

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
CORPUS CHRISTI DIVISION

FLOWBEE INTERNATIONAL, INC. and
FLOWBEE HAIRCUTTER
LIMITED PARTNERSHIP,

Plaintiffs,

v.

GOOGLE, INC.,

Defendant.

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CIVIL ACTION NO. 2:09-cv-199

JURY TRIAL DEMANDED

**PLAINTIFFS' MOTION FOR LEAVE TO FILE
SUR-REPLY IN SUPPORT OF RESPONSE TO DEFENDANT
GOOGLE, INC.'S MOTION TO DISMISS UNDER RULE 12(b)(3)**

Plaintiffs Flowbee International, Inc. ("Flowbee Int'l") and Flowbee Haircutter Limited Partnership ("Flowbee L.P."), (collectively "Plaintiffs"), file this Motion for Leave to File Sur-Reply in Support of Response to Defendant Google, Inc.'s Motion to Dismiss Under Rule 12(b)(3), or alternatively, Motion to Transfer this Action to the Northern District of California.

1. On September 14, 2009, Google, Inc. filed its Motion to Dismiss. On October 2, 2009, Plaintiffs filed their Response to Defendant Google, Inc.'s Motion to Dismiss.

2. Although the Local Rules of the United States District Court for the Southern District of Texas do not allow the filing of a reply brief, counsel for Plaintiffs agreed to allow Google, Inc. to file a Reply to Plaintiffs' Response. Google filed its Reply to Plaintiffs' Response on October 6, 2009.

3. Google's Reply raises new factual and legal issues that were not raised by either Google's original Motion or Plaintiffs' Response. For example, Google attaches

new evidence to its Reply that was not previously disclosed in its original Motion. (Decl. R. Hagan; Decl. M. Caruso.) This new evidence concerns information solely within the control of Google.

4. “The purpose of the reply brief is to allow the movant to rebut the non-movant’s response Thus, the reply ‘is to contain argument, not new supporting materials.’” *Galderma Laboratories v. Actavis Mid-Atlantic*, 2008 WL 3822622, *1 (N.D. Tex. Jul. 23, 2008). A court, in its discretion, may decline to consider new evidentiary materials filed in a reply brief. *Simmons v. T-Mobile USA*, 2006 WL 3447684, *1 (S.D. Tex. Nov. 22, 2006). If, however, a court considers materials submitted in a reply brief, it must give the opposing party an opportunity to respond. *Id.*

5. To address the evidence previously withheld by Google and respond to the legal issues raised, Plaintiffs respectfully request leave to file its Sur-Reply in Support of Its Response to Defendant Google Inc.’s Motion to Dismiss, which is attached hereto as Exhibit A. This relief is not sought for purposes of delay, but rather so that justice may be done. Good cause exists to allow such leave.

WHEREFORE Plaintiffs Flowbee International, Inc. and Flowbee Haircutter Limited Partnership respectfully seek leave to file the attached Sur-Reply in Support of Response to Defendant Google, Inc.’s Motion to Dismiss Under Rule 12(b)(3), or alternatively, Motion to Transfer this Action to the Northern District of California and for all other relief at law or in equity to which they may be entitled.

Dated: October 16, 2009

Respectfully submitted,

By: /s/ David T. Bright
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CERTIFICATE OF CONFERENCE

I hereby certify that on the 9th day of October 2009, counsel for Plaintiffs Flowbee International, Inc. and Flowbee Haircutter Limited Partnership conferred with counsel for Google, Inc. and counsel for Google, Inc. stated that Google, Inc. did not oppose the Motion.

/s/ David T. Bright
David T. Bright

CERTIFICATE OF SERVICE

I hereby certify that on the 16th day of October 2009, I electronically filed the foregoing with the Clerk of Court for the U.S. District Court, Southern District of Texas, using the CM/ECF system of the court, which will send notification of such filing to the to individuals who have consented in writing to accept notification as service of this document by electronic means. All other counsel of record not deemed to have consented to electronic service were served with a true and correct copy of the foregoing by first class mail today, October 16, 2009.

/s/ David T. Bright
David T. Bright