

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF VIRGINIA  
NORFOLK DIVISION

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I/P ENGINE, INC.,		)	
		)	
	Plaintiff,	)	
	v.	)	Civ. Action No. 2:11-cv-512
		)	
AOL, INC. et al.,		)	
		)	
	Defendants.	)	
<hr/>		)	

**PLAINTIFF I/P ENGINE, INC.’S REPLY IN FURTHER SUPPORT OF ITS  
THIRD MOTION FOR DISCOVERY SANCTIONS  
REGARDING UNTIMELY DISCOVERY RESPONSES**

**I. INTRODUCTION**

Although it spans 17 pages, the essence of Google’s opposition can be reduced to a single sentence: Google believes its obligation to respond to I/P Engine’s longstanding document requests and interrogatories is elective, subjective, and contingent on the content of I/P Engine’s expert reports. This is simply not the case, especially in this District. “Courts routinely and appropriately exclude evidence that is untimely and in violation of a scheduling order.” *Sohail v. Singh*, 2010 U.S. Dist. Lexis 103214 at \*10-11 (E.D. Va. 2010) (holding that exclusions of witnesses and exhibits at trial was proper because a party failed to timely produce required documents and information). I/P Engine’s document requests and interrogatories do not mention I/P Engine’s expert reports or contentions, and Google’s obligation to provide complete responses is not optional. I/P Engine repeatedly requested information that Google refused to provide until after the close of fact and expert discovery.

Google concedes, as its must, that its sole motivation in its untimely “supplementation” was to refute Dr. Frieder’s testimony, not to provide the information that I/P Engine requested.

To this day, Google has not provided the information that I/P Engine requested. Google has never provided any listing of attribute templates on an annual or quarterly basis, as I/P Engine requested in its interrogatory no. 21. Google's untimely production only was for a highly selective subset of templates that it believes contradict Dr. Frieder, which does not correspond to the full scope of Google's discovery obligation.

Google asserts (at 8) that it did not previously disclose the untimely source code until after the close of all discovery because the source code was not relevant until Dr. Frieder supplemented his report on September 4. This makes no sense for three reasons. First, the source code clearly was relevant prior to Dr. Frieder's supplemental report. As Defendants concede (at 7) Dr. Frieder referenced Google's source code no less than 13 times in his July 25 report. Second, the newly produced source code did not suddenly become relevant because Dr. Frieder cited newly developed testimony about other code as an example of his opinions. Third, Google tries to justify its untimely supplementation by repeatedly claiming (at 1, 2, 13) that it was responding to a "new theory" from Dr. Frieder. But there is no new theory. Google's response utterly ignores the fact that, as a courtesy, I/P Engine disclosed via redline format prior to Dr. Frieder's deposition how the recent testimony of Google's engineers further supported his opinions as previously provided.

Google's new production of source code it has had for years is not untimely simply because it was produced after Dr. Frieder amended his report to cite to newly-produced testimony of Google's engineers, who confirmed Dr. Frieder's earlier analysis of the source code. Google's untimely September 14 production of source code, and its related supplemental interrogatory responses, is untimely because it was not produced when requested by I/P Engine, and not produced before the discovery cutoff. To this day, Google has refused to provide a

proper answer to I/P Engine's interrogatory no. 21. This is not a motion to compel; trial starts on October 16, and Google's abuse of the Rule 16 Scheduling Order merits exclusion. On September 18, 2012, Magistrate Judge Stillman warned Google's counsel that its production of evidence at the end of, or after the close of, discovery would almost certainly cause the Court to exclude that evidence. The Court should sanction Google's ambush and enforce the Scheduling Order and Rules by precluding use of Google's untimely discovery responses.

## **II. DISCUSSION**

### **A. Google Improperly Withheld the Source Code Until After The Close of Discovery**

#### **1. Google Refused To Provide The Source Code**

Google chooses its words carefully, indicating that it did not refuse to provide source code (generally), but remaining silent as to whether it refused to provide the source code that is the subject of this motion until after the close of discovery. There is no question that Google never produced the untimely source code prior to September 14. Google's assertions regarding the source code it produced during discovery highlight its glaring failure to timely produce all of the relevant code.<sup>1</sup> Google also skips over the fact that, in April 2012, it had represented to I/P Engine that all versions of its source code were the same for purposes of this case, so that it should only be required to provide a representative version. I/P Engine relied on that representation. Now, however, after the close of discovery, Google has repudiated that

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<sup>1</sup> Google claims that I/P Engine repudiated its November 7, 2011 requests as they relate to source code. In fact, Google insisted that it would not produce source code without a signed protective order. Google did not complete its document production until April 2012, when I/P Engine noticed a Google Rule 30(b)(6) deposition on source code, among other things, which led to Google's production of what we now know is a highly selective subset of source code. Google cannot evade the fact that it always has been obligated to provide source code.

representation, and asserts that its source code is not the same for purposes of this case. This contumacious conduct has no place in this Court.

Google cannot escape the fact that I/P Engine’s interrogatories specifically asked about all attribute templates used to perform certain accused features **from 2004 to the present.**<sup>2</sup>

*Google responded not by disclosing any additional code, but pointing to the code it had already produced, and to which its fact witnesses had testified.* Ex. 1. Google has no

justification for its withholding of the “historical” source code it now seeks to add to this case.

2. The Code Was Relevant, Regardless of Contents of Dr. Frieder’s Report

Google’s allegation that Dr. Frieder’s Amended Expert Report transformed Google’s source code from irrelevant to “newly relevant” lacks any basis, and is utterly absurd. The operation of Google’s accused products, which is determined by Google’s source code, is relevant to infringement. Source code always has been relevant, regardless of what Dr. Frieder or anyone else says. I/P Engine had been focused on source code for months, and had spent considerable effort reviewing code and questioning Google’s engineers about it. The purpose of interrogatory no. 21 was to confirm what Google’s engineers and counsel already had represented: the representative source code that had been produced was in fact the same during the entire period of infringement. Google’s interrogatory response was that it was.

Google attempts to wriggle out of its sworn response by arguing that I/P Engine’s interrogatories are overbroad. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Google fully understood I/P Engine’s request. Its September 4 responses, pointing to the previously produced source code, confirmed to I/P Engine that there was no other relevant code. Within hours, I/P Engine served Dr. Frieder’s supplemental expert report citing to the interrogatory responses as well as the new testimony from the Google witnesses regarding the source code.

Google’s excuse for changing its mind and producing the source code after the close of discovery is particularly galling. Google alleges (at 14) that Dr. Frieder’s citation to other source code as examples made the withheld source code “newly relevant.” As Google ostensibly admits, this new “relevance” has nothing to do with whether the withheld code makes any issue in this case (such as infringement) more or less likely. Rather, Google says (at 13) that the new “relevance” is that this code uses different templates than the templates Dr. Frieder cited as examples in his report. In other words, Google produced the new code only after realizing that it could use it to ambush Dr. Frieder on the eve of trial. Google’s change of heart emphasizes the frivolity of its earlier justifications for withholding the source code.

### 3. Google’s Attempts To Blame The Victim

Google attempts to blame I/P Engine for not contesting the frivolity of its earlier positions. It writes (at p. 8):

[T]hese interrogatories were not limited to [the previously-disclosed] templates. Instead they sought a narrative of identification of every existing iteration of all of the templates. Google served its objections to these interrogatories on August 20.... 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.

That I/P Engine failed to realize that Google’s objections were made in bad faith is no excuse for Google withholding evidence until after the close of discovery. In addition, Google had two other independent obligations to produce this evidence. First, under Rule 26(a), it had to identify

and produce evidence that was relevant to its non-infringement defense. And under Rule 26(e), it had an obligation to correct its repeated misrepresentations that the previously produced code, which had formed the basis of all source code discovery, was in fact not representative. But Google did neither.

4. Google's Supplementation Was Not Timely

Despite bearing the burden of proof, Google never addresses the factors set forth in *Southern States Rack and Fixture, Inc. v. Sherwin-Williams Co.*, 318 F.3d 592, 596-597 (4<sup>th</sup> Cir. 2003). Google asserts (at 11) that Rule 37 does not apply to it, arguing that supplementation and production after the close of discovery was “timely.” Both the Court’s Scheduling Order and the case law clearly indicate otherwise.

Google seeks support from *Woods*, claiming the case supports the proposition that production on the last day of discovery is timely.<sup>3</sup> Opposition at 10-11. But *Woods* does nothing to help Google’s case. Google did not produce its documents on the last day of discovery. Google produced its documents after the close of discovery. There can be no doubt that violating the Court’s Scheduling Order renders Google’s production untimely. *See, e.g., Jarrell-Henderson v. Liberty Mut. Fire Ins. Co.*, 2009 WL 347801 (E.D.Va.) (striking documents produced after the close of discovery); *Barksdale v. E & M Transp., Inc.*, 2010 WL 4534954 (E.D. Va.) (striking documents produced ten days after close of discovery and interrogatory responses produced twelve days after close of discovery).

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<sup>3</sup> This undermines Google’s repeated (but irrelevant) arguments about the timeliness of Dr. Frieder’s Updated Report.

**B. Although Irrelevant To Google’s Discovery Obligations, Dr. Frieder’s Updated Report Was Timely**

Although Google’s obligation to respond to I/P Engine’s document requests and interrogatories were in no way contingent on Dr. Frieder’s Expert Report, Google cites Dr. Frieder’s report as its excuse for its untimely supplementation, alleging that Dr. Frieder’s report was itself untimely. In order to make this assertion, which has no bearing on the instant motion, Google is forced to mischaracterize the contents of Dr. Frieder’s Updated Report.

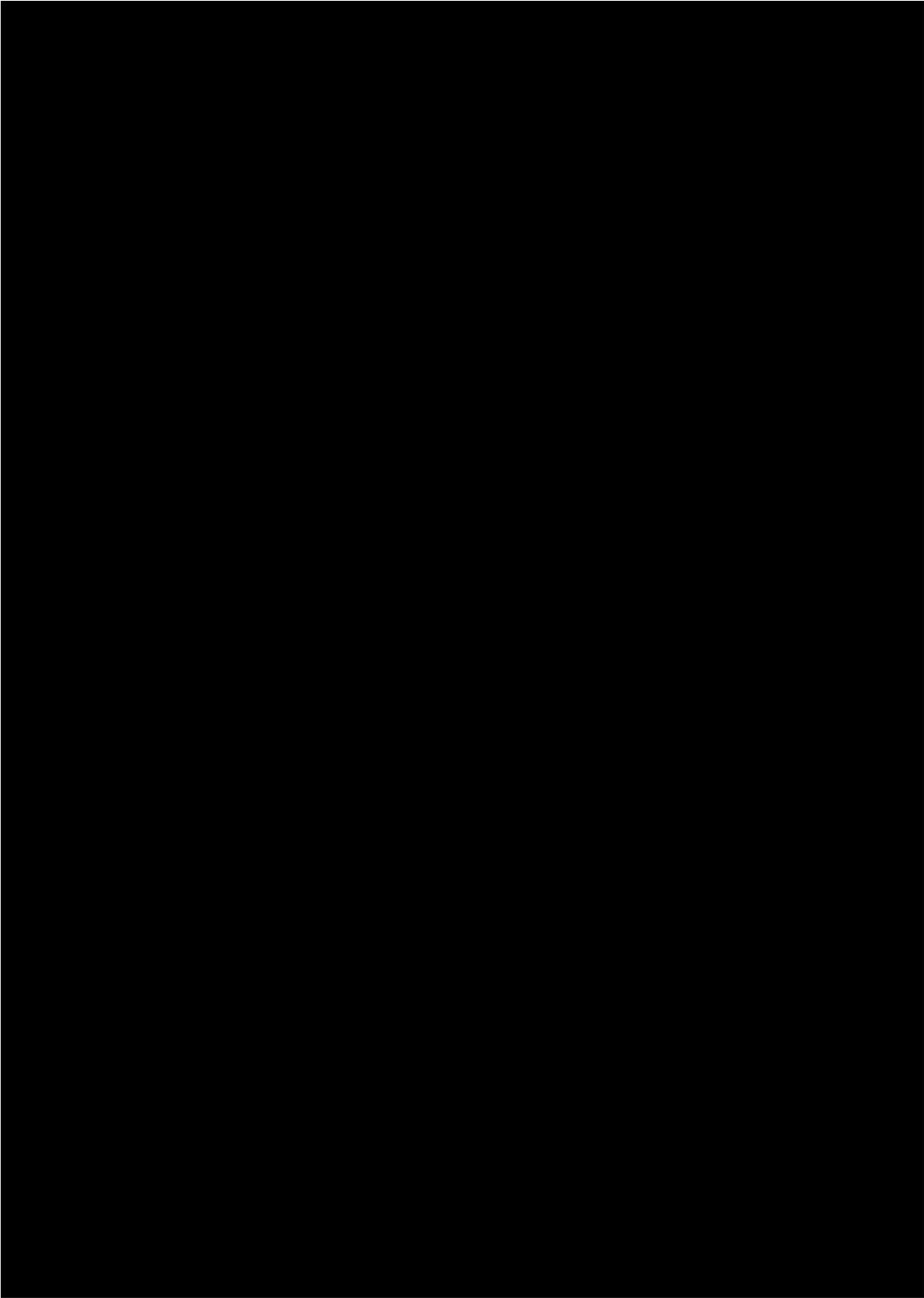
Dr. Frieder’s report does not contain any “new theories.” Not one. Dr. Frieder’s report adds citations to depositions that occurred after Dr. Frieder served his original report. One of those citations repeats the names of the attribute templates that were being discussed in the cited testimony as examples. Providing examples does not change the infringement theory that Dr. Frieder had already expressed. Indeed, Dr. Frieder did not revise his infringement theory in any way.

[REDACTED]

[REDACTED]

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<sup>4</sup> This supplementation occurs in more than one place because similar elements appears in many of the asserted claims. But in each occurrence the content of the supplement is the same.



Ex. 2.

As an examination of Dr. Frieder's actual report reveals, there is no "new theory" for Google to respond to. Dr. Frieder's updated report provides no basis whatsoever for Google's untimely discovery responses.

Dated: October 4, 2012

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**CERTIFICATE OF SERVICE**

I hereby certify that on this 4th day of October, 2012, the foregoing, **PLAINTIFF I/P ENGINE, INC.'S REPLY IN FURTHER SUPPORT OF ITS THIRD MOTION FOR DISCOVERY SANCTIONS REGARDING UNTIMELY DISCOVERY RESPONSES**, was served via the Court's CM/ECF system on the following:

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