup> 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. (Aug. 7, 2010, a.m.) at 4:2-5:1; Trans. (Aug. 6, 2010, p.m.) 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 Google’s complete failure of proof on certain of the asserted claim steps, such that no reasonable juror could fail to find infringement on those claim steps.

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<sup>1</sup> 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 any new arguments or grounds when it allowed the parties to file later written submissions.

## **II. GOOGLE FAILED TO PRODUCE EVIDENCE ON CERTAIN CLAIM STEPS**

As set forth generally in Bright Response's August 7, 2010 Motion, Google failed to adduce any evidence of non-infringement on certain claim steps, for literal infringement and infringement under Bright Response's doctrine of equivalents theory. Therefore, no reasonable juror could fail to find that Google meets certain claim steps, as set forth below, given Bright Response's ample evidence on those points.

### **A. No Evidence On Certain Steps Of Claim 26**

#### **1. Claim 26(a)**

Google produced no evidence to refute Bright Response's evidence in support of "non-interactive electronic message." For example, Google engineer Mr. Furrow admitted that an ad gets served after entering the search query. Trans. (8/5/10 p.m) at 76:11-15 ("Okay. And after Google receives – after the user presses enter after entering Las Vegas, this ad gets served, correct? A. That's correct..."). An admission can supply the evidence required to meet a claim step, as this is just the converse of Google's failure to rebut Bright response's evidence of a particular claim step. In light of Google's own admission on this claim step, as well as Bright Response's evidence on this claim step from Dr. Rhyne (Trans. Aug. 3, 2010, p.m.) at 56-60:2), no reasonable juror could fail to find that this claim step is not met.

Additionally, Google relied extensively on the notion of individual letters, or partially spelled queries as proving its point. They do not. These are not messages because the user is not searching for information about the fragment of a word. Spell correct and search suggestions are subsequent problems that arise after the responses are retrieved. Google cannot rely on this misplaced argument to show it does not infringe 26(a).

## 2. Claim 26(b)

Google produced no expert testimony or evidence to refute Bright Response's evidence in support of "rule base knowledge engine." Trans. (8/3/10 p.m.) at 60:4 – 76:11 (Rhyne testimony claim step 26(b)).

Dr. Fox testified regarding knowledge engines generally, and then specifically testified about "case base knowledge engines." Dr. Fox provided only provided argument, however, not evidence, that ads and associated attributes cannot be exemplar cases, and states that it is so only because it "doesn't make sense" otherwise:

Well, he's saying it's simply anything that's used for interpreting a message. We don't have to have a case base to do that. For example, we've already talked about rule base, and he's agreed that rule bases are interpreting the message. So that's – he's saying that a rule base would be case base. That doesn't make any sense, for example.

Trans. (8/5/10 p.m.) at 128:25-129:7.

Mere ipse dixit of an expert rejecting the opposing party's expert's factually supported opinion on how a claim step is met does not rise to the level of "evidence" and leaves Google without probative evidence to refute that it infringes Claim step 26(b). 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). "A claim cannot stand or fall on the mere ipse dixit of a credentialed witness." *Id.*

Further, the Court has recognized in its construction that an exemplar case could include an anticipated problem, and Dr. Fox likewise suggests that keywords describing advertisements could be exemplar cases, such as BR's contention regarding anticipated queries. Trans. (8/5/10 p.m.) at 129:19-23 ("This is saying that any set of keywords describing an advertisement is a case or part of a case. Essentially, this would mean that of the billions of cases that Google deals with, every single one is a case.")

### **3. 26(c)**

Google produced no testimony or evidence to refute Bright Response's evidence in support of "predetermined response." *See* Trans (8/3/10 p.m.) at 76:19 – 85:7. Instead, Google's witnesses and expert simply repeat that the individual ads are not selected until after the query is received. However, their witnesses, such as Mr. Furrow, confirm there is no occasion where ads are retrieved that were not already in the database. *See, e.g.,* Trans. (8/5/10 p.m.) (Furrow) at 77:2-77:8 ("And in order to put them on this page, Google has to retrieve them from the ads database, correct? A: Yes").

## **B. No Evidence Of Certain Steps Of Claim 28**

### **1. 28(b1)(i)**

Google produced no evidence to refute Bright Response's evidence in support of "classification" as "being able to be responded to automatically." Trans (8/3/10 p.m.) at 86-90:14. Dr. Rhyne and Google's own witnesses testified that there is a determination made as to whether there are any ads to serve in response to a query. Trans. (8/5/10 p.m.) (Furrow) at 83:19-23 ("In fact it has to determine whether or not any ads make it through the system and are good enough to serve, correct? A: Part of the system is making that determination"). Dr. Fox offered no evidence to contradict this admission from Google's fact witness and Bright Response's infringement expert.

### **2. 28(b1)(ii)**

Google produced no evidence to refute Bright Response's evidence in support of "classification as "requiring assistance from a human operator." Trans (8/3/10 p.m.) at 90:15-91:9 & 93:11-100:4). Dr. Rhyne and Google's own witnesses testified that there is software that flags or identifies queries in the form of creating logs and sending emails indicating that human operators need to review that query information Trans. (8/5/10 p.m.) (Furrow) at 85:25-86:4

(“And, in fact, Google uses an automated process to determine whether something looks funny to the system, sufficient enough to tag it for the human review, right? A: That’s right, yes”).

For expert opinion, Google has only Dr. Fox’s bare statement that because this information is aggregated in a way that is useful for Google, it cannot meet the limitation:

Okay. And not insubstantial difference, what does that refer to? A: Well, this related to some of the legal issues here, Doctrine of Equivalents and so forth. The point is that this matter is—is really different. If I’m talking about a sports team, the behavior of an individual person on the sports team as an individual is not the same thing as the team’s behavior. The team behaves as a group.

Trans. (8/5/10 p.m.) (Fox) at 137:17-25.

- **No Evidence on Doctrine of Equivalents**

Regarding doctrine of equivalents, Dr Fox asserts without support that the differences are not insubstantial because information about a collection of individuals doesn’t necessarily provide information about the individuals themselves. The analogy is inappropriate and cannot meet the because the aggregation is based specifically on similarity of the queries.

**C. No Rebuttal Evidence For Certain Steps of Claim 30**

**1. 30(b)(6)**

Google produced no testimony or evidence to refute Bright Response’s extensive evidence in support of “the scoring increasing when at least one of the attributes and text match.” Trans. (8/3/10 pm) (Rhyne) at 136:8–158:5. Dr. Fox only points to a single example regarding the score decreasing in response to a match or increasing in response to a mismatch and denies the effect of the claim language:

Q: There will be examples, in fact, lots of examples, when the score will increases when there’s a match; is that right?

A: There are examples of both the increasing and decrease in each of these situations, yes.

Q: Okay. And the claim only requires that the score increase when at least one or more of the text and attributes from the query – from the case model match the stored case model, correct?

A: I don't read it the same way you do, but – but that's what the words say.

Trans. (8/5/10 p.m.) (Fox) at 178:8-18.

However, Dr. Fox admits that there are instance when the score increases when the attributes and text of the query are more similar to the attributes and text of the ads:

You agree, Dr. Fox, that there are lots of examples in the Google AdWords system where the score increases when at least one of the text or attributes between the query and the ad match, correct? A: Sure.

*Id.* at 179:1-5.

Thus, there is unrebutted evidence that a match or mismatch of “at least one” of the text and attributes results in the requisite increase or decrease. No reasonable juror could fail to find that Google infringes step 30(b)(6). Indeed, no expert testimony exists from Google to rebut Bright Response's expert testimony that Google infringes the other claim steps of Claim 30 as well—claim steps 30(b)(1) through 30(b)(5).

**D. No Rebuttal Evidence For Certain Steps Of Claim 31**

Google produced no testimony or evidence to refute Bright Response's evidence in support of a “predetermined mismatch weight.” Trans. (8/3/10 pm) (Rhyne) at 158:10 – 162:9. Dr. Fox and Google's witnesses only point to a single example regarding the score increasing, rather than decreasing, in response to a mismatch. Yet Dr. Fox admits that the score generally decreases when at least one of the attributes and text of the query are less similar to the attributes and text of the ads. Trans. (8/5/10 pm) at 179:6-9 (“And there are lots of examples in the AdWords system when the score decreases when there's a mismatch in the text and the attributes, correct? A: Sure”). Thus, there is unrebutted evidence that a match or mismatch of “at least one” of the text and attributes results in the requisite increase or decrease.

### **E. No Rebuttal Evidence for Claim 33**

Google produced no evidence to refute Bright Response's evidence in support of normalization. Bright Response provided evidence of a division operation, which it merely represents a "conversion."

As to doctrine of equivalents on this claim, Google's witness, Mr. Furrow, agreed that the score could never be over 1. Trans. (8/5/10 p.m.) at 82:22-83:1 ("Okay. So the PCTR is never over 1, as indicated here, correct? A: I don't think it's indicated – I think I disagree with your premise. It is never over 1. This indicates PCTRs that are not over 1"). Dr. Fox did not testify regarding any reason why the limitation is not met under the doctrine of equivalents. *Id.* at 146:6-10 ("Okay, and would you – is this an equivalent to normalization in any way? A. They're not at all alike, no. One is just a mathematical thing, and the other one is actually a process of normalization.") Thus, Bright Response's testimony stands un rebutted, and infringement of this claim is established as a matter of law.

### **III. CONCLUSION**

Through either admissions from fact witnesses, bare conclusory statements from Google's expert witness on non-infringement, or no evidence whatsoever, Bright Response's evidence of infringement regarding certain claim steps stands completely un rebutted. On those claim steps, as outlined above and set forth generally in Bright response's Motion for JMOL on August 7, 2010, no reasonable jury could fail to find that Google infringes those claim steps.

Dated: August 9, 2010

Respectfully submitted,

By: /s/ Elizabeth A. Wiley  
Elizabeth A. Wiley

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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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