

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

**MEMORANDUM IN SUPPORT OF MOTION IN LIMINE #4 TO PRECLUDE
PLAINTIFF FROM OFFERING EVIDENCE OR ARGUMENT RELATING TO
DEFENDANTS' CONDUCT DURING DISCOVERY OR TO GOOGLE'S
UNPRODUCED LICENSES**

Defendants respectfully file this Motion in Limine to preclude Plaintiff from offering evidence or argument relating to Defendants' conduct during discovery or to Google Inc.'s ("Google") unproduced licenses.

I. PLAINTIFF SHOULD BE PRECLUDED FROM OFFERING EVIDENCE OR ARGUMENT RELATING TO DEFENDANTS' CONDUCT DURING DISCOVERY OR TO GOOGLE'S UNPRODUCED LICENSES

Without cause, Plaintiff I/P Engine, Inc. ("Plaintiff") may attempt to argue to the jury that Defendants Google Inc., Target Co., IAC Search & Media, Inc., and Gannett Co, Inc., ("Defendants") have delayed or resisted in their production of documents and witnesses during the discovery process in this litigation to bolster a lack of evidence. Plaintiff's only possible motivation for doing so would be to confuse and bias the jury against Defendants.

Any such allegations are baseless and wholly irrelevant to resolution of the issues in this lawsuit, and should therefore be excluded under Federal Rule of Evidence 402. Moreover, there have been no discovery motions granted that would allow such unfounded accusations, which would be highly prejudicial to Defendants and should be excluded under Federal Rule of Evidence 403. Such unsubstantiated accusations would only confuse and bias the jury by potentially leading them to believe that Defendants have attempted to conceal evidence or otherwise bias them against Defendants. Accordingly, Defendants hereby move this Court, *in limine*, for an order precluding Plaintiff from introducing evidence or making arguments related to the other Defendants' conduct during the discovery process.

Throughout this litigation, Plaintiff has generally asserted the unsubstantiated belief that Defendants have withheld various relevant documents, information, and witnesses. For example, on April 11, 2012, Plaintiff moved to compel the production of Google's custodial documents. The motion made incorrect and misleading statements about Google's diligence in producing documents and the significant resources that Google has committed to producing documents in a timely manner. (D.N. 117.) Denying this motion in part, the Court ordered Google to produce the same documents that Google had already offered to produce. The Court ordered that they be produced on a rolling basis and by May 30, 2012, both of which Google had already agreed to. (D.N. 156.)

More recently, Plaintiff moved for sanctions regarding "untimely disclosed prior art," claiming the Defendants were engaging in "untimely and highly prejudicial discovery tactics" and purposefully "sandbagging" the Plaintiff. (D.N. 201.) At the hearing, Plaintiff falsely accused Defendants of deliberately withholding this art. Plaintiff also falsely alleged that Defendants were engaging in a pattern of improper discovery conduct and threatened to file several other motions based upon the same premise. Plaintiff's motion was denied. (D.N. 275.)

Similarly, Plaintiff's damages expert Dr. Becker has repeatedly insinuated (and sometimes outright accused) that Defendants have engaged in discovery misconduct. (*See, e.g.*, Declaration of Emily C. O'Brien in Support of Defendants' Motion to Exclude ("O'Brien Dec."),

Ex. 1 (7/25/12 Expert Report of Stephen L. Becker, Ph.D. ("Becker Rep.")), ¶ 66 n.97, ¶ 150 n.203, ¶ 177 n.240.) Dr. Becker, repeatedly alleged supposed discovery misconduct by Google to excuse the shortcomings in his opinions. At one point, Becker protested: "You know, it – there's only so much that I can do when, you know, Google is the one who is holding the cards with respect to not having produced the kind of data that obviously underlies these charts." (Sohn Dec., Ex. I, 157:7-10) He went on to say that "it's frankly remarkable, in my opinion, that Google has not produced what I think any reasonable person would assume is present – has to be present in their records. I haven't seen it. . . . it's just staggering to me that . . . we can stack up in a pretty small stack the documents that have actually been produced responsive to that request." (*Id.*, 157:24-158:9.) In response to a question about whether he had asked for a final version of a draft, Dr. Becker said "I didn't specifically ask that, that way. I think it would have been covered with a general request to get Google to do what it's supposed to do, which is produce any relevant documents related to this area of the case." (*Id.*, 160:21-25.) Later, he said that one of his calculations was "not absolutely precise but it's the best we can do since Google didn't produce the underlying spreadsheet." (*Id.*, 166:4-6.). These are just examples of Dr. Becker's many unsubstantiated and superfluous criticisms of Google's discovery conduct which Dr. Becker has gratuitously volunteered, which did not qualify as statements within the purview of his alleged expertise, and which certainly would not aid the trier of fact in resolving the issues in this case.

During the deposition of Google's damages expert, Dr. Ugone, Plaintiff's counsel also alluded to the existence of Google licenses that were not produced in this litigation, again insinuating that Defendants were trying to hide something by not producing them despite the fact that Plaintiff has never suggested that unproduced licenses were relevant to the litigation or improperly withheld (which they were not). For example, the following exchange took place during the deposition:

Q. Did you review all of Google's inbound licenses?

A. That were produced in this case, yes.

Q. What about that weren't produced in this case?

A. I haven't seen -- let's try it this way. Here's the best answer I can give you. I have reviewed what was produced in this case. I did not go back and look at any other cases that I might have -- we talked about the other case. I didn't go back and look at those license agreements, but I would be very surprised if I reached a different conclusion.

...

Q. Sure. You didn't go back and ask Google to look at all of its inbound licenses before you made that opinion, right?

...

A. So I do recognize that there might be some licenses I haven't seen that for whatever reason aren't relevant to this case that haven't been produced.

Q. Right.

A. So I suppose one could say, you know, looking at the license agreements that were produced that were deemed relevant in this case by however that process happens, okay, that I drew the conclusions that I did.

Q. Okay. Did you look at any of Google's outbound licenses?

A. We looked at -- everything we looked at that was in -- was in the report, so there were all those inbound license agreements.

...

Q. Right. You didn't ask to see any of their outbound licenses other than if they were produced in this case?

A. Correct.

(Sohn Dec., Ex. J, 35:25-37:17 (emphasis added).) Other iterations on that theme continued throughout the deposition. (*See, e.g., id.*, 189:17-20.) Any references to unproduced licenses would be misleading and wholly irrelevant to resolution of the issues in this lawsuit.

Defendants have at all times been reasonable and cooperative in producing documents and witnesses. To date, Defendants have produced almost 1 million pages of documents, and continue to supplement their production in good faith. Defendants are concerned that, despite their best efforts to be reasonable and diligent in discovery, Plaintiff will attempt to introduce evidence or argument suggesting otherwise. Such evidence and argument would be irrelevant,

highly prejudicial, and serve to inflame and confuse the jury. Defendants, therefore, ask the Court to enter an order precluding Plaintiff from introducing evidence relating to the other parties' conduct during discovery.

II. ALLEGATIONS OF DELAY DURING DISCOVERY ARE ENTIRELY IRRELEVANT TO THIS LAWSUIT.

Plaintiff has no basis to assert that Defendants have not fully complied with their discovery obligations in this litigation, including through references to unproduced licenses; however, even assuming Plaintiff somehow had a basis for the assertion, such facts would not be relevant to any issues which the jury has been tasked with deciding, such as Plaintiff's claims of patent infringement or Defendants' counterclaims of invalidity. *See* Fed. R. Evid. 401 ("Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."); Fed. R. Evid. 402 ("Evidence which is not relevant is not admissible."). While Plaintiff might argue that evidence of discovery conduct would be relevant to a determination of sanctions under Rule 37 of the Federal Rules of Civil Procedure or enhanced damages under Section 281 of U.S. Code Title 35, these determinations are within the exclusive province of the Court and it is improper to put them before a jury. Accordingly, Plaintiff should be precluded under Federal Rule of Evidence 402 from introducing evidence or argument during trial relating to Defendants' conduct during discovery.

III. EVIDENCE OF DEFENDANTS' CONDUCT DURING DISCOVERY SHOULD BE EXCLUDED BECAUSE IT WILL RESULT IN JURY BIAS AND PREJUDICE.

Plaintiff's allegations that it believes Defendants failed to produce or were slow to produce relevant documents or witnesses may lead the jury to incorrectly assume that Defendants intentionally attempted to conceal evidence of wrongdoing or otherwise prejudice the jury against Defendants. While such statements are wholly untrue and unsupportable, they may make it appear to the jury that Defendants were hiding something or being less than

forthcoming. This would result in bias against Defendants, as the jury might not only believe that Plaintiff is correct – which it is not – but that the alleged documents or witnesses include evidence detrimental to Defendants' case or beneficial to Plaintiff. Thus, the likelihood that this type of evidence will bias the jury is far too great to allow the admission of such testimony.

Such allegations will also result in a waste of time and provide an unnecessary sidetrack from the actual issues in the case. Defendants will be forced to try a case within a case to correct the unsupported inferences of delay or wrongful withholding. Plaintiff's allegations regarding Defendants' conduct during discovery, including any references to unproduced Google licenses, should therefore be excluded under Rule 403 of the Federal Rules of Evidence. *See, e.g., Green v. Baca*, 226 F.R.D. 624, 642-43 (C.D. Cal. 2005) (holding in a section 1983 action that evidence of defendant's purported discovery violations should be excluded under Rule 403 because their probative value was substantially outweighed by the danger of unfair prejudice); *Miller v. Ford Motor Co.*, 2004 WL 4054843, at *10 (M.D. Fla. July 22, 2004) (granting defendants' motion *in limine* to exclude reference or evidence regarding Defendants' alleged misuse of discovery practices); *Blue Cross & Blue Shield, Inc. v. Philip Morris, Inc.*, 2000 WL 1805359, at *2 (E.D.N.Y. Dec. 11, 2000) (granting defendants' motion *in limine* to exclude references to alleged discovery abuses).

Conclusion

For the foregoing reasons, Defendants respectfully ask this Court to preclude any evidence and argument during trial relating to any parties' conduct during discovery.

DATED: September 21, 2012

/s/ Stephen E. Noona

Stephen E. Noona
Virginia State Bar No. 25367
KAUFMAN & CANOLES, P.C.
150 West Main Street, Suite 2100
Norfolk, VA 23510
Telephone: (757) 624.3000
Facsimile: (757) 624.3169
senoona@kaufcan.com

David Bilsker
David A. Perlson
QUINN EMANUEL URQUHART &
SULLIVAN, LLP
50 California Street, 22nd Floor
San Francisco, California 94111
Telephone: (415) 875-6600
Facsimile: (415) 875-6700
davidbilsker@quinnemanuel.com
davidperlson@quinnemanuel.com

*Counsel for Google Inc., Target Corporation,
IAC Search & Media, Inc., and Gannet Co., Inc.*

By: /s/ Stephen E. Noona
Stephen E. Noona
Virginia State Bar No. 25367
KAUFMAN & CANOLES, P.C.
150 W. Main Street, Suite 2100
Norfolk, VA 23510
Telephone: (757) 624-3000
Facsimile: (757) 624-3169

Robert L. Burns
FINNEGAN, HENDERSON, FARABOW, GARRETT &
DUNNER, LLP
Two Freedom Square
11955 Freedom Drive
Reston, VA 20190
Telephone: (571) 203-2700
Facsimile: (202) 408-4400

Cortney S. Alexander
FINNEGAN, HENDERSON, FARABOW, GARRETT &
DUNNER, LLP
3500 SunTrust Plaza
303 Peachtree Street, NE
Atlanta, GA 94111
Telephone: (404) 653-6400
Facsimile: (415) 653-6444

Counsel for Defendant AOL Inc.

CERTIFICATE OF SERVICE

I hereby certify that on September 21, 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:

Jeffrey K. Sherwood
Kenneth W. Brothers
DICKSTEIN SHAPIRO LLP
1825 Eye Street NW
Washington, DC 20006
Telephone: (202) 420-2200
Facsimile: (202) 420-2201
sherwoodj@dicksteinshapiro.com
brothersk@dicksteinshapiro.com

Donald C. Schultz
W. Ryan Snow
Steven Stancliff
CRENSHAW, WARE & MARTIN, P.L.C.
150 West Main Street, Suite 1500
Norfolk, VA 23510
Telephone: (757) 623-3000
Facsimile: (757) 623-5735
dschultz@cwm-law.com
wrsnow@cwm-law.com
sstancliff@cwm-law.com

Counsel for Plaintiff, I/P Engine, Inc.

/s/ Stephen E. Noona
Stephen E. Noona
Virginia State Bar No. 25367
KAUFMAN & CANOLES, P.C.
150 West Main Street, Suite 2100
Norfolk, VA 23510
Telephone: (757) 624.3000
Facsimile: (757) 624.3169
senoona@kaufcan.com