

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION

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I/P ENGINE, INC.,)	
	Plaintiff,)	
	v.)	Civ. Action No. 2:11-cv-512
AOL, INC. et al.,)	
	Defendants.)	REDACTED VERSION
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**PLAINTIFF I/P ENGINE, INC.’S OPPOSITION TO DEFENDANTS’ MOTION IN
LIMINE #4 TO PRECLUDE PLAINTIFF FROM OFFERING EVIDENCE OR
ARGUMENT RELATING TO DEFENDANTS’ CONDUCT DURING DISCOVERY OR
TO GOOGLE’S UNPRODUCED LICENSES**

Generally speaking, I/P Engine agrees that, without prior leave of Court, evidence of the parties’ conduct during discovery should not be referenced to the jury. In this case, however, I/P Engine has pending certain sanctions motions that could give rise to circumstances where it might be relevant to advise the jury of Google’s withholding of evidence. For example, Google’s damages expert expressly criticized I/P Engine’s damages expert, claiming that he should have relied upon evidence that Google improperly withheld until long after he submitted his report. I/P Engine has moved to preclude that untimely evidence, which should end the matter. *See* D.I. 277 (Plaintiff’s Second Motion for Sanctions). But, if for any reason Defendants’ expert is permitted to offer that criticism, I/P Engine should be permitted to explain Defendants’ discovery misconduct and the reason that I/P Engine’s expert did not analyze this information in his initial report. Similarly, I/P Engine has a pending motion to preclude Defendants from relying on source code that Google produced well after the close of fact

discovery. *See* D.I. 282 (Plaintiff’s Third Motion for Sanctions). If that motion is denied, then I/P Engine should be allowed to explain the circumstances in which such information was made available to defend against unjust criticism of I/P Engine’s technical expert for not considering information that was withheld by Defendants until after I/P Engine’s technical expert submitted his report.

I. DEFENDANTS’ MOTION IS TOO VAGUE

This Court has stated that “the purpose of a motion in limine is to allow the trial court to rule in advance of trial on the admissibility and relevance of *certain* forecasted evidence.” *Gerrero v. Deane*, 2012 U.S. Dist. LEXIS 125404 (E.D. Va. Sept. 4, 2012) (emphasis added). Contrary to this instruction, Defendants have not identified any exhibits or specific evidence that it believes is affected by the motion. Defendants’ motion seeks to vaguely preclude the use of unspecified evidence because it may relate to Defendants’ discovery conduct. General preclusion of such a broad range of evidence and argument, without determining its admissibility by balancing its probative value against its prejudicial potential, is contrary to the balancing test of Fed. R. Evid. 403.

In essence, Defendants ask this Court to provide a broad, blanket exclusion of evidence and arguments without evaluating possible exceptions where the probative nature of the evidence outweighs its minimal prejudicial effect or where it would be unjust to exclude such evidence. However, this Court has previously refused to grant similar motions *in limine* that seek broad exclusion of general evidence more appropriately reviewed on a specific basis. *See e.g. Torkie-Tork v. Wyeth*, 2010 U.S. Dist. LEXIS 121804 (E.D. Va. Nov. 15, 2010) (refusing to grant defendant’s motion to exclude “marketing and promotional material” in general because “the category is too broad and vague, and it is appropriate to consider this objection in the context of specific evidentiary submissions and deposition designations”). Based on the same

reasoning, this Court should deny Defendants' motion and review evidence related to discovery conduct on a more specific basis as Defendants' blanket exclusion is simply unjust.

II. EXAMPLES OF RELEVANT AND ADMISSIBLE EVIDENCE THAT WOULD BE WRONGLY EXCLUDED UNDER DEFENDANTS' MOTION

I/P Engine can provide at least three specific examples of relevant and admissible evidence that would be wrongly excluded under Defendants' broad preclusion argument. These examples illustrate the importance of denying Defendants' motion to ensure that such appropriate evidence and argument may be presented at trial or at least evaluated for relevance as specific evidentiary submissions.

A. Evidence and Argument Relating to Defendants' Untimely Discovery Responses Relating to Damages Data Should Be Admissible To Combat Defendants' Unwarranted Criticism of I/P Engine's Damages Expert

Defendants waited until the very end of fact discovery to disclose critical categories of damages-related evidence that were requested at the very beginning of this case. Simultaneous with these last-minute disclosures, Defendants served an expert damages report that criticized I/P Engine's damages expert for relying on Defendants' prior-produced documents, interrogatory responses, and Rule 30(b)(6) testimony, instead of this new, previously absent evidence. This egregious conduct has been more fully and appropriately briefed in reference to Plaintiff's Second Motion for Sanctions (D.I. 277).

Defendants are trying to have it both ways. They want to have their expert criticize I/P Engine's expert for not relying on data that Defendants concealed and which was not available when I/P Engine's expert prepared his report, but Defendants do not want I/P Engine to point out the obvious rejoinder, which goes to their discovery misconduct. Defendants' present motion *in limine* seeks preclusion of any reference by I/P Engine to these late submissions, while permitting Defendants to criticize I/P Engine's expert for not using them in his initial expert

report. If Defendants are permitted to open that door, then evidence or arguments regarding Defendants' failure to provide such key damages information prior to Plaintiff's service of its expert damages report should be admissible at trial to combat unwarranted and unjust criticism of I/P Engine's damages expert.

B. Evidence and Arguments Related to Defendants' Untimely Production of Source Code and Other Technical Discovery Responses Should Be Admissible To Combat Defendants' Probable Criticism of I/P Engine's Technical Expert

On September 14, ten days after the close of fact discovery, 50 days after I/P Engine served its infringement expert report, and after the deposition of I/P Engine's infringement expert, Google produced more than 250 pages of source code that had never previously been disclosed, despite I/P Engine's repeated discovery requests dating from November 2011. The same day, Defendants also served supplemental interrogatory responses asserting that the previously concealed source code allegedly shows that, prior to 2010, the accused systems did not include all features that I/P Engine has accused of infringement. Google's misconduct in this matter has been briefed more fully and appropriately in relation to Plaintiff's Third Motion for Sanctions (D.I. 283).

Once again, Defendants have produced information on an untimely basis, then unjustly criticized I/P Engine's expert for not considering the unavailable information. Defendants' present motion *in limine* would reward these tactics. For example, if this motion is granted, and Defendants are permitted to attack I/P Engine's technical expert for not addressing this information, I/P Engine would be unable to explain Defendants' sandbagging. This result is unjust. If Defendants are permitted to rely on this untimely evidence, then I/P Engine should be permitted to explain to the jury (or the Court should so advise the jury) of Defendants' wrongful actions.

C. I/P Engine Should Be Permitted To Cross-Examine Defendants' Damages Expert Regarding [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] This admission exposes a fundamental flaw in Dr. Ugone's reasoning, and legitimately calls into question his conclusion. Dr. Ugone has made a sweeping generalization based upon a limited review of a small sample.

Defendants now seek to preclude this criticism. D.I. 306 at p. 3. Defendants assert that this criticism could cause the jury to infer that Google was negligent in its production responsibilities and assume discovery misconduct. Defendants thus would have this Court preclude any evidence relating to this flaw in Dr. Ugone's conclusion. Defendants again are trying to have it both ways. [REDACTED]

[REDACTED] The probative value of subjecting an expert to a vigorous cross-examination on such a relevant analytical omission easily outweighs the small chance of prejudice to Defendants. Such evidence should not be precluded from trial.

III. CONCLUSION

For the foregoing reasons, Defendants' motion *in limine* to broadly preclude all evidence or arguments related to Defendants' discovery conduct should be denied. In any event, for the foregoing reasons, this Court should specifically allow evidence or arguments relating to (1)

untimely discovery responses regarding damages information, which are necessary to explain and defend against unjust criticism of the damages analysis provided by I/P Engine's damages expert, (2) untimely discovery responses regarding technical aspects of the case, which are necessary to explain and defend against probable, unjust criticism of I/P Engine's technical expert and (3) [REDACTED]

Dated: September 27, 2012

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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 #4 TO PRECLUDE PLAINTIFF FROM OFFERING EVIDENCE OR ARGUMENT RELATING TO DEFENDANTS' CONDUCT DURING DISCOVERY OR TO GOOGLE'S UNPRODUCED LICENSES**, was served via the Court's CM/ECF system, on the following:

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