

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

**DEFENDANTS' OPPOSITION TO PLAINTIFF'S SECOND MOTION FOR  
DISCOVERY SANCTIONS**

**I. INTRODUCTION**

Plaintiff seeks three drastic sanctions related to two updated interrogatory responses and one production of emails that were served before the close of fact and expert discovery. First, Plaintiff seeks a sanction that will allow its damages expert, Dr. Becker, to inflate his damages calculation [REDACTED] using sales outside the U.S. While both Dr. Becker and Defendants agree (as they must) that using such sales is improper, Plaintiff argues it should be allowed because the updated interrogatories explicitly identifying the U.S. sales figures for a three year period were a surprise and caused prejudice. This is simply not the case.

Google produced a number of spreadsheets that identified both U.S. and worldwide revenue over different time periods. It then had a 30(b)(6) witness testify unequivocally that one of the spreadsheets covered U.S. revenue while another reported worldwide revenue. Dr. Becker cited testimony from the 30(b)(6) witness and used the spreadsheets, even identifying one of the spreadsheets as showing worldwide data. Instead of apportioning the worldwide revenues so that he could calculate royalties based only on the U.S. revenue, however, he simply used worldwide

sales when calculating damages in the period from August 2009- March 2012 – despite knowing this was improper. For this period, he did not attempt to calculate the U.S. sales from the worldwide sales data. Instead, he stated that if updated sales figures became available, he would supplement his report.

Google's production of an updated interrogatory response before the close of fact discovery identifying U.S. revenue from 2009 to 2012 simply made explicit what Dr. Becker already knew and could readily have calculated himself for the 2009-2012 time period. The updated interrogatory response was not, as Plaintiff characterizes it, a complete change of position. Nor was it a surprise that caused any prejudice. Plaintiff has stated that Dr. Becker can easily supplement his report to account for the U.S. sales data though a simple math calculation. Moreover, any prejudice that Plaintiff might suffer as a result of Dr. Becker being criticized for not attempting to calculate U.S. sales can be alleviated by preventing Google from raising that issue at trial. As there was no undue surprise, change of position or prejudice, Plaintiff's motion to strike the updated revenue interrogatory should be denied.

Next, Plaintiff seeks to prevent Google from relying on non-infringing alternatives to the accused system that were identified in another interrogatory that was supplemented before the close of fact and expert discovery. While Plaintiff complains that this supplemental interrogatory results in prejudice, again that is not the case. Plaintiff's claim of prejudice rests on not being able to depose a Google witness on the non-infringing alternatives. But, Google informed Plaintiff that it would present such a witness after claim construction was complete, Plaintiff never sought a deposition, and Plaintiff asked very few questions about non-infringing alternatives of the Google witness deposed after Defendants' expert identified him as a person with knowledge of the topic. Moreover, Plaintiff had more than ample time between the supplemental interrogatory and expert depositions to prepare for and ask Google's experts about the non-infringing alternatives. In summary, Google supplemented the interrogatory after it received the claim construction order and after Plaintiff finally provided some (albeit incomplete) facts identifying its infringement theories. As Google could not have reasonably

provided its non-infringing alternatives until those events occurred, its supplemental responses were timely and Plaintiff has suffered no prejudice.

Third, Plaintiff seeks to exclude emails that [REDACTED]

[REDACTED] Google identified and diligently produced these emails after Plaintiff's expert identified and relied upon a document that allegedly showed the opposite was true. It was only after Plaintiff identified that document that Google became aware that it should question certain employees about documents they may have relevant to this topic. Once the emails were found, they were promptly produced before the close of fact discovery. Moreover, Plaintiff can provide no justification for excluding Google's expert from relying upon a similar email produced in May, more than three months before the discovery deadline.

## II. THE LEGAL STANDARDS

Google timely supplemented its discovery responses pursuant to Federal Rule of Civil Procedure 26(e). Plaintiff bases its motion on its misreading of a recent Federal Circuit decision, which does not, contrary to Plaintiff's suggestion, stand for the proposition that evidence properly produced "during the last days of fact discovery" should be excluded. (D.N. 309, 2.) In *Woods v. DeAngelo Marine Exhaust, Inc.*, -- F. 3d --, 2012 WL 3683536, \*4 (Fed. Cir. Aug. 28, 2012), defendant discovered certain drawings it believed constituted prior art and wrote an email to plaintiff disclosing the drawings on the last day of fact discovery. Defendant never supplemented its response to plaintiff's prior art interrogatory to include reference to the drawings. *Woods*, 2012 WL 3683536 at \*4, \*6. The Federal Circuit noted that the timeliness of the document production and the failure to supplement the interrogatory response were two distinct issues. *Id.*, \*6. The Federal Circuit actually disagreed with the district court's determination that the documents were not timely produced, noting:

The district court, by local rule or by court order, may require such production at an earlier date. But the problem here is that there was no such local rule or court

order, save the order setting a discovery deadline of February 9, 2010. The documents were disclosed on February 8, before the discovery deadline . . .

*Id.*, \*7. Although the Federal Circuit upheld the trial court's exclusion of the documents, its decision was explicitly based not on timeliness grounds (the production was timely), but on Defendant's failure to ever supplement its interrogatory response. *Id.*, \*7-8.

The Federal Circuit found that defendant met its Fed. Rule C. P. 26(e) supplementation obligations with respect to production of the drawings, because the rule

requires only that parties supplement prior discovery responses *in a timely manner if the party learns* that in some material respect the disclosure or response is incomplete or incorrect . . . The rule prohibits parties who are aware of their deficient response from holding back material items and disclosing them at the last moment.

*Id.*, \*7 (quotations omitted) (emphasis in original). Like the defendant in *Woods*, Google met its discovery obligations by promptly producing documents upon learning of them. Unlike the defendant in *Woods*, however, Google also fulfilled its discovery obligation to supplement its interrogatory responses. Thus, Plaintiff's reliance on *Woods* is misplaced.

Plaintiff's reliance on the five-factor test in *Southern States* is also not appropriate. This test is used to determine "whether a party's nondisclosure of evidence was substantially justified or harmless" under Federal Rule of Civil Procedure 37(c). *Southern States Rack and Fixture, Inc. v. Sherwin-Williams Co.*, 318 F.3d 592, 596-97 (4th Cir. 2003). The Rule 37(c) exclusion rule applies where a party has failed to make the appropriate disclosures or to supplement discovery responses under Federal Rules of Civil Procedure 26(a) and (e). Fed. R. Civ. P. 37(c)(1). Here, Google has made all appropriate disclosures and has timely supplemented its discovery responses, and so the exclusionary rule, and the *Southern States* five-factor test, are inapplicable.

**III. GOOGLE'S SUPPLEMENTAL RESPONSE TO REVENUE INTERROGATORY WAS TIMELY AND PROPER.**

**A. There Was No Surprise From Google's Updated Interrogatory Response**

On August 29, 2012, prior to the close of fact discovery, Google supplemented its response to Interrogatory No. 15 to more particularly identify the U.S. revenue for the accused products from August 2009 to June 2012. (Ghaussy Dec., Ex. A.) The response previously contained only worldwide data for this time period, [REDACTED]

[REDACTED] (See, e.g., Ghaussy Dec., Ex. C (Datta Tr.), 98:18-22.) Google also updated the sales figures to be current through July 2012. Google then updated its response again on September 13, 2012, solely to make it current through August 2012 for AdSense for Mobile Search. (*Id.*, Ex. B.) There was no element of surprise or prejudice that flows from these updates.

While Plaintiff now argues that its expert, Dr. Becker, had every reason to believe his reliance on the spreadsheets that contained worldwide sales was proper (D.N. 309, 7), the facts show the opposite is true. Dr. Becker acknowledges only U.S. revenues can serve as a basis for damages in this case. (D.N. 386, ¶ 57; D.N. 387, 104:2-5 (Becker Tr.) ("Q: [Y]ou agree that the accused revenues in this case are the U.S. revenues of the accused products? A: Yes."))<sup>1</sup> Indeed, Dr. Becker's report explicitly states that should additional U.S. revenue data be produced, he reserved the right to supplement his report. (D.N. 386, ¶ 62.) Thus, neither he nor Plaintiff can argue surprise when Google supplemented its response to more particularly identify U.S. sales and make the updates current through August 2012. Six weeks prior to service of Dr. Becker's report, Google's 30(b)(6) witness, Sanjay Datta, testified [REDACTED]

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<sup>1</sup> Defendants have filed a *Daubert* motion to exclude Dr. Becker's flawed damages theory. (D.N. 385.) Among the flaws identified in that motion is Dr. Becker's improper use of worldwide revenues as a royalty base. (*Id.*, 11-12.)

[REDACTED]<sup>2</sup> (D.N. 391, 54:22-55:18; *see also* Ghaussy Dec., Ex. C, 97:25-98:11 ([REDACTED])  
[REDACTED]  
[REDACTED]).)

Six weeks later, Dr. Becker relied on these spreadsheets to establish revenue figures that he would use in his royalty calculation. Dr. Becker had clearly reviewed Mr. Datta's deposition transcript and understood that certain revenue was worldwide. For example, in exhibit SLB-5 to his expert report, Mr. Becker identifies the spreadsheet which was Datta Exhibit 2 as Google's worldwide revenue. (D.N. 386, SLB-5.) He also cites to Mr. Datta's testimony, stating, "Google's corporate representative testified that updating U.S. revenue information for the accused systems should be an easy thing to do. Should Google clarify or produce additional or updated information after the issuance of this report, I reserve the right to revise my calculation of the royalty base as necessary." (*Id.*, ¶ 62.) The evidence all points to Dr. Becker knowing that he was relying on worldwide data. Yet, he chose to wait for Google to provide an update to the U.S. sales rather than attempting to apportion the worldwide sales to account for them. Dr. Becker had ample data available to him to make the apportionment. He had years of data showing the percentage of U.S. to worldwide sales for the accused products. (*C.f.* Ghaussy Dec., Exs. D (Datta Tr. Ex. 2) and E (Datta Tr. Ex. 3).) He also had Google's 10Ks, which provided insight into how to make the apportionment, and Mr. Datta also explained in his deposition that this apportionment could be done. (Ghaussy Dec., Ex. C, 116:13-120:4.) He has also explicitly stated that U.S. revenue is the appropriate measure of damages. (D.N. 387, 104:2-5.) Given Dr. Becker's choice to wait for an update, the necessity for which became clear only after he chose to simply rely on worldwide data rather than apportioning it, Google should not be penalized for providing it to him.

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<sup>2</sup> This unequivocal testimony refutes Plaintiff's claim that [REDACTED]  
[REDACTED]. (*See* D.N. 309, 6-7).

**B. Plaintiff Will Not Suffer Any Prejudice As a Result of Google Updating Its Revenue Numbers**

Plaintiff itself has stated, in its opposition to Defendants' *Daubert* motion, that Dr. Becker "could easily adjust his royalty base" to take into account the U.S.-specific revenues. (D.N. 309, 11.) This is simply "a matter of mathematics": Dr. Becker "will be able to conduct the math exercise and adjust the royalty base." (*Id.*, 2.) Given the ease with which Dr. Becker can supplement his report, Plaintiff cannot establish that Google's updated numbers prejudice Plaintiff's ability to present its case. Dr. Becker can simply perform the revised calculation and produce a supplemental report identifying a revised damage number that is based only on allowable sales within the U.S. See 35 U.S.C. § 271(a); *Microsoft Corp. v. AT&T Corp.*, 550 U.S. 437, 455 (2007) ("The presumption that United States law governs domestically but does not rule the world applies with particular force in patent law."); *NTP, Inc. v. Research in Motion Ltd.*, 418 F.3d 1282, 1313 (Fed. Cir. 2005) ("Section 271(a) is only actionable against patent infringement that occurs within the United States.").

Though Dr. Becker's report easily can be supplemented through simple math, Plaintiff complains that it will suffer prejudice if Google's expert criticizes Dr. Becker for relying on incorrect data, given that Dr. Becker did not have access to the U.S. data at the time he submitted his report. (D.N. 309, 8-9.) However, Google's expert acknowledges that Dr. Becker did not have explicit U.S. revenues for all time periods; he criticizes Dr. Becker for choosing not to estimate U.S. revenues for those years, even though it was clear that the revenue was worldwide and that Dr. Becker had the means to make an estimate. (D.N. 468-4, ¶ 162.) Dr. Becker could have used the U.S. versus worldwide revenue from 2005-2009 as a guideline for U.S. revenues generated from 2009-2012, or used information in Google's 10-Ks to make this apportionment. Dr. Becker chose not to do so, and continues not to do so, and it is for this reason that Dr. Becker's methodology is flawed.

Even if the criticism of Dr. Becker were considered prejudicial, the prejudice could be alleviated in a much less drastic and significant way than striking Google's updated August 29

interrogatory response and allowing [REDACTED] in improper damages to become part of the damages asserted in the case. For example, the Court could issue an order precluding Google from cross examining Dr. Becker about his initial use of worldwide data, and it could preclude Google's expert from criticizing Dr. Becker for failing to initially apportion the worldwide revenue to include U.S. only sales. This would completely alleviate any prejudice that Plaintiff claims it will suffer.

Last, Plaintiff claims that it has suffered prejudice because it cannot depose fact witnesses and verify the new revenue numbers. (D.N. 309, 2,9.) As a practical matter, it would be hard to see how Plaintiff would question the veracity of the updated numbers. For this reason, Plaintiff had taken the opposite position earlier in the case: it stated that it wanted an updated interrogatory response on the revenue numbers in lieu of a deposition about those numbers. (*Id.*, 7.) This is exactly what Plaintiff got. Moreover, to the extent Plaintiff wanted to question witnesses about the revenue numbers, it was free to do so. The August 29 supplementation was made in advance of Plaintiff's September 14 deposition of Defendants' expert witness on damages. (Ghaussy Dec., ¶ 14.) Thus, Plaintiff had a full and fair opportunity to question Google's expert about the updated U.S. revenue figures. Plaintiff also had an opportunity to obtain discovery from Google fact witnesses on the updated numbers. Plaintiff served deposition notices on August 31, after it had received the supplementation, for the depositions of two third-party witnesses. (D.N. 438-7, 438-8.) Defendants cooperated with making those witnesses available for deposition after the close of fact discovery. (D.N. 243.) Google would also have cooperated with allowing depositions regarding the updated financial numbers, as it did other Google and third-party fact witnesses Plaintiff deposed as late as September 12, 18, 25 and 27. (Ghaussy Dec., ¶ 15.)

**C. The Remedy Plaintiff Seeks Is Unjustified**

Plaintiff's expert has testified that if his damages calculation included sales outside the U.S., then it needs to be revised. (D.N. 387, 104:21-105:7.) Google agrees. Plaintiff, on the

other hand, requests that Google's interrogatory response be stricken and worldwide sales remain as part of the damages calculation. Plaintiff disregards the fact that this could lead to [REDACTED] windfall. (D.N. 387, 104:2-5 (Becker Tr.) ("Q: [Y]ou agree that the accused revenues in this case are the U.S. revenues of the accused products? A: Yes."); *Microsoft Corp.*, 550 U.S. at 455. There is no basis for such drastic relief.

Similarly, such a result would lead to the untenable position of forcing Dr. Becker to admit that his damages numbers are incorrect and inflated, and would likely create jury confusion. Google will necessarily be able to question Dr. Becker's use of the worldwide numbers instead of the more correct U.S. numbers and his knowledge of the earlier produced charts showing the distinction for the 2005-2009 period. To exclude the correct numbers would be to invite a verdict that was inherently flawed.

There was no surprise when Google updated its revenue numbers. Google's 30(b)(6) witness had already testified that the earlier data included worldwide sales. Dr. Becker acknowledged this in Exhibit SLB-5 to his report, and in his statements within the report. Thus, the only possible justification for striking the updated interrogatory response would be based on a prejudice that cannot be alleviated. Such prejudice does not exist. Dr. Becker can easily supplement his report to include the proper revenue base, and Google can be prevented from raising his original inclusion of worldwide sales data in his damages calculation. For these reasons, Plaintiff's request to strike the updated interrogatory response and prevent any reliance on the actual U.S. sales figures should be denied.

#### **IV. GOOGLE'S SUPPLEMENTARY RESPONSE TO NON-INFRINGEMENT ALTERNATIVES INTERROGATORY WAS TIMELY AND PROPER.**

##### **A. Google's Supplementation was Necessary Given Plaintiff's Delay in Disclosing its Infringement Contentions**

Google served its supplementary interrogatory response identifying additional non-infringing alternatives on August 30, 2012, five days before the close of fact discovery. Plaintiff's argument that this response should be excluded fails, given that it was Plaintiff's delay

in providing consistent and complete infringement contentions that caused the August 30 supplementation.<sup>3</sup>

As with Plaintiff's motion to exclude Defendants' prior art, which was denied, here again Plaintiff complains about Google's identification of evidence when this identification was made to respond to Plaintiff's own new theories. (See D.N. 275, 1 (Order denying Plaintiff's motion for discovery sanctions).) On November 7 and 11, 2011, Plaintiff served infringement contentions for certain of the accused products based on publicly available information. (D.N. 105, 3.) A month later, Google produced over 200,000 pages of technical documents concerning the accused products, and in January, Defendants requested that Plaintiff supplement its infringement contentions to account for the technical documents. (*Id.*) After meeting and conferring, Plaintiff agreed and served supplemental infringement contentions, which were still incomplete, in February 2012. (*Id.*, 3-4.) When Plaintiff refused to supplement its deficient contentions, Defendants Google and IAC Search & Media, Inc. moved to compel complete infringement contentions, because Plaintiff's contentions did not put Defendants on notice of the claims against them. (*Id.*, 4-6.) In May, the Court granted the motion in part, ordering Plaintiff to supplement its infringement contentions by July 2. (D.N. 156, 2.) On June 4, the Court held a *Markman* hearing, during which Plaintiff identified some features of the accused products that met the collaborative data element of the asserted patents. (D.N. 220, 7-8.) The Court issued its *Markman* order on June 18. (*Id.*) On July 2, Plaintiff served supplemental infringement contentions asserting several new infringement theories. For example, Plaintiff for the first time asserted that other aspects of Google's accused systems ██████████ met the content-based filtering limitation in Claims 10(c), 25(c) of the '420 Patent and Claims 1(d) and 26(e) of the '664

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<sup>3</sup> Plaintiff served supplemental interrogatory responses and also supplemented its expert infringement report on September 4, 2012, the last day of fact discovery. Plaintiff's motion does not seek to exclude Google's September 20 supplementation of the same non-infringing alternative interrogatory, presumably because it recognizes that this supplementation was made only to respond to Plaintiff's new infringement expert report served September 4.

Patent.<sup>4</sup> (*Id.*, 9-10.) On July 25, Plaintiff's infringement expert submitted his report, which identified that Plaintiff was alleging that "Defendants' systems infringe the asserted claims whenever they filter advertisements in response to a search query from a user using pCTR." (D.N. 240-4 (Frieder Report), ¶ 71.) Thus, Dr. Frieder's report, in combination with Plaintiff's July 2 supplemental infringement contentions, clarified that Plaintiff was pointing [REDACTED] [REDACTED], as meeting the limitations of the patents-in-suit. The report stated that any one of these features is sufficient to meet the claim limitations. (*Id.*) It thus became apparent that, under Plaintiff's theory of infringement, Google could design around the patents-in-suit by not using pCTRs calculated [REDACTED].

After Google learned of Plaintiff's position, Google contacted the appropriate Google employees to discuss Plaintiff's newly disclosed position, discussed Plaintiff's report with its experts, and coordinated conversations between its employees and experts. (*See, e.g.*, D.N. 468-4 (Ugone Report), ¶¶ 14, 26, 127.) Google could not determine the non-infringing alternatives to its product without knowing what the claim terms meant and what Plaintiff specifically contended was infringing – information contained in the Court's *Markman* order (and later order granting Defendants' motion for reconsideration) and Plaintiff's expert report. Google investigated diligently and properly submitted its non-infringement expert report, which set forth Google's non-infringing alternative position, on August 30. The very same day, Google supplemented its interrogatory response to include the non-infringing alternatives identified in its expert report. This supplementation was therefore timely.

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<sup>4</sup> Plaintiff failed to supplement its contentions as to certain of the accused products, in violation of the Court's order. After extensive meet-and-confers between the parties, and the threat of a motion for sanctions by Defendants, Plaintiff ultimately agreed to dismiss these products from the case. (D.N. 203.)

## **B. Plaintiff Suffered No Prejudice From the Supplementation**

Plaintiff cannot show any prejudice as a result of Google's supplemental interrogatory response. Plaintiff attempts to create prejudice from the fact that it did not depose a Google 30(b)(6) witness concerning non-infringing alternatives. But Plaintiff fails to mention that Google explained repeatedly that it would be willing to produce a 30(b)(6) witness on non-infringing alternatives after the Court issued its claim construction order. (D.N. 180-16, Ghaussy Dec. Ex. G, 3 ("Defendants are willing to produce a witness in response to topics regarding non-infringing alternatives and design-arounds after the Court issues its Markman order.")) Google's position was that the claims needed to be construed and Plaintiff needed to identify its infringement positions before Google could identify non-infringing alternatives. It would have been a waste of time for Plaintiff to depose Google's non-infringing alternatives witness both before and after the claim construction order. Despite Google's offer, however, Plaintiff never requested that Google provide a 30(b)(6) witness on non-infringing alternatives after the claim construction order issued.<sup>5</sup> (Ghaussy Dec., ¶ 13.) That Plaintiff never requested and therefore never deposed a 30(b)(6) witness on the topic of non-infringing alternatives is Plaintiff's fault, not Google's.

Furthermore, on September 12, 2012, Plaintiff did take the deposition of Google employee Nicholas Fox, whom Dr. Ugone identified in his August 29 expert report as a person with knowledge of Google's non-infringing alternatives. (D.N. 468-4, ¶ 26.) Although Mr. Fox's deposition occurred nearly two weeks after the supplementation Plaintiff moves to exclude, Plaintiff asked Mr. Fox very few questions about non-infringing alternatives. (Ghaussy Dec. Ex. H (Fox Tr.), 231:7-233:17.) Plaintiff therefore had a full opportunity to question one of the Google employees with knowledge about the non-infringing alternatives contained in the

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<sup>5</sup> Although the Court's claim construction order is dated June 15, it was sent to the parties on June 18. (D.N. 171; Ghaussy Dec., ¶ 13.) The deposition of Mr. Alferness occurred on June 21, three days later. (*Id.*) After the order issued, Plaintiff did not request that Mr. Alferness be designated for the non-infringing alternative topic (presumably due to the short notice for both parties), nor did Plaintiff ever request a witness on this topic after the order.

supplemental response, but chose not to do so. Furthermore, the supplementation was made well in advance of Plaintiff's September 22-23 deposition of Defendants' expert witness on non-infringement and the September 14 deposition of Defendants' expert witness on damages, and Plaintiff did in fact ask questions of both experts about non-infringing alternatives. (Ghaussy Dec., ¶ 14.) Again, Plaintiff had ample opportunity to investigate the non-infringing alternatives, and therefore cannot demonstrate prejudice.

Plaintiff's other complaints about discovery prejudice also ring hollow. Plaintiff states that Dr. Becker had to issue his report without knowing Plaintiff's non-infringing alternatives (D.N. 309, 15); however, as discussed above, Dr. Becker could have supplemented his report but did not do so. In addition, it is common in patent cases for the plaintiff's expert report to be due before the defendant's expert report, because the plaintiff bears the burden of proof on most issues. Therefore it is not unusual for a plaintiff to receive the full set of non-infringing alternatives after it submits its reports.<sup>6</sup>

As set forth above, Plaintiff continued to notice depositions after the supplementations and continued to take fact depositions – including of Google fact witnesses – even after the close of fact discovery. Plaintiff had the opportunity to take more fact discovery on this issue, to ask Google to provide a 30(b)(6) witness on non-infringing alternatives after the *Markman* order, and to question a Google employee with knowledge of non-infringing alternatives about the supplementation – and chose not to do so. Any discovery prejudice is entirely Plaintiff's own doing.

V. **GOOGLE'S AUGUST 29 DOCUMENT PRODUCTION WAS TIMELY AND PROPER.**

Google's production of emails demonstrating that [REDACTED]

[REDACTED] was not untimely. Like the timely produced

<sup>6</sup> The discovery schedule originally provided for rebuttal expert reports by Plaintiff, but Plaintiff decided to forego rebuttal expert reports in exchange for a one-week extension to the deadline for its original reports. (D.N. 192).

drawings in *Woods*, the emails were not served in violation of any discovery deadline. *Woods*, 2012 WL 3683536 at \*7. Google's diligent search for responsive documents did not uncover these emails; they were located only after Plaintiff's expert report identified that Plaintiff was specifically concerned with [REDACTED]

On December 7, 2011, three months prior to the first day of discovery under the Court's Rule 26(f) Pretrial Order, Google produced over 200,000 pages of technical documents related to the then-accused products from its technical repositories. (D.N. 145, 4-5.) Google continued to search for documents responsive to Plaintiff's requests throughout fact discovery, ultimately producing almost 900,000 pages of documents in this case. (Ghaussy Dec., ¶ 17.) On July 25, Plaintiff served the damages report of Dr. Stephen Becker. Dr. Becker relied heavily on a single internal Google presentation suggesting [REDACTED] [REDACTED]. (D.N. 386, ¶¶ 174-76, Ex. SLB-18.) After speaking with the author of the presentation, Google determined that the author of that statement did not have personal knowledge of it, and that a different Google employee would have knowledge of this issue.<sup>7</sup> (Ghaussy Dec. ¶ 16.) This employee gave to Google's counsel the emails at issue, which were then promptly produced to Plaintiff. (*Id.*)

Plaintiff's vague requests for documents concerning "internal testing" or "increases in revenue after incorporating a Relevance Score into a paid search advertising system" (D.N. 309, 10) were not specific or intelligible enough to put Google on notice that it needed to conduct an investigation targeted to [REDACTED] [REDACTED], especially given that the relevant damages period in this case does not begin prior to September 2005. (D.N. 386, Ex. SLB-1.) Google is a large company, with many products, and many product experiments. Only after Plaintiff's expert reports identified

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<sup>7</sup> Plaintiff also had the opportunity to question the Google employee who provided the information in the presentation, Gary Holt, at Mr. Holt's August 23 deposition. Mr. Holt confirmed that he did not have personal knowledge of the information contained in the presentation that Plaintiff's expert relied on. (Ghaussy Dec. Ex. I (Holt Tr.), 124:21-125:13.)

that Plaintiff was concerned specifically with [REDACTED] [REDACTED] was Google able to focus its search and locate the documents. Once Google discovered that documents [REDACTED] were at issue and uncovered them, it promptly produced them, meeting its Rule 26(e) obligation to supplement. *See Woods*, 2012 WL 3683536 at \*7.

Plaintiff implies that Google's witness Jonathan Alferness acted improperly when he failed to testify at his deposition about the experiments discussed in the emails at issue. (D.N. 309, 10.) But the deposition testimony Plaintiff points to shows, to the contrary, Mr. Alferness indicating that [REDACTED]

[REDACTED] (D.N. 309-8 (Alferness Tr.), 307:23-308:11.) Plaintiff did not ask Mr. Alferness whether [REDACTED].

Rather, in the exhibit to its motion, Plaintiff points to testimony where it asks whether Google conducted experiments "before it implemented Quality Score." (*Id.*, 308:17-19.) Plaintiff's motion states without citation [REDACTED]

[REDACTED] (D.N. 309, 10 fn 2.) Not so. As Mr. Alferness testified, as a Google product manager, he understood [REDACTED]

[REDACTED] (D.N. 241-11, 14:3-11; Ghaussy Dec. Ex. J, 31:13-32:5.) That Mr. Alferness should have understood Plaintiff's question about Quality Score as a code to indicate that Plaintiff was actually asking [REDACTED]

[REDACTED] is a stretch at best. Google addressed Plaintiff's contention [REDACTED] when Plaintiff first made the contention, *i.e.* in Dr. Becker's July 25 expert report.

Furthermore, Plaintiff cannot credibly claim surprise as to the contents of the emails themselves, because an earlier-produced email contains some of the same information. Plaintiff

points to certain paragraphs of Dr. Ugone's report that it claims rely on the emails, but these paragraphs also rely on an email produced by Google in May 2012 ("the May Email"). (D.N. 468-4, 110 fn 466.) The May Email, sent to [REDACTED]

[REDACTED]. (Ghaussy Dec., Ex. K.) Therefore, even if the Court were to exclude the emails Plaintiff has moved to exclude, Plaintiff's request that Dr. Ugone be precluded from testifying about this information in general should be denied. Furthermore, although the May Email was produced in May, Plaintiff has not questioned a single one of Google's witnesses about it, nor requested any type of follow-up discovery. (Ghaussy Dec., ¶ 12.) This demonstrates that the emails do not raise an issue of surprise. Rather, Plaintiff simply chose not to address certain facts that show its theories are incorrect.

Plaintiff's claim of prejudice is also not convincing given Google's willingness to conduct discovery beyond the set deadline in order to alleviate any perceived harm to Plaintiff. For example, Google did not object to Plaintiff's deposition notices served as late as August 31, two business days before the close of fact discovery, and cooperated with Plaintiff when it decided to take fact witness depositions, including of Google employees, after the close of fact discovery. Had Plaintiff wanted to seek depositions of Google employees related to these emails – including the author of the emails – it was free to do so. It chose not to.

## **VI. CONCLUSION**

Google timely supplemented and updated its interrogatory responses and document production. Google's supplemental responses and production of four emails did not cause any cognizable prejudice to Plaintiff. To the extent any prejudice exists, it can be alleviated by means other than excluding evidence. Google's production was timely under the circumstances and should be allowed.

DATED: October 1, 2012

/s/ Stephen E. Noona

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**CERTIFICATE OF SERVICE**

I hereby certify that on October 1, 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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