

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION

_____)	
I/P ENGINE, INC.,)	
)	
	Plaintiff,)	
v.)	Civ. Action No. 2:11-cv-512
)	
AOL, INC. et al.,)	REDACTED VERSION
)	
	Defendants.)	
_____)	

PLAINTIFF I/P ENGINE, INC.’S OPPOSITION TO DEFENDANTS’ MOTION IN LIMINE #3 TO EXCLUDE MARKETING AND HIGH-LEVEL NON-TECHNICAL MATERIALS RELATED TO HISTORICAL CLICK-THROUGH RATE

I. INTRODUCTION

It is axiomatic that evidence must be relevant to be admissible. And a hallmark of admissibility is reliability or trustworthiness. Historically, a litigant’s own statements, when asserted against that litigant, have been accorded the highest degree of reliability because it is widely accepted that statements against interest are likely to be very reliable. Such statements are almost *always* admissible.

which is a central issue in this case. Google's proposed exclusion based on its own misstatement is so broad that it includes not only public documents, but technical documents that are provided to Google engineers and other technical staff. In fact, Google's technical expert relied on at least one of the documents that Google apparently seeks to exclude. And Google cited these documents pursuant to FRCP 33(d) in its sworn responses to I/P Engine's interrogatories, which Google has not sought to withdraw or amend in any respect and which are on I/P Engine's trial exhibit list. Nor should Google be allowed to change those answers now, after the close of fact discovery.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Google’s motion is also utterly unfair and impracticable. Google never identifies the documents that are subject to the motion; what is “high-level” or “non-technical?” Presumably, Google does not seek to exclude documents upon which its expert relied, nor the documents that it uses to pursue summary judgment, but its standard for implementing any such ruling seems to be that whatever might hurt Google should be excluded.¹

Google’s motion plainly has one goal – to protect it from relevant, reliable, but harmful evidence. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

II. DISCUSSION

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

¹ Because I/P Engine believes certain of Google’s summary judgment documents accurately, *though incompletely*, reflect how the Google system operates, I/P Engine has not disputed their admissibility for summary judgment purposes. They are therefore part of the admissible evidence in this case, which may moot this motion without further consideration. I/P Engine will use those exhibits at trial in support of its proof of infringement.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]. For years

Google relied on those documents to explain the operation of its products to its customers, and to generate revenue from these features. [REDACTED]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

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[Redacted]

[Redacted]

[REDACTED]

The disagreement over how Google’s products work is a classic fact dispute that will be addressed by both fact and expert witnesses, and will be for the jury to resolve. In resolving this factual dispute, Google's own documents and statements, both internal and external, about how the accused system works, are highly relevant and reliable. I/P Engine will offer evidence that these documents are in fact accurate descriptions of the underlying functionality in Google’s systems.

Google claims it is prepared to put on its own competing testimony about its documents and how its products work. That is exactly how the trial should proceed. [REDACTED]

[REDACTED]

[Redacted text block]

[REDACTED]

3. Google Cites No Applicable Case Law to Support its Motion

Google cites a single case in support of its motion, *Bradley v. Cooper Tire & Rubber Co.*, Case No. 4:03-cv-00094, 2007 WL 4624613 (S.D. Miss. Aug. 3, 2007). To the extent that a single unreported products liability case from Mississippi district court is even relevant to this Court’s consideration, the *Bradley* case does not suggest that Google’s own documents, which Google admits are the “best” non-technical description, are irrelevant.

Google relies on the *Bradley* court’s exclusion of Ford “advertisements regarding off-road capabilities” of the Ford Explorer. Motion at 3. [REDACTED]

[REDACTED]

[REDACTED] The *Bradley* court excluded advertisements regarding Ford’s off-road capability because “the mere fact that Ford marketed the vehicle as safe for off-road use does not equate to a claim that it was safe for off-road use *when the vehicle leaves the highway in an unintended manner.*” *Bradley*, 2007 WL 4624613 at *5 (emphasis added). In the same order, the *Bradley* court held that “a witness may be allowed to testify about conclusions Ford reached or what Ford should have known *based on its own documents and data.*” *Id.* at *3 (emphasis added). The

court also denied Ford’s other motion *in limine* to exclude documents that were “relevant to the issues as discussed regarding the off-road advertisements.” *Id.* at *6.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

In contrast to *Bradley*, where the statements bore no relation to a products liability claim, in patent cases, the Federal Circuit and other district courts have admitted and relied upon defendants’ own advertising materials. *See, e.g., Howmedica Osteonics Corp. v. Wright Medical Technology, Inc.*, 540 F.3d 1337, 1345 (Fed. Cir. 2008) (citing defendants’ own advertising for its accused product as contradicting defendants’ arguments against infringement); *Arista Records, Inc. v. Flea World, Inc.*, Case No. 03-cv-002670 (JBS), 2006 WL 842883, *13 n.14 (D.N.J. Mar. 31, 2006) (upholding expert report under *Daubert* challenge where expert relied, in part, on defendants’ own advertising).

B. Google’s Fear of Contradicting Its Own Statements Does Not Substantially Outweigh The Documents’ Probative Value Under Fed. R. Evid. 403

Federal Rule of Evidence 403 allows this Court to exclude relevant evidence if its probative value is “substantially outweighed by a danger of . . . unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.” Fed. R. Evid. 403. Google does not make a colorable showing of any of these dangers.

First, Google repeats its argument that there is nothing in dispute, and thus discussion of the operation of its products would serve “only to confuse the jury.” Motion at 3. As discussed above in Section II.A, Google plainly mischaracterizes Dr. Frieder’s testimony in an

attempt to make its argument. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Google also argues that, were its witnesses confronted with its own documents, Google would be prejudiced by the resulting “sideshow.” Motion at 3. The only “prejudice” would be the jury’s rightful skepticism when Google’s witnesses make self-serving statements that contradict their own documents (and prior testimony) explaining how these systems work. “It is well established that a defendant who voluntarily offers himself as a witness and testifies in his own behalf subjects himself to legitimate and pertinent cross-examination to test his veracity and credibility.” *U.S. v. Dike*, App. No. 98-4136, 166 F.3d 335 (Table), 1998 WL 879732, *4 (4th Cir. Dec. 17, 1998) (upholding impeachment of defendant with his own documents that were excluded for other purposes).

Google suggests that I/P Engine intends to waste its own time at trial making a case about Google’s deceptive advertising. Motion at 3. I/P Engine has no such intention; instead, these documents will be offered to illustrate the operation of the accused system, will show Google’s infringement, and also prove its inducement to others to infringe. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of September, 2012, the foregoing **PLAINTIFF I/P ENGINE, INC.'S OPPOSITION TO DEFENDANTS' MOTION IN LIMINE #3 TO EXCLUDE MARKETING AND HIGH-LEVEL NON-TECHNICAL MATERIALS RELATED TO HISTORICAL CLICK-THROUGH RATE**, was served via the Court's CM/ECF system and via Hand Delivery, on the following:

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