

Plaintiff's opposition fails to address the issues raised by Defendants in their Motion to Preclude Dr. Frieder's Untimely Opinions.

In response to Defendants' motion, Plaintiff contends that all "Dr. Frieder did is cite the newly produced evidence in his report and exhibits." (D.N. 464, 2.) This is demonstrably false. As Dr. Frieder himself admitted at his deposition, the [REDACTED] he first identified in his September 4 Updated Report as relevant to the "content filtering" limitations in the patent, were available to and reviewed by Dr. Frieder on July 13, before his July 25 Original Report. Not only had Dr. Frieder reviewed the source code with these [REDACTED] before his report, but in the testimony cited by Defendants in their Opening brief, he admitted he understood the importance of those [REDACTED] before his report. Tellingly, Plaintiff does not address this testimony at all.

Having known of the supposed importance of these [REDACTED] at the time of his Original Report, there is simply no excuse for Dr. Frieder and Plaintiff not including them specifically in that report, rather than at 11:06 pm EDT on September 4, 54 minutes before the close of fact discovery, and 36 hours before his deposition, in an Updated Report. Even worse, when Dr. Frieder did finally identify these [REDACTED] he still failed to explain how they were relevant to his theories in his Updated Report. It was only at his deposition that he provided any clue as to how these [REDACTED] fit into his opinions.

Defendants were thus left scrambling to deal with Plaintiff's new theory, not only in dealing with it essentially on the fly at Dr. Frieder's deposition, but in doing its own investigation in relation to this theory. Adding insult to injury, Plaintiff has even moved for sanctions to preclude, on the basis that it was produced after close of discovery, source code Defendants only learned was relevant in Dr. Frieder's Updated Report served less than an hour before the close of discovery. The prejudice to Defendants is manifest, and the tardy disclosure by Plaintiff inexcusable. Defendants' motion to strike Dr. Frieder's tardy theories on content filtering based

on the [REDACTED] first identified in his September 4 Updated Report should be granted.

Further, as detailed in Defendants' Motion, Dr. Frieder repeatedly admitted, under oath, that [REDACTED] He also stated that he was "not saying the CTR" was the feedback data found in the accused products. Despite his sworn deposition testimony to the contrary, Plaintiff has represented to the Court that Dr. Frieder "stood by his contention that CTR is collaborative feedback data." To require Defendants to cross-examine Dr. Frieder on a theory he has already disavowed under oath would merely serve to confuse the jury. Therefore, Plaintiff and Dr. Frieder should be precluded from presenting this theory at trial.

Nor should Plaintiff or Dr. Frieder be able to present two new theories for how the accused products meet the feedback limitation that Dr. Frieder identified for the first time in his September 6 deposition. As Dr. Frieder did not include these theories in his reports, and Plaintiff indicates that it does not intend to rely on these theories, his testimony related to these theories should be excluded.

I. PLAINTIFF FAILS TO JUSTIFY DR. FRIEDER'S UNTIMELY OPINIONS NOT DISCLOSED IN HIS ORIGINAL REPORT.

A. Plaintiff Does Not Rebut that Dr. Frieder Withheld Opinions.

Rather than address Defendants' points head on, Plaintiff attempts to shift the focus away from them, arguing that its supplemental report did not drastically alter Dr. Frieder's Original Report, that it added a couple sentences about the Court's reconsideration of its Claim Construction Order, or that certain depositions were close in time to his Updated Report and provided further clarity. (D.N. 464, 2, 5-6.)

Yet, Plaintiff never addresses the main issue—that Dr. Frieder already knew which [REDACTED] he was planning on relying upon prior to serving his Original Report. (See D.N. 328.

3-4.) This is made clear in Dr. Frieder's deposition testimony, cited by Defendants in their Opening brief, in which he admitted that he not only had access to the source code with the [REDACTED] but that he read and understood the code as well as the supposed relevance of this code to his infringement theory on content filtering before his Original Report. (D.N. 329-7, 54:21-55:6, 55:9-10, 56:7-18, 209:5-211:4.)

Moreover, in Plaintiff's "Third" Motion for Sanctions, Plaintiff admits that Plaintiff and Dr. Frieder had already identified the specific [REDACTED] (See D.N. 283, 2.) 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." (*Id.* (emphasis added)). Plaintiff served the interrogatory it referred to on August 1, just a few days after Dr. Frieder's Original Report. Thus, 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.

If Plaintiff and Dr. Frieder wished to rely upon these [REDACTED] (that they already knew about), there can be no excuse for failing to disclose them in Dr. Frieder's Original Report, and certainly no basis to wait until September 4. *Lindner v. Meadow Gold Dairies, Inc.*, 249 F.R.D. 625, 639 (D. Haw. 2008) ("[C]ourts have rejected supplemental expert reports that . . . attempted to deepen and strengthen the expert's prior reports.") (internal citations omitted).

B. Dr. Frieder's Theory *Did* Change.

Plaintiff also argues that "Dr. Frieder did not change his opinions or conclusions." (D.N. 464, 6.) Once again, the facts show otherwise. In his Original Report, Dr. Frieder stated that "Google AdWords receives and filters advertisements on the basis of content data (e.g., ad text, keyword, and landing page attributes) for relevance to the query." (D.N. 240-5, 5.) At his deposition, however, Dr. Frieder changed his mind. Contrary to his report, Dr. Frieder testified that keyword and landing page attributes were not content data. (Declaration of Howard Chen ("Chen Dec."), Ex. I, 192:18-193:2.) Dr. Frieder did not identify any [REDACTED] in his July 25 Report. Instead, he pointed to 72 pages of source code in [REDACTED] [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. (D.N. 240-8, 7, 23, 36, 47.) This is a change in theory, pure and simple.¹

C. Plaintiff's Arguments as to Timeliness Fail.

1. Rule 26(e)(2) Does Not Excuse Plaintiff's Updated Report.

Plaintiff argues the timing of his Updated Report, served six weeks after his Original Report and also after Dr. Ungar's rebuttal report, was somehow timely under Fed. R. Civ. P. 26(a)(3) and 26(e)(2). (D.N. 464, 4.) Plaintiff bases its argument on Fed. R. Civ. P. 26(e)(2)'s language that requires supplementation prior to the "time the party's pretrial disclosures under Rule 26(a)(3) are due." But this language does not undo the requirement of Fed. R. Civ. P.

¹ Plaintiff argues that under *Lindner*, supplementation is allowed when the expert report "does not drastically alter the expert's original disclosure." (D.N. 464, 4-5.) But, unlike here, in *Lindner*, the supplemental report that was allowed by the Court did not contain new opinions. *Lindner*, 249 F.R.D. at 640. Dr. Frieder's Updated Report instead is like the report in *Linder* that *did* raise new theories and was excluded.

26(a)(2)(B)(i) requiring the disclosure of "complete statement of all opinions the witness will express and the basis and reasons for them."

Rather, courts distinguish "true supplementation (e.g., correcting inadvertent errors or omissions) from gamesmanship, and have therefore repeatedly rejected attempts to avert summary judgment by supplementing an expert report with a new and improved expert report." *East West, LLC v. Rahman*, Case No. 1:11CV1380, 2012 WL 4105129, at *6 (E.D. Va. Sep. 17, 2012) (striking "supplemental" report when the Court was not convinced of "the argument that the report is based upon newly discovered information"). While Rule 26(e)(2) does impose an obligation to supplement, "this duty does not permit a party to make an end-run around the normal timetable for conducting discovery." *Id.* (quoting *Colony Apartments v. Abacus Project Mgmt., Inc.*, 179 Fed. App'x 217, 231 (4th Cir. 2006)). Nor does "[c]haracterizing the instant report as 'supplementation' [] give [a party] free reign to file expert reports, rebuttal or otherwise, until the last moment before trial." *Id.* at *7. In other words, "Rule 26(e) does not give license to sandbag one's opponent with claims and issues which should have been included in the expert witness' report." *Cohlmia v. Ardent Health Services, LLC*, 254 F.R.D. 426, 433 (N.D. Okla. 2008) (quotation omitted). If it did, the exception would swallow the rule.

2. The Google Depositions Provide No Excuse for Dr. Frieder's Tardy Disclosure of His New Content Filtering Theory.

Plaintiff argues that the supplementation was appropriate because the depositions of Furrow, Holt and Cook occurred after Dr. Frieder submitted his Original Report, and seeks to place blame on Defendants for this timing. (D.N. 464, 5-6.) Yet, Plaintiff again ignores, and flatly mischaracterizes, the facts.

As described in the Motion, Plaintiff did not notice Mr. Furrow until two weeks before Dr. Frieder's Report, and when it finally did notice his deposition, they asked for Mr. Furrow's deposition after the due date for Dr. Frieder's report. (D.N. 329-3.) Recognizing that Plaintiff

might seek to use Mr. Furrow's deposition as a basis for supplementing its expert reports, Defendants provided a date for Mr. Furrow's deposition that was before Dr. Frieder's report was due. (D.N. 329-4.) Having done so, Defendants made clear that they would object to Plaintiff using Mr. Furrow's deposition as a basis to supplement their expert report. (*Id.* ("We note that the date in Plaintiff's notice [for] Mr. Furrow was two weeks after the due date for Opening expert reports. Please be aware that to the extent that Plaintiff intends to depose Mr. Furrow after its Opening expert infringement report is due and supplement that report later, Google will object to any such supplementation.")) Plaintiff, however, still refused to take the deposition before Dr. Frieder's deposition. Plaintiff cannot use its own lack of diligence to excuse its tardy supplementation. *Lindner*, 249 F.R.D. at 640 (rejecting the supplementation of a report that was based on discovery that could have been performed prior to the original expert disclosure deadline; "Plaintiff should have known at that time that such additional [discovery] would be relevant.")

Plaintiff also argues that it was reasonable to wait for Mr. Holt's deposition to supplement due to his knowledge of the [REDACTED]. Initially, here too, any delay in Mr. Holt's deposition is the fault of Plaintiff given that they did not ask for his deposition until after Dr. Frieder served his Original Report. Plaintiff ignores this fact too. In any event, even were it acceptable to supplement based on additional information from Mr. Holt's deposition, that cannot excuse Plaintiff from including the information and opinions that Dr. Frieder did have when he served his Opening Report. As for Mr. Cook, Plaintiff provides no explanation at all why his deposition was needed to supplement Dr. Frieder's opinions regarding his content filtering theory based on the [REDACTED]. This is unsurprising given that Dr. Frieder does not cite Mr. Cook on this issue.

D. Dr. Frieder's Updated Report was not Justified nor Harmless.

While Plaintiff attempts to argue that Dr. Frieder's Updated Report was substantially justified and harmless under *S. States Rock and Fixture, Inc., v. Sherwin-Williams Co.*, 318 F.3d 592, 597 (4th Cir. 2003), that case is of no help to Plaintiff, but only serves to show why his updated report should be stricken.

1. Dr. Frieder's Late Disclosure of the Specific [REDACTED] Came as a Surprise.

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. (D.N. 240-8, 7, 23, 36, 47.) As Dr. Ungar had already submitted his rebuttal report and Dr. Frieder's deposition was in less than 36 hours, Dr. Frieder's late disclosure was, as common sense would dictate, a complete surprise. Dr. Frieder had reviewed Google's source code on July 13. He served his Original Report on July 25. Thus, given that Dr. Frieder was obliged to fully disclose his position, Defendants expected that, to the extent Dr. Frieder intended to rely upon specific [REDACTED] Dr. Frieder would have identified those [REDACTED] in his expert report.

Plaintiff also claims that Defendants should not have been surprised by the supplementation based on Mr. Furrow's deposition since Dr. Frieder was present at the deposition. But as detailed above, Defendants informed Plaintiff it would object to Dr. Frieder supplementing his report based on Mr. Furrow's deposition given that Defendants had made Mr. Furrow available before Dr. Frieder's report. Thus, it is Plaintiff that should not have been surprised that Defendants would object to Plaintiff's tardy supplementation. And given these statements to Plaintiff, Defendants certainly were surprised that not only did Plaintiff supplement

but that they waited 4 weeks after Mr. Furrow's deposition to do so with less than an hour left in fact discovery.²

2. Plaintiff Fails to Rebut the Prejudice from Dr. Frieder's Late Disclosure, which Cannot Be Cured.

The prejudice from getting an unexpected expert report that raises new theories, with an hour left in fact discovery, and 36 hours before the expert's deposition, is self-evident.

Defendants were unable to address this new theory in Dr. Unger's Rebuttal report. Instead, Defendants had to deal with and prepare for this new theory with almost no notice at Dr. Frieder's deposition. While Plaintiff states "Defendants have not asserted they were precluded from examining Dr. Frieder on any issues relating to his updated report," this too is incorrect. As detailed in Defendants' brief, Defendants were not able to adequately prepare prior to the deposition to investigate the identified [REDACTED] as well as the over hundred pages of deposition testimony that Dr. Frieder added in his Updated Report.³ (D.N. 328, 8.) Indeed, the deposition testimony cited by Plaintiff as evidence that Defendants were able to ask Dr. Frieder questions about the new citations (D.N. 464, 7), mostly relate to why Dr. Frieder failed to supplement in a timely fashion and not the substance of Dr. Frieder's additional citations. (See D.N. 464-3, 212:12-220:12.) That Defendants had to waste valuable time exploring the basis

² Plaintiff argues that Defendants "feign" surprise that Dr. Frieder would supplement his expert report to reflect the Court's order on reconsideration of claim construction. While Defendants would not necessarily have been surprised had Plaintiff sought to supplement Dr. Frieder's report in a timely manner after the Court's ruling, Defendants were surprised that Plaintiff waited 3 weeks and until after Dr. Unger's rebuttal report. In any case, this supplementation has no bearing on Defendants' request to strike Dr. Frieder's reference to the [REDACTED] identified for the first time in Dr. Frieder's Updated Report served on September 4.

³ Plaintiff claims that Defendants asserted that they "did not have an opportunity to conduct an 'in depth investigation' of the deposition testimony of its own employees." (D.N. 464, 7.) This is not what Defendants contend. To begin with, Defendants stated that they were unable to perform an "in depth investigation" of the specific [REDACTED] identified by Dr. Frieder for the first time prior to his deposition which was 36 hours later. (D.N. 328, 8.) In addition, as explained above and in Defendants Motion, Defendants did not have time to examine how the

for supplementation, rather than opinions disclosed in his Original Report, only further shows the prejudice. It also shows that Plaintiff's suggestion that Defendants' prejudice was cured simply by being able to cross-examine Dr. Frieder is baseless. The ability to cross-examine does not alone cure prejudice. *S. States*, 318 F.3d at 598 ("Noting that 'the ability to simply cross-examine an expert concerning a new opinion at trial is not the ability to cure,' the court emphasized that 'rules of expert disclosure are designed to allow an opponent to examine an expert opinion for flaws and to develop counter-testimony through that party's own experts. Such was not possible here.'")

Plaintiff also ignores the fact that Dr. Frieder's updated positions would also be relevant to Dr. Ugone's rebuttal report on damages as well, and the date of the hypothetical negotiation based on Plaintiff's new infringement theory. The hypothetical negotiation date is, of course, be highly relevant to Dr. Ugone's reasonable royalty analysis. According to Plaintiff, however, Defendants should not be allowed to address the affect on the hypothetical negotiation from Plaintiff's theory disclosed on the last day of discovery, by producing documents and information after discovery closed. Rather, Plaintiff has moved for sanctions to preclude, on the basis that it was produced after close of discovery, source code Defendants only learned was relevant in Dr. Frieder's Updated Report served less than one hour before the close of discovery. Plaintiff's conduct and position on this issue has put Defendants in an impossible catch-22, and the prejudice cannot be undone. Of course, all these unnecessary costs, motion practice, and wasted time could have been avoided had Dr. Frieder provided a timely and full disclosure of his opinions in his Original Report.

testimony cited by Dr. Frieder related to his opinion. (*See id.*)

3. Dr. Frieder's Late Disclosure Disrupts Trial Which is Set to Begin in 2 Weeks.

Plaintiff argues that trial will not be disrupted by Dr. Frieder's late disclosure. Initially, that would only be true were Defendants not allowed to perform the fulsome investigation to which they should be entitled. But Plaintiff argues in its "Third" Motion for Sanctions that the evidence Defendants produced in response to Dr. Frieder's late disclosure would disrupt trial. (D.N. 283, 9-10.) In other words, according to Plaintiff, its disclosure of a new theory less than an hour before the close of discovery does not disrupt trial, but what Defendants do in response to this new theory would disrupt trial. Plaintiff's one-sided and contradictory position should be rejected.

4. Any Importance of Dr. Frieder's Late Disclosure Does Not Justify Allowing it.

If the additional reliance on the specific [REDACTED] was critical to Plaintiff's infringement theory, it only further emphasizes why Dr. Frieder should have disclosed this information in his Original Report and the prejudice caused by Plaintiff and Dr. Frieder not doing so. *S. States*, 318 F.3d at 598-99 ("The fact that the expert's testimony . . . might have been helpful to [Plaintiff's] case in the eyes of the jury also points out why it should have been disclosed in a timely manner to [Defendant.]").

Nevertheless, Plaintiff suggests that it is "important" to allow the additional analysis of Dr. Frieder based on Google engineers' deposition testimony. (D.N. 464, 8.) Initially, there is no real "analysis" of the depositions in Dr. Frieder's report. He simply cites lengthy portions of them (which is part of the reason it was so difficult to deal with this supplementation 36 hours before his deposition). (*See* D.N. 240-8.) Moreover, if the depositions of the Google engineers were so important, it only shows that Plaintiff should not have waited until right before (and

after) expert reports were due to request their depositions.⁴ (D.N. 328, 5-8.) Further, while Plaintiff refers to the Court's Order on reconsideration of its claim construction, even Plaintiff does not suggest this excused its failure to identify its theory on content filtering in Dr. Frieder's Original Report. Nor could it, as the Order had nothing to do with content filtering.

5. Plaintiff Provides No Credible Explanation for its Delay.

As detailed above in Section I.C, Plaintiff provides no legitimate explanation for its tardy theory. Again, as Dr. Frieder testified, and as Plaintiff does not dispute, Dr. Frieder said he only needed a day to supplement his report. (D.N. 329-7, 141:9-142:3.) There is no excuse for Plaintiff not doing so earlier. As described above, Dr. Frieder's late disclosure was not harmless or justified and should be excluded.

E. Plaintiff Fails to Justify the Improper Expansion of Dr. Frieder's Tardy Theories at His Deposition.

Plaintiff completely ignores that Dr. Frieder raises new theories during the course of his September 6, 2012 deposition. For example, Plaintiff does not deny that despite identifying the specific [REDACTED] he wishes to rely upon at trial in his Updated Report, Dr. Frieder provided no explanation of how these [REDACTED] met the claimed limitation. It is also undisputed that the first time Dr. Frieder even attempted to describe how these [REDACTED] allegedly met the claim limitations was during his deposition. Thus, even if his supplementation was appropriate, Dr. Frieder should still not be allowed to continue to add in theories that were only first identified during his September 6 deposition and not a part of either of his two reports. Indeed, as explained by Plaintiff, "[t]he Federal Rules are designed to prevent situations like in *Sharpe*, where an expert provides only a 'sketchy and vague' report where it is 'completely unclear . . .

⁴ This inconsistency is further emphasized by Plaintiff's insistence on relying upon Google's marketing documents to attempt to demonstrate that Smart Ads tracks the historical CTR of an advertisement [REDACTED]

what the reasons are for the opinion' or like in *Wright*, where the expert report does not provide a report at all. (D.N. 464, 11 (citations omitted).)⁵

II. DR. FRIEDER SHOULD BE PRECLUDED FROM TESTIFYING ABOUT ANY INCORRECT OR UNTIMELY-DISCLOSED THEORY OF INFRINGEMENT REGARDING [COLLABORATIVE] FEEDBACK

A. Dr. Frieder Admits that [REDACTED]

As detailed in Defendants' motion, Dr. Frieder at his deposition repeatedly [REDACTED]

[REDACTED]

[REDACTED] (D.N. 238, 12-14.) In its opposition, Plaintiff takes the same approach as it did in its Opposition to Defendants' Motion for Summary Judgment: simply ignoring nearly all this testimony as if it had never been said.

While Plaintiff does purport to address one of the statements Dr. Frieder made at his deposition regarding historical CTR, its discussion of that testimony does not provide a basis for allowing the historical CTR testimony to be elicited at trial. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

This is highlighted by further testimony that Plaintiff chose to ignore completely. In this testimony, Dr. Frieder made clear that regardless [REDACTED]

[REDACTED]

⁵ Plaintiff tries to misdirect the Court by attempting to distinguish the cases cited by Defendants in this section of their Opening brief (D.N. 328, 10), in their discussion regarding Dr. Frieder's continually changing positions (D.N. 464, 11). There, they ignore the case law where Courts have excluded inconsistent expert opinions. (*Compare* D.N. 328, 13 and D.N. 464, 11.)

[REDACTED]

[REDACTED]

B. Dr. Frieder Admits Repeatedly that He is not Contending that Historical CTR is Collaborative Feedback for Purposes of Infringement.

Plaintiff next argues that Dr. Frieder's testimony that [REDACTED]

[REDACTED]

[REDACTED] Rather, Plaintiff argues that Dr. Frieder maintained his position when he testified that he was using the explanation provided in Google documents. (D.N. 464, 11.)⁶ But given what Dr. Frieder testified, this argument is not credible.

Confronted with a report and contradictory testimony regarding Dr. Frieder's contention on collaborative feedback data, Google asked Dr. Frieder point blank whether he was sticking to his contention that historical CTR in the Google AdWords system is what met the collaborative feedback element of the claims. He confirmed he was not:

Q. Okay. But that's not what you said here is it?

A. No. I said here the CTR is collaborative feedback data.

Q. And that's not what your current contention is?

A. CTR is collaborative feedback data but that's not what I'm -- contention for the claims. I'm claiming that the information -- the [REDACTED] derived from the clicks, like the CTR would be derived, is the collaborative data.

⁶ To support its position that Dr. Frieder's report was based on the language of Google's documents, Plaintiff cites to a discussion regarding a different subject. (See D.N. 464, 11.) Here, Defendants were asking Dr. Frieder about his statement that Quality Score is based on historical CTR. (Chen Dec., Ex. I, 222:21-223:24, [REDACTED] (Id., 223:22-23.) Dr. Frieder's admission only further supports Defendants position that he should not be relying on marketing documents which only roughly describe the accused products for his expert opinion. (See D.N. 328, 11, n. 9.)

Q. But for purposes of AdWords, you're not saying that the -- the CTR is collaborative data?

A. No. I" (sic) not saying the CTR. I'm saying the [REDACTED] are indeed. (Chen Dec., Ex. I, 221:25-222:16.)

Dr. Frieder's testimony unequivocally states that the [REDACTED] not the historical CTR, is the collaborative feedback data. Any reliance on Google's marketing documents does not change this fact.

C. Plaintiff Ignores that Dr. Frieder Inappropriately Relies on Non-Authoritative Marketing Documents.

Plaintiff also fails to address that allowing Dr. Frieder to stick to his now-disavowed theory on historical CTR would permit testimony that lacks any reliable basis. In forming this original opinion on this now disavowed theory, Dr. Frieder relied exclusively on Google's marketing materials which only offer a "high-level feel for how the system operates," instead of relying upon authoritative sources like Google's source code, the testimony of Google's engineers who worked on the accused product or Google's internal technical documents. (*See* D.N. 328, 11, n. 9.) Plaintiff did not even attempt to address the impropriety of such reliance in the face of cases like *Whirlpool* which stand for the proposition that use of high level marketing documents to contradict how a product actually functions cannot be sustained. *Whirlpool Corp. v. LG Elecs., Inc.*, Case No. 1:04-cv-100, 2006 WL 2035215, at *8 (W.D. Mich. July 18, 2006) ("[I]t is the [product], not the marketing materials, that are the subject of the infringement accusation. The marketing materials cannot override the actual operation of the [product]."). The Federal Circuit has also recognized the impropriety of relying for purposes of infringement on marketing documents that contradict the actual functionality of a product. *See Phillips Petroleum Co. v. Huntsman Polymers Corp.*, 157 F.3d 866, 877 (Fed. Cir. 1998) (affirming summary judgment that accused products did not meet the claimed "block copolymer" limitation when Plaintiff

merely pointed to some "product literature" that used this term to describe the products).

Accordingly, as Dr. Frieder's theory lacks reliable support, it should be stricken.

D. Plaintiff Fails to Explain how the Changes in Dr. Frieder's Position are Due to Google's Documents.

Plaintiff cannot and does not deny that during his deposition, while disavowing his reliance on historical CTR for the collaborative feedback element, Dr. Frieder then claimed that the clicks and [REDACTED] are the collaborative feedback. (See D.N. 328, 12-13.) Nor does Plaintiff point to any basis for these new positions in either Dr. Frieder's Original or Updated Report. In fact, Plaintiff does not provide any justification for introducing two new theories for what constitutes the collaborative feedback data. Instead, Plaintiff merely falls back on the argument that it never disavowed that historical CTR was the collaborative feedback data (ignoring the fact, as explained above, that its expert has disavowed it). (D.N. 464, 11.)

Consequently, Plaintiff should not object to the preclusion of the new theories based on clicks and the [REDACTED] being the collaborative feedback data, as Defendants have requested.

Plaintiff and Dr. Frieder's ever-changing opinion must come to rest. Now is the time for that to happen. Dr. Frieder's opinions regarding clicks and [REDACTED] which do not appear in his expert report, should be excluded.

E. Plaintiff Does not Deny that Defendants Have Suffered Prejudice Due to Dr. Frieder's Last Minute Change in Positions.

Plaintiff does not even attempt to address the prejudice Defendants have suffered due to Dr. Frieder's late and ever-changing infringement theories. In addition to the prejudice, allowing Dr. Frieder to testify regarding his numerous theories for collaborative feedback would only serve to confuse the jury and continue Plaintiff's moving target game. Accordingly, Dr. Frieder's opinion regarding historical CTR should be stricken and he should also be precluded from offering any testimony at trial regarding his new theory that clicks and the [REDACTED] meet

the collaborative feedback element as these were late disclosed theories that even Plaintiff's opposition does not contend will be offered.

III. CONCLUSION

For the foregoing reasons, Defendants request that the Court Grant their Motion to Preclude Dr. Ophir Frieder from Testifying Regarding Untimely Opinions that were not Disclosed in his Original Expert Report and Opinions that He Now Concedes are Incorrect.

DATED: October 2, 2012

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CERTIFICATE OF SERVICE

I hereby certify that on October 2, 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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