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 "THIRD" MOTION FOR SANCTIONS

I. INTRODUCTION

As described in Defendants' Motion to Preclude Dr. Frieder from testifying regarding untimely opinions, after 11 p.m. EDT on September 4, the very last day of fact discovery, and less than 36 hours before Dr. Frieder's deposition, Plaintiff served an "Updated" Expert Report for Dr. Frieder. Dr. Frieder's Updated Report identified, for the first time, four [redacted] that Dr. Frieder claimed supposedly meet the content-based filtering limitation of the asserted claims.[1] These same [redacted] were in the source code Dr. Frieder reviewed July 13, nearly two weeks before his July 25 Original Report and almost six weeks before his "Updated" report. Plaintiff had never previously pointed to these [redacted] as a basis of its infringement theory, whether in an interrogatory response or otherwise.

Upon receipt of Dr. Frieder's "Updated" report, Google promptly investigated these [redacted]. Google made available code identifying when the newly relied upon [redacted] were first used just 10 days after it received Plaintiff's tardy "Updated" Report, and promptly supplemented its interrogatory responses based on this new information.

Through its "Third" Motion for Sanctions, Plaintiff now seeks to preclude Google from relying on this source code that identifies when the [redacted] were first used. Even though Google made this source code available just days after it first learned it was relevant, through Dr. Frieder's tardy "Updated" report served in the last hour of fact discovery, Plaintiff seeks to exclude this code because it was disclosed after the last day of discovery. In other words, Plaintiff contends it is acceptable for it to disclose a new theory the last day of discovery; yet

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[1] Please refer to Section II.B of Defendants' Motion for Summary Judgment (D.N. 238) for an in-depth discussion regarding the use of [redacted] in AdWords.

Google is not allowed to produce information relevant to this new theory at any time after the close of the discovery. Plaintiff's view of discovery is untenable.

While Plaintiff claims prejudice and surprise from Google's production, these claims lack merit for several reasons. To the extent Plaintiff claims any prejudice from the timing of production, Plaintiff has only itself to blame. Again, it was not until literally the last hour of fact discovery that Plaintiff's (tardy) "Updated" Report first made this historical code relevant. Previously, Plaintiff had not pointed to any specific [redacted] as relevant to infringement. Nor had Plaintiff ever requested historical revisions of code. Thus, there was no reason for Google to investigate when certain [redacted] had been introduced. Further, Plaintiff's unsupported claim that Google had "refused" to produce source code in November 2011 is flatly untrue. Plaintiff first asked for code on June 27, just three weeks before its expert report was due, and Google promptly provided it.

Moreover, Plaintiff's arguments themselves acknowledge that Plaintiff knew the supposed importance of these [redacted] for weeks before it disclosed its new theory that relied on the [redacted] on September 4. For example, Plaintiff states in its Introduction that "[a]s a result of that review and analysis [of the source code], I/P Engine identified '[redacted]' in the source code that are important to the infringement issues in this case. I/P Engine then served an interrogatory requesting that Google identify all '[redacted]' used in Google's accused systems for the period of alleged infringement (September 2005 to present)" so its expert "could rely on Google's identification of those particular [redacted] for the full infringing period." (D.N. 283, 2.) (emphasis added). In other words, Plaintiff admits it knew the supposed importance of particular [redacted] before it served its interrogatories on August 1. Yet, Plaintiff did not disclose the supposed importance of these [redacted] until September 4, after Google responded to these same interrogatories. And even though Plaintiff was apparently only interested in

"particular" [redacted] through its interrogatory, it instead made the vastly overbroad request for all "[redacted]" used in Google's accused from September 2005 to present. (*Id.*, 6-7 (Interrogatory Nos. 20-23).)

Plaintiff's claims of "surprise" are also without merit. Plaintiff argues in its Introduction that "I/P Engine and its expert relied upon Google's discovery responses in formulating its infringement opinions, as set forth in I/P Engine's expert report of July 25, 2012." (D.N. 283, 2.) The interrogatories in which Google was allegedly supposed to provide information regarding historical versions of code were not even served until August 1, after Dr. Frieder's July 25 report. Any claim of surprise is further debunked by the fact that the code that Dr. Frieder had when he served his July 25 report [redacted]. Thus, Plaintiff had no basis to assume, as they apparently did, [redacted]. Also, Google's witnesses, and even Dr. Frieder himself, repeatedly testified [redacted].

Finally, Plaintiff's suggestion that Google should have known all along about the importance of these [redacted] is not credible. Google has not, as Plaintiff contends, "long . . . been aware that the [redacted] used in the source code would be relevant to the infringement issues in this case, e.g., the [redacted] identified by Dr. Frieder's July 25 Report as representing the content and collaborative data recited in the claims." (D.N. 283, 2.) Again, Dr. Frieder did not identify any specific [redacted] in his July 25 Report. Rather, he made a blanket citation to 72 pages of source code [redacted]. The first time Plaintiff and Dr. Frieder pointed to any specific [redacted] was in his "Updated" report in the last hour of fact discovery. Once Google became aware of the relevance of these [redacted] to Dr. Frieder's tardy theory, Google promptly produced the relevant code and updated its interrogatories, just as it is supposed to do.

In sum, under the circumstances, Plaintiff's request for "sanctions" for Google's prompt disclosure of relevant information once it became known to be relevant should be denied.

II. FACTUAL BACKGROUND

Throughout its brief, usually with no citation to the record or declaration testimony, Plaintiff misstates the relevant history surrounding Plaintiff's requests for, and Google's production of, source code. The actual history is important and shows why Plaintiff's motion should be denied.

A. Plaintiff Initially Requested Technical Documents, Not Source Code.

Plaintiff states "I/P Engine requested production of Google's technical documents in its November 11, 2011 First Request for Documents. Google refused at that time to produce any source code." (D.N. 283, 1.) This is not correct. Plaintiff provides no support for the assertion that Google ever "refused" to provide source code. In fact, when the parties first were negotiating production of technical documents, Plaintiff told Defendant it was not interested in source code. (Declaration of Margaret P. Kammerud in Support of Defendants' Opposition to Plaintiff's Third Motion for Discovery Sanctions ("Kammerud Dec."), ¶ 9.) Instead, the parties stipulated that after Plaintiff provided preliminary infringement contentions and initial written discovery on November 7, Google would make an initial production of technical documents from its document repositories by December 7. (D.N. 145, 4.) Google provided these documents, some 217,614 pages, on December 7, and fielded requests from Plaintiff for more documents over the next several weeks. (*See, e.g.*, D.N. 145, 4-5.)

B. Plaintiff Delays Taking Google's Technical Rule 30(b)(6) depositions.

In its brief, Plaintiff suggests that Google was somehow responsible for Plaintiff's delay in taking Google's Rule 30(b)(6) deposition. (D.N. 283, 6.) This too is incorrect. The Court entered the parties' agreed Protective Order on January 23, 2012. (D.N. 85.) Yet, Plaintiff did

not notice Google's technical Rule 30(b)(6) deposition until April 2. In response to the notice, Google offered to make its witness available on May 23. (D.N. 180-16, 7.) Plaintiff, however, did not want to take this deposition at that time. Instead, Plaintiff indicated it wanted to take the depositions of the non-Google defendants first. (*Id.*) Plaintiff did so even though Google repeatedly made clear to Plaintiff that the corporate representatives for these non-Google defendants would not know the working of Google's internal systems. (*Id.*) Plaintiff eventually deposed Google's technical Rule 30(b)(6) witness on June 21. (Kammerud Dec., ¶ 13.)

C. Plaintiff First Seeks Source Code Three Weeks Before Its Expert Report Is Due.

Plaintiff requested source code for the first time on June 27. (D.N. 329-2.) Contrary to Plaintiff's unsupported accusation that Google had previously "refused" to produce source code, Plaintiff acknowledged in the letter that, "In the past, counsel has indicated that relevant source code for this matter could be made available if it became necessary upon request by I/P Engine." Plaintiff further stated "[g]iven Mr. Alferness' testimony, Google's source code is now necessary," and requested a narrow set of specific source code files listed in the letter. (*Id.* (emphasis added).) Thus, it was only after Mr. Alferness's testimony (which Plaintiff itself chose to delay for a month), five months after the Protective Order was entered, almost seven months after the completion of Google's technical repository document production, and three only weeks before Plaintiff's Opening expert report was due, that Plaintiff first expressed any need for source code in this case.[2]

[2] In Dr. Frieder's deposition he indicated that he did not start work on his report until about a month before it was due, and it was at that time he requested source code. (Declaration of Jen Ghaussy in Support of Google's Opposition to Motions for Sanctions ("Ghaussy Dec."), Ex. M, 58:23-59:2.)

On July 10, Google notified Plaintiff that the source code Plaintiff requested would be available for review beginning the next day, on July 11. (D.N. 329-1.) On the night of July 12, Plaintiff requested access to the source code the following morning, despite the fact that the Protective Order required Plaintiff to give notice of its intent to inspect the source code at least three business days in advance. (*Id.*; D.N. 85, 6.) As a courtesy to Plaintiff, Defendants made the source code available the next morning, July 13. (D.N. 329-1.) Dr. Frieder reviewed the code on July 13. (D.N. 328-2, 3.)

As Dr. Frieder admitted at his deposition, the [redacted] he later identified in his September 4 "Updated" Report appear in the source code that he reviewed on July 13. (D.N. 329-1; *see also id.*, D.N. 329-7, 55-56.). Dr. Frieder testified that, based on this review, he had [redacted] in mind with respect to content filtering <u>before</u> he served his Original Report. For example, Dr. Frieder testified that when he saw one of the [redacted] (D.N. 329-7, 209:5-211:4; 56:7-18 ("Q. Okay. So you had -- before you served your opening report, you had an intuition that this comparison occurred through your view of the [redacted], but you weren't 100 percent sure of that; correct? A. I wouldn't say it's an intuition. <u>Intuition is a gut instinct. I've been in the search world for now 20 years.</u> [redacted] <u>And therefore I was quite confident that that was the case</u>.") (emphasis added).)

Dr. Frieder further testified that from just studying the source code, he also believed [redacted]t. (*Id.*; *see also id.* 54:21-55:6 ("Q. Do you recall how much time you spent looking at the [redacted] before your opening report? A. I recall that I looked at it a sufficient amount of time

to be able to see that there's clear examples of content matching and context evaluation. I – I spent a significant amount of time in my report and part – a significant part of it as well looking at the [redacted] and looking at the documents and the like. I cannot give you any specific number.").)

D. Dr. Frieder Serves His Opening Report Without Identifying Any [redacted].

On July 25, Dr. Frieder served his Expert Report on Infringement ("Original Report"). Despite already believing that these [redacted], as detailed above, Dr. Frieder did not disclose them in this Original Report.[3] Rather, the Original Report makes no mention of any specific [redacted]. In fact, the only place Dr. Frieder references source code at all is in his claim chart as a "see also" in string cites: "Alferness Deposition at 101:17-108:23; 110:2-118:21; 195:2-14; G-IPE-0241639-42; ***see also*** **SC-G-IPE-0000001-72**; G-IPE-0223576-585." (D.N. 240-5, 7 (citation to source code in bold); *id.*, 10, 13, 21, 24, 27, 32, 34, 36, 41, 43, 45.) Dr. Frieder did not even limit his citations to [redacted] he later pointed to appear, but rather cited to 72 pages of source code [redacted]. (*Id.*)

E. Plaintiff Serves Interrogatories 20-23.

On August 1, on the very last day to serve written discovery, Plaintiff served interrogatory requests 18-25, which included requests regarding source code. (Kammerud Dec., Ex. L.) In its brief, Plaintiff states that it served these interrogatories to discover information regarding the [redacted]. Plaintiff argues:

> As a result of that review and analysis [of the source code], I/P Engine identified "[redacted]" in the source code that are important to the infringement issues in this

[3] As detailed in Defendants' Motion to Preclude Dr. Frieder's untimely opinions, Plaintiff also delayed taking the deposition of Bartholomew Furrow, a Google engineer who worked on the Smart Ads system and was knowledgeable about these templates, until after Dr. Frieder's report. (D.N. 328, 5-6.)

> case. I/P Engine then served an interrogatory requesting that Google identify of all "[redacted]" used in Google's accused systems for the period of alleged infringement (September 2005 to present). [redacted], so that I/P Engine's expert could rely on Google's identification of those particular [redacted] for the full infringing period.

(D.N. 283, 2 (emphases added).) In other words, Plaintiff states that it knew the importance of the [redacted] before it served its interrogatories on August 1. Yet, these interrogatories were not limited to those [redacted]. Instead, they sought a narrative identification of every existing iteration of all of the [redacted].

Google served its objections to these interrogatories on August 20. (Kammerud Dec., ¶ 12.) Google objected on the basis of undue burden and overbreadth, and that they sought information that was irrelevant, immaterial, and not reasonably calculated to lead to the discovery of admissible evidence. Google also objected on the basis that they were vague and ambiguous, particularly with respect to the phrase [redacted] among others. (Kammerud Dec., Ex. N.). Despite the supposed importance of these interrogatories to Plaintiff's case, Plaintiff made no effort to meet and confer with Google regarding Google's objections. Indeed, Plaintiff expressed no concern about Google's objections at all.

Defendants' responses to Interrogatories 20-23 were due September 4, the last day of discovery. (Kammerud Dec., Ex. N.) Google responded to the requests by directing Plaintiff to previously produced source code, which plainly indicates that the model with the [redacted] Dr. Frieder pointed to in his "Updated" Report that had been put in place until May 9, 2012. (Kammerud Dec., ¶ 11.) Google also pointed to the testimony of Google employees, who had uniformly testified that [redacted]

F. Plaintiff Discloses Its Reliance On The [redacted] for the First Time Less than Hour Before Fact Discovery Closes.

Plaintiff argues "Dr. Frieder updated his infringement expert report to include additional citations to evidence (deposition testimony and documents) that I/P Engine did not have when he served his report," and that "Google has conceded that all of the new material in Dr. Frieder's updated report post-dated his initial report." (D.N. 283, 7 n.3.) Once again, Plaintiff's assertions are incorrect. It is surprising that Plaintiff would even make them given that Dr. Frieder himself admitted that the [redacted] he first identified in his September 4 "Updated" Report,[4] were available to (and reviewed by) Dr. Frieder before his July 25 Original Report. (D.N. 329-1; *see also id.*, D.N. 329-7, 55-56.). But for whatever reason, Dr. Frieder and Plaintiff chose to wait until September 4 to disclose their supposed importance to Plaintiff's infringement case.

G. Google Promptly Supplements to Account for Plaintiff's Tardy Theory.

Immediately after Plaintiff served its untimely Updated Report, Google researched internally to determine when these [redacted]—identified for the first time in the September 4 "Updated" Report--were launched. (Kammerud Dec., ¶ 10.) Then, promptly upon learning of Dr. Frieder's late-disclosed theories, on September 13, Google made available additional source code that showed these [redacted] The same day, Google supplemented its responses to interrogatories 20-23, which ask Google to "[redacted]." (*Id.*, Ex. L, 6-7.) Google supplemented its

[4] Please refer to Section II.B of Defendants' Motion for Summary Judgment (D.N. 238) for

interrogatory responses as appropriate to identify the dates that the specific [redacted], identified by Dr. Frieder in his Updated Expert Report served on September 4, 2012, were introduced. (*Id.*, Ex. O, 9-11.)

On September 14, Plaintiff asked to meet and confer regarding Google's supplemental production. During a meet and confer on September 17, Plaintiff did not express any issue with Google's supplementation being incomplete. Nor did they ask for any further information, source code, discovery, or anything else that might cure any supposed prejudice. Plaintiff only requested that the source code be withdrawn completely. (*Id.*, Ex. P.)

III. LEGAL STANDARDS

Rule 26(e)(1) states that a party must supplement its interrogatory responses in a timely manner if it learns that a prior response was incomplete. 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. 283, 3.) 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 <u>disagreed</u> with the district court's determination that the documents were not timely produced. Although the Federal Circuit upheld the trial court's exclusion of the documents, its decision was explicitly based <u>not</u> on

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an in-depth discussion regarding the use of [redacted].

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 their relevance. 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.

IV. ARGUMENT

A. Google Supplemented Its Source Code and Interrogatories Immediately After Receiving the New Information in Dr. Frieder's Tardy "Updated" Report.

Plaintiff argues that "[n]othing has transpired post-discovery that would justify Google's production of this new source code" and that "Dr. Frieder's opinions and conclusions did not change in any way." (D.N. 283, 7.) Plaintiff further states that Dr. Frieder had updated his report to include citations to evidence "that I/P Engine did not have when he served his report." (*Id.*) But as Plaintiff itself acknowledges, Plaintiff did already have the source code that Dr. Frieder refers to specifically for the first time in his "Updated" report. Yet it was not until 11:06 pm EDT on September 4, 56 minutes before the close of fact discovery, that Plaintiff first referred to the [redacted] in Dr. Frieder's unauthorized "Updated" Report. (D.N. 328, Ex. 2.)

Plaintiff further admits that "[a]s a result of that review and analysis [of the source code], I/P Engine identified '[redacted]s' in the source code that are important to the infringement issues in this case. I/P Engine then served an interrogatory requesting that Google identify of all [sic] "[redacted]" used in Google's accused systems for the period of alleged infringement (September 2005 to present)." Plaintiff claims to have requested this information so its expert "could rely on Google's identification of those particular [redacted] for the full infringing period." (D.N. 283, 2. (emphasis added)). This argument is telling in several respects.

First, Plaintiff clearly admits it knew the importance of the [redacted] before it served its interrogatories on August 1. (Kammerud Dec., Ex. L.) Yet, it did not disclose this supposed importance until September 4, after Defendants had already responded to Plaintiff's interrogatory. Moreover, Plaintiff said it was seeking through these interrogatories to determine whether the particular [redacted] that I/P Engine identified has been used by Google since 2005. Yet, Plaintiff asked Google to identify of all "[redacted]" used in Google's accused systems for

the period of alleged infringement (September 2005 to present). (*Id.*, Interrogatory Nos. 20-23.) In other words, while Plaintiff obviously had particular [redacted] in mind when serving its interrogatories, it did not identify any of them, but asked for all [redacted]. Gathering information on all [redacted] used in Google's accused systems over the past seven years would be a prohibitively difficult, time-consuming, and burdensome process, and Google properly objected to the requests on that basis. (Kammerud Dec., Ex. N, 9-13.) Plaintiff has raised no issues with these objections.

Despite having prior knowledge of the [redacted] he wanted to rely on, Dr. Frieder's Updated Report identified, for the first time, aspects of the accused products that supposedly meet the [redacted]. The basis for Dr. Frieder's new opinion was actually information he reviewed as early as July 13, nearly two weeks before his Original Report was served on July 25. Upon receipt of Dr. Frieder's updated expert report, Google promptly investigated the [redacted] the updated report cited to. This investigation revealed that [redacted]. Google then promptly made the newly relevant code available just 10 days after Plaintiff's "Updated" Report, and supplemented its interrogatory responses based on this code at the same time.

Under the circumstances, Google's production was timely, and Plaintiff can claim no legitimate prejudice from Google's prompt supplementation of discovery based on Plaintiff's new theory disclosed less than an hour before discovery closed.

B. Plaintiffs Allegations of "Surprise" Are Without Merit.

Plaintiff argues that "[redacted] (D.N. 283, 2), and that "I/P Engine deposed three Google engineers about the source code and at no time during those depositions did Google's

engineers testify that the source code was incomplete or that different relevant source code existed." (D.N. 283, 9.) This is simply not true. First, [redacted]. (Kammerud Dec., ¶ 11.) Moreover, Defendants' witnesses testified again and again [redacted]

For example, Mr. Alferness testified: "[redacted]." (D.N. 241-11, 25:6-10.) Mr. Furrow similarly testified when asked whether "[redacted]." (Kammerud Dec., Ex. Q, 149:17-25.) And when asked "[redacted]" in the source code produced, he said [redacted]." The following colloquy ensued:

[redacted]

[redacted] Yet, Plaintiff never asked for the source code for these prior models.

Plaintiff's expert also recognized that the [redacted] change over time: [redacted] (*Id.*, Ex. M, 297:24-298:3, *see also id.* 22:3-7 (emphasis added).)

Plaintiff also argues "I/P Engine and its expert relied upon Google's discovery responses in formulating its infringement opinions, as set forth in I/P Engine's expert report of July 25, 2011 [sic]." (D.N. 283, 2.) This makes no sense. The interrogatories on which Plaintiff bases its motion were not even served until August 1, 2012, after Dr. Frieder's Opening Report.

C. Plaintiff's "Harm" Arguments Are Based On A False Premise.

Plaintiff sets forth a parade of horribles based on the supposed "harm" from the supplementation of these interrogatories and production of source code, claiming that the harm "cannot be mitigated in any meaningful way" with "trial less than a month away." (D.N. 283, 8.) It claims that if the Court permitted the supplementation, Plaintiff would have to analyze the new information, depose additional Google engineers, and update its expert report. (*Id.*) This is disingenuous. The situation would have been no different had Google provided the identical information on September 4. Plaintiff would no doubt have still have complained that Google's information was somehow tardy for the reason that Plaintiff does now—i.e., this information is damaging to Plaintiff's case. That, however, is not the type of prejudice that justifies the drastic relief Plaintiff seeks.

Plaintiff also argues that "I/P Engine cannot fully evaluate the importance of the new evidence because it has not had a sufficient opportunity to review and analyze Google's new source code nor has it even received the remainder of the code requested by its interrogatory." (*Id.*, 10.) However, Plaintiff could simply have looked at the new code and seen that, as described in Google's supplemented interrogatory response, [redacted] identified by Google. There is no reason Plaintiff could not do that in a very short time after receiving the code.

Moreover, given that Plaintiff did not serve its interrogatory seeking historical information until the last possible day to serve written discovery, Plaintiff knew it wouldn't get

an answer until the very last day of fact discovery. Google produced the source code Plaintiff complains about just ten days after being informed of its alleged relevance. (D.N. 240-7.)

D. Plaintiff's "Preclusion" Arguments Rely On A False Premise.

Plaintiff argues that "[p]reclusion is appropriate under Rule 16(f) as Google's production violates this Court's Rule 16 Scheduling Order because the production was clearly after the close of fact and expert discovery." (D.N. 283, 3.) But Google could not have known which [redacted] were relevant until Plaintiff submitted the Updated Report, which was done in the last few minutes of fact and expert discovery. Given that Plaintiff served its interrogatories such that responses would be due the last day of discovery, Plaintiff ensured that any supplementation would have to be after the close of discovery. Apparently, however, under Plaintiff's view, a discovery response due the last day of discovery could never be supplemented.

Plaintiff also argues that:

> Google cannot credibly argue that it was unaware – or did not understand – the significance of the [redacted] information, nor can it argue that it was somehow exempt from answering I/P Engine's interrogatory based on a lack of understanding about the significance of the information. Google long has been aware that the [redacted] used in the source code would be relevant to the infringement issues in this case, e.g., the [redacted] identified by Dr. Frieder's July 25 Report as representing the content and collaborative data recited in the claims.

(D.N. 283, 2.) This too is incorrect. Again, Dr. Frieder did not identify any [redacted] in his July 25 Report. Instead, he pointed to 72 pages of source code in [redacted]. (*See, e.g.*, D.N. 240-5, 7, 10, 13, 21, 24, 27, 32, 34, 36, 41, 43, 45 (intermittently citing "SC-G-IPE-0000001-72" within a string cite).) The first time he pointed to any specific [redacted] was in his "Updated" report served a few hours after Google responded to Plaintiff's interrogatories. (D.N. 240-7.)

Plaintiff further argues, without citation, that "[p]reclusion also is consistent with this Court's comments during the hearing on September 18, 2012." (D.N. 283, 3.) This is not the

case. In fact, at the September 18 hearing, the Court indicated that one of the reasons it denied Plaintiff's previous motion for sanctions was that Defendants had disclosed the prior art at issue once they were aware of its relevance. (Kammerud Dec., Ex. R, 37:21-23. ("I believe that Google here developed an understanding with respect to the necessity of disclosing the prior art, [and] they did so in a timely manner under Rule 26(e).")) The same is true here. Google supplemented its responses almost immediately after Plaintiff filed the untimely Updated Report that referenced specific [redacted] from documents Google had produced before the original report was filed.

V. CONCLUSION

For the foregoing reasons, Defendants respectfully requests that the Court deny Plaintiff's "Third" Motion for Discovery Sanctions Regarding Untimely Discovery Responses.

DATED: October 1, 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 Gannett 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 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:

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.cm
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