UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION

I/P ENGINE, INC. Plaintiff, v. AOL, INC., *et al.*, Defendants.	Civil Action No. 2:11-cv-512 **Redacted Version**

OPPOSITION BRIEF TO PLAINTIFF'S MOTION TO COMPEL GOOGLE'S CUSTODIAL DOCUMENT PRODUCTION

I. INTRODUCTION

Plaintiff's Motion to Compel Google's Custodial Document Production should be denied. Google has already agreed to produce the custodial documents Plaintiff seeks in its motion. Google has also provided a reasonable estimate of the date of completion of this production—May 30. It has committed to a rolling production by custodian, including agreeing to produce documents for three custodians that Plaintiff is most interested in by May 11. Google has committed significant resources to this review and production to get it done on this schedule. There is simply no reason to compel Google to produce custodial documents by any date, let alone by April 30.

Each of Plaintiff's arguments for this April 30 date in support of its motion fail; most are based on incorrect or misleading statements. First, Plaintiff claims that Google has offered only a target date of June 15, 2012 for production. This is incorrect. As Plaintiff acknowledges in a

footnote, at the time Plaintiff filed its motion Google had actually proposed an estimated completion date for custodial production of May 30. Google agreed to produce documents on a rolling basis, as it has done throughout this litigation. Google also agreed to prioritize custodians according to Plaintiff's preference, with an estimated completion date of April 27 for the first custodian and May 11 for the second and third custodians. This is far from the last-minute document dump that Plaintiff alleges Google plans to make.

Second, Plaintiff incorrectly claims that Google has unreasonably delayed its production of custodial documents. Plaintiff makes much of the "six months" that have passed since I/P Engine served its initial document requests. But Plaintiff ignores that this Court's Pretrial Order states that no party is required to respond to any form of discovery sooner than March 9, 2012. Plaintiff also ignores that despite this, Google voluntarily agreed, pursuant to the parties' stipulation, to produce over 200,000 pages of technical documents to Plaintiff on December 7, 2011 (one month after Plaintiff served its document requests). Plaintiff also fails to mention the license agreements and financial documents that Google produced to Plaintiff in January and February 2012. It is these documents that are likely to be the key documents in this case, and the ones upon which Plaintiff's experts will presumably rely. It is also striking that for all of Plaintiff's complaints about Google's supposed failure and delay to produce custodial documents, as of the day it filed its motion to compel, Plaintiff had yet to produce *any* custodial emails.[1]

Third, Plaintiff oddly argues that Google need not review its custodial documents for responsiveness or privilege. Google has never agreed that all of the custodial documents that resulted from Plaintiff's search terms are responsive. Instead, Google has repeatedly informed

[1] Plaintiff has conditionally agreed to produce custodial email by April 20, 2012.

Plaintiff that its search terms are overly broad, and will likely result in non-responsive documents. Thus, the documents resulting from these search terms do need to be reviewed for responsiveness. Indeed, the day after Plaintiff filed its motion to compel, Plaintiff complained in opposing Defendants' Motion to Compel Sufficient Infringement Contentions about having to review purportedly irrelevant documents in Google's production. Furthermore, contrary to Plaintiff's assertion, these documents must also be reviewed for privilege. It is not credible for Plaintiff to claim that no such privilege review is necessary or appropriate, given the significant risk to Google from the production of its privileged information.

Fourth, Plaintiff falsely suggests that Google is stalling or failing to commit its resources to this document review in order to prejudice Plaintiff in this case. To the contrary, Google has staffed the case with 20 full-time outside contract attorneys, five full-time in-house attorneys, and 30 additional temporary in-house attorneys working extended hours, in order to complete the production by the estimated May 30 date and the interim April 27 and May 11 dates. Google has always made clear that, due to practical considerations, it would run search terms and review the custodial documents only once, after the parties agreed on custodians and a final list of search terms. Plaintiff also ignores that its own insistence on the final list of nine custodians and 41 search terms led to the extensive number of documents that now need to be reviewed for responsiveness and privilege.

Finally, Plaintiff maligns Google's conduct during the meet and confer process regarding Google custodians and search terms, ignoring that it was Plaintiff's own insistence on unreasonable search terms and additional custodians that contributed to the need to meet and confer from December to March 27 before a final list of search terms and custodians could be

agreed upon. It is Plaintiff's failure to agree to reasonable search terms that is the cause of any delay here.

Because Google has agreed to produce custodial documents and is doing so in a diligent and timely fashion following the parties' agreement to search terms and custodians, Plaintiff's motion to compel should be denied.

II. BACKGROUND

A. The Parties Agreed to Early Production of Technical Documents and Later Production of Custodial Documents.

On November 4, the parties agreed that Plaintiff would serve infringement contentions based on publicly available information, as well as initial written discovery, on November 7. (Declaration of Emily O'Brien in Support of Google's Opposition ("O'Brien Decl."), Ex. A, ¶2-3.) According to the agreement, Google would serve its responses to the written discovery by producing responsive technical documents by December 7: "Google's initial production of documents shall be from the technical document repositories corresponding to the systems or functionalities identified in Plaintiff's claim terms." (*Id.*, ¶3.) The agreement provided that the parties would then meet and confer regarding Defendants' production of non-technical documents. (*Id.*, ¶6.)

Google had no obligation to enter into an agreement for such early production of documents. Indeed, this Court's Rule 26(f) Pretrial Order provided that "no party will be required to respond to a deposition notice or other form of discovery sooner than **March 9, 2012**, unless specifically ordered by the court." (Dkt. 83, ¶3.) Plaintiff itself acknowledges in its Opposition to Defendants' Motion to Compel Supplemental Infringement Contentions that this discovery was voluntary and "[b]ut for the parties' agreements, discovery could not have been served prior to March 9, 2012". (Dkt. 127, 9.) However, Google agreed to this extensive early

production of documents, and on December 7, produced 217,614 pages of technical documents related to Search, AdWords, and AdSense for Search. (O'Brien Decl., ¶3.) These documents included technical specifications, design requirements and other technical documentation. (*Id.*)

On December 16, Google produced additional documents related to prior art. (*Id.*) Google produced data about Google's revenue from AdWords and AdSense for Search and license agreements related to these products in late January and early February. (*Id.*) From January to April, Google has produced and is continuing to produce other documents in response to Plaintiff's requests, including but not limited to documents related to previous Google litigations and documents related to the reexamination of one of the patents-at-issue. (*Id.*) Google's production is on going. (*Id.*) Thus far, Google has already produced over 220,000 pages of documents in this litigation. (*Id.*)

B. The Parties Negotiated Custodians, Search Terms, and Production Protocol.

Shortly after Google's production of technical documents, the parties began negotiating custodians and search terms for Google's custodial production. (*Id.*, Ex. B.) Throughout the negotiations, due the prohibitive cost and burden associated with such an effort, Google made clear that it intended to run search terms across all of the custodians' documents and process the results for review only once. (*Id.*, Ex. C; Ex. D, 3.)

1. Negotiation of custodians.

On December 16, Google requested that Plaintiff propose custodians whose documents Google would collect. (*Id.*, Ex. C, 2.) Google emphasized that it "want[ed] to avoid searching custodial document and then having Plaintiff come back later and asking for more custodians as much as possible." (*Id.*) Google originally proposed five custodians for collection and production. (*Id.*, Ex. E, 2.) However, on December 20, Google agreed to increase this number to seven custodians, again emphasizing "[a]s we have previously stated, we intend to do our

custodial collection only once." (*Id.*, Ex. C, 1 (emphasis added).) Plaintiff countered with a proposal for 11 custodians. (*Id.*, Ex. F.) In the spirit of compromise, Google agreed to nine custodians, provided that (consistent with Google's repeated assertions that it would process custodial documents for review only once) Plaintiff would agree not to seek additional custodians, without leave of Court upon a showing of distinct need. (*Id.*, Ex. G, 2; Ex. D, 1.) Google began collecting the documents from these custodians.

2. Negotiation of search terms.

Although Plaintiff and Google began negotiating search terms in December, the parties did not reach agreement on a final set of search terms until March 27. (*Id.*, Ex. C, 1; Ex. F; Ex. H, 1.) While insisting that it did not want a "dump" of irrelevant documents, Plaintiff repeatedly proposed overly broad terms that would have resulted in collection and review of an avalanche of irrelevant, nonresponsive documents. (*Id.*, Ex. I, 2-3.) For example, Plaintiff proposed "AdWords or AdSense" as a search term. (*Id.*, Ex. F.) Most of the proposed custodians work on these accused products, and so the term would have resulted in a very large number of documents, while doing nothing to tailor the results to the issues in this case. Plaintiff also proposed the very broad terms "relevance," "ad and revenue," and "(keyword or query) and (ad or adwords)," all of which would have resulted in a flood of nonresponsive documents. (*Id.*)

Google readily agreed to Plaintiff's search terms that were tailored to the issues in the case on January 9 and January 17. (*Id.*, Ex. I, 2; Ex. J, 1; Ex. K, 1.) For example, terms like "collaborative feedback data" were targeted to identify documents concerning technology like that disclosed in the patents-in-suit. (*Id.*, Ex G, 1-2.) However, Google told Plaintiff that it would not begin reviewing and producing custodial documents until a final search term list was agreed. "There is significant time and cost involved in collecting, searching and reviewing

custodial documents for production, and as we have repeatedly informed you Google does not intend to conduct custodial document production piecemeal." (*Id.*, Ex. D, 3.)

After Google warned Plaintiff repeatedly that its search terms would result in the "document dump" Plaintiff professed it wanted to avoid (*id.*, Ex. I, 2; Ex. G, 1; Ex. K, 1-2), Plaintiff agreed to provide a more tailored list of terms. (*Id.*, Ex. K, 1-2.) However, Plaintiff's revised list still included overly broad terms like "coverage" and "depth." (*Id.*, Ex. L, 4.) Google ran internal test searches on the collected documents of two custodians to determine which terms resulted in a reasonable number of hits. (*Id.*, Ex. D, 2; O'Brien Decl., ¶15.) In addition to the terms it had already agreed upon, on March 1 Google agreed to five more terms and explained to Plaintiff that certain other terms resulted in too high a percentage of hits when test searches were run. (O'Brien Decl., Ex. M.)

The parties continued to meet and confer and correspond throughout March regarding the list of search terms, agreeing on some terms and modifying others to arrive at a reasonable list; the parties reached agreement on March 27. (*Id.*, Exs. N-S.) Throughout the meet and confer process, Google explained that it reserved its rights regarding all such terms, in the event that they later resulted in burdensome numbers of documents to review for any custodian. (*See, e.g., id.*, Ex. D, 2; Ex. R, 2.)

C. Google Took Reasonable Efforts to Process, Search and Review Documents Following the March 27 Agreement to a Final List of Search Terms.

Following the parties' agreement to a final list of search terms on March 27, on March 28 Google sent the data it had collected to date from the nine custodians to its outside vendor for processing and searching. (Declaration of Kristin Zmrhal in Support of Google's Opposition ("Zmrhal Decl."), ¶2.) On March 28, Google also informed Plaintiff that since a final list of search terms had been agreed to the day before, Google was "running the search terms against

the nine custodians' documents, and reviewing the results of those terms." (Opening Br., 5 (citing Ex. 18).) Google further stated that it was "endeavoring to determine the total number of documents to be reviewed so that we can provide an estimated date for completion of review and production." (*Id.* (emphasis added).)

Because of the large number of custodians, the collected data consisted of approximately 12.5 million documents, or 366 GB of uncompressed data for nine individual custodians. (Zmrhal Decl., ¶2.) Google's document processing vendor had originally estimated that it would be able to process and upload the 12.5 million documents, deduplicate, create an index, run the search terms across the collection, and provide the number of results by April 5. (*Id.*, ¶3.) Given the time, complexity and expense of uploading and searching the documents, it is prohibitive for the vendor to perform this process multiple times, which is why Google made clear throughout its negotiations with Plaintiff that it would only be performed once, after a final list of custodians and search terms was agreed. (*Id.*, ¶2; *see, e.g.*, O'Brien Decl., Ex. C; Ex. D, 3.) Due to the massive amount of data, loading and searching the documents took longer than initially estimated, and on April 6, Google determined that the search terms run across the entire collection resulted in over 400,000 documents. (Zmrhal Decl., ¶3.) Based on the review of the initial search results, Google determined that there was an unreasonably large number of hits for the search term "Ads Quality." (*Id.*, ¶4.) Excluding the unreasonably large "Ads Quality" term resulted in approximately 250,000 documents to review for responsiveness and privilege. (*Id.*) Google further determined that, due to the nature of some of the search terms requested by Plaintiff, the standard index used by Google's eDiscovery vendor needed to be modified to include additional characters to ensure that the search terms applied captured the intended terms. (*Id.*, ¶6.)

Google sent a letter to Plaintiff on April 6 informing it of these issues, and suggesting that Plaintiff withdraw its "Ads Quality" term. (O'Brien Decl., Ex. T, 2-3.) Google also asked Plaintiff to agree to a meet and confer the next business day to discuss these issues, as well as an outstanding ESI agreement issue, in an attempt to resolve them all so that Google could "finalize the review population and provide you with an estimated date for completion of production." (*Id.*, 2-3.)

The parties met and conferred regarding the custodial document production, as well as other discovery issues on April 9. (*Id.*, Ex. U.) During that meet and confer, Google discussed the issues raised in its letter of April 6. Plaintiff requested that Google modify rather than withdraw entirely the term "Ads Quality." (*Id.*, 2.) Google agreed to run a test of Plaintiff's proposed modification, to see if it would work, and confirmed the next day that it would incorporate the modified term into the final list of search terms. (*Id.*) Google indicated that the vendor was still working on the technical issue raised in the April 6 letter, and hoped to resolve the issue shortly. (*Id.*) [redacted] (*Id.*, 1.) During that phone call, in response to Plaintiff's prior request, Google estimated a final production date of June 15, with rolling production and prioritization of custodians according to Plaintiff's request. (*Id.*, 2.)

In response, Plaintiff stated that it intended to move to compel production of custodial documents. (*Id.*) Google pointed out that it had already agreed to produce these documents, and therefore that the motion would be moot. (*Id.*) Plaintiff then stated that it would move to compel production of documents by April 30. (*Id.*) Google explained that even without the overbroad "Ads Quality" term, the search terms resulted in over 250,000 documents to review for

responsiveness and privilege. (*Id.*) Google explained that it was committing significant resources to this process, and was working to complete the review as quickly as feasible. (*Id.*) Google asked how Plaintiff would suggest that Google review, process, and produce this many documents in a shorter time frame. (*Id.*) Plaintiff had no answer. (*Id.*) Instead, Plaintiff simply repeatedly insisted that it needed production of all custodial documents by April 30, without any explanation of why or how this demand was possible to meet. (O'Brien Decl., ¶25.) Google also pointed out that it had agreed to produce custodial documents on a rolling basis, and had offered to produce documents from the three employees listed in Google's initial disclosures first. (*Id.*) Again, Plaintiff stated that it intended to move forward with a motion to compel. (*Id.*)

In an effort for further compromise, Google suggested and the parties discussed the possibility of providing Plaintiff with a series of "tiered dates" for production, given that Google had committed to rolling the production by custodian. (*Id.*, ¶26.) Google stated that it did not know by what date it could begin to produce custodial documents, as Plaintiff had not previously asked for that information. (*Id.*) However, Google agreed to look into that issue and get back to Plaintiff as soon as possible. (*Id.*) Later that day, Plaintiff sent an email indicating that it was willing "to consider Google's proposal of providing dates for a tiered production. If Google agrees to provide the proposed dates by tomorrow, I/P Engine will not file its motion today." (O'Brien Decl., Ex. V.) Accordingly, the next day Google sent Plaintiff a letter offering a revised estimate of May 30 for completion of custodial production, with an estimated completion date of April 27 for the first custodian and May 11 for the remaining priority custodians. (*Id.*, Ex. U, 3.)

Plaintiff ignored Google's good faith attempt to resolve this dispute. Plaintiff instead filed its motion to compel the next day. In this motion, Plaintiff repeatedly argued that Google's proposed date for production of documents of June 15 was unacceptable. (*See, e.g.*, Opening Br., 1, 2.) Plaintiff only mentioned Google's offer to produce all custodial documents by May 30, and two earlier sets of custodial documents by April 27 and May 11, in a footnote. (*Id.*, 6 n.1.) Plaintiff did not bother to reject Google's offer until approximately three hours before Google received electronic notice that Plaintiff had filed its motion.[2] (O'Brien Decl., Ex. W; O'Brien Decl., ¶28.)

D. Google Has Committed Extensive Resources to Processing, Searching, Reviewing and Producing Custodial Documents.

Google has staffed the case with 20 full-time outside contract attorneys, five full-time in-house attorneys, and 30 additional temporary in-house attorneys working extended hours, in order to complete the production by the estimated May 30 date and the interim April 27 and May 11 dates. (Zmrhal Decl., ¶10.) Outside counsel at Quinn Emanuel is also working with Google's internal and external reviewers to manage the review and production of custodial documents. After deduplication, running forty one terms across two separate indices created on the custodial documents, including the modified "Ads Quality" term, [redacted], this team will be conducting a substantive review of approximately 115,000 documents. (*Id.*, ¶¶2-8.) Review of these documents includes a review for responsiveness, privilege, and source code. (*Id.*, ¶11.) After all review is complete, the vendor must process the responsive documents for production; for a

[2] Plaintiff's relegation of Google's operative proposal to a mere footnote in its motion suggests that Plaintiff already had its brief written and was not interested in good faith negotiations to resolve the dispute.

100,000 page production, processing takes approximately 72 hours. (*Id.*) On average, Google typically finds that there are about 2.5 pages per document in a production. (*Id.*)

III. ARGUMENT

A. Google's Proposed Production Dates and Efforts to Produce Custodial Documents Are Reasonable and Diligent.

Plaintiff argues that Google has waited over six months to produce custodial documents. (Opening Br., 1.) In reality, the parties did not agree to a final list of search terms until March 27; Google's proposed production completion date of May 30, two months later, is more than reasonable. Google's proposal is especially reasonable given Google's agreement to roll production by custodian, including producing custodial documents for the three employees listed in Google's initial disclosures by April 27 and May 11, and Google's diligent and proactive conduct in discovery to date.

1. Google worked in good faith with Plaintiff to agree to a list of custodians and search terms.

Plaintiff asserts that the parties' stipulation provided "that full discovery in the present litigation would commence" as of November 4, 2011. (Opening Br., 3.) This is false. In reality, the stipulation provided that Plaintiff would provide Google with preliminary infringement contentions and initial written discovery on November 7; that Google would make an initial production of technical documents from its repositories by December 7; and that "the parties also shall meet and confer regarding Defendants' production of non-technical documents." (O'Brien Decl., Ex. A, 1-2 (emphasis added).) This is precisely what the parties did. Google produced documents periodically in response to Plaintiff's requests, as outlined above. And the parties met and conferred to establish a list of custodians and search terms for Google's custodial production.

On December 20, Google proposed a set of custodians and search terms and invited Plaintiff to provide additional ones it wanted Google to consider, because, "[a]s we have previously stated, we intend to do our custodial collection only once." (*Id.*, Ex. C, 1.) Although it professed a desire to avoid a "document dump," Plaintiff proposed, and continued to propose, overly broad search terms, like "AdWords or AdSense" and "depth," which would have resulted in an avalanche of irrelevant documents. (*See* Section II.B.2, *supra.*) Google ran internal test searches on the documents of two custodians to determine which terms produced an unreasonable number of results, and the parties negotiated, agreeing to some terms and modifying others. (*Id.*) The parties reached final agreement on March 27. (*Id.*) The very next day, Google sent the data it had collected for the nine custodians to its eDiscovery vendor to begin processing, deduplicating said documents, creating an index, and running the search terms across those custodians, in order to create a population for review and production. (Zmrhal Decl., ¶2.)

2. Google informed Plaintiff of its appropriate and reasonable refusal to review and produce custodial documents in piecemeal fashion.

Throughout the meet-and-confer process, Google made clear that it was not willing to search, review and produce custodial documents on a piecemeal basis. (O'Brien Decl, Ex. C; Ex. D, 3.) Doing so would have been inefficient and created extra expense. For example, the parties' draft ESI agreement provided that documents could be deduplicated across custodians. (O'Brien Decl., ¶31.) [redacted] (Zmrhal Decl., ¶9.) It would have been unduly burdensome to do so more than once. (*Id.*, ¶2.) In addition, a piecemeal review could have

required hiring different groups of contract attorneys at different times and re-introducing each group to the issues involved in this litigation. (*Id.*, ¶9.) Indeed, Plaintiff itself appeared to understand Google's repeated statements that it would not fragment review, writing on March 18, "[o]nce the parties have agreement on these remaining terms, Google should promptly conduct its custodial collection." (O'Brien Decl., Ex. Q, 2.)

3. Google is working diligently to produce documents in a timely manner.

Contrary to Plaintiff's unsupported statements, Google has allocated more than reasonable resources to complete this production. Google has staffed the case with 20 full-time outside contract attorneys, five full-time in-house attorneys, and 30 additional temporary in-house attorneys working extended hours, in order to complete the production by the estimated May 30 date and the interim April 27 and May 11 dates. (Zmrhal Decl., ¶10.) Had Plaintiff requested a more reasonable, limited number of custodians as Google initially proposed, this review could have begun and been completed sooner.

Plaintiff makes a number of unsupported statements that reviewing documents over the course of two weeks would incur the same expense as reviewing them over the course of 60 days. (Opening Br., 2, 8.) However, hiring a larger team reduces efficiency; team members on their third or fourth week of review work more efficiently than team members on their first or second week of review. Moreover, Google has already employed a large number of attorneys to complete production by the April and May estimated dates. Plaintiff does not explain how or where Google could obtain, clear conflicts, train and manage even more attorneys in such a short time frame, or why the burden to Google in doing so is outweighed by the benefit of Plaintiff receiving all documents by April 30, rather than by May 30. And again Plaintiff argues that Google has only agreed to produce documents by June 15, ignoring that Google told Plaintiff in advance of its filing the motion that Google estimated it would be rolling custodial production

beginning on April 27, and ending on May 30. (O'Brien Decl., Ex. U, 3.) Plaintiff cannot prove that Google is "evading" discovery obligations merely by repeating unsubstantiated allegations. And these allegations do not support Plaintiff's motion.

Particularly given Google's fulsome early production of the most important technical and financial documents in this case, Google's mobilization of a force of 25 full-time attorneys (not including outside counsel) to complete production by May 30, rolling production by custodian, is reasonable.

B. Plaintiff's Argument that Google Need Not Review its Documents for Responsiveness and Privilege is Baseless.

As an initial matter, Plaintiff's assertion that "Google admits to possessing 250,000 relevant, responsive custodial documents" is false. (Opening Br., 7.) Plaintiff repeatedly assumes that documents resulting from the search terms are responsive, but provides no support for this assumption. (*See, e.g.*, *id.*, 5.) During the parties' April 9 meet and confer, Google indicated that preliminary search results pulled approximately 250,000 documents, excluding the overbroad and burdensome "Ads Quality" term. (O'Brien Decl., Ex. U, 2.) When Plaintiff referred to these hits as "relevant documents," Google disputed the characterization. (O'Brien Decl., ¶25.) The mere fact that a search term pulls up a document does not make that document relevant to this litigation or responsive to Plaintiff's production requests. In the spirit of compromise and to move the litigation forward, Google agreed to many terms that it felt were overly broad; for example, [redacted]

Plaintiff's suggestion that Google be precluded from reviewing its documents for responsiveness is further puzzling, given Plaintiff's representations in its opposition to

Defendants' Motion to Compel Plaintiff to Supplement its Infringement Contentions, filed the day after this motion. (Dkt. 127, 3.) In that opposition, Plaintiff complained that Google's December 7 technical production "included wholly irrelevant documents" and that Plaintiff's counsel had to "sift out a great amount of irrelevant information." (*Id.*) Plaintiff used this alleged burden as an excuse to explain its insufficient infringement contentions. Google's initial production of technical documents totals slightly over 200,000 pages pulled from technical repositories specifically related to the accused products. (O'Brien Decl., ¶3.) By contrast, even after all of the negotiations between Plaintiff and Google regarding the final list of search terms, [redacted], Google's attorneys will be required to review 115,000 documents. Given that Plaintiff believes it to be overly burdensome to review 200,000 pages of documents that allegedly contain non-responsive documents, it is nonsensical that Plaintiff wished for Google to produce 250,000 documents without reviewing and removing non-responsive documents from the population. If Plaintiff thinks 200,000 pages is burdensome to review, one can only imagine what it would think of reviewing 250,000 documents, or even 115,000 documents.

Plaintiff also suggests that Google can, under the terms of the Protective Order in this case, simply claw back any privileged documents that are inadvertently produced as a result of a truncated review. (Opening Br., 8.) However, return of such documents cannot unring the bell; "[t]here is no way for a court . . . to wipe from an adversary's mind any mental impressions or litigation strategy that may have been disclosed." *Continental Cas. Co. v. Under Armour, Inc.*, 537 F. Supp. 2d 761, 773 (D.Md. 2008) (quoting Edna Selan Epstein, *The Attorney-Client Privilege and the Work-Product Doctrine* (2001)). In addition to attorney-client privileged and work product privileged information, the documents in this case are likely to contain highly

confidential source code that, under the terms of the Protective Order in this case, require the highest level of protection and must be viewed only on a protected computer. (Dkt. 85, 6.) It is possible that some of these documents also contain information that would violate individuals' privacy if released.

C. The Estimated Completion Date of May 30 With Rolling Production Does Not Prejudice Plaintiff.

Plaintiff's claim that Google's estimated completion date will prejudice Plaintiff ignores the good-faith efforts Google has made throughout this litigation to provide timely discovery to Plaintiff, and mischaracterizes Google's agreements and efforts to produce documents in this case.

1. Google agreed to rolling production of custodial documents, beginning on April 27 and ending on May 30, 2012.

Plaintiff repeatedly states in its brief that Google has only offered to produce custodial documents by June 15. (Opening Br., 1, 2, 5.) This is false. As of the date of the filing of Plaintiff's brief, Google had estimated that it would complete the custodial production by May 30. (O'Brien Decl., Ex. U, 3.) Moreover, Plaintiff's brief ignores the fact that Google has offered to roll its production by custodian, with custodians prioritized per Plaintiff's request. (*Id.*, 2.) Prior to the parties' meet and confer on April 9, Google offered to roll custodial productions, and to prioritize the documents of the three employees in Google's initial disclosures. (O'Brien Decl., Ex. X, 3.) Plaintiff agreed to this proposal. (*Id.*, Ex. Y, 1.) During the parties' meet and confer, Google repeatedly reiterated that it would be producing custodial documents on a rolling basis, including prioritizing the three agreed custodians. (*Id.*, Ex. U, 2.)

Plaintiff refuses to acknowledge these efforts. Instead, Plaintiff states that "Google refused to agree to an earlier production data for all or even any portion of those documents." (Opening Br., 5.) This is demonstrably untrue. Google agreed to productions prior to June 15.

(O'Brien Decl., Ex. U, 3.) When Plaintiff asked for specific dates, Google agreed to look into the issue and get back to Plaintiff as soon as possible. (*Id.*) Indeed, following the parties' April 9 meet and confer, Plaintiff indicated that it would withhold filing a motion to compel if Google provided by April 10 dates for tiered custodial production as discussed during the parties' meet and confer. (*Id.*, Ex. V.) Accordingly, on April 10, Google offered an estimate of May 11 for completion of production of the three custodians listed in Google's initial disclosures, with an estimate of April 27 for the first of these custodians. (*Id.*, Ex. U, 3.) Plaintiff summarily rejected the offer the next day and, about three hours later, Google received electronic notice that Plaintiff had filed this motion. (*Id.*, Ex. W; O'Brien Decl., ¶28.) Notably, in its brief Plaintiff mischaracterizes this offer as a "close of business" last-ditch proposal to avoid motion practice. (Opening Br., 6 n.1.) Google's proposal was a good faith effort that Plaintiff invited to avoid motion practice; Plaintiff's summary rejection suggests that it was Plaintiff's request for a proposal that was not made in good faith.

2. Google has already produced over 200,000 pages of relevant documents to Plaintiff, almost all in advance of the March 9, 2012 opening of discovery, and well in advance of the deadline for opening expert reports.

Even though it had no obligation to do so, Google produced over 200,000 pages of technical documents to Plaintiff in early December. (O'Brien Decl., ¶3.) Plaintiff complains that it will be prejudiced because Google's final custodial production will be complete shortly before expert reports are due on July 18 (using the June 15 estimate, rather than the May 30 estimate that was operative when it filed its motion). (Opening Br., 7.) But it is the technical and design documents produced in December that will likely form the corpus of documents relied upon in the infringement report. Google has also already produced other relevant documents, including data about Google's revenue from AdWords and AdSense for Search. (O'Brien Decl., ¶3.) These documents will likely provide the basis for the damages report. And

Google has agreed to produce the documents of the three priority custodians by May 11, over two months before the first expert reports are due. (*Id.*, Ex. U, 3.) Thus, Google's estimated custodial production dates do not prejudice Plaintiff; rather, it is Plaintiff's repeated insistence on seeking court intervention without first fully meeting and conferring that prejudices Google, and only leads to delay.

3. Google's meet and confer efforts were made in good faith, not to delay or prejudice Plaintiff.

Plaintiff also falsely suggests that the meet-and-confer process was a delay tactic by Google. (Opening Br., 4.) Plaintiff asserts that prior to January 9, Google had not proposed search terms except for terms associated with Google's "knowledge" of the asserted patents. (Opening Br., 3.) To clarify, on December 20, Google provided Plaintiff with a proposed list containing search terms that went beyond the scope of Google's knowledge of the asserted patents: for example, "demand search," "scan /3 search /3 network," "(content based filter) or (content-based filter)," "collaborative feedback data," "content /2 profile," "((collaborative filter) or (collaborative filtering)) /10 ((content filter) or (content filtering))," and "(hybrid /2 filter) or (hybrid /2 filtering)." (O'Brien Decl., Ex. C, 2.) These terms were crafted to retrieve documents that might conceivably refer to the technology at issue in this case. That many of the terms may not result in a large number, or any, hits does not make the terms improper for this case; it merely shows that Google does not use the technology at issue in Plaintiff's patents.

By contrast, many of Plaintiff's proposed terms were overbroad and unreasonable. For this reason, Google spent time and energy in correspondence and meet and confers to try to reach agreement on a reasonable list of search terms. Google's interest was not in delaying Plaintiff, but instead in creating a reasonable population of documents to review and produce that would actually provide documents responsive to Plaintiff's requests. Even with all of these efforts,

Google is still left with over 115,000 documents that need to be substantively reviewed for responsiveness and privilege. (Zmrhal Dec., ¶11.)

Again, it was Plaintiff—not Google—that insisted on the production of custodial documents from nine separate custodians. (O'Brien Decl., Ex. K, 2; Ex. D, 1.) Google had originally proposed five custodians, and only agreed to increase the number to nine to accommodate Plaintiff's request. (*Id.*, Ex. E, 2; Ex. C, 1; Ex. G, 2; Ex. D, 1.) Those nine custodians had approximately 12.5 million documents to be collected, deduplicated, indexed and searched. (Zmrhal Decl., ¶2.) Even after multiple rounds of modification of the search terms, [redacted], Google was left with 115,000 custodial documents that need to be reviewed for privilege and responsiveness. (O'Brien Decl., ¶32.) Throughout the meet and confer process, Google repeatedly attempted to work with Plaintiff to create a list of search terms that would lead to a reasonable number of documents to review and produce. It was Plaintiff's unwillingness to do so, rather than any purposeful "stalling tactic" by Google, that resulted in the current situation.

IV. CONCLUSION

The cost and burden associated with Plaintiff's proposed production schedule is unrealistic and overly burdensome under Rule 26; Google has provided a practical, comprehensive and realistic production schedule that takes into account and seeks to produce the most important custodians' documents on a rolling basis.

For the foregoing reasons, Plaintiff's Motion should be denied and Google's proposed production schedule adopted.

DATED: April 20, 2012

/s/ Stephen E. Noona
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I hereby certify that on April 20, 2012, I will electronically file the foregoing with the Clerk of Court using the CM/ECF system, which will send a notification of such filing (NEF) to the following:

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