

Exhibit 5

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TEXAS
MARSHALL DIVISION

SOFTWARE RIGHTS ARCHIVE, LLC

v.

GOOGLE INC., YAHOO! INC., IAC
SEARCH & MEDIA, INC., AOL, LLC,
AND LYCOS, INC.

Civil Case No. 2:07-cv-511 (CE)

FILED UNDER SEAL

REPLY IN SUPPORT OF DEFENDANTS' MOTION TO
DISMISS FOR LACK OF STANDING

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TABLE OF ABBREVIATIONS

For the ease of the Court, Defendants have adopted Plaintiff's abbreviations for the corporate entities Site Technologies, Inc. (aka Deltapoint, Inc.) and Site/Technologies/Inc. (aka Libertech, Inc.). These and other abbreviations are summarized below:

Ait Depo.	Deposition of Jeffrey Franklin Ait on September 30, 2008 (Rp. Ex. 2)
Deltapoint	Deltapoint, Inc. (later known as Site Technologies Inc., a California corporation)
DGCL	Delaware General Corporations Law
Egger Depo.	Deposition of Daniel Egger on October 2, 2008 (Rp. Ex. 1)
Libertech	Libertech, Inc. (later known as Site/Technologies/Inc., a Delaware corporation)
Lynch Depo.	Deposition of J. Christopher Lynch on October 1, 2008 (Rp. Ex. 3)
Mot.	Defendants' Brief in Support of their Motion to Dismiss (Docket No. 66)
Opp.	SRA's Brief in Opposition to Defendants' Motion to Dismiss (Docket No. 76)
Mot. Ex. ___	An exhibit attached to Defendants' Motion to Dismiss
Opp. Ex. ___	An exhibit attached to the Declaration of Lee L. Kaplan submitted with SRA's Brief in Opposition
Rp. Ex. ___	An exhibit attached to this Reply
Site Tech	Site Technologies Inc., a California corporation, (formerly known as Deltapoint)
Site/Tech	Site/Technologies/Inc., a Delaware corporation, (formerly known as Libertech)
SRA	Plaintiff Software Rights Archive, LLC
1997 Stock Exchange Agreement	Stock Exchange Agreement between Deltapoint, Inc. and Site/Technologies/Inc. dated July 11, 1997 (Mot. Ex. 6)
1998 Bill of Sale	Bill of Sale, Assignment and License Agreement Between Site Technologies, Inc. and Daniel Egger dated September 16, 1998 (Mot. Ex. 10)
2005 Assignment	Assignment from Site/Technologies/Inc. to Daniel Egger dated February 11, 2005 (Mot. Ex. 14)
2008 Assignment	Assignment from Site Technologies, Inc. to Daniel Egger dated August 13, 2008 (Rp. Ex. 5)

I. SUMMARY

SRA never owned the patents-in-suit and thus has no standing to sue Defendants. SRA claims that its rights in the patents trace back to the 1998 Bill of Sale from Site Tech to Egger (who then purported to assign his rights to SRA in 2005). But SRA does not dispute that Site/Tech, the record title holder to the patents, was not a party to the 1998 Bill of Sale. SRA also implicitly concedes that there is no written instrument specifically transferring title to the patents from Site/Tech to Site Tech prior to the 1998 Bill of Sale. Thus, because Site Tech did not own the patents, Egger obtained no rights by this contract.

Because of this fatal flaw, SRA now offers a litany of legal theories to excuse the broken chain of title. Yet, SRA, through its own actions, has twice conceded that the 1998 Bill of Sale failed to transfer anything. First, in 2005, Egger, his lawyer, and SRA recognized that Egger needed to take title from Site/Tech and thus that the 1998 Bill of Sale by Site Tech (rather than Site/Tech) was defective. Undeterred by their lack of authority to act for Site Tech, Egger and his lawyer proceeded to manufacture a new instrument – the fraudulent 2005 Assignment (Mot. Ex. 14) – which Egger signed as Site/Tech’s “President” even though Egger himself admits that he was not Site/Tech’s President in 2005 and that Site/Tech had since ceased to exist.¹

This was no isolated act. After Defendants filed this motion, Egger and SRA persuaded Jeffrey Ait, the former CEO of Site Tech, to likewise go beyond Ait’s authority and execute another assignment again purporting to convey the patents to Egger (the 2008 Assignment). They did so even though the Bankruptcy Court of the Northern District of California retains jurisdiction over the assets of Site Tech and Site/Tech and even though Ait had no authority to bind Site Tech – his status as the responsible person for the Site Tech estate ended long ago in 2004, and Ait conceded that he was not Site Tech’s CEO in 2008.²

¹ Egger Depo at 63:1-3. (Rp. Ex 1). During Egger’s deposition, Site/Tech was referred to as “Slash.” *Id.* at 27:2-5.

² Ait Depo. at 134:14-19; 166:35-167:7. (Rp. Ex 2).

As a consequence of these events, there are now three documents that purportedly conveyed the patents to Egger – the 1998 Bill of Sale, the 2005 Assignment, and the August 2008 Assignment. None was effective:

A. ***The 1998 Bill of Sale.*** SRA relies on the 1998 Bill of Sale (Mot. Ex. 10) to evidence Egger’s alleged receipt of the patents-in-suit from Site/Tech, a Delaware corporation (aka Libertech), in 1998, even though Site/Tech was *not* a party to the 1998 agreement and even though Site/Tech never assigned its rights to Site Tech, a California corporation, in a writing. SRA offers three theories for why the 1998 Bill of Sale was effective despite the absence of the patent owner as a party. (Opp. at 1-2). Each theory fails.

1. **Site Tech did not obtain the patents by operation of law in 1997.** SRA argues that Site Tech obtained the patents by operation of law when it purchased Site/Tech’s stock in 1997. However, Delaware law does not “operate” to vest property as SRA posits.
2. **Site Tech’s actions did not bind Site/Tech.** SRA claims that the doctrines of *alter ego*, agency, and ratification transferred Site/Tech’s title to the patents. But Site Tech was neither Site/Tech’s *alter ego* nor its agent, and Site/Tech never ratified the 1998 Bill of Sale. Furthermore these equitable and common law doctrines cannot circumvent the statutory requirement that a patent conveyance be in writing.
3. **The doctrine of after-acquired title does not help Egger.** SRA theorizes that, under the doctrine of after-acquired title, legal title to the patents “immediately” transferred to Egger when Site/Tech and Site Tech merged. Critically, SRA ignores that the bankruptcy proceedings extinguished Egger’s alleged right to specific performance. Moreover, the doctrine of after-acquired title does not “immediately” transfer title and is eviscerated by Egger’s unclean hands.

B. ***The 2005 Assignment.*** SRA now attempts to wash its hands of the purported 2005 Assignment from Site/Tech to Egger. (Opp. at 24; Mot. Ex. 14). This is unsurprising, as the document falsely identifies Egger as Site/Tech’s “President” and both Egger and his attorney knew this representation to be inaccurate.³ Egger

³ Egger Depo. at 84:4-11; Lynch Depo. at 140:5-8. (Rp. Ex. 3).

and his attorney now claim that they prepared and recorded the assignment merely to provide “public notice” of Egger’s ownership – not to prove that the patents were actually conveyed to Egger.⁴ But Egger made no such distinction when he filed the 2005 Assignment with the Patent Office.

In fact, the law firm that Egger hired informed him that the 2005 assignment was “necessary to establish a clear chain of title” from Site/Tech to Egger. (Rp. Ex. 4). Thus, the 2005 Assignment evidences Egger’s own belief that, as late as 2005, he owned nothing, and that he needed to take title from Site/Tech, rather than its parent, Site Tech. Moreover, the 2005 Assignment – which Egger himself signed – asserts that “Site/Technologies/Inc . . . is the owner of the patent(s).” Egger and SRA cannot plausibly deny that Site/Tech continued to own the patents after the 1998 Bill of Sale.

C. *The 2008 Assignment.* Finally, in August 2008, Egger belatedly tried to obtain yet *another* assignment purporting to assign Site Tech’s remaining interests in the patents to himself. (Rp. Ex. 5). However, Site Tech had long since ceased to operate, and the signing officer, Jeffrey Ait, had long been relieved of his authority to act for Site Tech.⁵ As a result, this third document is no more effective than the other two.

In short, no written document conveyed the patents-in-suit to Egger. SRA advances various theories about the 1997 Stock Exchange Agreement, but these are wrong as a matter of law. Its remaining theories require the court to ignore the Patent Law’s requirement for a written transfer and respect for the corporate form of the patentee, Site/Tech. SRA would disregard that settled law on the ground that Site/Tech was a shell company. However, the facts prove Site/Tech was not a shell, and Ait, the former President of Site/Tech, acknowledged this at

⁴ Egger Depo. at 121:11-22.

⁵ Ait Depo. at 166:25-167:7.

deposition.⁶ Consequently, the 1998 Bill of Sale gave Egger no rights to the patents-in-suit, and SRA obtained none from Egger. Plaintiff SRA has failed to meet its burden of establishing standing to sue. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992).

II. ARGUMENT

A. The 1997 Stock Exchange Agreement Did Not Transfer The Patents-In-Suit From Site/Tech To The Stock Purchaser, Site Tech.

1. Site Tech Did Not Receive The Patents-In-Suit By Operation Of Law.

SRA incorrectly argues that Site/Tech's Certificate of Incorporation (Opp. Ex. 10) transferred the patents to Site Tech "by operation of law" as a consequence of Site Tech's acquisition of Site/Tech stock. SRA relies upon a single clause in the Certificate – Art. IV.B.2.b (the "Liquidation Preference"). This clause states that, when it is triggered, "any remaining assets and funds [of Site/Tech] . . . shall be distributed among the [stockholders of Site/Tech]." SRA erroneously theorizes that Site Tech's stock acquisition invoked the Liquidation Preference and caused this clause to automatically vest all of Site/Tech's property in Site Tech. This theory fails because there is no law in "operation."

a. The Liquidation Preference Does Not Vest Property "By Operation of Law."

SRA argues that the Liquidation Preference conveys property "by operation of law." However, there is no underlying law in "operation." The Supreme Court has held that a transfer "by operation of law" only occurs if the transaction "mechanism is entirely statutory, effecting an automatic transfer without any voluntary action by the parties." *United States v. Seattle-First Nat'l Bank*, 321 U.S. 583, 588 (1944). Delaware also follows this rule.⁷ In *Pioneer National Title Insurance Co. v. Child, Inc.*, 401 A.2d 68, 70 (Del. 1979), the Delaware Supreme Court held that an assignment or transfer "by operation of law" only occurs "by the mere application . . . of the established rules of law, without the act or cooperation of that person," and

⁶ Ait Depo. at 110:8-14. During Ait's deposition, Site/Tech was referred to as "Slash."

⁷ Delaware law controls as Site/Tech was a Delaware corporation at the time of the stock exchange agreement. SRA likewise relies upon Delaware law. Opp. at 9.

applied the rule to reject an alleged transfer of a claim by “operation of law” between a corporation and its successor.

Delaware does have laws that vest property by operation of law, such as its version of the UCC foreclosure law.⁸ However, Site/Tech’s Liquidation Preference does not invoke any of these laws, and SRA does not rely on them. As its name suggests, the Liquidation Preference is intended primarily for distributions in a “liquidation, dissolution, or winding up.” The Delaware laws that pertain to dissolution, DGCL §§ 275-285, do not automatically vest property. Rather they call on dissolving corporations to actively administer their assets. DGCL § 278 is illustrative: it continues the existence of dissolved corporations so that they may “gradually . . . dispose of and convey their property, . . . discharge their liabilities and . . . distribute to their shareholders any remaining assets.”⁹ This process necessarily involves voluntary acts. For example, the statute does not require any particular party to be vested with the corporation’s property and expressly permits its disposal generally.¹⁰ Thus, Delaware’s dissolution laws cannot convey property “by operation of law.” See *Seattle-First Nat’l Bank*, 321 U.S. at 588.

SRA relies on Delaware’s dividend law, DGCL § 173, as the operative law. (Opp. at 9). But DGCL § 173 cannot vest property “by operation of law.” DGCL § 173 simply provides that no corporation shall pay dividends except in accordance with the Delaware statute, particularly DGCL § 170, which provides that “directors . . . may declare and pay dividends” if certain

⁸ Delaware’s version of UCC § 9-617 reads: “A secured party’s disposition of collateral after default: . . . transfers to a transferee for value all of the debtor’s rights in the collateral.” Del. Code Ann. tit. 6, § 9-617 (emphasis added). Its merger law, DGCL § 259(a), states that “all property, real, personal and mixed [of the disappearing corporation in the merger], and all debts due . . . shall be vested in the corporation surviving or resulting.” (emphasis added). See also DGCL § 292 (“Trustees . . . shall, upon their appointment . . . be vested by operation of law and without any act or deed, with the title of the corporation to all of its property.”) (emphasis added).

⁹ See also DGCL § 279 (requiring that the corporation “appoint . . . trustees . . . to take charge of the corporation’s property, . . . and to do all other acts . . . necessary for the final settlement”); DGCL § 280(e) (providing for a successor entity “to [inter alia] dispose of and convey the property of the dissolved corporation”); DGCL § 281 (permitting exercise of “the judgment of directors” in paying for claims out of corporate assets before any distribution of remaining assets).

¹⁰ See e.g., *Storm Waterproofing Corp. v. L. Sonneborn Sons, Inc.*, 31 F.2d 992, 994 (D. Del. 1929) (permitting dissolving company under predecessor statute to DGCL § 278 to sell a trademark asset to a third party).

financial tests are met.¹¹ (emphasis added). Dividends therefore are discretionary and entirely dependent on voluntary acts – specifically, a declaration of a dividend by the board of directors, followed by actual payment of the dividend by the corporation.¹² See *Gabelli & Co., Inc. Profit Sharing Plan v. Liggett Group, Inc.*, 444 A.2d 261, 264 (Del. Ch. 1982) (“A decision to declare a dividend is a matter ordinarily addressed to the discretion of the Board of Directors.”). Thus, § 173 and Delaware’s dividend statutes cannot be the law “in operation” according to *Seattle-First National Bank*. Because no law operated to automatically vest Site/Tech’s property in Site Tech, SRA’s argument that the Liquidation Preference vested the patents “by operation law” fails.

b. Even If There Were Operative Law, Site/Tech Never Performed The Statutory Acts Required To Cause A Distribution.

Even if one were to assume that Delaware law could somehow “operate” to transfer the patents to Site Tech, Site/Tech never performed the legal acts required to transfer its property. Distributions under Delaware corporate law require affirmative acts as a matter of law. Dividends and dissolutions are no exception. With respect to dividends, DGCL §§ 170, 173 and 213 require a declaration of the board, a determination of which stockholders are entitled to receive the dividend by setting a formal record date, and affirmative action to actually make the dividend payment.¹³ Site/Tech did not take these steps. With respect to dissolutions, DGCL §§ 275 and 278 require board and stockholder approval of the dissolution and the filing of a certificate of dissolution with the Delaware Secretary of State. Thereafter, either a court proceeding occurs or the board of directors adopts a “plan of distribution” pursuant to § 281(b) of the DGCL that provides for noticing claimants, the paying off the corporation’s liabilities, and

¹¹ DGCL § 173 requires that “[n]o corporation shall pay dividends except in accordance with this chapter,” and thus invokes § 170, which provides that a board may declare and pay dividends but restricts dividends to monies payable “(1) out of surplus, . . . or (2) . . . out of its net profits.”

¹² See also Drexler, Black & Sparks, Delaware Corporation Law & Practice § 20.02 (2007) (“Specific board action exercising the board’s discretionary power to declare a dividend is essential to the creation of an enforceable obligation by the corporation to pay dividends to stockholders.”). Nor is there any evidence that the required voluntary acts, such as a board declaration and payment, took place. Indeed, the payment of a patent as dividend would require a written assignment. 35 U.S.C. § 261.

¹³ See Drexler, Black & Sparks, Delaware Corporation Law & Practice § 20.02 (2007).

only then distributing any remaining funds or assets to the stockholders. Again, Site/Tech did not take these steps. Delaware law is straightforward – distributions do not occur unless the corporation takes affirmative steps required by statute. Under the law that SRA alleges was in operation to transfer the patents, Site/Tech never took the statutorily required steps to effect a conveyance.

c. The Liquidation Preference Is Not Self-Executing As A Matter Of Contract Interpretation.

SRA's argument also fails as a matter of contract interpretation.¹⁴ First, the absence of language mandating automatic action precludes the Liquidation Preference's prospective term ("shall be distributed") from being construed as self-executing. The Delaware Chancery Court reached this same conclusion in *Pharm-Eco Lab., Inc., v. Immtech Int'l, Inc.*, No. Civ. A.18246, 2001 WL 220698 (Del. Ch. Feb. 26, 2001). The contract in *Pharm-Eco* stated that "upon completion of [Immtech's] IPO . . . Pharm-Eco will grant or assign to Immtech . . . an exclusive worldwide license." *Id.* at *2 (emphasis added). The court rejected the argument "that the Letter Agreement's provision requiring [Pharm-Eco] to grant or assign a license to Immtech was self-executing upon the occurrence of the IPO." *Id.* at *6. It explained:

[T]he natural inference one draws from the language is that Pharm-Eco was obligated to take specific action to grant or assign the Exclusive License upon completion of the IPO. If it were otherwise, one would expect that the Letter Agreement would state that upon completion of the IPO, all of Pharm-Eco's rights under the 1993 Letter Agreement would be automatically assigned to Immtech.

Id. at *7 (emphasis added). Like the license grant in *Pharm-Eco*, Site/Tech's Liquidation Preference does not state that its assets would be automatically assigned to stockholders. Consequently it is not self-executing, but merely prospective. Site/Tech knew how to use such self-executing language since Article 3(a)(iii) in its Articles of Incorporation, for example, called for preferred shares to "automatically convert." (Rp. Ex. 6 at 6).

¹⁴ A corporation's certificate of incorporation is a contract between the corporation and its stockholders and "general rules of contract interpretation apply to its terms." See *Staar Surgical Co. v. Waggoner*, 588 A.2d 1130, 1136 (Del. 1991); accord *Waggoner v. Laster*, 581 A.2d 1127, 1134 (Del. 1990); *Ellingwood v. Wolf's Head Oil Ref. Co.*, 38 A.2d 743 (Del. 1944); *Lawson v. Household Fin. Corp.*, 152 A. 723, 727 (Del. 1930).

Even apart from the contractual language, the Federal Circuit has held that a prospective agreement to assign an invention cannot serve as a present assignment sufficient to confer standing to sue. *See Arachnid, Inc. v. Merit Indus.*, 939 F.2d 1574, 1580-81 (Fed. Cir. 1991). In *Arachnid*, a consulting agreement provided that “any inventions conceived” during the consultancy “shall be the property of [Arachnid], and all rights thereto will be assigned by [the consultant] to [Arachnid].” *Id.* at 1576 (emphasis added). The Federal Circuit held that this language did not constitute a present assignment of rights to the patented invention and thus did not clothe plaintiff with standing to sue. *Id.* at 1580-81. As in *Pharm-Eco* and *Arachnid*, the Liquidation Preference’s directive that Site/Tech’s assets “shall be distributed” did not constitute a present assignment and thus did not actually transfer those assets.

Moreover, Site/Tech was not obliged to transfer any specific property under this clause. In fact, the Liquidation Preference, at most, was an obligation to distribute “an amount” corresponding to the corporation’s “remaining assets.” The Liquidation Preference nowhere required that any specific property be transferred. Rather, its language (*e.g.*, “remaining”) contemplated disposing of corporate property to raise funds and then distributing the proceeds of such funds (*i.e.*, distributing an “amount”). Thus, there was no absolute requirement that corporate property be distributed “in kind,” and hence cannot be regarded as automatically vesting the corporate property with the stockholders.

d. SRA’s Reliance On *Akazawa* And *Sky Tech* Is Misplaced.

SRA cites two cases as allegedly obviating the need for a written assignment from Site/Tech to Site Tech, but neither case applies here.

The first case – *Akazawa v. Link New Technology International, Inc.*, 520 F.3d 1354 (Fed. Cir. 2008) – concerned a disputed conveyance under Japanese intestacy law. Contrary to SRA’s reading of *Akazawa*, the Federal Circuit held that a written instrument might be necessary, depending on the facts of the case. The court stressed that, if Japanese law provided for administration of a decedent’s estate, “a written assignment in accordance with § 261 may

then be necessary to convey the patent from the estate to [the] heirs.” *Id.* at 1358. The court expressly distinguished situations where the law automatically vests property in the heirs (as in *H.M. Stickle v. Heublein, Inc.*, 716 F.2d 1550 (Fed. Cir. 1983)) from situations requiring administration of an estate. *See Akazawa*, 520 F.3d at 1356, 1358. Here, as demonstrated above, no law automatically vests property under the Liquidation Preference. At a minimum, administrative acts (that did not occur here) would have been required to dispose of Site/Tech’s assets under the Liquidation Preference and Delaware law. *See* DGCL §§ 278-281. Thus, the situation here is akin to the one that the Federal Circuit in *Akazawa* contemplated would require a written assignment, and so *Akazawa* actually undermines SRA’s position that none is needed.

SRA’s other case – *Sky Technologies, LLC v. SAP AG* (“*Sky Tech*”), Case No. 2:06-cv-440 (DF), (E.D. Tex. August 25, 2008) (Opp. Ex. 25) – also does not support finding a valid transfer of the patents from Site/Tech to Site Tech.¹⁵ *Sky Tech* involved an underlying state law that expressly vested property with a successful bidder in a public auction. The court found the transfer to the successful bidder to be valid because the auction triggered a state foreclosure law that directly vested the auctioned property in the purchaser. *Id.* at *18. The court emphasized that the operative state law expressly stated that the “disposition [*i.e.*, the public auction] transfers . . . all of debtor’s rights in the collateral.” Mass. Ann. L. ch. 106 § 9-617(a) (emphasis added). *Sky Tech* thus turned on a statute that automatically transfers property. As discussed above, the deemed liquidation event invoked by SRA did not trigger any such law and so *Sky Tech* does not support SRA’s position.

e. The Circumstances Of The 1997 Stock Exchange Agreement Further Belie SRA’s Position.

The circumstances surrounding 1997 Stock Exchange Agreement also do not support SRA’s position that this Agreement transferred all Site/Tech assets to Site Tech. First, Site/Tech

¹⁵ The Federal Circuit recently granted an interlocutory appeal in *Sky Tech*. Fed. Cir. Case No. 2008-1606. The Eastern District of Texas (Judge Folsom) has stayed the case pending the outcome.

actually retained assets following the stock exchange according to its tax returns and Jeffrey Ait, Site/Tech's former President.¹⁶

Second, Ait testified that the former owners of Site/Tech rejected Site Tech's (then Deltapoint's) offer to buy Site/Tech's assets because they "wanted to get rid of all liabilities as well as all assets."¹⁷ Thus the owners of Site/Tech sold the entire company, *i.e.*, as a full-fledged entity comprising all its liabilities together with its assets. Likewise, Site Tech maintained Site/Tech as a separate legal entity in order to insulate itself from potential liabilities. Ait testified that "We kept a legal entity in place as a Delaware corporation because . . . we wanted to protect the public corporation from any liabilities that might arise out of [Site/Tech]."¹⁸ Since Site/Tech's liabilities were not transferred into Site Tech pursuant to the 1997 Stock Exchange Agreement, its assets also did not transfer. Delaware liquidation law requires that an asset transfer to stockholders cannot be accomplished until liabilities are addressed, and, not until December 2000 did this deliberate separation end when the two companies merged and the surviving company expressly assumed responsibility for Site/Tech's liabilities. (Mot. Ex. 12).

Third, there is no evidence that the parties intended to cause an asset transfer by amending the Articles of Incorporation for Site/Tech. Rather, the articles were amended so that the preferred shareholders of Site/Tech could receive a preferential payment in the 1997 Share Exchange Agreement.¹⁹ Unless the articles were amended to define a share exchange as a liquidation event, the preferred shareholders had no right to the preferred payment that they received in the 1997 Share Exchange Agreement.²⁰ It was for this reason that the parties amended the Articles of Incorporation to define a share exchange as a liquidation event.

¹⁶ See Ait Depo. at 79:12-16 (filing of tax returns after stock exchange); *id.* at 81:11-19; 82:8-21 (continuing to pay salaries after stock exchange); *id.* at 85:5-94:18; 110:4-7 (continuing to file tax returns, retain assets, pay rent and pay salaries after stock exchange). See also Rp. Exs. 7-8.

¹⁷ Ait Depo. at 78:16-21.

¹⁸ *Id.* at 109:2-10.

¹⁹ Rp. Ex. 6.

²⁰ *Id.*

The simple fact remains that there is no evidence that Site/Tech transferred all its property to its Site Tech pursuant to the 1997 Stock Exchange Agreement. As explained above, the evidence shows that Site/Tech retained assets and that Site/Tech continued as a separate corporate entity until December 2000.²¹

2. The Stock Exchange Agreement Did Not Cause a *De Jure* or *De Facto* Merger Between Site/Tech And Site Tech In 1997.

SRA alludes to a “*de facto* merger transaction” between Site/Tech and Site Tech (Opp. at 3-6), but the patents could not have transferred to Site Tech by virtue of a *de facto* merger since Delaware courts have applied “*de facto* mergers” in only very limited circumstances not present here.²² Moreover, Delaware courts have explicitly rejected characterizing stock exchanges as *de facto* mergers that result in the automatic transfer of assets. For instance, in *Orzeck v. Englehart*, 195 A.2d 375, 377 (Del. 1963), the Delaware Supreme Court found that a stock exchange was not a *de facto* merger and did “nothing more” than make the purchasing corporation the stockholder of the other corporation. In emphasizing this point, the court stated:

[T]he purchasing corporation is *not the owner of the assets* of the other corporation, but is merely a stockholder Nor do the corporate identities [merge] by reason solely of the purchase by one of all of the other’s stock.²³

Id. (Emphasis added). Here, Site/Tech and Site Tech intentionally structured the transaction as a stock exchange so that Site/Tech’s sellers could declare a tax loss, and so that Site Tech would be insulated from Site/Tech’s liabilities.²⁴ Under Delaware law, this transaction was not a merger, and cannot be so characterized to erode the distinctiveness of Site/Tech as a separate legal entity from Site Tech. Absent a *de jure* merger, Site/Tech’s assets remained squarely with

²¹ See *supra* note 16.

²² See Balotti & Finkelstein, Delaware Law of Corporations and Business Organizations § 9.3. Under Delaware law, the rare cases acknowledging *de facto* mergers typically have involved illegal asset sales. See *Heilbrunn v. Sun Chem. Corp.*, 150 A.2d 755, 758 (Del. 1959). No asset sale occurred here, however.

²³ Likewise, *Findanque v. Am. Maracaibo Co.*, 92 A.2d 311 (Del. Ch. 1952), held that the acquisition of all the outstanding stock by a corporation of another corporation did not result in a *de facto* merger of the two corporations, for the reason that ownership of stock in one corporation by another does not create an identity of interest between the two corporations and make one the owner of the property of the other. See also *Owl Fumigating Corp. v. Cal. Cyanide Co.*, 24 F.2d 718 (D. Del. 1928).

²⁴ See *supra* note 18.

Site/Tech until its December 2000 merger into Site Tech. Thus, Site/Tech continued to be the title holder of the patents-in-suit well after the 1997 Stock Exchange Agreement.

Notably, the filing of merger papers in December 2000 undermines any claim that a merger, whether *de facto* or *de jure*, occurred earlier. There would have been no need for the December 2000 merger if the companies had merged earlier. The continued separateness of the two corporate identities also is reflected by the fact that, after the 1997 Stock Exchange Agreement, Site/Tech continued to maintain a separate office, hold assets in its name, pay salaries to its employees, and pay taxes.²⁵

3. Site/Tech Did Not Transfer the Patents To Site Tech Via Written Conveyance Under § 261.

SRA also relies on Site/Tech's Certificate of Incorporation to purportedly satisfy 35 U.S.C. § 261's requirement that an assignment of a patent be evidenced by "an instrument in writing." As SRA notes, the Federal Circuit recently observed in a footnoted *dictum* that § 261 "allow[s] the instrument that assigns 'any interest' to take the form of a patent license or any other *written instrument that transfers patent rights.*" See *Morrow v. Microsoft Corp.*, 499 F.3d 1332, 1338 n.3 (Fed. Cir. 2007) (emphasis added). For the reasons explained above, however, Site/Tech's Certificate of Incorporation is not a "*written instrument that transfers patent rights.*" It did not invoke any law that automatically vests property. It did not mention (let alone automatically effect) the conveyance of any specific property much less the corporation's patents. At most, it was a prospective agreement to allocate value (rather than property), and thus did not constitute an assignment under *Arachnid*. Consequently, the Certificate of Incorporation does not satisfy § 261's writing requirement.²⁶

²⁵ Ait Depo. at 87:10-88:5; 110:4-7. These facts also confirm that Site/Tech was not liquidated in July 1997.

²⁶ The cases cited in footnote 8 of SRA's opposition (Opp. at 12) do not address the situation here. In *CMS Industries*, there was nothing in the opinion to suggest that the asset transfer from one subsidiary to another subsidiary was not accomplished pursuant to a valid written assignment. See generally *CMS Indus., Inc. v. L.P.S. Int'l, Ltd.*, 643 F.2d 289 (5th Cir. 1981). In *Intel Corp.*, the court expressly recognized that the patents were transferred by a written document recorded at the patent office. See *Intel Corp. v. Broadcom Corp.*, 173 F. Supp. 2d 201, 209 (D. Del. 2001). *Surfer Internet* concerned a motion to transfer and the opinion did not address whether or not there was a valid transfer of patent rights. See generally *Surfer Internet Broad. of Miss. v. XM Satellite Radio, Inc.*, No. 4:07-CV-034, 2008 WL 1868426 (N.D. Miss. April 24, 2008). And in *Mechmetals*,

4. Site/Tech Did Not Ratify An Assignment To Site Tech.

SRA argues that Site/Tech ratified a transfer of the patents from Site/Tech to Site Tech. According to SRA, ratification occurs “where a board of directors has notice of a transfer, does not object to a transfer, and retains the fruits of the transfers.” (Opp. at 12). The premise of this argument is that there was an actual “transfer,” since SRA does not suggest that ratification can be used to circumvent the writing requirement of 35 U.S.C. § 261. As discussed above, however, there was no such “transfer” of the patent rights and no assignment that complied with § 261. Consequently there was nothing for Site/Tech to “ratify” in connection with Site Tech’s acquisition of Site/Tech stock.²⁷ Thus, SRA’s ratification argument fails.

Furthermore, SRA has failed to point to any affirmative act by Site/Tech, let alone a writing, in which Site/Tech specifically ratified the conveyance of the patents prior to this litigation.²⁸ Site/Tech did not, in fact, convey all its property to Site Tech as it continued to have its own North Carolina office and assets after the agreement. Also, according to Ait, Site/Tech was continued as a separate entity to prevent its liabilities from reaching Site Tech.²⁹ These facts further demonstrate that there was no ratification.

Conclusion: Contrary to SRA’s argument, the Liquidation Preference in Site/Tech’s Articles of Incorporation failed to convey the patents from Site/Tech to Site Tech. Thus, Site Tech did not have any rights to the patents-in-suit when it entered into the 1998 Bill of Sale with Egger.

there was no indication that the transfer of patent rights was not done via a valid written assignment. *See Mechmetals Corp. v. Telex Computer Prods., Inc.*, 709 F.2d 1287, 1290 (9th Cir. 1983).

²⁷ There is no evidence that, at the time the alleged transfer occurred, that Site/Tech retained any fruits of the alleged transfer. Under SRA’s theory, Site/Tech would have been gutted of all its assets, and left with liabilities.

²⁸ Ratification is an act that occurs *after* the alleged transaction, but in its brief, (Opp. at 12), SRA emphasizes the acts of Site/Tech’s pre-acquisition board in amending Site/Tech’s articles of incorporation as amounting to a ratification. Even so, this board (acting *before* the alleged transaction) never acted to ratify any acquisition-related transfer of any specific property (let alone the patents) out of Site/Tech. All the pre-acquisition board did was to sell out its shares in Site/Tech and obtain preferential payment for its preferred shareholders. These acts *before* the alleged transaction are also distinguishable from *CarrAmerica Realty Corp. v. Kaidanow*. 321 F.3d 165, 173 (D.C. Cir. 2003), where the board passed a resolution specifically ratifying the disputed transaction.

²⁹ Ait Depo. at 109:2-10.

B. The Doctrines Of *Alter Ego*, Agency, And Ratification Did Not Convey The Patents-In-Suit To Egger.

Unable to show that Site Tech owned the patents when it purported to assign them to Egger in 1998, SRA claims that the 1998 Bill of Sale bound Site/Tech, the true owner of the patents, under the *alter ego* doctrine and agency and ratification principles. For the reasons below, SRA is again wrong.

1. The Patent Laws Require A Written Patent Assignment From The True Patentee, Site/Tech, And None Exists.

As an initial matter, for there to be an assignment of patent rights, the owner of the patent must deliver title to the assignee by way of a written instrument. *See* 35 U.S.C. § 261. This provision sets forth a bright line rule that protects the issue of ownership from being clouded by parol evidence. Indeed, the Federal Circuit has consistently held that the writing requirement cannot be evaded, as only a writing provides the requisite “certainty” that a transfer has occurred. *See Enzo APA & Son, Inc. v. Geapag AG*, 134 F.3d 1090, 1093 (Fed. Cir. 1998). The court explained that absent a writing, “[p]arties would be free to engage in revisionist history, circumventing the certainty provided by the writing requirement of section 261.” *Id.*

To support its *alter ego*, agency, and ratification arguments, however, SRA offers exactly the type of parol evidence that the Federal Circuit found to undermine the certainty of § 261. Specifically, SRA offers declarations prepared expressly for this litigation, rather than any assignment by Site/Tech itself. But, as detailed below, there is a wealth of other evidence that controverts SRA’s claim that Site Tech was Site/Tech’s agent or that Site/Tech was a “shell company.” Among other things, Site/Tech’s own tax returns show that Site/Tech was a separate business entity that reported its own income and losses. One need not balance all of this parol evidence, as one thing remains certain: no written conveyance ever transferred the patents-in-suit from Site/Tech.

Nonetheless, on the basis of its controverted evidence, SRA asks this Court to ignore the fact that Site/Tech, the actual patentee in 1998, was not a party to the 1998 Bill of Sale. The case law and patent statutes do not permit SRA to disregard the corporate form in this manner. A

patentee's owner is not a legally equivalent of the patentee. *See e.g., Lans v. Digital Equip. Corp.*, 252 F.3d 1320, 1328 (Fed. Cir. 2001); Mot. at 10. As the Federal Circuit explained in *Lans*, the sole owner of a patentee does not have standing to assert the patentee's patent. As a result, Site Tech clearly lacked standing to assert Site/Tech's patents in 1998.

It is axiomatic that a party cannot grant another more rights than it has. *See TM Patents, L.P. v. Int'l Bus. Machs. Corp.*, 121 F. Supp. 2d 349, 365 (S.D.N.Y. 2000). Since Site Tech itself lacked standing to sue in 1998, it could not have assigned this right to Egger (or any subsequent assignee), and thus the 1998 Bill of Sale between Site Tech and Egger could not have conferred standing on Egger, nor SRA.

2. Site/Tech Was Not The *Alter Ego* Of Site Tech.

SRA argues that Site/Tech's separate corporate identity should be disregarded under Delaware's *alter ego* law. (Opp. at 13-15). Under Delaware law, however, "[i]t is only the exceptional case where a court will disregard the corporate form." *Sears, Roebuck & Co. v. Sears plc*, 744 F. Supp. 1297, 1305 (D. Del. 1990). To prove Site/Tech was an *alter ego* of Site Tech, SRA must show that: (i) Site/Tech and Site Tech operated as a single economic entity; and (ii) an overall element of fraud or injustice is present. *In re Foxmeyer Corp.*, 290 B.R. 229, 235-236 (Bankr. D. Del. 2003) ("The requisite injustice or unfairness is also not simple in nature but rather something that is similar in nature to a fraud or sham . . . fraud or something like it is required.") (emphasis in original); *see also Fletcher v. Atex, Inc.*, 68 F.3d 1451, 1457 (2nd Cir. 1995). Neither element is present here.

Not A Single Economic Unit. To demonstrate that the two companies allegedly operated as a single economic unit, SRA emphasizes that Site/Tech was wholly-owned by Site Tech and had the same directors and officers. (Opp. at 13-14). These factors are insufficient to establish *alter ego* status under Delaware law. *See Mabon, Nugent & Co. v. Tex. Am. Energy Corp.*, Civ. A. No. 8578, 1990 WL 44267, at *5 (Del. Ch. April 12, 1990) (refusing to apply the *alter ego* doctrine based "merely on a showing of common management of the two entities" or "a showing that the parent owned all the stock of the subsidiary").

SRA also claims that Site/Tech had “essentially no assets” or “employees or operations of its own.” (Opp. at 14). However, Site/Tech’s 1998 and 1999 tax returns controvert these claims. (Rp. Exs. 7-8).³⁰ According to these tax returns, Site/Tech had its own assets, earned \$18,920 and \$50,381 from its business activities in 1998 and 1999 respectively,³¹ declared \$581,668 and \$36,167 in losses in those two years, and paid \$88,000 in annual employee salaries.³² Moreover, Site/Tech retained offices and three employees in North Carolina after it became Site Tech’s subsidiary,³³ and also released a software product under its name.³⁴ These facts demonstrate that Site/Tech continued as an independent business after the 1997 stock exchange agreement and prove conclusively that Site/Tech was not Site Tech’s *alter ego*. This independence is also consistent with Ait’s testimony, quoted above (see fn. 18), that Site/Tech was maintained as a separate entity to insulate Site Tech from Site/Tech’s liabilities.

SRA’s claim that Site/Tech was a “shell entity” of Site Tech is also wrong. (Opp. at 14). Ait set the record straight at his deposition, testifying that Site/Tech was *not* a shell entity after its acquisition by Site Tech:

Q: So you would agree under your own definition of shell entity, under the definition that you just told me, and I mean this respectfully, Slash [*i.e.*, Site/Tech] was not a shell entity at least in 1998, you would agree with that; right, and the same in 1999; correct?

A: Okay.³⁵

In light of all this evidence, SRA cannot show that Site/Tech and Site Tech operated as a single economic entity.

No Fraud Or Injustice. Even if Site/Tech and Site Tech were a single economic entity (which they were not), SRA’s *alter ego* argument still fails because these companies were not

³⁰ *Id.* at 85:5-20.

³¹ Rp. Exs. 7-8; Ait Depo. at 88:20-22, 89:22-24.

³² Rp. Exs. 7-8.

³³ Ait Depo. at 81:11-19; 82:8-21.

³⁴ *See* Mot. Exs. 7-8.

³⁵ Ait Depo. at 110:8-14. During Ait’s deposition, Site/Tech was referred to as “Slash.” *Id.* at 15:5-9.

used to perpetrate a fraud or injustice. Under Delaware law, the *alter ego* doctrine applies only where a corporation uses its alleged *alter ego* to perpetrate “fraud or similar injustice.” *See, e.g., Wallace ex rel. Cencom Cable Income Partners II, Inc., L.P. v. Wood*, 752 A.2d 1175, 1184 (Del. Ch. 1999) (“Piercing the corporate veil under the *alter ego* theory ‘requires that the corporate structure cause fraud or similar injustice.’ Effectively, the corporation must be a sham and exist for no other purpose than as a vehicle for fraud.”); *In re Foxmeyer*, 290 B.R. at 236.

Here, there is no evidence that Site Tech and Site/Tech intentionally used their corporate structure to defraud Egger. When Site Tech purchased all shares in Site/Tech, it maintained Site/Tech as a separate entity for legitimate tax and liability purposes – not to perpetrate a fraud or injustice on Egger.³⁶ *See Sears*, 744 F. Supp. at 1305 (desire to benefit from Delaware tax law does not evidence fraudulent intent for purposes of *alter ego* theory).

That Egger might have had a breach of contract claim against Site Tech for its failure to convey title to the patents-in-suit does not demonstrate the necessary fraud or injustice. *See Mobil Oil Corp. v. Linear Films, Inc.*, 718 F. Supp. 260, 268 (D. Del. 1989) (cause of action for breach of contract or tort “does not supply the necessary fraud or injustice” to pierce corporate veil). As a former officer of Site/Tech and stockholder at the time of the 1997 stock exchange agreement, Egger was (or should have been) familiar with Site/Tech’s status as a Site Tech subsidiary after the stock exchange was concluded.³⁷ Given this knowledge, Egger cannot claim to have been “defrauded” for *alter ego* purposes. *See Harper v. Del. Valley Broadcasters, Inc.*, 743 F. Supp. 1076, 1086 (D. Del. 1990) (finding no *alter ego* liability where party advancing theory was former director and officer of one of the companies and familiar with their corporate structure).

Moreover, the Patent Office records at the time of the 1998 Bill of Sale indicated that Libertech (*i.e.*, Site/Tech) was the owner of the patents-in-suit, not Site Tech. (Mot. Exs. 3-4).

³⁶ *See Opp.* at 3 (“For tax reasons, the parties structured the acquisition as a stock exchange with a distribution of assets into the parent, rather than as a formal merger.”).

³⁷ Egger Depo. at 12:22-13:4; 28:4-16.

Egger therefore was on constructive notice that Site Tech did not own the patents in 1998. This, too, weighs against a finding of “fraud or similar injustice.” See *Hauspie v. Stonington Partners, Inc.*, 945 A.2d 584, 586 (Del. 2008) (a fraud claim requires *justifiable* reliance by the alleged victim upon a false representation). In short, neither of the two factors required for finding Site Tech and Site/Tech to be *alter egos* is present here.

SRA Is Not Entitled To Raise An *Alter Ego* Claim. SRA alleges that Site Tech was generally Site/Tech’s *alter ego*, but SRA has no standing to bring an *alter ego* claim against Site Tech in view of Site Tech’s bankruptcy. A debtor’s claims against its alleged principal are property of the bankruptcy estate, and thus can only be asserted by the debtor acting as trustee under 11 U.S.C. § 1107. See, e.g., *In re Davey Roofing, Inc.*, 167 B.R. 604, 608 (Bankr. C.D. Cal. 1994) (“[T]hese *alter ego* claims are property of the bankruptcy estate, and . . . *Debtor’s creditors are barred from bringing such claims.*”) (emphasis added). Thus, once Site Tech filed for bankruptcy, only Site Tech itself could have brought an *alter ego* claim based on contracts arising before the bankruptcy. Accordingly SRA is not the proper party to assert this claim now.

3. Site Tech Was Not Site/Tech’s Agent For Conveying Patent Rights.

Relying on California law, SRA also contends that Egger obtained title from the 1998 Bill of Sale because Site Tech acted as Site/Tech’s actual or apparent agent and because Site/Tech also ratified the assignment. (Opp. at 15-21). As shown below, these arguments fail because Site/Tech never made Site Tech its agent to dispose of its patents, nor did it ever represent as much.

Equal Dignity Rule. Under California law, an agent must be authorized in writing in order to enter into contracts that are required by law to be in writing on behalf of a principal. Specifically, Cal. Civ. Code § 2309 (“the equal dignity rule”) provides that “an authority to enter into a contract required by law to be in writing can only be given by an instrument in writing.” 35 U.S.C. § 261 requires that patent assignments be in writing and thus is the equivalent of the statute of frauds for patent rights. Therefore, for Site Tech to have been Site/Tech’s agent in

executing patent assignments, SRA must identify a writing that appoints Site Tech as Site/Tech's agent. It failed to do so.

The purpose behind the equal dignity rule is to prevent parties from evading statutory writing requirements and thus applies here. The Federal Circuit itself has adopted this principle, holding that "virtual assignments" must be in writing, like true assignments, so as to satisfy the degree of "certainty" required by § 261. *Enzo APA* 134 F.3d at 1093. The equal dignity rule provides this certainty and thus bars SRA's agency arguments, whether based on actual or apparent agency.

No Actual Authority. SRA's claim that Site Tech was Site/Tech's actual agent is also not supported by the facts. Under California law, "the significant test of an agency relationship is the principal's right to control the activities of the agent." *CenterPoint Energy, Inc. v. Superior Court*, 157 Cal. App. 4th 1101, 1118 (Cal. Ct. App. 2007); *accord Malloy v. Fong*, 232 P.2d 241, 249 (Cal. 1951). Here, SRA has produced no evidence that Site/Tech (the supposed principal) could control the activities of Site Tech (the supposed agent). To the contrary, SRA contends that the supposed agent, Site Tech, totally controlled the principal, Site/Tech, because Site Tech took over Site/Tech's daily operations, controlled Site/Tech's officers, and filed Site/Tech's tax returns on its behalf. (Opp. at 14). There is no evidence supporting the converse – that Site/Tech, as principal, controlled Site Tech, as agent. As a result, Site Tech could not have been Site/Tech's actual agent.³⁸ *See Kaplan v. Coldwell Banker Res. Affiliates, Inc.*, 59 Cal. App. 4th 741, 746 (Cal. Ct. App. 1997) (finding absence of agency because alleged principal "did not control or have the right to control [the alleged agent's] business activities.").

³⁸ Because Site Tech was *not* Site/Tech's agent, SRA's argument that an agent may bind its principal to a contract made in the agent's name is simply irrelevant. *See* Opp. at 17, fn. 9. In all the cases SRA cites to support this argument, there was an acknowledged agency relationship. *See Sterling v. Taylor*, 152 P.3d 420, 430 (Cal. 2007) ("Defendants . . . do not dispute Taylor's authorization to act as SMC's agent"); *Sumner v. Flowers*, 279 P.2d 772, 773 (Cal. Ct. App. 1955) ("Miss Flowers' position as confidential secretary and agent to Furnish was known and recognized as such"); *Pac. Fin. Corp. v. Foust*, 285 P.2d 632, 633-34 (Cal. 1955) ("The trial court found . . . that Universal gave to Lonnie's authority to sell the cars There can be no doubt as to the sufficiency of the evidence to support the findings on factorship [agency] issue.").

SRA incorrectly asserts that Site/Tech should be bound by Site Tech's claims to own the patents. The claims of ownership upon which SRA relies all were made on behalf of Site Tech, not Site/Tech. (*See* Opp. at 16; Opp. Exs. 12-16, 24). Under Delaware law, an officer who signs a document on behalf of one company does not bind every other company for whom he or she is an officer, even if the two companies are parent and subsidiary. *Cf. United States v. Bestfoods*, 524 U.S. 51, 69 (1988) (“[D]irectors and officers holding positions with a parent and its subsidiary can and do ‘change hats’ to represent the two corporations separately, despite their common ownership.”). As a result, Ait’s remarks on behalf of Site Tech (aka Deltapoint) – while wearing his “Deltapoint hat” – cannot be imputed to or bind Site/Tech.³⁹

SRA also improperly relies upon DGCL § 271(a) & (c) as authorizing Site Tech to transfer its subsidiary’s (Site/Tech’s) property. DGCL § 271 simply has no application here. First, the statute only applies when a parent company sells “all or substantially all of its property and assets.”⁴⁰ Here, there was no sale of *any* assets of the parent company, and so the statute does not apply. Second, even if § 271 did apply, it would require the approval of the parent’s stockholders for the asset sale. There is no evidence that the approval of Site Tech’s stockholders was obtained here. Third, the statute also does not change the fact that the assets of the subsidiary are still legally owned by the subsidiary alone. *See Orzeck*, 195 A.2d at 377 (“[T]he purchasing corporation is not the owner of the assets of the other corporation [that was purchased], but is merely a stockholder.”). Thus, § 271 also does not change the fact that no sale can occur unless the subsidiary does in fact convey the assets. In sum, contrary to SRA’s

³⁹ SRA claims that the facts here are similar to those in *Kothman Enters., Inc. v. Trinity Indus., Inc.*, 394 F. Supp. 2d 923, 941-42 (S.D. Tex. 2005). In *Kothman*, however, the true owner of the patent assigned the patent. *See id.* at 941-42 (“It is undisputed that ISC held valid legal title to the ‘003 Patent on October 30, 2000, when Kothman [ISC’s owner] signed the document.”). The Court merely refused to recognize language in the assignment that purported to make the assignment effective as of a date earlier than it was signed. *Id.* Here, by contrast, Site Tech did *not* own the patents when it purportedly assigned them to Egger in 1998. *See RAD Data Commc’ns, Inc. v. Patton Elecs. Co.*, 882 F.Supp. 351, 353 (S.D.N.Y. 1995) (finding no assignment because assignor had no rights on stated execution date and rejecting argument based on “intent” of parties).

⁴⁰ *See Gimbel v. Signal Companies, Inc.*, 316 A.2d 599, 605 (Del. Ch. 1974) (holding that by negative implication “[a] sale of less than all or substantially all assets is not covered” by § 271).

argument, § 271 does not generally authorize a parent to sell the assets of its subsidiary and does not apply to the alleged sale of the patents in September 1998.

No Apparent Authority. SRA's argument that Site Tech was Site/Tech's apparent agent is also wrong, and barred by the equal dignity rule. To create apparent authority, the principal must "cause[] a third person to believe another to be his agent who is not really employed by him." Cal. Civ. Code § 2300. There is no evidence that Site/Tech caused Egger or anyone else to believe that Site Tech was Site/Tech's agent for disposing of its patent rights. Egger testified that he knew at the time that he was dealing with Site Tech: "I knew that I was dealing with Delta Point [aka Site Tech], of course."⁴¹

Furthermore, SRA has contended that Site/Tech did not undertake any corporate actions after its acquisition by Site Tech in 1997. (Opp. at 14). If so, Site/Tech did nothing to make Egger believe that Site Tech was Site/Tech's agent. See *Emery v. Visa Int'l Serv. Ass'n*, 95 Cal. App. 4th 952, 961 (Cal. Ct. App. 2002) ("Ostensible authority must be based on the acts or declarations of the principal and not solely upon the agent's conduct."). Moreover, SRA cannot point to any action that *Site/Tech itself* took to convince anyone that Site Tech was Site/Tech's agent for selling the patents. Absent such action, Site Tech cannot be deemed Site/Tech's apparent agent.⁴²

No Ratification. SRA also incorrectly claims that Site/Tech created an after-the-fact agency relationship through the ratification doctrine. (Opp. at 21). As an initial matter, there

⁴¹ Egger Depo. at 91:20-92:1.

⁴² SRA cites the unpublished *Regency Centers* case, Opp. at 20, but this decision is inapplicable for many reasons. First, the decision concerned a dispute over an option to be an interest in a company (Vista Village LLC), and thus the disputed contract was not required to be in writing. See *Regency Centers v. Civic Partners Vista Village I, LLC*, No. G038095, 2008 WL 2358860, at *3 (Cal. App. 4th Dist. June 11, 2008). Moreover, unlike the circumstances here, all the elements of an "implied agency" were present. See, e.g., *id.* at *14 (noting that there was no dispute that the parties understood that the agent exercised the option on behalf of the principal). Further, SRA's contention that "California law was applied [in *Regency*] to find an implied agency relationship to manifest the parties intentions" is wrong since *Regency* court explicitly rejected applying California law and applied Delaware law instead. See *id.* (finding that "Defendants' reliance on [California law] is inapt"). SRA's other cited case, *People Express Pilot*, also is distinguishable for at least the same reasons: it did not concern an agreement required to be in writing, it did not apply California law, and it did not involve facts where the principal took no action. See *People Express Pilot Merger Comm. v. Tex. Air Corp.*, Civ. A. No. 87-1155, 1987 WL 18450, at *4 (D.N.J. Oct. 14, 1987).

was no effective transfer of rights pursuant to the 1998 Bill of Sale, and therefore no transfer for Site/Tech to ratify. Under California law, the ratification doctrine requires that the principal have the ability to create an actual agency relationship. See Cal. Civ. Code § 2312 (“A ratification is not valid unless, at the time of ratifying the act done, the principal has power to confer authority for such an act”); accord 2B Cal. Jur. 3d Agency § 74 (“[A]n effective ratification requires that the principal possess the power to authorize the agent’s unauthorized act, both at the time the act is done and at the time of ratification.”). As discussed above, Site/Tech lacked authority to make Site Tech its agent because Site/Tech had no ability to control Site Tech. Thus, Site/Tech could not have “ratified” Site Tech’s purported sale of the patents to Egger in 1998 after-the-fact. See *Lindsay-Field v. Friendly*, 36 Cal. App. 4th 1728, 1736 (Cal. Ct. App. 1995) (“The principal cannot ratify if the principal lacks power to confer authority.”).⁴³

As a result of the December 2000 merger between Site/Tech and Site Tech, Site Tech became the owner of the patents-in-suit. While SRA argues that Site Tech also ratified the 1998 Bill of Sale and the fraudulent 2005 Assignment concocted by Egger in 2008, this argument carries no weight. The evidence that SRA offers in support of this alleged ratification are the Declaration of Ait (Opp. Ex. 7) and the 2008 Assignment (Rp. Ex. 5), signed by Ait. These documents prove nothing, however, as Ait had no authority to act or speak on Site Tech’s behalf after the bankruptcy proceeding concluded on January 6, 2004.⁴⁴

Conclusion: For the reasons above, Egger did not obtain the patents-in-suit pursuant to the doctrines of *alter ego*, agency, and ratification. Furthermore, even assuming that Egger could

⁴³ By contrast, the lone case that SRA cites in support of its ratification argument – *Scholastic Book Clubs, Inc. v. State Bd. of Equalization*, 207 Cal. App. 3d 734 (Cal. Ct. App. 1989) – involved a principal (Scholastic) that *did* have the power to authorize other parties (various teachers) to act as its agents at all relevant times. See *id.* at 737 (“The teachers are obviously not acting under anyone else’s authority, and once they undertake to act, they are obviously acting under appellant’s [Scholastic’s] authority.”). In addition, the principal received payments, *i.e.*, the fruits of the teachers’ acts, *id.* at 738, whereas here there is no evidence that Site/Tech received any benefit.

⁴⁴ See *supra* at 28; Ait Depo. at 134:14-19; see also Article 7.3 of the Plan provided that “[t]he Responsible Person shall be discharged from all duties and responsibilities of the Plan upon the issuance of the final decree.” (Rp. Ex. 9). Moreover, Ait had not even seen the 2005 Assignment when he allegedly ratified it. Ait Depo. at 168:7-14.

have raised a claim against Site/Tech (while it existed) under the doctrines of agency, *alter ego*, and ratification to obtain a written assignment or a final, written judgment delivering title, Egger never did so prior to Site Tech's bankruptcy.⁴⁵ As a result, title to the patents remained squarely with Site/Tech until its merger with Site Tech in December 2000 while the bankruptcy proceedings were pending. As explained below, Site Tech's bankruptcy bars Egger from subsequently attempting to procure title from Site Tech.

C. No Equitable Principle Conveyed the Patents-In-Suit To Egger After Site Tech Filed For Bankruptcy.

SRA further alleges that it obtained title to the patents-in-suit when Site Tech and Site/Tech merged in December 2000 based on the doctrine of after-acquired title. (Opp. at 21-24). This theory also fails for the reasons set forth below.

1. The Rejection Of The 1998 Bill Of Sale During The Bankruptcy Proceedings Relieved Site Tech Of Any Obligation To Transfer The Patents-In-Suit.

SRA's after-acquired title argument ignores that, on February 2, 1999, Site Tech filed a petition for relief under Chapter 11 of the Bankruptcy Code in the Northern District of California. (Rp. Ex. 10). Assuming that the 1998 Bill of Sale obligated Site Tech to transfer the patents-in-suit to Egger, that obligation remained unperformed since Site Tech could not have conveyed to Egger what it did not own and thus Egger could not have received title to the patents. When Site Tech filed for bankruptcy, its unperformed obligations became "executory obligations" and the 1998 Bill of Sale became an "executory contract" subject to rejection by the trustee or debtor-in-possession.⁴⁶

Section 365 of the Bankruptcy Code governs the treatment of executory contracts and the obligations of parties to such contracts.⁴⁷ The Supreme Court has held that the commencement

⁴⁵ Egger did obtain such a document, allegedly from Site Tech, in August 2008. That alleged assignment is discussed below. *See supra* at 30.

⁴⁶ Under ¶ 4 of the 1998 Bill of Sale, for example, both parties had continuing obligations, among other things, to defend and indemnify the other party. Mot. Ex. 10.

⁴⁷ Subject to bankruptcy court approval, § 365 provides the trustee or the debtor-in possession with the option of "assuming" or "rejecting" the executory contract that was suspended by filing of the bankruptcy petition. (Site Tech was a "debtor-in-possession," as no Chapter 11 trustee had been appointed.) "Assumption" means that the

of a bankruptcy case immediately and automatically suspends the debtor's obligation to render any further performance under an executory contract. *See NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 533 (1984) (“[T]he filing of a petition in bankruptcy under Chapter 11 makes the contract unenforceable.”). Thus, as of the commencement of its Chapter 11 case, Site Tech's alleged obligation to deliver title to the patents-in-suit – an obligation that it could not possibly have performed until it acquired title – was at most an executory obligation under an executory contract, *i.e.*, the 1998 Bill of Sale.

Site Tech then proceeded to reject this contract pursuant to its court-approved Chapter 11 reorganization plan (“Plan”; Rp. Ex. 9). The Plan comprehensively addressed the treatment of all executory contracts. Article 8.1 of the Plan provided that, “[e]xcept as previously provided by the Bankruptcy Court order, no other executory contract . . . will be assumed by the debtor.” Article 8.3 of the Plan then provided that all executory contracts that had not previously been assumed or assigned were rejected, and further that “[c]onfirmation of the Plan shall be deemed to constitute Bankruptcy Court approval of such rejection.” Site Tech did not expressly assume the 1998 Bill of Sale before the Plan was confirmed, and thus it was rejected when the Bankruptcy Court confirmed the Plan on June 15, 2000. (Rp. Ex. 11).

The court's confirmation of Site Tech's Plan relieved Site Tech of any obligation to thereafter specifically perform under the rejected 1998 Bill of Sale.⁴⁸ Egger's exclusive remedy for non-performance was to timely assert a general unsecured claim for damages under 11 U.S.C. § 365(g)(1), which he did not do. *See Midway Motor Lodge of Elk Grove v. Innkeepers' Telemanagement & Equip. Corp.*, 54 F.3d 406, 407 (7th Cir. 1995) (“Rejection avoids specific performance, but the debtor assumes a financial obligation equivalent to damages for breach of contract.”); *Lubrizol Entr. Inc., v. Richmond Metal Finishers, Inc.*, 756 F.2d 1043, 1048 (4th

debtor-in-possession commits to perform all of its obligations under the contract and becomes entitled to receive all of the performance due it under the contract. “Rejection” discharges the debtor-in-possession of all obligations to further perform under the contract.

⁴⁸*Begier v. INS*, 496 U.S. 53 (1990), and the other cases cited by SRA at Opp. at 26-27 are not to the contrary. These authorities do not alter the fact that at most Egger had an unsecured claim against the bankrupt party, Site Tech. *Begier*, for example, concerned preferential avoidance powers under § 547, which is not at issue here.

Cir. 1985) (“Under 11 U.S.C. § 365(g), Lubrizol . . . could not seek to retain its contract rights in the technology by specific performance even if that remedy would ordinarily be available upon breach of this type of contract.”).

In light of the rejection of the 1998 Bill of Sale and the court’s approval of that rejection, Egger cannot invoke the after-acquired title doctrine now. Egger’s invocation of the doctrine is nothing more than a request for specific performance of an obligation that the Supreme Court has held to be unenforceable as of the commencement of the case and a collateral attack on the rejection effected by the Confirmation Order. *See, e.g.*, 11 U.S.C. § 365(g)(1); *Bildisco*, 465 U.S. at 533; *Midway Motor Lodge*, 54 F.3d at 407.

2. Contrary To SRA’s “Res Judicata” Forfeiture Theory, The Patents Remain Subject To The Jurisdiction Of The Bankruptcy Court.

SRA argues, without citing any authority, that confirmation of Site Tech’s bankruptcy plan “is *res judicata* that the property was not in the estate.” (Opp. at 26). SRA’s argument is contrary to the explicit provisions of the Federal Rules of Bankruptcy Procedure and black letter bankruptcy law. Under bankruptcy law, only an adversary proceeding can determine the “validity, priority, or extent” of an interest in property. *See* Fed. R. Bankr. Proc. 7001; *see also In re Golden Plan of Cal., Inc.*, 829 F.2d 705, 711 (9th Cir. 1986). No such adversary proceeding occurred here. Thus, confirmation of the Plan cannot operate as *res judicata* confirming Egger’s title to the patents.

While the *res judicata* effect of the Plan is not dispositive of title to the patents-in-suit (or to any matter involving Defendants), it is dispositive of Egger’s right to assert a claim with respect to the 1998 Bill of Sale and any obligations he contends were not fully performed prior to February 2, 1999. Not only did Egger receive notification of the bankruptcy proceeding, but Egger admitted that he was aware of the bankruptcy proceedings and gave it attention out of concern over the title to the patents.⁴⁹ At this time, of course, Egger had constructive and actual notice that Site Tech was the only contracting party to the 1998 Bill of Sale and that the

⁴⁹ Egger Depo. at 51:11-22; 54:12-21.

contemporaneous Patent Office records (which constituted assignments signed by him to Site/Tech) showed that Site Tech was not the owner of the patents. Nonetheless, Egger chose not to assert a claim against Site Tech based on its failure to deliver title, and not to object to the Plan's rejection of unassumed executory contracts, including the 1998 Bill of Sale, even though the Plan set forth unequivocal bar dates for these actions. (Plan at ¶ 8.4). Indeed, Egger waited until January 7, 2004 – the very day after the final decree issued in Site Tech's bankruptcy (January 6, 2004) – to incorporate SRA for the express purpose of holding the patents-in-suit.⁵⁰ (Rp. Exs. 12-13).

However, the Bankruptcy Court's Confirmation Order is a *res judicata* judgment and is binding on Egger and SRA. *See, e.g., Trulis v. Barton*, 107 F.3d 685, 691 (9th Cir. 1995) (“Once a bankruptcy plan is confirmed, it is binding on all parties and all questions that could have been raised pertaining to the plan are entitled to *res judicata* effect.”). Egger cannot contest that the 1998 Bill of Sale was rejected now, and he cannot avoid the important consequences that flow from that rejection under the Plan and the Confirmation Order – including his lack of entitlement to equitable relief.

To the extent that Egger is now attempting an untimely assertion of his alleged rights, he must do so with the Bankruptcy Court of the Northern District of California. In its Confirmation Order at ¶ 5 (Rp. Ex. 11), “[t]he Court reserve[d] jurisdiction with regard to the matters and proceedings set forth in Article 13 of the First Amended Plan.” Since Article 13 of the Plan (Rp. Ex. 9) encompasses Site Tech's property rights (¶ 13.1D), the rejection of any executory contract (¶ 13.1C), and the treatment of any claims (¶ 13.1B), it necessarily encompasses any resolution of the rights that Egger and SRA are now asserting over the patents-in-suit. The Supreme Court confirms that such a dispute must be resolved by the Bankruptcy Court. *See Celotex Corp. v. Edwards*, 514 U.S. 300, 313 (1995) (holding that judgment creditors were required to abide by bankruptcy court's injunction and could not collaterally attack its order in another court). In

⁵⁰ *Id.* at 65:7-12; 66:7-13.

addition, because the Bankruptcy Court of the Northern District of California ordered the dissolution of Site Tech many years ago when it issued its final decree in Site Tech's bankruptcy, it alone has the power to exercise Site Tech's corporate authority and take any action with respect to the company's property.

3. Because The After-Acquired Title Doctrine Does Not Cause "Immediate" And Automatic Transfers, Title Remains With Site Tech.

Even apart from the fact that bankruptcy law bars Egger's claim for specific performance, the doctrine of after-acquired title does not "immediately" and automatically transfer title to a supposed assignee, as SRA posits occurred with Site/Tech and Site Tech's merger in December 2000. Any right to invoke the doctrine of after-acquired title can be negated by equitable defenses, such as unclean hands, as well as equitable subordinations, fraudulent transfer, and other avoiding powers in bankruptcy. *See, e.g.*, 11 U.S.C. § 549.

Mills Novelty Co. v. Monarch Tool & Manufacturing Co., a Sixth Circuit opinion cited by SRA (Opp. at 23), confirms that the after-acquired title doctrine does not result in any transfer of title, but rather regards the after-acquiring party as merely "hold[ing] legal title." 49 F.2d 28, 31 n.3 (6th Cir. 1931). Under the doctrine, legal title can be passed to a third party other than the alleged prior assignee. If the third party is a *bona fide* purchaser, such a transfer is superior to any equitable rights that the alleged assignee might have held. *See also Taylor Engines, Inc. v. All Steel Engines, Inc.*, 192 F.2d 171, 174 (9th Cir. 1951) ("The equitable claim of the Nevada corporation could have been cut off by a sale to a *bona fide* purchaser."⁵¹ Although Site Tech did not appear to have sold the patents-in-suit to such a *bona fide* purchaser, the fact that it could have done so under the law demonstrates that legal title to the patents did not "immediately" and automatically transfer to Egger when Site Tech acquired the patents-in-suit by merger in December 2000. However, to this day, Egger has not made any legitimate attempts to obtain title

⁵¹ *Gottfried v. Miller* is not inconsistent. In *Gottfried*, the Supreme Court's holding did not address when if ever title to an after-acquired patent would vest in an earlier assignor. Rather the Court only held that a subsequent assignor was bound by an express release clause from asserting a patent against an alleged infringer against whom an earlier assignor would have been estopped from suing. *See* 104 U.S. 521, 527 (1881).

from Site/Tech or from Site Tech by acting on his alleged right to after-acquired title or otherwise. Rather, Egger's efforts to obtain title were to manufacture the fraudulent 2005 Assignment with his lawyer and then, through SRA, to cause Ait to purportedly act on Site Tech's behalf despite Ait's lack of authority to do so. As a result, Site Tech's estate, not SRA, continues to hold title to the patents, and thus SRA has no standing to assert them.

4. Unclean Hands And Other Equitable Defenses Bar Any Equitable Remedy Under The After-Acquired Title Doctrine.

Even if Egger were able to enforce his alleged rights under the equitable doctrine of after-acquired title, he is barred from exercising these rights by his own unclean hands, among other equitable defenses. "[H]e who comes into equity must come with clean hands." *Precision Instrument Mfg. Co. v. Auto. Co.*, 324 U.S. 806, 814 (1945). Here, Egger has unclean hands because, among other things, he created patently false conveyance documents and submitted them before the Patent and Trademark Office ("PTO") to establish his alleged ownership of Site/Tech assets:

- a. In February 2005, as described above and in the Mot. at 5-6; 11-12, Egger executed an assignment allegedly on behalf of Site/Tech to grant himself rights to the '352 and '494 patents. Egger knew this document to contain false information that was not disclosed therein to establish a "clear chain of title." (Rp. Ex. 4). Although the identity of the assignor, the existence of the assignor, and the corporate authority of the executing party were all necessarily material facts when proving ownership by assignment, Egger concealed the truth about each of these facts. The actual assignor of the 1998 Bill of Sale was Site Tech (not Site/Tech), Site/Tech had ceased to exist, and Daniel Egger was not in fact the President as he alleged. Nonetheless, Egger and SRA used this assignment before the PTO in an attempt to establish Egger's ownership to the '494 patent when he sought to revive the expired '494 patent. (Rp. Ex. 14).
- b. In 2003, during Site Tech's bankruptcy, Egger executed an assignment allegedly on behalf of Libertech (aka Site/Tech) to grant to himself the V-Search Trademark (Registration No. 2,058,774). (Rp. Ex. 15). Egger purported to be the President and CEO of Libertech at this time even though, by his own admission, Egger knew this information to be false.⁵² The day after executing this purported assignment Egger filed this assignment with the PTO to advance the prosecution of his trademark. (Rp. Ex. 16). This assignment proves that Egger repeatedly relied upon Site/Tech as the true former owner of the property allegedly

⁵² Egger Depo. at 141:3-20.

purchased in the 1998 Bill of Sale and further repeatedly and falsely presented himself as its current officer.

The creation and use of documents with patently false information tarnishes Egger's hands and those of his purported successor, SRA. These unclean acts further bar Egger and SRA from relying upon equitable principles to regain title to the patents. Other deeds by Egger and SRA to procure Site/Tech's property include acts that have evaded the jurisdiction of the Bankruptcy Court presiding over Site Tech.

In view of these acts, equity estops SRA from denying that Site/Tech continued to own the patents-in-suit despite the 1998 Bill of Sale. The fraudulent 2005 Assignment signed by Egger asserted, without equivocation, that Site/Tech was the owner of the patents-in-suit in February 2005. Egger submitted this document to the PTO in an attempt to (falsely) create a chain of title between Site/Tech, as the assignee of the named inventors of the '494 patent, and himself. The basic tenets of estoppel prevent SRA from repudiating the 2005 Assignment.⁵³

Conclusion: In conclusion, Egger did not obtain the patents from Site/Tech in December 2000 or anytime thereafter pursuant to the after-acquired title doctrine. Any alleged equitable right to such a conveyance was extinguished by bankruptcy law and Egger's unclean hands. Furthermore, because Egger never sought such a conveyance before bringing suit, SRA had no standing when it filed its complaint here.

⁵³ See *New Hampshire v. Maine*, 532 U.S. 742, 750-51 (2001) ("The circumstances under which judicial estoppel may appropriately be invoked are probably not reducible to any general formulation of principle."). The first factor identified in this case is: (1) whether the positions are "clearly inconsistent." Here SRA's position is clearly inconsistent with the 2005 Assignment which states that Site/Tech continued to be the "owner" of the patents after the 1998 Bill of Sale. The second factor is: (2) "whether the party has succeeded in persuading a court to accept that party's earlier position, so that judicial acceptance of an inconsistent position in a later proceeding would create the perception that either the first or the second court was misled." Here, SRA persuaded the Patent Office that it was the owner so as to revive the '494 patent. (Mot. Ex. 16 & 17). The 2005 Assignment was the only submitted assignment that could establish a clear chain of title from the prior record owner Site/Tech to Egger. The third factor is: (3) "whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped." The public and Defendants are prejudiced by SRA's inconsistent position, in part because the 2005 Assignment was never authorized by Site/Tech and the PTO was never told of the omitted material facts.

D. The August 2008 Assignment Also Does Not Convey Rights To The Patents-In-Suit.

Apparently motivated by the many deficiencies in the earlier alleged assignments to Egger and Defendants' Motion to Dismiss, on August 13, 2008, SRA paid \$1000 to Ait to obtain a further assignment of Site Tech's rights to the patents-in-suit. (Rp. Ex. 17). This Assignment (Rp. Ex. 5) purports to deliver the "entire right, title and interest into and under the patents to the extent that now held by the Site Entities." Ait executed this Assignment stating that he "acted as and remains Chief Executive Officer of [Site Tech]." *Id.* However, Ait testified that this was untrue at his deposition. He explained that, after Site Tech declared bankruptcy, he ceased to be Site Tech's CEO.⁵⁴ Ait's only subsequent authority, as Responsible Person under the Chapter 11 Plan, ended on January 4, 2004, when the Bankruptcy Court issued the Final Decree ending the bankruptcy proceedings.⁵⁵ Since Ait was neither the CEO (or other officer) of Site Tech nor empowered by the Bankruptcy Court as Responsible Person when he executed the August 13, 2008, he lacked the necessary corporate authority to divest Site Tech of its property. Consequently, the August 2008 assignment is void and does not give Egger (or SRA) any rights.⁵⁶ As explained above, the Bankruptcy Court alone retains jurisdiction over this property.

III. CONCLUSION

For the reasons stated, SRA lacks standing to bring this litigation and thus this Court lacks subject matter jurisdiction over this case. Defendants respectfully move the Court for dismissal of SRA's Complaint and this lawsuit.

⁵⁴ Ait Depo. at 42:18-43:10; 167:3-7.

⁵⁵ The Plan provided that "[t]he Responsible Person shall be discharged from all duties and responsibilities of the Plan upon the issuance of the final decree." (Rp. Ex. 11). *See also supra* note 44.

⁵⁶ Even if the August 2008 Assignment was effective, it does not cure the fact that SRA lacked title to the patents-in-suit when it brought this action in November 2007 (*i.e.*, before SRA obtained rights under the August 2008 assignment). A Plaintiff must have standing at the time that the complaint is filed. *Schreiber Foods, Inc. v. Beatrice Cheese, Inc.*, 402 F.3d 1198, 1203 (Fed. Cir. 2005). Thus, SRA's most recent effort to obtain title would not give them standing to maintain this litigation.

Dated: November 10, 2008

Respectfully submitted,

By: /s/ Thomas B. Walsh, IV

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing document has been served via e-mail upon the following counsel of record this 10th day of November, 2008:

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/s/ Thomas B. Walsh, IV
Thomas B. Walsh, IV

CERTIFICATION BY COUNSEL

The undersigned hereby certifies that the above document is filed under seal pursuant to the Agreed Protective Order (Dkt. No. 99-2) filed by all parties on November 4, 2008. The Agreed Protective Order has not yet been entered by the Court because there is one dispute among the parties that the Court has been asked to resolve, but this one dispute does not concern the authority to file documents containing protected information under seal.

/s/ Thomas B. Walsh, IV
Thomas B. Walsh, IV

Exhibit 6

FILED

SEP 30 2003

JAN 06 2004

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2 JANICE M. MURRAY (099996)
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CLERK
UNITED STATES BANKRUPTCY COURT
SAN JOSE, CALIFORNIA

Attorneys for Debtor

8 UNITED STATES BANKRUPTCY COURT
9 NORTHERN DISTRICT OF CALIFORNIA
10 SAN JOSE DIVISION

11 In re:) Case No. 99-50736-JRG-11
12 Site Technologies, Inc.,)
13 dba DeltaPoint, Inc.) Chapter 11
14 Debtor.)
15 EIN No.: 77-0216760)

FINAL DECREE

17 THE APPLICATION FOR ENTRY OF FINAL DECREE having been filed by Site
18 Technologies, Inc., the Debtor herein; the Court being fully advised in the premises; and good cause
19 appearing therefor;

20 IT IS HEREBY ORDERED that the above-captioned Chapter 11 case of Site
21 Technologies, Inc. be, and it hereby is, closed.

22
23 Dated: Jan 6, 2004 
24 United States Bankruptcy Judge

25 The United States Trustee has no objection to the entry of the Final Decree in this case.

26
27 UNITED STATES TRUSTEE

28 By: Nanette Durnas
Nanette Durnas, Esq.

ORIGINAL

Exhibit 7

California Business Portal

Secretary of State DEBRA BOWEN

DISCLAIMER: The information displayed here is current as of JAN 30, 2009 and is updated weekly. It is not a complete or certified record of the Corporation.

Corporation

SITE TECHNOLOGIES, INC.

Number: C1632789

Date Filed: 2/1/1989

Status: suspended

Jurisdiction: California

Address

1120 FORREST AVENUE

SUITE 301

PACIFIC GROVE, CA 93950

Agent for Service of Process

C T CORPORATION SYSTEM

818 WEST SEVENTH ST

LOS ANGELES, CA 90017

Blank fields indicate the information is not contained in the computer file.

If the status of the corporation is "Surrender", the agent for service of process is automatically revoked. Please refer to California Corporations Code Section 2114 for information relating to service upon corporations that have surrendered.

Exhibit 8

**Issued by the
UNITED STATES DISTRICT COURT**

FOR THE

**NORTHERN
DISTRICT OF**

CALIFORNIA

SOFTWARE RIGHTS ARCHIVE, LLC,

Plaintiff,

v.

**GOOGLE INC., YAHOO! INC., IAC SEARCH &
MEDIA, INC., AOL, LLC, AND LYCOS, INC.,**

SUBPOENA IN A CIVIL CASE

CASE NUMBER: ¹ Civil Case No. 2:07-cv-511 (CE)
EASTERN DISTRICT OF TEXAS

Defendants.

TO:

Wilson Sonsini Goodrich & Rosati
650 Page Mill Road
Palo Alto, California 94304

YOU ARE COMMANDED to appear in the United States District Court at the place, date, and time specified below to testify in the above case.

PLACE OF TESTIMONY	COURTROOM
	DATE AND TIME

YOU ARE COMMANDED to appear at the place, date, and time specified below to testify at the taking of a deposition in the above case. (See attached Notice of Deposition)

PLACE OF DEPOSITION	DATE AND TIME

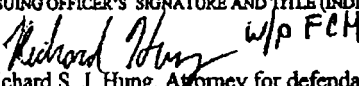
YOU ARE COMMANDED to produce and permit inspection and copying of the following documents or objects at the place, date and time specified below (list documents or objects): *See Appendix A, attached hereto.*

PLACE Offices of Morrison & Foerster LLP, 755 Page Mill Road, Palo Alto, CA 94304, (650) 813-5600; or another suitable location to be mutually agreed upon.	DATE AND TIME September 26, 2008, 9:30 AM
---	--

YOU ARE COMMANDED to permit inspection of the following premises at the date and time specified below.

PREMISES	DATE AND TIME

Any organization not a party to this suit that is subpoenaed for the taking of a deposition shall designate one or more officers, directors, or managing agents, or other persons who consent to testify on its behalf, and may set forth, for each person designated, the matters on which the person will testify. Federal Rules of Civil Procedure, 30(b)(6).

ISSUING OFFICER'S SIGNATURE AND TITLE (INDICATE IF ATTORNEY FOR PLAINTIFF OR DEFENDANT)  w/p FCH Richard S. J. Hung, Attorney for defendant Yahoo! Inc.	DATE September 17, 2008
--	----------------------------

ISSUING OFFICER'S NAME, ADDRESS AND PHONE NUMBER Richard S.J. Hung Morrison & Foerster LLP, 425 Market St., San Francisco CA, 94105, (415) 268-7602	
---	--

(See Rule 45, Federal Rules of Civil Procedure, Parts C& D on the next page)

¹ If action is pending in district other than district of issuance, state district under case number.
sf-2569114

PROOF OF SERVICE

DATE	PLACE
SERVED	
SERVED ON (PRINT NAME)	MANNER OF SERVICE
SERVED BY (PRINT NAME)	TITLE

DECLARATION OF SERVER

I declare under penalty of perjury under the laws of the United States of America that the foregoing information contained in the Proof of Service is true and correct.

Executed on _____ DATE _____ SIGNATURE OF SERVER _____

ADDRESS OF SERVER _____

Rule 45, Federal Rules of Civil Procedure, Parts C & D:

(c) PROTECTING A PERSON SUBJECT TO SUBPOENAS.

(1) **Avoiding Undue Burden or Expense; Sanctions.** A party or attorney responsible for issuing and serving a subpoena must take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena. The issuing court must enforce this duty and impose an appropriate sanction — which may include lost earnings and reasonable attorney’s fees — on a party or attorney who fails to comply.

(2) **Command to Produce Materials or Permit Inspection.**

(A) **Appearance Not Required.** A person commanded to produce documents, electronically stored information, or tangible things, or to permit the inspection of premises, need not appear in person at the place of production or inspection unless also commanded to appear for a deposition, hearing, or trial.

(B) **Objections.** A person commanded to produce documents or tangible things or to permit inspection may serve on the party or attorney designated in the subpoena a written objection to inspecting, copying, testing or sampling any or all of the materials or to inspecting the premises — or to producing electronically stored information in the form or forms requested. The objection must be served before the earlier of the time specified for compliance or 14 days after the subpoena is served. If an objection is made, the following rules apply:

- (i) At any time, on notice to the commanded person, the serving party may move the issuing court for an order compelling production or inspection.
- (ii) These acts may be required only as directed in the order, and the order must protect a person who is neither a party nor a party’s officer from significant expense resulting from compliance.

(3) **Quashing or Modifying a Subpoena.**

(A) **When Required.** On timely motion, the issuing court must quash or modify a subpoena that:

- (i) fails to allow a reasonable time to comply;
- (ii) requires a person who is neither a party nor a party’s officer to travel more than 100 miles from where that person resides, is employed, or regularly transacts business in person — except that, subject to Rule 45(c)(3)(B)(iii), the person may be commanded to attend a trial by traveling from any such place within the state where the trial is held;
- (iii) requires disclosure of privileged or other protected matter, if no exception or waiver applies; or
- (iv) subjects a person to undue burden.

(B) **When Permitted.** To protect a person subject to or affected by a subpoena, the issuing court may, on motion, quash or modify the subpoena if it requires:

- (i) disclosing a trade secret or other confidential research, development, or commercial information;
- (ii) disclosing an unretained expert’s opinion or information that does not describe specific occurrences in dispute and results from the expert’s study that was not requested by a party; or
- (iii) a person who is neither a party nor a party’s officer to incur substantial expense to travel more than 100 miles to attend trial.

(C) **Specifying Conditions as an Alternative.** In the circumstances described in Rule 45(c)(3)(B), the court may, instead of quashing or modifying a

subpoena, order appearance or production under specified conditions if the serving party:

- (i) shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship; and
- (ii) ensures that the subpoenaed person will be reasonably compensated.

(d) DUTIES IN RESPONDING TO A SUBPOENA.

(1) **Producing Documents or Electronically Stored Information.** These procedures apply to producing documents or electronically stored information:

(A) **Documents.** A person responding to a subpoena to produce documents must produce them as they are kept in the ordinary course of business or must organize and label them to correspond to the categories in the demand.

(B) **Form for Producing Electronically Stored Information Not Specified.** If a subpoena does not specify a form for producing electronically stored information, the person responding must produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms.

(C) **Electronically Stored Information Produced in Only One Form.** The person responding need not produce the same electronically stored information in more than one form.

(D) **Inaccessible Electronically Stored Information.** The person responding need not provide discovery of electronically stored information from sources that the person identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the person responding must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for the discovery.

(2) **Claiming Privilege or Protection.**

(A) **Information Withheld.** A person withholding subpoenaed information under a claim that it is privileged or subject to protection as trial-preparation material must:

- (i) expressly make the claim; and
- (ii) describe the nature of the withheld documents, communications, or tangible things in a manner that, without revealing information itself privileged or protected, will enable the parties to assess the claim.

(B) **Information Produced.** If information produced in response to a subpoena is subject to a claim of privilege or of protection as trial-preparation material, the person making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information to the court under seal for a determination of the claim. The person who produced the information must preserve the information until the claim is resolved.

(e) **CONTEMPT.** The issuing court may hold in contempt a person who, having been served, fails without adequate excuse to obey the subpoena. A nonparty’s failure to obey must be excused if the subpoena purports to require the nonparty to attend or produce at a place outside the limits of Rule 45(c)(3)(A)(ii).

APPENDIX A

DEFINITIONS

The following definitions shall apply:

1. "YOU" and "YOUR" mean Wilson, Sonsini, Goodrich & Rosati, including each of its partners, employees, attorneys, representatives, agents, and all entities acting in consort, joint-venture or partnership relationships with, and others acting, on behalf of Wilson, Sonsini, Goodrich & Rosati.
2. "SRA" means Software Rights Archive, LLC, including without limitation, all of its corporate locations, and all predecessors, former and current subsidiaries, parents, and affiliates, and all past and present directors, officers, agents, representatives, employees, consultants, and attorneys of Software Rights Archive, LLC (inclusive of its former and current subsidiaries), and all entities acting in consort, joint-venture or partnership relationships with, and others acting, on behalf of Software Rights Archive, LLC (inclusive of its former and current subsidiaries).
3. "SITE TECHNOLOGIES" means Site Technologies, Inc., including without limitation, all of its corporate locations, and all predecessors, such as DeltaPoint, Inc., former and current subsidiaries, parents, and affiliates, and all past and present directors, officers, agents, representatives, employees, consultants, and attorneys of Site Technologies, Inc. (inclusive of its former and current subsidiaries), and all entities acting in consort, joint-venture or partnership relationships with, and others acting, on behalf of Site Technologies, Inc. (inclusive of its former and current subsidiaries).
4. "SITE/TECHNOLOGIES/INC." means Site/Technologies/Inc., including without limitation, all of its corporate locations, and all predecessors, such as Libertech, Inc., the company as it actually or purportedly existed at all times, including without limitation from June 15, 1992 to December 21, 2000, former and current subsidiaries, parents, and affiliates, and all past and present directors, officers, agents, representatives, employees, consultants, and attorneys of Site/Technologies/Inc. (inclusive of its former and current subsidiaries), and all entities acting in consort, joint-venture or partnership relationships with, and others acting, on behalf of Site/Technologies/Inc. (inclusive of its former and current subsidiaries).

5. "PATENTS-IN-SUIT" means U.S. Patent No. 5,544,352 ("the '352 patent"), U.S. Patent No. 5,832,494 ("the '494 patent"), and U.S. Patent No. 6,233,571 ("the '571 patent"), and any application from which each such patent issued.

6. "RELATED PATENTS OR APPLICATIONS" means (i) any application to which any patent-in-suit claims priority, (ii) any application, either in the United States or any other jurisdiction, which includes a claim of priority, directly or indirectly, to any application identified in (i), and (iii) any patent, other than a PATENT-IN-SUIT, issuing from an application identified in (i) or (ii).

7. "DOCUMENT" is defined broadly to be given the full scope of that term contemplated in Federal Rule of Civil Procedure 34, and includes all tangible things, all originals (or, if originals are not available, identical copies thereof), all non-identical copies of a document, all drafts of final documents, all other written, printed, or recorded matter of any kind, and all other data compilations from which information can be obtained and translated if necessary, that are or have been in your actual or constructive possession or control, regardless of the medium on which they are produced, reproduced, or stored (including without limitation computer programs and files containing any requested information), and any recording or writing, as these terms are defined in Rule 1001, Federal Rules of Evidence. Any document bearing marks, including without limitation, initials, stamped initials, comments, or notations not a part of the original text or photographic reproduction thereof, is a separate document.

8. "COMMUNICATION" means any form of transmittal of information without limitation as to means of transmittal, including meetings, telephone conversations, voice messages, electronic mail, text messages, correspondence, memoranda, contracts, agreements, and verbal or nonverbal actions intended to or actually conveying information.

9. "PERSON" includes not only natural persons, but also, firms, partnerships, associations, corporations, and other legal entities, and divisions, departments, or other units thereof.

10. "RELATES TO", "RELATING TO" and "RELATED TO" mean describing, discussing, concerning, evidencing, reflecting, comprising, illustrating,

containing, embodying, constituting, analyzing, stating, identifying, referring to, dealing with, or in any way pertaining to.

11. "DESCRIBE" means to give a full and complete explanation of the requested information, including identifying all relevant circumstances, all relevant dates, all PERSONS involved or having relevant knowledge, all relevant DOCUMENTS, and explaining the significance or the role of each date, PERSON, and DOCUMENT.

INSTRUCTIONS

1. The singular form of a word should be interpreted in the plural as well. Any pronoun shall be construed to refer to the masculine, feminine, or neutral gender as in each case is most appropriate. The words "and" and "or" shall be construed conjunctively or disjunctively, whichever makes the request more inclusive.

2. The use of the word "including" should be interpreted to mean "including without limitation."

3. These requests are continuing in character to the extent permitted by Rule 26(e) of the Federal Rules of Civil Procedure and require supplemental answers if additional or different information is obtained prior to trial.

4. These requests seek all information that is known to you, your representatives, agents or investigators, and unless otherwise privileged, their counsel, employees, representatives, agents, servants, investigators or consultants.

5. If any request is objected to in part, a complete answer to all portions of the request not objected to should be provided.

6. For any information withheld on the ground that it is embodied in COMMUNICATIONS or DOCUMENTS protected by the attorney-client privilege, work-product immunity, or any other claim of privilege or immunity, provide a written statement setting forth, at a minimum:

- (a) an identification of each COMMUNICATION or DOCUMENT embodying the allegedly protected information by author, date, and title;
- (b) the identity of all PERSON(S) from and to whom the information has been communicated;
- (c) a brief description of the subject matter of the information; and

(d) the legal and factual ground(s) upon which you rely in withholding the information in sufficient detail so that the Court may make a determination on your claim of privilege.

7. To the extent these requests seek information that is recorded in any form of document, including electronically stored DOCUMENTS such as word processing files and e-mail, or to the extent these requests seek identification of DOCUMENTS, including electronically stored DOCUMENTS, you are asked to take steps to ensure that all such DOCUMENTS are preserved for this litigation, and to take steps to ensure that no responsive electronically stored DOCUMENTS are erased or deleted. Sanctions may be imposed for failure to maintain evidence within your care, custody, or control.

8. Any term not specifically defined herein is to be defined in accordance with the Federal Rules of Civil Procedure and with Local Rules.

DOCUMENTS FOR PRODUCTION

1. ALL DOCUMENTS RELATING TO SITE/TECHNOLOGIES/INC.
2. ALL DOCUMENTS RELATING TO the alleged acquisition of SITE/TECHNOLOGIES/INC. by SITE TECHNOLOGIES, including the Stock Purchase Agreement of July 11, 1997 and any schedules thereof.
3. ALL DOCUMENTS RELATING TO any alleged merger of SITE TECHNOLOGIES and SITE/TECHNOLOGIES/INC., including any merger in December 2000.
4. ALL DOCUMENTS RELATING TO the bankruptcy of SITE TECHNOLOGIES.
5. ALL DOCUMENTS RELATING TO Daniel Egger.
6. ALL DOCUMENTS RELATING TO the PATENTS-IN-SUIT, any RELATED PATENTS OR APPLICATIONS, and any litigation concerning the PATENTS-IN-SUIT.
7. ALL DOCUMENTS RELATING TO any alleged conveyance, assignment, license, or other transfer of any rights in the PATENTS-IN-SUIT and any RELATED PATENTS OR APPLICATIONS.
8. ALL DOCUMENTS (including manuals, compiled and uncompiled code, and computer files) relating to any software described in Paragraph 7 of the alleged September 1998 Bill of Sale, Assignment, and License Agreement from SITE TECHNOLOGIES to Daniel Egger.
9. ALL DOCUMENTS RELATING TO any royalties or other consideration paid by SITE TECHNOLOGIES to SITE/TECHNOLOGIES/INC.
10. ALL DOCUMENTS RELATING TO "v-Search" and "SiteSweeper."
11. ALL DOCUMENTS RELATING TO Starbase and the sale of any technology to Starbase.
12. All tax returns filed by SITE TECHNOLOGIES on or after January 1, 1996 and any RELATED DOCUMENTS.
13. All tax returns filed by SITE/TECHNOLOGIES/INC. and any RELATED DOCUMENTS.
14. All financial statements of SITE TECHNOLOGIES on or after January 1, 1996 and any RELATED DOCUMENTS.
15. All financial statements of SITE/TECHNOLOGIES/INC. and any RELATED DOCUMENTS.

16. All DOCUMENTS RELATING TO any Certificate(s) of Incorporation, and any amendments thereto, of SITE/TECHNOLOGIES/INC.
17. All DOCUMENTS RELATING TO the corporate status of SITE TECHNOLOGIES subsequent to January 1, 1996, including the reactivation attempted or effected on or about August 1, 2008, and including any COMMUNICATIONS regarding any decision(s) made in connection with any such change.
18. All DOCUMENTS RELATING TO the corporate governance, structure, and management of SITE TECHNOLOGIES and SITE/TECHNOLOGIES/INC. including bylaws, corporate charters, proxy materials, board of director minutes.
19. All DOCUMENTS identifying any assets of SITE TECHNOLOGIES as of January 1, 1996.
20. All DOCUMENTS identifying any assets of SITE/TECHNOLOGIES/INC. at any time.
21. All disclosures and filings made with any governmental authority regarding the corporate status, corporate governance, and/or assets of SITE TECHNOLOGIES as of January 1, 1996.
22. All disclosures and filings made with any governmental authority regarding the corporate status, corporate governance, and/or assets of SITE/TECHNOLOGIES/INC.

Exhibit 9

1 MARK PARNES, State Bar No. 104775
WILSON SONSINI GOODRICH & ROSATI
2 Professional Corporation
650 Page Mill Road
3 Palo Alto, CA 94304-1050
Telephone: (650) 493-9300
4 Facsimile: (650) 493-6811

5 Attorneys for Third Party
WILSON SONSINI GOODRICH & ROSATI
6

7 UNITED STATES DISTRICT COURT
8 NORTHERN DISTRICT OF CALIFORNIA
9

10 SOFTWARE RIGHTS ARCHIVE, LLC,)	CIVIL CASE NO.: 2:07-cv-511 (CE)
)	EASTERN DISTRICT OF TEXAS
11 Plaintiff,)	
)	RESPONSE AND OBJECTIONS OF
12 v.)	THIRD PARTY WILSON SONSINI
)	GOODRICH & ROSATI TO
13 GOOGLE INC., YAHOO! INC., IAC SEARCH)	SUBPOENA IN A CIVIL CASE FROM
& MEDIA, INC., AOL, LLC, AND)	DEFENDANT YAHOO! INC.
14 LYCOS, INC.,)	
)	
15 Defendants.)	
)	

16
17 Pursuant to the Federal Rules of Civil Procedure, Wilson Sonsini Goodrich & Rosati
18 ("WSGR") makes the following response and objections to the Subpoena to WSGR served on
19 September 17, 2008 by Yahoo! Inc. ("defendant"). While asserting the following objections,
20 WSGR reserves the right to assert additional objections and limitations concerning the Subpoena
21 as it may deem necessary or appropriate as developments warrant.

22 GENERAL OBJECTIONS

23 WSGR makes the following general objections, whether or not separately set forth in
24 response to each and every instruction, definition and document request made by defendant.

25 1. WSGR objects to the Subpoena as a whole on the ground that it requests
26 information from WSGR client files protected from disclosure by the duty of confidentiality
27 under Business and Professions Code Section 6068(e) and the attorney-client privilege as well as
28 the work product doctrine.

1 Absent client consent to production, WSGR has a duty to maintain the
2 confidentiality of client files under both Business and Professions Code Section 6068(e) and the
3 attorney-client privilege. The duty of confidentiality applies to all information relating to client
4 representation, whatever its source, and applies to secrets that the client has requested be held
5 inviolate, or the disclosure of which would likely be detrimental to the client. See e.g., Cal. State
6 Bar Form. Opns. 1993-133, 1988-96, 1986-97, 1981-58 & 1980-52; Los Angeles Bar Ass'n
7 Form. Opns. 386 (1980), 436 (1985), and 452 (1988). WSGR thus objects to the Subpoena as a
8 whole to the extent it requires WSGR to disclose client confidential information without the
9 consent of Site Technologies, Inc. and/or Site/Technologies/Inc. or their successors in interest.

10 2. WSGR objects to the subpoena as a whole on the ground that the subpoena does
11 not provide reasonable time for compliance pursuant to Rule 45 of the Federal Rules of Civil
12 Procedure. Accordingly, WSGR objects to producing documents on the date and time specified
13 in the subpoena.

14 3. WSGR objects to the requests to the extent that they seek documents containing
15 communications or other matters protected by the attorney client privilege, the work product
16 doctrine and or similar privileges or immunities.

17 4. WSGR objects to each and every request to the extent the requests require WSGR
18 to produce any document containing any information received from a third party under a
19 nondisclosure agreement. WSGR also objects to producing the content of any part of any
20 agreement between any of its clients and a third party, which by its terms may not be disclosed
21 by WSGR.

22 5. WSGR objects to the requests to the extent they seek documents that contain
23 confidential information which would impinge on the constitutional and protected right to
24 privacy of individuals or entities under California law.

25 6. WSGR objects to the requests to the extent they seek materials which are not in
26 its possession, custody or control.

27
28

1 definition is vague and ambiguous and renders the Subpoena overbroad, burdensome,
2 unreasonable and oppressive.

3 3. WSGR objects to the definition of "SITE TECHNOLOGIES" in Item 3 of the
4 Definitions to the extent it includes "Site Technologies, Inc., including without limitation, all of
5 its corporate locations, and all predecessors, such as Delta Point, Inc., former and current
6 subsidiaries, parents, and affiliates, and all past and present directors, officers, agents,
7 representatives, employees, consultants, and attorneys of Site Technologies, Inc. (inclusive of its
8 former and current subsidiaries), and all entities acting in consort, joint-venture or partnership
9 relationships with, and others acting, on behalf of Site Technologies, Inc. (inclusive of its former
10 and current subsidiaries)." This definition is vague and ambiguous and renders the Subpoena
11 overbroad, burdensome, unreasonable and oppressive.

12 4. WSGR objects to the definition of "SITE/TECHNOLOGIES/INC." in Item 4 of
13 the Definitions to the extent it includes "including without limitation, all of its corporate
14 locations, and all predecessors, such as Libertech, Inc., the company as it actually or purportedly
15 existed at all times, including without limitation from June 15, 1992 to December 21, 2000,
16 former and current subsidiaries, parents, and affiliates, and all past and present directors, officers,
17 agents, representatives, employees, consultants, and attorneys of (inclusive of its former and
18 current subsidiaries), and all entities acting in consort, joint-venture or partnership relationships
19 with, and others acting, on behalf of (inclusive of its former and current subsidiaries)." This
20 definition is vague and ambiguous and renders the Subpoena overbroad, burdensome,
21 unreasonable and oppressive.

22 5. WSGR objects to the term "PATENTS-IN-SUIT" in Item 5 of the Definitions to
23 the extent it includes "any application from which such patent issued". This definition is vague
24 and ambiguous and renders the Subpoena overly broad and unduly burdensome.

25 6. WSGR objects to the term "RELATED PATENTS OR APPLICATIONS" in
26 Item 6 of the Definitions to the extent it includes "(i) any application to which any patent-in-suit
27 claims priority, (ii) any application, either in the United States or any other jurisdiction, which
28 includes a claim of priority, directly or indirectly, to any application identified in (i), and (iii) any

1 patent, other than a PATENT-IN-SUIT, issuing an application identified in (i) or (ii).” This
2 definition is vague and ambiguous and renders the Subpoena overly broad and unduly
3 burdensome.

4 7. WSGR objects to the definition of “DOCUMENT” in Item 7 of the Definitions to
5 the extent it seeks to impose more than is required by the discovery provisions of the Federal
6 Rules of Civil Procedure, to the extent that it would pose an unreasonable and undue annoyance,
7 burden and expense, and to the extent it is inconsistent with the Federal Rules of Evidence.

8 8. WSGR objects to the term “COMMUNICATION” in Item 8 of the Definitions to
9 the extent that term requires production of privileged information.

10 9. WSGR objects to the term “PERSON” in Item 9 of the Definitions since the
11 definition is vague and ambiguous in its failure to identify with reasonable specificity the
12 documents requested, thus rendering the Subpoena overbroad, burdensome, and unreasonable.

13 10. WSGR objects to the terms “RELATES TO,” “RELATING TO” and “RELATED
14 TO” in Item 10 of the Definitions to the extent those terms lack sufficient specificity to enable
15 WSGR to determine from the face of the documents whether they are responsive

16 11. WSGR objects to the term “DESCRIBE” in Item 11 of the Definitions since the
17 definition is vague and ambiguous in its application to a document request, thus rendering the
18 Subpoena overbroad, burdensome, and unreasonable.

19 12. WSGR objects to the instructions portion of the subpoena to the extent the
20 instructions exceed the requirements of the Federal Rules of Civil Procedure, including, but not
21 limited to, requiring “continuing” search for documents, requiring a search outside of WSGR
22 client files, and requiring an unduly burdensome privilege log.

23 ///

24 ///

25 ///

26 ///

27 ///

28 ///

1 DOCUMENT REQUESTS

2 WSGR responds to the specific document requests contained in the subpoena as follows:

3 **REQUEST NO. 1:**

4 All DOCUMENTS RELATING TO SITE/TECHNOLOGIES/INC.

5 **RESPONSE TO REQUEST NO. 1:**

6 WSGR incorporates each general objection into this response as though set out in full.
7 Without waiving the foregoing objections, WSGR further objects to this request on the ground
8 that it is vague, ambiguous and overbroad in its failure to identify with reasonable specificity the
9 documents requested. WSGR further objects to this request on the ground that it is overbroad
10 and requests documents that are not relevant to the subject matter of this lawsuit nor reasonably
11 calculated to lead to the discovery of admissible evidence. WSGR further objects to this request
12 to the extent it requests WSGR client documents without the consent of the client; WSGR may
13 not disclose any client documents without client consent based on its duty of confidentiality.
14 WSGR further objects to the request to the extent it requests third party documents without the
15 consent of such third party since such documents are subject to the terms of the California
16 constitutional right to privacy. WSGR further objects to the extent this request requires
17 production of documents protected from discovery by the attorney-client privilege and the work
18 product doctrine or any other applicable privilege.

19 **REQUEST NO. 2:**

20 All DOCUMENTS RELATING TO the alleged acquisition of
21 SITE/TECHNOLOGIES/INC. by SITE TECHNOLOGIES, including the Stock Purchase
22 Agreement of July 11, 1997 and any schedules thereof.

23 **RESPONSE TO REQUEST NO. 2:**

24 WSGR incorporates each general objection into this response as though set out in full.
25 Without waiving the foregoing objections, WSGR further objects to this request on the ground
26 that it is vague, ambiguous and overbroad in its failure to identify with reasonable specificity the
27 documents requested. WSGR further objects to this request to the extent it requests WSGR
28 client documents without the consent of the client; WSGR may not disclose any client

1 documents without client consent based on its duty of confidentiality. WSGR further objects to
2 the request to the extent it requests third party documents without the consent of such third party
3 since such documents are subject to the California constitutional right to privacy. WSGR further
4 objects to the extent this request requires production of documents protected from discovery by
5 the attorney-client privilege and the work product doctrine or any other applicable privilege.

6 **REQUEST NO. 3:**

7 All DOCUMENTS RELATING TO any alleged merger of SITE TECHNOLOGIES and
8 including any merger in December 2000.

9 **RESPONSE TO REQUEST NO. 3:**

10 WSGR incorporates each general objection into this response as though set out in full.
11 Without waiving the foregoing objections, WSGR further objects to this request on the ground
12 that it is vague, ambiguous and overbroad in its failure to identify with reasonable specificity the
13 documents requested. WSGR further objects to this request to the extent it requests WSGR
14 client documents without the consent of the client; WSGR may not disclose any client
15 documents without client consent based on its duty of confidentiality. WSGR further objects to
16 the request to the extent it requests third party documents without the consent of such third party
17 since such documents are subject to the California constitutional right to privacy. WSGR further
18 objects to the extent this request requires production of documents protected from discovery by
19 the attorney-client privilege and the work product doctrine or any other applicable privilege.

20 **REQUEST NO. 4:**

21 All DOCUMENTS RELATING TO the bankruptcy of SITE TECHNOLOGIES.

22 **RESPONSE TO REQUEST NO. 4:**

23 WSGR incorporates each general objection into this response as though set out in full.
24 Without waiving the foregoing objections, WSGR further objects to this request on the ground
25 that it is vague, ambiguous and overbroad in its failure to identify with reasonable specificity the
26 documents requested. WSGR further objects to this request to the extent it requests WSGR
27 client documents without the consent of the client; WSGR may not disclose any client
28 documents without client consent based on its duty of confidentiality. WSGR further objects to

1 the request to the extent it requests third party documents without the consent of such third party
2 since such documents are subject to the California constitutional right to privacy. WSGR
3 further objects to the extent this request requires production of documents protected from
4 discovery by the attorney-client privilege and the work product doctrine or any other applicable
5 privilege.

6 **REQUEST NO. 5:**

7 All DOCUMENTS RELATING TO Daniel Egger.

8 **RESPONSE TO REQUEST NO. 5:**

9 WSGR incorporates each general objection into this response as though set out in full.
10 Without waiving the foregoing objections, WSGR further objects to this request on the ground
11 that it is vague, ambiguous and overbroad in its failure to identify with reasonable specificity the
12 documents requested. WSGR further objects to this request on the ground that it is overbroad
13 and requests documents that are not relevant to the subject matter of this lawsuit nor reasonably
14 calculated to lead to the discovery of admissible evidence. WSGR further objects to this request
15 to the extent it requests WSGR client documents without the consent of the client; WSGR may
16 not disclose any client documents without client consent based on its duty of confidentiality.
17 WSGR further objects to the request to the extent it requests third party documents without the
18 consent of such third party since such documents are subject to the California constitutional
19 right to privacy. WSGR further objects to the extent this request requires production of
20 documents protected from discovery by the attorney-client privilege and the work product
21 doctrine or any other applicable privilege.

22 **REQUEST NO. 6:**

23 All DOCUMENTS RELATING TO the PATENTS-IN-SUIT, any RELATED
24 PATENTS OR APPLICATIONS, and any litigation concerning the PATENTS-IN-SUIT.

25 **RESPONSE TO REQUEST NO. 6:**

26 WSGR incorporates each general objection into this response as though set out in full.
27 Without waiving the foregoing objections, WSGR further objects to this request on the ground
28 that it is vague, ambiguous and overbroad in its failure to identify with reasonable specificity the

1 documents requested. WSGR further objects to this request to the extent it requests WSGR
2 client documents without the consent of the client; WSGR may not disclose any client
3 documents without client consent based on its duty of confidentiality. WSGR further objects to
4 the request to the extent it requests third party documents without the consent of such third party
5 since such documents are subject to the California constitutional right to privacy. WSGR
6 further objects to the extent this request requires production of documents protected from
7 discovery by the attorney-client privilege and the work product doctrine and any other applicable
8 privilege.

9 **REQUEST NO. 7:**

10 All DOCUMENTS RELATING TO any alleged conveyance, assignment, license, or
11 other transfer of any rights in the PATENTS-IN-SUIT and any RELATED PATENTS OR
12 APPLICATIONS.

13 **RESPONSE TO REQUEST NO. 7:**

14 WSGR incorporates each general objection into this response as though set out in full.
15 Without waiving the foregoing objections, WSGR further objects to this request on the ground
16 that it is vague, ambiguous and overbroad in its failure to identify with reasonable specificity the
17 documents requested. WSGR further objects to this request to the extent it requests WSGR
18 client documents without the consent of the client; WSGR may not disclose any client
19 documents without client consent based on its duty of confidentiality. WSGR further objects to
20 the request to the extent it requests third party documents without the consent of such third party
21 since such documents are subject to the California constitutional right to privacy. WSGR
22 further objects to the extent this request requires production of documents protected from
23 discovery by the attorney-client privilege and the work product doctrine and any other applicable
24 privilege.

25 **REQUEST NO. 8:**

26 ALL DOCUMENTS (including manuals, compiled and uncompiled code, and computer
27 files) relating to any software described in Paragraph 7 of the alleged September 1998 Bill of
28 Sale, Assignment, and License Agreement from SITE TECHNOLOGIES to Daniel Egger.

1 **RESPONSE TO REQUEST NO. 8:**

2 WSGR incorporates each general objection into this response as though set out in full.
3 Without waiving the foregoing objections, WSGR further objects to this request on the ground
4 that it is vague, ambiguous and overbroad in its failure to identify with reasonable specificity the
5 documents requested. WSGR further objects to this request to the extent it requests WSGR
6 client documents without the consent of the client; WSGR may not disclose any client
7 documents without client consent based on its duty of confidentiality. WSGR further objects to
8 the request to the extent it requests third party documents without the consent of such third party
9 since such documents are subject to the California constitutional right to privacy. WSGR
10 further objects to the extent this request requires production of documents protected from
11 discovery by the attorney-client privilege and the work product doctrine and any other applicable
12 privilege.

13 **REQUEST NO. 9:**

14 All DOCUMENTS RELATING TO any royalties or other consideration paid by SITE
15 TECHNOLOGIES to SITE/TECHNOLOGIES/INC.

16 **RESPONSE TO REQUEST NO. 9:**

17 WSGR incorporates each general objection into this response as though set out in full.
18 Without waiving the foregoing objections, WSGR further objects to this request on the ground
19 that it is vague, ambiguous and overbroad in its failure to identify with reasonable specificity the
20 documents requested. WSGR further objects to this request to the extent it requests WSGR
21 client documents without the consent of the client; WSGR may not disclose any client
22 documents without client consent based on its duty of confidentiality. WSGR further objects to
23 the request to the extent it requests third party documents without the consent of such third party
24 since such documents are subject to the California constitutional right to privacy. WSGR
25 further objects to the extent this request requires production of documents protected from
26 discovery by the attorney-client privilege and the work product doctrine and any other applicable
27 privilege.

28

1 **REQUEST NO. 10:**

2 ALL DOCUMENTS RELATING TO "v-Search" and "SiteSweeper".

3 **RESPONSE TO REQUEST NO. 10:**

4 WSGR incorporates each general objection into this response as though set out in full.
5 Without waiving the foregoing objections, WSGR further objects to this request on the ground
6 that it is vague, ambiguous and overbroad in its failure to identify with reasonable specificity the
7 documents requested. WSGR further objects to this request to the extent it requests WSGR
8 client documents without the consent of the client; WSGR may not disclose any client
9 documents without client consent based on its duty of confidentiality. WSGR further objects to
10 the request to the extent it requests third party documents without the consent of such third party
11 since such documents are subject to the California constitutional right to privacy. WSGR
12 further objects to the extent this request requires production of documents protected from
13 discovery by the attorney-client privilege and the work product doctrine and any other applicable
14 privilege.

15 **REQUEST NO. 11:**

16 ALL DOCUMENTS RELATING TO Starbase and the sale of any technology to
17 Starbase.

18 **RESPONSE TO REQUEST NO. 11:**

19 WSGR incorporates each general objection into this response as though set out in full.
20 Without waiving the foregoing objections, WSGR further objects to this request on the ground
21 that it is vague, ambiguous and overbroad in its failure to identify with reasonable specificity the
22 documents requested. WSGR further objects to this request to the extent it requests WSGR
23 client documents without the consent of the client; WSGR may not disclose any client
24 documents without client consent based on its duty of confidentiality. WSGR further objects to
25 the request to the extent it requests third party documents without the consent of such third party
26 since such documents are subject to the California constitutional right to privacy. WSGR
27 further objects to the extent this request requires production of documents protected from
28

1 discovery by the attorney-client privilege and the work product doctrine and any other applicable
2 privilege.

3 **REQUEST NO. 12:**

4 All tax returns filed by SITE TECHNOLOGIES on or after January 1, 1996 and any
5 RELATED DOCUMENTS.

6 **RESPONSE TO REQUEST NO. 12:**

7 WSGR incorporates each general objection into this response as though set out in full.
8 Without waiving the foregoing objections, WSGR further objects to this request on the ground
9 that it is vague, ambiguous and overbroad in its failure to identify with reasonable specificity the
10 documents requested. WSGR further objects to this request on the ground that it is overbroad
11 and requests documents that are not relevant to the subject matter of this lawsuit nor reasonably
12 calculated to lead to the discovery of admissible evidence. WSGR further objects to this request
13 to the extent it requests WSGR client documents without the consent of the client; WSGR may
14 not disclose any client documents without client consent based on its duty of confidentiality.
15 WSGR further objects to the request to the extent it requests third party documents without the
16 consent of such third party since such documents are subject to the California constitutional
17 right to privacy. WSGR further objects to the extent this request requires production of
18 documents protected from discovery by the attorney-client privilege and the work product
19 doctrine and any other applicable privilege.

20 **REQUEST NO. 13:**

21 All tax returns filed by SITE/TECHNOLOGIES/INC. and any RELATED
22 DOCUMENTS.

23 **RESPONSE TO REQUEST NO. 13:**

24 WSGR incorporates each general objection into this response as though set out in full.
25 Without waiving the foregoing objections, WSGR further objects to this request on the ground
26 that it is vague, ambiguous and overbroad in its failure to identify with reasonable specificity the
27 documents requested. WSGR further objects to this request on the ground that it is overbroad
28 and requests documents that are not relevant to the subject matter of this lawsuit nor reasonably

1 calculated to lead to the discovery of admissible evidence. WSGR further objects to this request
2 to the extent it requests WSGR client documents without the consent of the client; WSGR may
3 not disclose any client documents without client consent based on its duty of confidentiality.
4 WSGR further objects to the request to the extent it requests third party documents without the
5 consent of such third party since such documents are subject to the California constitutional
6 right to privacy. WSGR further objects to the extent this request requires production of
7 documents protected from discovery by the attorney-client privilege and the work product
8 doctrine and any other applicable privilege.

9 **REQUEST NO. 14:**

10 All financial statements of SITE TECHNOLOGIES on or after January 1, 1996 and any
11 RELATED DOCUMENTS.

12 **RESPONSE TO REQUEST NO. 14:**

13 WSGR incorporates each general objection into this response as though set out in full.
14 Without waiving the foregoing objections, WSGR further objects to this request on the ground
15 that it is vague, ambiguous and overbroad in its failure to identify with reasonable specificity the
16 documents requested. WSGR further objects to this request on the ground that it is overbroad
17 and requests documents that are not relevant to the subject matter of this lawsuit nor reasonably
18 calculated to lead to the discovery of admissible evidence. WSGR further objects to this request
19 to the extent it requests WSGR client documents without the consent of the client; WSGR may
20 not disclose any client documents without client consent based on its duty of confidentiality.
21 WSGR further objects to the request to the extent it requests third party documents without the
22 consent of such third party since such documents are subject to the California constitutional
23 right to privacy. WSGR further objects to the extent this request requires production of
24 documents protected from discovery by the attorney-client privilege and the work product
25 doctrine and any other applicable privilege.

26 **REQUEST NO. 15:**

27 All financial statements of SITE/TECHNOLOGIES/INC. and any RELATED
28 DOCUMENTS.

1 **RESPONSE TO REQUEST NO. 15:**

2 WSGR incorporates each general objection into this response as though set out in full.
3 Without waiving the foregoing objections, WSGR further objects to this request on the ground
4 that it is vague, ambiguous and overbroad in its failure to identify with reasonable specificity the
5 documents requested. WSGR further objects to this request on the ground that it is overbroad
6 and requests documents that are not relevant to the subject matter of this lawsuit nor reasonably
7 calculated to lead to the discovery of admissible evidence. WSGR further objects to this request
8 to the extent it requests WSGR client documents without the consent of the client; WSGR may
9 not disclose any client documents without client consent based on its duty of confidentiality.
10 WSGR further objects to the request to the extent it requests third party documents without the
11 consent of such third party since such documents are subject to the California constitutional
12 right to privacy. WSGR further objects to the extent this request requires production of
13 documents protected from discovery by the attorney-client privilege and the work product
14 doctrine and any other applicable privilege.

15 **REQUEST NO. 16:**

16 All DOCUMENTS RELATING TO any Certificate(s) of Incorporation, and any
17 amendments thereto, of SITE/TECHNOLOGIES/INC.

18 **RESPONSE TO REQUEST NO. 16:**

19 WSGR incorporates each general objection into this response as though set out in full.
20 Without waiving the foregoing objections, WSGR further objects to this request on the ground
21 that it is vague, ambiguous and overbroad in its failure to identify with reasonable specificity the
22 documents requested. WSGR further objects to this request to the extent it requests WSGR
23 client documents without the consent of the client; WSGR may not disclose any client
24 documents without client consent based on its duty of confidentiality. WSGR further objects to
25 the request to the extent it requests third party documents without the consent of such third party
26 since such documents are subject to the California constitutional right to privacy. WSGR
27 further objects to the extent this request requires production of documents protected from
28

1 discovery by the attorney-client privilege and the work product doctrine and any other applicable
2 privilege.

3 **REQUEST NO. 17:**

4 All DOCUMENTS RELATING TO the corporate status of SITE TECHNOLOGIES
5 subsequent to January 1, 1996, including the reactivation attempted or effected on or about
6 August 1, 2008, and including any COMMUNICATIONS regarding any decision(s) made in
7 connection with any such change.

8 **RESPONSE TO REQUEST NO. 17:**

9 WSGR incorporates each general objection into this response as though set out in full.
10 Without waiving the foregoing objections, WSGR further objects to this request on the ground
11 that it is vague, ambiguous and overbroad in its failure to identify with reasonable specificity the
12 documents requested. WSGR further objects to this request to the extent it requests WSGR
13 client documents without the consent of the client; WSGR may not disclose any client
14 documents without client consent based on its duty of confidentiality. WSGR further objects to
15 the request to the extent it requests third party documents without the consent of such third party
16 since such documents are subject to the California constitutional right to privacy. WSGR
17 further objects to the extent this request requires production of documents protected from
18 discovery by the attorney-client privilege and the work product doctrine and any other applicable
19 privilege.

20 **REQUEST NO. 18:**

21 All DOCUMENTS RELATING TO the corporate governance, structure, and
22 management of SITE TECHNOLOGIES and SITE/TECHNOLOGIES/INC. including bylaws,
23 corporate charters, proxy materials, board of director minutes.

24 **RESPONSE TO REQUEST NO. 18:**

25 WSGR incorporates each general objection into this response as though set out in full.
26 Without waiving the foregoing objections, WSGR further objects to this request on the ground
27 that it is vague, ambiguous and overbroad in its failure to identify with reasonable specificity the
28 documents requested. WSGR further objects to this request to the extent it requests WSGR

1 client documents without the consent of the client; WSGR may not disclose any client
2 documents without client consent based on its duty of confidentiality. WSGR further objects to
3 the request to the extent it requests third party documents without the consent of such third party
4 since such documents are subject to the California constitutional right to privacy. WSGR
5 further objects to the extent this request requires production of documents protected from
6 discovery by the attorney-client privilege and the work product doctrine and any other applicable
7 privilege.

8 **REQUEST NO. 19:**

9 All DOCUMENTS identifying any assets of SITE TECHNOLOGIES as of January 1,
10 1996.

11 **RESPONSE TO REQUEST NO. 19:**

12 WSGR incorporates each general objection into this response as though set out in full.
13 Without waiving the foregoing objections, WSGR further objects to this request on the ground
14 that it is vague, ambiguous and overbroad in its failure to identify with reasonable specificity the
15 documents requested. WSGR further objects to this request on the ground that it is overbroad
16 and requests documents that are not relevant to the subject matter of this lawsuit nor reasonably
17 calculated to lead to the discovery of admissible evidence. WSGR further objects to this request
18 to the extent it requests WSGR client documents without the consent of the client; WSGR may
19 not disclose any client documents without client consent based on its duty of confidentiality.
20 WSGR further objects to the request to the extent it requests third party documents without the
21 consent of such third party since such documents are subject to the California constitutional
22 right to privacy. WSGR further objects to the extent this request requires production of
23 documents protected from discovery by the attorney-client privilege and the work product
24 doctrine and any other applicable privilege.

25 **REQUEST NO. 20:**

26 All DOCUMENTS identifying any assets of SITE/TECHNOLOGIES/INC. at any time.
27
28

1 **RESPONSE TO REQUEST NO. 20:**

2 WSGR incorporates each general objection into this response as though set out in full.
3 Without waiving the foregoing objections, WSGR further objects to this request on the ground
4 that it is vague, ambiguous and overbroad in its failure to identify with reasonable specificity the
5 documents requested. WSGR further objects to this request on the ground that it is overbroad
6 and requests documents that are not relevant to the subject matter of this lawsuit nor reasonably
7 calculated to lead to the discovery of admissible evidence. WSGR further objects to this request
8 to the extent it requests WSGR client documents without the consent of the client; WSGR may
9 not disclose any client documents without client consent based on its duty of confidentiality.
10 WSGR further objects to the request to the extent it requests third party documents without the
11 consent of such third party since such documents are subject to the California constitutional
12 right to privacy. WSGR further objects to the extent this request requires production of
13 documents protected from discovery by the attorney-client privilege and the work product
14 doctrine and any other applicable privilege.

15 **REQUEST NO. 21:**

16 All disclosures and filings made with any governmental authority regarding the corporate
17 status, corporate governance, and/or assets of SITE TECHNOLOGIES as of January 1, 1996.

18 **RESPONSE TO REQUEST NO. 21:**

19 WSGR incorporates each general objection into this response as though set out in full.
20 Without waiving the foregoing objections, WSGR further objects to this request on the ground
21 that it is vague, ambiguous and overbroad in its failure to identify with reasonable specificity the
22 documents requested. WSGR further objects to this request to the extent it requests WSGR
23 client documents without the consent of the client; WSGR may not disclose any client
24 documents without client consent based on its duty of confidentiality. WSGR further objects to
25 the request to the extent it requests third party documents without the consent of such third party
26 since such documents are subject to the California constitutional right to privacy. WSGR
27 further objects to the extent this request requires production of documents protected from
28

1 discovery by the attorney-client privilege and the work product doctrine and any other applicable
2 privilege.

3 **REQUEST NO. 22:**

4 All disclosures and filings made with any governmental authority regarding the corporate
5 status, corporate governance, and/or assets of SITE/TECHNOLOGIES/INC.

6 **RESPONSE TO REQUEST NO. 22:**

7 WSGR incorporates each general objection into this response as though set out in full.
8 Without waiving the foregoing objections, WSGR further objects to this request on the ground
9 that it is vague, ambiguous and overbroad in its failure to identify with reasonable specificity the
10 documents requested. WSGR further objects to this request to the extent it requests WSGR
11 client documents without the consent of the client; WSGR may not disclose any client
12 documents without client consent based on its duty of confidentiality. WSGR further objects to
13 the request to the extent it requests third party documents without the consent of such third party
14 since such documents are subject to the California constitutional right to privacy. WSGR
15 further objects to the extent this request requires production of documents protected from
16 discovery by the attorney-client privilege and the work product doctrine and any other applicable
17 privilege.

18 Dated: September 24, 2008

WILSON SONSINI GOODRICH & ROSATI

19
20 By: Mark Parnes

21 Mark Parnes
22 Attorneys for Third Party
23 WILSON SONSINI GOODRICH & ROSATI
24
25
26
27
28

1 **PROOF OF SERVICE BY NEXT-DAY DELIVERY**

2
3 I, Monica A. Torres, declare:

4 I am employed in Santa Clara County. I am over the age of 18 years and not a party to
5 the within action. My business address is Wilson Sonsini Goodrich & Rosati, 650 Page Mill
6 Road, Palo Alto, California 94304-1050. I am readily familiar with Wilson Sonsini Goodrich &
7 Rosati's practice for collection and processing of correspondence for next-day delivery by an
8 express mail service. In the ordinary course of business, correspondence would be consigned to
9 an express mail service on this date.

10 On this date, I served **RESPONSE AND OBJECTIONS OF THIRD PARTY**
11 **WILSON SONSINI GOODRICH & ROSATI TO SUBPOENA IN A CIVIL CASE FROM**
12 **DEFENDANT YAHOO! INC.** on the person(s) listed below by placing the document(s)
13 described above in an envelope addressed as indicated below, which I sealed. I consigned the
14 envelope(s) to an express mail service by placing it/them for collection and processing on this
15 day, following ordinary business practices at Wilson Sonsini Goodrich & Rosati.

16 Richard S.J. Hung, Esq.
17 MORRISON & FOERSTER LLP
18 425 Market Street, 34th Floor
San Francisco, CA 94105-2482

Lee Landa Kaplan, Esq.
SMYSER KAPLAN & VESELKA
700 Louisiana Street, Suite 2300
Houston, TX 77002

19 Attorneys for Defendant Yahoo! Inc.

Attorneys for Plaintiff Software Rights Archive, LLC

20 Thomas Bernard Walsh, IV., Esq.
21 FISH & RICHARDSON PC
22 5000 Bank One Center
1717 Main Street
Dallas, TX 75201

Harry Lee Gillant, Jr., Esq.
GILLAM & SMITH, LLP
303 South Washington Avenue
Marshall, TX 75670

23 Attorneys for Defendant Google Inc.

Attorneys for Defendants Google, Inc. and AOL, LLC.

24
25 I declare under penalty of perjury under the laws of the State of California that the
26 foregoing is true and correct. Executed at Palo Alto, California on September 24, 2008.

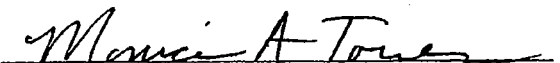
27
28 
Monica A. Torres

Exhibit 10

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
MARSHALL DIVISION

SOFTWARE RIGHTS ARCHIVE, LLC

v.

GOOGLE, INC., ET AL.

§
§
§
§
§

CIVIL NO. 2:07-CV-511(TJW-CE)

**EGGER'S, STI'S, AND SOFTWARE RIGHTS ARCHIVE, LLC'S
OBJECTIONS AND RESPONSES TO SUBPOENA SERVED ON
WILSON SONSINI GOODRICH & ROSATI**

To: Yahoo! Inc., by and through their attorneys of record Richard S.J. Hung, Morrison & Foerster LLP, 425 Market Street, San Francisco, CA 94105.

Daniel Egger, Site Technologies Inc. (including but not limited to Site/Technologies/Inc.), and Plaintiff Software Rights Archive, LLC, collectively "Respondents," make the following objections and responses to the requests for documents in the Subpoena in a Civil Case to Wilson Sonsini Goodrich & Rosati ("Wilson Sonsini") issued in the above-styled matter.

Respectfully submitted,



Lee L. Kaplan

LEAD ATTORNEY

State Bar No. 11094400

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(903) 531-3535
(903) 533-9687 (fax)

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing instrument has been forwarded to all counsel of record pursuant to Federal Rules of Civil Procedure on this the 24th day of September, 2008.



Lee L. Kaplan

GENERAL OBJECTIONS TO REQUESTS FOR PRODUCTION OF DOCUMENTS

1. Respondents object to these requests because producing the requested documents at the appointed place, date, and time is an undue burden for Wilson Sonsini and Respondents. *See* FED. R. CIV. P. 45(3)(A)(iv) (mandating that subpoenas be quashed or modified where they “subject[] a person to undue burden”).
2. Respondents object to these requests because they are overbroad and unduly burdensome. *See* FED. R. CIV. P. 45(3)(A)(iv) (mandating that subpoenas be quashed or modified where they “subject[] a person to undue burden”); *Wiwa*, 392 F.3d at 818 (“A court may find that a subpoena presents an undue burden when the subpoena is facially overbroad.”). Subpoenas are “facially overbroad” when “[a] large quantity of the documents sought have no connection to anything involved in this case.” *Schaaf v. SmithKline Beecham Corp.*, 233 F.R.D. 451, 455 (E.D.N.C. 2005). Here, the parties have agreed that discovery will be directed at this stage of the case only to the issue of whether title to the patents-in-suit, having been originally vested in Egger, ultimately transferred to SRA (“standing”). These requests seek numerous documents with no connection whatsoever to standing.
3. Respondents object to these requests because they seek information that is protected by the attorney-client privilege, including but not limited to any common interest or joint prosecution or defense privileges, and/or work product privilege. All of Wilson Sonsini’s communications and work product in connection with its various representations of Respondents are protected by the attorney-client and/or work product privileges. As set forth in the Responses and Objections to the Christopher Lynch deposition notice and subpoena duces tecum, Egger only has waived privilege as to communications generated in connection with that particular representation of Egger that was undertaken by Christopher Lynch of Wyrick, Robbins, Yates and Ponton LLP on or about February 11, 2005 for the purpose of clarifying to the PTO Egger’s rights to the patents-in-suit (“the February 11, 2005 representation of Egger”). Respondents preserve the privilege as to all other communications and work product. These requests seek information far beyond Christopher Lynch’s February 11, 2005 representation of Egger.

**OBJECTIONS AND RESPONSES TO
REQUESTS FOR DOCUMENTS FOR PRODUCTION**

1. ALL DOCUMENTS RELATING TO SITE/TECHNOLOGIES/INC.

RESPONSE:

Respondents object to the extent that this request seeks to invade the attorney-client privilege or work product doctrine, see General Objection No. 3. Respondents also object to this request because it is irrelevant; it does not relate to the issue of standing, nor does it appear reasonably calculated to lead to the discovery of admissible evidence regarding standing. See *Schaaf*, 233 F.R.D. at 453 (holding that Rule 26 relevance requirements apply to subpoenas issued under Rule 45). Respondents object to this request because it is overbroad and unduly burdensome. See FED. R. CIV. P. 45(3)(A)(iv) (mandating that subpoenas be quashed or modified where they “subject[] a person to undue burden”); *Wiwa*, 392 F.3d at 818 (“A court may find that a subpoena presents an undue burden when the subpoena is facially overbroad.”). A subpoena request is “facially overbroad” when “[a] large quantity of the documents sought have no connection to anything involved in this case.” *Schaaf*, 233 F.R.D. at 455. By seeking “all” documents “relating to Site/Technologies/Inc.,” rather than just those documents relating to standing, this request seeks numerous documents with no connection whatsoever to standing or any issue in this case.

2. ALL DOCUMENTS RELATING TO the alleged acquisition of SITE/TECHNOLOGIES/INC. by SITE TECHNOLOGIES, including the Stock Purchase Agreement of July 11, 1997 and any schedules thereof.

RESPONSE:

Respondents object to the extent that this request seeks to invade the attorney-client privilege or work product doctrine, see General Objection No. 3. Respondents also object to this request because it is overbroad and unduly burdensome. See FED. R. CIV. P. 45(3)(A)(iv) (mandating that subpoenas be quashed or modified where they “subject[] a person to undue burden”); *Wiwa*, 392 F.3d at 818 (“A court may find that a subpoena presents an undue burden when the subpoena is facially overbroad.”). A subpoena request is “facially overbroad” when “[a] large quantity of the documents sought have no connection to anything involved in this case.” *Schaaf*, 233 F.R.D. at 455. By seeking “all” documents relating to the acquisition, rather than just those documents relating to standing, this request seeks numerous documents with no connection whatsoever to standing or any issue in this case.

3. ALL DOCUMENTS RELATING TO any alleged merger of SITE TECHNOLOGIES and SITE/TECHNOLOGIES/INC., including any merger in December 2000.

RESPONSE:

Respondents object to the extent that this request seeks to invade the attorney-client privilege or work product doctrine, see General Objection No. 3. Respondents also object

to this request because it is overbroad and unduly burdensome. *See* FED. R. CIV. P. 45(3)(A)(iv) (mandating that subpoenas be quashed or modified where they “subject[] a person to undue burden”); *Wiwa*, 392 F.3d at 818 (“A court may find that a subpoena presents an undue burden when the subpoena is facially overbroad.”). A subpoena request is “facially overbroad” when “[a] large quantity of the documents sought have no connection to anything involved in this case.” *Schaaf*, 233 F.R.D. at 455. By seeking “all” documents relating to “any” alleged merger, rather than just those documents arising out of the December 2000 merger and relating to the ownership or transfer of the rights to the patents-in-suit, this request seeks numerous documents with no connection whatsoever to standing or any issue in this case.

4. ALL DOCUMENTS RELATING TO the bankruptcy of SITE TECHNOLOGIES.

RESPONSE:

Respondents object to the extent that this request seeks to invade the attorney-client privilege or work product doctrine, see General Objection No. 3. Respondents also object to this request because it is overbroad and unduly burdensome. *See* FED. R. CIV. P. 45(3)(A)(iv) (mandating that subpoenas be quashed or modified where they “subject[] a person to undue burden”); *Wiwa*, 392 F.3d at 818 (“A court may find that a subpoena presents an undue burden when the subpoena is facially overbroad.”). A subpoena request is “facially overbroad” when “[a] large quantity of the documents sought have no connection to anything involved in this case.” *Schaaf*, 233 F.R.D. at 455. By seeking “all” documents relating to the bankruptcy, rather than just those documents relating to the bankruptcy that would affect the ownership or transfer of the rights to the patents-in-suit, this request seeks numerous documents with no connection whatsoever to standing or any issue in this case.

5. ALL DOCUMENTS RELATING TO Daniel Egger.

RESPONSE:

Respondents object to the extent that this request seeks to invade the attorney-client privilege or work product doctrine, see General Objections No. 3. Respondents also object to this request because it is overbroad and unduly burdensome. *See* FED. R. CIV. P. 45(3)(A)(iv) (mandating that subpoenas be quashed or modified where they “subject[] a person to undue burden”); *Wiwa*, 392 F.3d at 818 (“A court may find that a subpoena presents an undue burden when the subpoena is facially overbroad.”). A subpoena request is “facially overbroad” when “[a] large quantity of the documents sought have no connection to anything involved in this case.” *Schaaf*, 233 F.R.D. at 455. By seeking “all” communications relating to Daniel Egger, rather than just those communications or transactions relating to standing, this request seeks numerous documents with no connection whatsoever to standing or any issue in this case.

6. **All DOCUMENTS RELATING TO the PATENTS-IN-SUIT, any RELATED PATENTS OR APPLICATIONS, and any litigation concerning the PATENTS-IN-SUIT.**

RESPONSE:

Respondents object to the extent that this request seeks to invade the attorney-client privilege or work product doctrine, see General Objection No. 3. Respondents also object to this request because it is overbroad and unduly burdensome. See FED. R. CIV. P. 45(3)(A)(iv) (mandating that subpoenas be quashed or modified where they “subject[] a person to undue burden”); *Wiwa*, 392 F.3d at 818 (“A court may find that a subpoena presents an undue burden when the subpoena is facially overbroad.”). A subpoena request is “facially overbroad” when “[a] large quantity of the documents sought have no connection to anything involved in this case.” *Schaaf*, 233 F.R.D. at 455. By seeking “all” communications relating to the patents-in-suit, rather than just those communications or transactions relating to standing, this request seeks numerous documents with no connection whatsoever to standing or any issue in this case.

7. **All DOCUMENTS RELATING TO any alleged conveyance, assignment, license, or other transfer of any rights in the PATENTS-IN-SUIT and any RELATED PATENTS OR APPLICATIONS.**

RESPONSE:

Respondents object to the extent that this request seeks to invade the attorney-client privilege or work product doctrine, see General Objections No. 3. Respondents also object to this request because it is overbroad and unduly burdensome. See FED. R. CIV. P. 45(3)(A)(iv) (mandating that subpoenas be quashed or modified where they “subject[] a person to undue burden”); *Wiwa*, 392 F.3d at 818 (“A court may find that a subpoena presents an undue burden when the subpoena is facially overbroad.”). A subpoena request is “facially overbroad” when “[a] large quantity of the documents sought have no connection to anything involved in this case.” *Schaaf*, 233 F.R.D. at 455. By seeking “all” communications relating to “any” alleged conveyance, rather than just those communications or transactions relating to standing, this request seeks numerous documents with no connection whatsoever to standing or any issue in this case.

Respondents further object that “license or other transfer” is vague, ambiguous, overly broad, and seeks documents irrelevant to standing.

8. **All DOCUMENTS (including manuals, compiled and uncompiled code, and computer files) relating to any software described in Paragraph 7 of the alleged September 1998 Bill of Sale, Assignment, and License Agreement from SITE TECHNOLOGIES to Daniel Egger.**

RESPONSE:

Respondents object to the extent that this request seeks to invade the attorney-client privilege or work product doctrine, see General Objection No. 3. Respondents also object

to this request because it is overbroad and unduly burdensome. *See* FED. R. CIV. P. 45(3)(A)(iv) (mandating that subpoenas be quashed or modified where they “subject[] a person to undue burden”); *Wiwa*, 392 F.3d at 818 (“A court may find that a subpoena presents an undue burden when the subpoena is facially overbroad.”). A subpoena request is “facially overbroad” when “[a] large quantity of the documents sought have no connection to anything involved in this case.” *Schaaf*, 233 F.R.D. at 455. By seeking “all” documents relating to software, rather than just those communications or transactions relating to standing, this request seeks numerous documents with no connection whatsoever to standing. Documents related to the named software have nothing to do with standing and will not lead to the discovery of admissible evidence regarding standing or any issue in this case.

9. ALL DOCUMENTS RELATING TO any royalties or other consideration paid by SITE TECHNOLOGIES to SITE/TECHNOLOGIES/INC.

RESPONSE:

Respondents object to the extent that this request seeks to invade the attorney-client privilege or work product doctrine, see General Objection No. 3. Respondents also object to this request because it is overbroad and unduly burdensome. *See* FED. R. CIV. P. 45(3)(A)(iv) (mandating that subpoenas be quashed or modified where they “subject[] a person to undue burden”); *Wiwa*, 392 F.3d at 818 (“A court may find that a subpoena presents an undue burden when the subpoena is facially overbroad.”). A subpoena request is “facially overbroad” when “[a] large quantity of the documents sought have no connection to anything involved in this case.” *Schaaf*, 233 F.R.D. at 455. By seeking “all” documents relating to “any” royalties or other consideration, rather than just those documents relating to the ownership or transfer of the rights to the patents-in-suit, this request seeks numerous documents with no connection whatsoever to standing or any issue in this case.

10. ALL DOCUMENTS RELATING TO “v-Search” and “SiteSweeper.”

RESPONSE:

Respondents object to the extent that this request seeks to invade the attorney-client privilege or work product doctrine, see General Objection No. 3. Respondents also object to this request because it is overbroad and unduly burdensome. *See* FED. R. CIV. P. 45(3)(A)(iv) (mandating that subpoenas be quashed or modified where they “subject[] a person to undue burden”); *Wiwa*, 392 F.3d at 818 (“A court may find that a subpoena presents an undue burden when the subpoena is facially overbroad.”). A subpoena request is “facially overbroad” when “[a] large quantity of the documents sought have no connection to anything involved in this case.” *Schaaf*, 233 F.R.D. at 455. By seeking “all” communications relating to v-search and SiteSweeper, rather than just those communications or transactions relating to standing, this request seeks numerous documents with no connection whatsoever to standing.

11. All DOCUMENTS RELATING TO Starbase and the sale of any technology to Starbase.

RESPONSE:

~~Respondents object to the extent that this request seeks to invade the attorney-client privilege or work product doctrine, see General Objection No. 3. Respondents also object to this request because it is overbroad and unduly burdensome. See FED. R. CIV. P. 45(3)(A)(iv) (mandating that subpoenas be quashed or modified where they "subject[] a person to undue burden"); *Wiwa*, 392 F.3d at 818 ("A court may find that a subpoena presents an undue burden when the subpoena is facially overbroad."). A subpoena request is "facially overbroad" when "[a] large quantity of the documents sought have no connection to anything involved in this case." *Schaaf*, 233 F.R.D. at 455. By seeking "all" documents relating to Starbase and any sale of technology to Starbase, rather than just those communications or transactions relating to standing, this request seeks numerous documents with no connection whatsoever to standing or any issue in this case.~~

12. All tax returns filed by SITE TECHNOLOGIES as of January 1, 1996 and any RELATED DOCUMENTS.

RESPONSE:

Respondents object to the extent that this request seeks to invade the attorney-client privilege or work product doctrine, see General Objection No. 3. Respondents also object to this request because it is overbroad and unduly burdensome. See FED. R. CIV. P. 45(3)(A)(iv) (mandating that subpoenas be quashed or modified where they "subject[] a person to undue burden"); *Wiwa*, 392 F.3d at 818 ("A court may find that a subpoena presents an undue burden when the subpoena is facially overbroad."). A subpoena request is "facially overbroad" when "[a] large quantity of the documents sought have no connection to anything involved in this case." *Schaaf*, 233 F.R.D. at 455. By seeking "all" tax returns and related documents, rather than just those returns evidencing the ownership or transfer of the rights to the patents-in-suit, this request seeks numerous documents with no connection whatsoever to standing or any issue in this case.

13. All tax returns filed by SITE/TECHNOLOGIES/INC. and any RELATED DOCUMENTS.

RESPONSE:

Respondents object to the extent that this request seeks to invade the attorney-client privilege or work product doctrine, see General Objection No. 3. Respondents also object to this request because it is overbroad and unduly burdensome. See FED. R. CIV. P. 45(3)(A)(iv) (mandating that subpoenas be quashed or modified where they "subject[] a person to undue burden"); *Wiwa*, 392 F.3d at 818 ("A court may find that a subpoena presents an undue burden when the subpoena is facially overbroad."). A subpoena request is "facially overbroad" when "[a] large quantity of the documents sought have no connection to anything involved in this case." *Schaaf*, 233 F.R.D. at 455. By seeking "all" tax returns and related documents, rather than just those returns evidencing the

ownership or transfer of the rights to the patents-in-suit, this request seeks numerous documents with no connection whatsoever to standing or any issue in this case.

14. All financial statements of SITE TECHNOLOGIES on or after January 1, 1996 and any RELATED DOCUMENTS.

RESPONSE:

Respondents object to the extent that this request seeks to invade the attorney-client privilege or work product doctrine, see General Objection No. 3. Respondents also object to this request because it is overbroad and unduly burdensome. *See* FED. R. CIV. P. 45(3)(A)(iv) (mandating that subpoenas be quashed or modified where they “subject[] a person to undue burden”); *Wiwa*, 392 F.3d at 818 (“A court may find that a subpoena presents an undue burden when the subpoena is facially overbroad.”). A subpoena request is “facially overbroad” when “[a] large quantity of the documents sought have no connection to anything involved in this case.” *Schaaf*, 233 F.R.D. at 455. By seeking “all” financial statements and related documents, rather than just those statements evidencing the ownership or transfer of the rights to the patents-in-suit, this request seeks numerous documents with no connection whatsoever to standing or any issue in this case.

15. All financial statements of SITE/TECHNOLOGIES/INC. and any RELATED DOCUMENTS.

RESPONSE:

Respondents object to the extent that this request seeks to invade the attorney-client privilege or work product doctrine, see General Objection No. 3. Respondents also object to this request because it is overbroad and unduly burdensome. *See* FED. R. CIV. P. 45(3)(A)(iv) (mandating that subpoenas be quashed or modified where they “subject[] a person to undue burden”); *Wiwa*, 392 F.3d at 818 (“A court may find that a subpoena presents an undue burden when the subpoena is facially overbroad.”). A subpoena request is “facially overbroad” when “[a] large quantity of the documents sought have no connection to anything involved in this case.” *Schaaf*, 233 F.R.D. at 455. By seeking “all” financial statements and related documents, rather than just those statements evidencing the ownership or transfer of the rights to the patents-in-suit, this request seeks numerous documents with no connection whatsoever to standing or any issue in this case.

16. All DOCUMENTS RELATING TO any Certificate(s) of Incorporation, and any amendments thereto, of SITE/TECHNOLOGIES/INC.

RESPONSE:

Respondents object to the extent that this request seeks to invade the attorney-client privilege or work product doctrine, see General Objection No. 3. Respondents also object to this request because it is overbroad and unduly burdensome. *See* FED. R. CIV. P. 45(3)(A)(iv) (mandating that subpoenas be quashed or modified where they “subject[] a person to undue burden”); *Wiwa*, 392 F.3d at 818 (“A court may find that a subpoena presents an undue burden when the subpoena is facially overbroad.”). A subpoena

request is “facially overbroad” when “[a] large quantity of the documents sought have no connection to anything involved in this case.” *Schaaf*, 233 F.R.D. at 455. By seeking “all” documents relating to any Certificate of Incorporation or amendment, rather than just those Certificates of Incorporation or amendments evidencing the ownership or transfer of the rights to the patents-in-suit, this request seeks numerous documents with no connection whatsoever to standing or any issue in this case.

- 17. ~~All DOCUMENTS RELATING TO the corporate status of SITE TECHNOLOGIES~~ subsequent to January 1, 1996, including the reactivation attempted or effected on or about August 1, 2008, and including any COMMUNICATIONS regarding any decision(s) made in connection with any such change.**

RESPONSE:

Respondents object to the extent that this request seeks to invade the attorney-client privilege or work product doctrine, see General Objection No. 3. Respondents also object to this request because it is overbroad and unduly burdensome. See FED. R. CIV. P. 45(3)(A)(iv) (mandating that subpoenas be quashed or modified where they “subject[] a person to undue burden”); *Wiwa*, 392 F.3d at 818 (“A court may find that a subpoena presents an undue burden when the subpoena is facially overbroad.”). A subpoena request is “facially overbroad” when “[a] large quantity of the documents sought have no connection to anything involved in this case.” *Schaaf*, 233 F.R.D. at 455. By seeking “all” documents relating to corporate status, rather than just those evidencing the ownership or transfer of the rights to the patents-in-suit, this request seeks numerous documents with no connection whatsoever to standing or any issue in this case.

- 18. All DOCUMENTS RELATING TO the corporate governance, structure, and management of SITE TECHNOLOGIES and SITE/TECHNOLOGIES/INC. including all bylaws, corporate charters, proxy materials, board of directors minutes.**

RESPONSE:

Respondents object to the extent that this request seeks to invade the attorney-client privilege or work product doctrine, see General Objection No. 3. Respondents also object to this request because it is overbroad and unduly burdensome. See FED. R. CIV. P. 45(3)(A)(iv) (mandating that subpoenas be quashed or modified where they “subject[] a person to undue burden”); *Wiwa*, 392 F.3d at 818 (“A court may find that a subpoena presents an undue burden when the subpoena is facially overbroad.”). A subpoena request is “facially overbroad” when “[a] large quantity of the documents sought have no connection to anything involved in this case.” *Schaaf*, 233 F.R.D. at 455. By seeking “all” documents relating to the companies’ corporate governance, structure, and management, rather than just those documents relating to standing, this request seeks numerous documents with no connection whatsoever to standing or any issue in this case.

19. All DOCUMENTS identifying any assets of SITE TECHNOLOGIES as of January 1, 1996.

RESPONSE:

~~Respondents object to the extent that this request seeks to invade the attorney-client privilege or work product doctrine, see General Objection No. 3. Respondents also object to this request because it is overbroad and unduly burdensome. See FED. R. CIV. P. 45(3)(A)(iv) (mandating that subpoenas be quashed or modified where they "subject[] a person to undue burden"); *Wiwa*, 392 F.3d at 818 ("A court may find that a subpoena presents an undue burden when the subpoena is facially overbroad."). A subpoena request is "facially overbroad" when "[a] large quantity of the documents sought have no connection to anything involved in this case." *Schaaf*, 233 F.R.D. at 455. By seeking "all" documents identifying any assets as of January 1, 1996, rather than just those evidencing the ownership or transfer of the rights to the patents-in-suit, this request seeks numerous documents with no connection whatsoever to standing or any issue in this case.~~

20. All DOCUMENTS identifying any assets of SITE/TECHNOLOGIES/Inc. at any time.

RESPONSE:

Respondents object to the extent that this request seeks to invade the attorney-client privilege or work product doctrine, see General Objection No. 3. Respondents also object to this request because it is overbroad and unduly burdensome. See FED. R. CIV. P. 45(3)(A)(iv) (mandating that subpoenas be quashed or modified where they "subject[] a person to undue burden"); *Wiwa*, 392 F.3d at 818 ("A court may find that a subpoena presents an undue burden when the subpoena is facially overbroad."). A subpoena request is "facially overbroad" when "[a] large quantity of the documents sought have no connection to anything involved in this case." *Schaaf*, 233 F.R.D. at 455. By seeking "all" documents identifying any assets at any time, rather than just those evidencing the ownership or transfer of the rights to the patents-in-suit, this request seeks numerous documents with no connection whatsoever to standing or any issue in this case.

21. All disclosures and filings made with any governmental authority regarding the corporate status, corporate governance, and/or assets of SITE TECHNOLOGIES as of January 1, 1996.

RESPONSE:

Respondents object to this request because it is overbroad and unduly burdensome. See FED. R. CIV. P. 45(3)(A)(iv) (mandating that subpoenas be quashed or modified where they "subject[] a person to undue burden"); *Wiwa*, 392 F.3d at 818 ("A court may find that a subpoena presents an undue burden when the subpoena is facially overbroad."). A subpoena request is "facially overbroad" when "[a] large quantity of the documents sought have no connection to anything involved in this case." *Schaaf*, 233 F.R.D. at 455. By seeking "all" disclosures and filings with any governmental authority regarding corporate status, corporate governance, and/or assets, rather than just those evidencing

the ownership or transfer of the rights to the patents-in-suit, this request seeks numerous documents with no connection whatsoever to standing or any issue in this case.

- 22. All disclosures and filings made with any governmental authority regarding the corporate status, corporate governance, and/or assets of SITE/TECHNOLOGIES/Inc.**
-

RESPONSE:

Respondents object to this request because it is overbroad and unduly burdensome. *See* FED. R. CIV. P. 45(3)(A)(iv) (mandating that subpoenas be quashed or modified where they “subject[] a person to undue burden”); *Wiwa*, 392 F.3d at 818 (“A court may find that a subpoena presents an undue burden when the subpoena is facially overbroad.”). A subpoena request is “facially overbroad” when “[a] large quantity of the documents sought have no connection to anything involved in this case.” *Schaaf*, 233 F.R.D. at 455. By seeking “all” disclosures and filings with any governmental authority regarding corporate status, corporate governance, and/or assets, rather than just those evidencing the ownership or transfer of the rights to the patents-in-suit, this request seeks numerous documents with no connection whatsoever to standing or any issue in this case.

Exhibit 11

**Issued by the
UNITED STATES DISTRICT COURT**

FOR THE DISTRICT OF SOUTH CAROLINA

SOFTWARE RIGHTS ARCHIVE, LLC,

Plaintiff,

v.

SUBPOENA IN A CIVIL CASE

GOOGLE INC., YAHOO! INC., IAC SEARCH & MEDIA, INC., AOL, LLC, AND LYCOS, INC.,

CASE NUMBER: ¹ Civil Case No. 2:07-cv-511 (CE)
EASTERN DISTRICT OF TEXAS

Defendants.

**TO: Jeffrey Franklin Ait
1253 Monticello Drive
Myrtle Beach, SC 29577-8111**

YOU ARE COMMANDED to appear in the United States District Court at the place, date, and time specified below to testify in the above case.

PLACE OF TESTIMONY	COURTROOM
	DATE AND TIME

YOU ARE COMMANDED to appear at the place, date, and time specified below to testify at the taking of a deposition in the above case. (See attached Notice of Deposition)

PLACE OF DEPOSITION Myrtle Beach Marriott, 8400 Costa Verde Drive, Myrtle Beach, South Carolina 29572, (843) 449-8880; or another suitable location to be mutually agreed upon.	DATE AND TIME September 30, 2008, 9:30 PM To be recorded by stenography and videotape.
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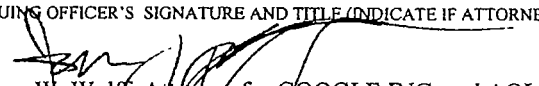
YOU ARE COMMANDED to produce and permit inspection and copying of the following documents or objects at the place, date and time specified below (list documents or objects): See "Appendix A" attached hereto.

PLACE Myrtle Beach Marriott, 8400 Costa Verde Drive, Myrtle Beach, South Carolina 29572, (843) 449-8880; or another suitable location to be mutually agreed upon.	DATE AND TIME September 22, 2008, 1:30 PM
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YOU ARE COMMANDED to permit inspection of the following premises at the date and time specified below.

PREMISES	DATE AND TIME
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Any organization not a party to this suit that is subpoenaed for the taking of a deposition shall designate one or more officers, directors, or managing agents, or other persons who consent to testify on its behalf, and may set forth, for each person designated, the matters on which the person will testify. Federal Rules of Civil Procedure, 30(b)(6).

ISSUING OFFICER'S SIGNATURE AND TITLE (INDICATE IF ATTORNEY FOR PLAINTIFF OR DEFENDANT)  Jason W. Wolff, Attorney for GOOGLE INC. and AOL, LLC.	DATE September 2, 2008
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ISSUING OFFICER'S NAME, ADDRESS AND PHONE NUMBER Jason W. Wolff, Fish & Richardson P.C., 12390 El Camino Real, San Diego, CA 92130. Tel: 858-678-5070	
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(See Rule 45, Federal Rules of Civil Procedure, Parts C& D on the next page)

¹ If action is pending in district other than district of issuance, state district under case number.

PROOF OF SERVICE

DATE	PLACE
SERVED	
SERVED ON (PRINT NAME)	MANNER OF SERVICE
SERVED BY (PRINT NAME)	TITLE

DECLARATION OF SERVER

I declare under penalty of perjury under the laws of the United States of America that the foregoing information contained in the Proof of Service is true and correct.

Executed on

DATE

SIGNATURE OF SERVER

ADDRESS OF SERVER

Rule 45, Federal Rules of Civil Procedure, Parts C & D:

(c) PROTECTING A PERSON SUBJECT TO SUBPOENAS.

(1) **Avoiding Undue Burden or Expense; Sanctions.** A party or attorney responsible for issuing and serving a subpoena must take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena. The issuing court must enforce this duty and impose an appropriate sanction — which may include lost earnings and reasonable attorney’s fees — on a party or attorney who fails to comply.

(2) **Command to Produce Materials or Permit Inspection.**

(A) **Appearance Not Required.** A person commanded to produce documents, electronically stored information, or tangible things, or to permit the inspection of premises, need not appear in person at the place of production or inspection unless also commanded to appear for a deposition, hearing, or trial.

(B) **Objections.** A person commanded to produce documents or tangible things or to permit inspection may serve on the party or attorney designated in the subpoena a written objection to inspecting, copying, testing or sampling any or all of the materials or to inspecting the premises — or to producing electronically stored information in the form or forms requested. The objection must be served before the earlier of the time specified for compliance or 14 days after the subpoena is served. If an objection is made, the following rules apply:

(i) At any time, on notice to the commanded person, the serving party may move the issuing court for an order compelling production or inspection.

(ii) These acts may be required only as directed in the order, and the order must protect a person who is neither a party nor a party’s officer from significant expense resulting from compliance.

(3) **Quashing or Modifying a Subpoena.**

(A) **When Required.** On timely motion, the issuing court must quash or modify a subpoena that:

(i) fails to allow a reasonable time to comply;

(ii) requires a person who is neither a party nor a party’s officer to travel more than 100 miles from where that person resides, is employed, or regularly transacts business in person — except that, subject to Rule 45(c)(3)(B)(iii), the person may be commanded to attend a trial by traveling from any such place within the state where the trial is held;

(iii) requires disclosure of privileged or other protected matter, if no exception or waiver applies; or

(iv) subjects a person to undue burden.

(B) **When Permitted.** To protect a person subject to or affected by a subpoena, the issuing court may, on motion, quash or modify the subpoena if it requires:

(i) disclosing a trade secret or other confidential research, development, or commercial information;

(ii) disclosing an unretained expert’s opinion or information that does not describe specific occurrences in dispute and results from the expert’s study that was not requested by a party; or

(iii) a person who is neither a party nor a party’s officer to incur substantial expense to travel more than 100 miles to attend trial.

(C) **Specifying Conditions as an Alternative.** In the circumstances described in Rule 45(c)(3)(B), the court may, instead of quashing or modifying a

subpoena, order appearance or production under specified conditions if the serving party:

- (i) shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship; and
- (ii) ensures that the subpoenaed person will be reasonably compensated.

(d) DUTIES IN RESPONDING TO A SUBPOENA.

(1) **Producing Documents or Electronically Stored Information.** These procedures apply to producing documents or electronically stored information:

(A) **Documents.** A person responding to a subpoena to produce documents must produce them as they are kept in the ordinary course of business or must organize and label them to correspond to the categories in the demand.

(B) **Form for Producing Electronically Stored Information Not Specified.** If a subpoena does not specify a form for producing electronically stored information, the person responding must produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms.

(C) **Electronically Stored Information Produced in Only One Form.** The person responding need not produce the same electronically stored information in more than one form.

(D) **Inaccessible Electronically Stored Information.** The person responding need not provide discovery of electronically stored information from sources that the person identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the person responding must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for the discovery.

(2) **Claiming Privilege or Protection.**

(A) **Information Withheld.** A person withholding subpoenaed information under a claim that it is privileged or subject to protection as trial-preparation material must:

- (i) expressly make the claim; and
- (ii) describe the nature of the withheld documents, communications, or tangible things in a manner that, without revealing information itself privileged or protected, will enable the parties to assess the claim.

(B) **Information Produced.** If information produced in response to a subpoena is subject to a claim of privilege or of protection as trial-preparation material, the person making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information to the court under seal for a determination of the claim. The person who produced the information must preserve the information until the claim is resolved.

(e) **CONTEMPT.** The issuing court may hold in contempt a person who, having been served, fails without adequate excuse to obey the subpoena. A nonparty’s failure to obey must be excused if the subpoena purports to require the nonparty to attend or produce at a place outside the limits of Rule 45(c)(3)(A)(ii).

APPENDIX A

DEFINITIONS

The following definitions shall apply:

1. “SRA” means Software Rights Archive, LLC, including without limitation, all of its corporate locations, and all predecessors, former and current subsidiaries, parents, and affiliates, and all past and present directors, officers, agents, representatives, employees, consultants, and attorneys of Software Rights Archive, LLC (inclusive of its former and current subsidiaries), and all entities acting in consort, joint-venture or partnership relationships with, and others acting, on behalf of Software Rights Archive, LLC (inclusive of its former and current subsidiaries).

2. “SITE TECHNOLOGIES” means Site Technologies, Inc., including without limitation, all of its corporate locations, and all predecessors, such as DeltaPoint, Inc., former and current subsidiaries, parents, and affiliates, and all past and present directors, officers, agents, representatives, employees, consultants, and attorneys of Site Technologies, Inc. (inclusive of its former and current subsidiaries), and all entities acting in consort, joint-venture or partnership relationships with, and others acting, on behalf of Site Technologies, Inc. (inclusive of its former and current subsidiaries).

3. “SITE/TECHNOLOGIES/INC.” means Site/Technologies/Inc., including without limitation, all of its corporate locations, and all predecessors, such as Libertech, Inc., the company as it actually or purportedly existed at all times, including without limitation from June 15, 1992 to December 21, 2000, former and current subsidiaries, parents, and affiliates, and all past and present directors, officers, agents, representatives, employees, consultants, and attorneys of Site/Technologies/Inc. (inclusive of its former and current subsidiaries), and all entities acting in consort, joint-venture or partnership relationships with, and others acting, on behalf of Site/Technologies/Inc. (inclusive of its former and current subsidiaries).

4. “PATENTS-IN-SUIT” means U.S. Patent No. 5,544,352 (“the ’352 patent”), U.S. Patent No. 5,832,494 (“the ’494 patent”), and U.S. Patent No. 6,233,571 (“the ’571 patent”), and any application from which each such patent issued.

5. “RELATED PATENTS OR APPLICATIONS” means (i) any application to which any patent-in-suit claims priority, (ii) any application, either in the United States or any other jurisdiction, which includes a claim of priority, directly or indirectly, to any application identified in (i), and (iii) any patent, other than a PATENT-IN-SUIT, issuing from an application identified in (i) or (ii).

6. “DOCUMENT” is defined broadly to be given the full scope of that term contemplated in Federal Rule of Civil Procedure 34, and includes all tangible things, all originals (or, if originals are not available, identical copies thereof), all non-identical copies of a document, all drafts of final documents, all other written, printed, or recorded matter of any kind, and all other data compilations from which information can be obtained and translated if necessary, that are or have been in your actual or constructive possession or control, regardless of the medium on which they are produced, reproduced, or stored (including without limitation computer programs and files containing any requested information), and any recording or writing, as these terms are defined in Rule 1001, Federal Rules of Evidence. Any document bearing marks, including without limitation, initials, stamped initials, comments, or notations not a part of the original text or photographic reproduction thereof, is a separate document.

7. “COMMUNICATION” means any form of transmittal of information without limitation as to means of transmittal, including meetings, telephone conversations, voice messages, electronic mail, text messages, correspondence, memoranda, contracts, agreements, and verbal or nonverbal actions intended to or actually conveying information.

8. “PERSON” includes not only natural persons, but also, firms, partnerships, associations, corporations, and other legal entities, and divisions, departments, or other units thereof.

9. “RELATES TO,” “RELATING TO,” and “RELATED TO” mean describing, discussing, concerning, evidencing, reflecting, comprising, illustrating, containing, embodying, constituting, analyzing, stating, identifying, referring to, dealing with, or in any way pertaining to.

10. “DESCRIBE” means to give a full and complete explanation of the requested information, including identifying all relevant circumstances, all relevant dates,

all PERSONS involved or having relevant knowledge, all relevant DOCUMENTS, and explaining the significance or the role of each date, PERSON, and DOCUMENT.

INSTRUCTIONS

1. The singular form of a word should be interpreted in the plural as well. Any pronoun shall be construed to refer to the masculine, feminine, or neutral gender as in each case is most appropriate. The words “and” and “or” shall be construed conjunctively or disjunctively, whichever makes the request more inclusive.

2. The use of the word “including” should be interpreted to mean “including without limitation.”

3. These requests are continuing in character to the extent permitted by Rule 26(e) of the Federal Rules of Civil Procedure and require supplemental answers if additional or different information is obtained prior to trial.

4. These requests seek all information that is known to you, your representatives, agents or investigators, and unless otherwise privileged, their counsel, employees, representatives, agents, servants, investigators or consultants.

5. If any request is objected to in part, a complete answer to all portions of the request not objected to should be provided.

6. For any information withheld on the ground that it is embodied in COMMUNICATIONS or DOCUMENTS protected by the attorney-client privilege, work-product immunity, or any other claim of privilege or immunity, provide a written statement setting forth, at a minimum:

(a) an identification of each COMMUNICATION or DOCUMENT embodying the allegedly protected information by author, date, and title;

(b) the identity of all PERSON(S) from and to whom the information has been communicated;

(c) a brief description of the subject matter of the information; and

(d) the legal and factual ground(s) upon which you rely in withholding the information in sufficient detail so that the Court may make a determination on your claim of privilege.

7. To the extent these requests seek information that is recorded in any form of document, including electronically stored DOCUMENTS such as word processing files and e-mail, or to the extent these requests seek identification of DOCUMENTS, including electronically stored DOCUMENTS, you are asked to take steps to ensure that all such DOCUMENTS are preserved for this litigation, and to take steps to ensure that no responsive electronically stored DOCUMENTS are erased or deleted. Sanctions may be imposed for failure to maintain evidence within your care, custody, or control.

8. Any term not specifically defined herein is to be defined in accordance with the Federal Rules of Civil Procedure and with Local Rules.

DOCUMENTS FOR PRODUCTION

1. Your most recent curriculum vitae.
2. All COMMUNICATIONS between you and SRA, including its attorneys, such as Lee Kaplan, Victor Hardy, and Raj Duvvuri.
3. All COMMUNICATIONS between you and Daniel Egger, including his attorneys, such as Lee Kaplan, Victor Hardy, and Raj Duvvuri.
4. All DOCUMENTS RELATING TO Daniel Egger, SRA, the PATENTS-IN-SUIT, any RELATED PATENTS OR APPLICATIONS, and any litigation concerning the PATENTS-IN-SUIT.
5. All DOCUMENTS regarding your current relationship with SITE TECHNOLOGIES, SITE/TECHNOLOGIES/INC., SRA, and Daniel Egger.
6. All COMMUNICATIONS between you and Sharon Fugitt since July 1, 2008.
7. All DOCUMENTS (including COMMUNICATIONS) RELATING TO your August 18, 2008 Declaration in the above captioned matter, including any drafts thereof.
8. All DOCUMENTS that you reviewed in preparation of your August 18, 2008 Declaration in the above captioned matter.
9. The boxes of DOCUMENTS belonging to SITE TECHNOLOGIES and currently held in a storage unit in California.
10. All DOCUMENTS RELATING TO the corporate status of SITE TECHNOLOGIES subsequent to January 1, 1996, including any change in the corporate status of SITE TECHNOLOGIES with the California Secretary of State, such as the reactivation effected on or about August 1, 2008, and including any COMMUNICATIONS regarding any decision(s) made in connection with any such change.
11. All DOCUMENTS RELATING TO the alleged acquisition of SITE/TECHNOLOGIES/INC. by SITE TECHNOLOGIES, including the Stock Purchase Agreement of July 11, 1997 and any schedules thereof.
12. All DOCUMENTS RELATING TO the alleged September 1998 Bill of Sale, Assignment, and License Agreement from SITE TECHNOLOGIES to Daniel Egger.
13. All DOCUMENTS RELATING TO any alleged merger of SITE TECHNOLOGIES and SITE/TECHNOLOGIES/INC., including any merger in December 2000.
14. All DOCUMENTS RELATING TO the bankruptcy of SITE TECHNOLOGIES.
15. All DOCUMENTS RELATING TO any filing made on or about December 15, 2004 with the California Secretary of State allegedly on behalf of SITE TECHNOLOGIES.

16. All DOCUMENTS RELATING TO any filing made on or about August 1, 2008 with the California Secretary of State allegedly on behalf of SITE TECHNOLOGIES.
17. All DOCUMENTS RELATING TO the corporate governance, structure, and management of SITE TECHNOLOGIES and SITE/TECHNOLOGIES/INC. including all bylaws, corporate charters, proxy materials, and board of directors meeting agendas and minutes.
18. All DOCUMENTS RELATING TO any Certificate(s) of Incorporation, and any amendments thereto, of SITE/TECHNOLOGIES/INC.
19. All tax returns (including any state and federal tax returns) filed by SITE TECHNOLOGIES as of January 1, 1996 and any RELATED DOCUMENTS.
20. All tax returns (including any state and federal tax returns) filed by SITE/TECHNOLOGIES/INC. and any RELATED DOCUMENTS.
21. All financial statements of SITE TECHNOLOGIES as of January 1, 1996 and any RELATED DOCUMENTS, including all documents identifying any income, expenditure, salary paid, and taxable deductions.
22. All financial statements of SITE/TECHNOLOGIES/INC. and any RELATED DOCUMENTS as of January 1, 1996, including all documents identifying any income, expenditure, salary paid, and taxable deductions.
23. All disclosures and filings made with any governmental authority regarding the corporate status, corporate governance, and/or assets of SITE TECHNOLOGIES as of January 1, 1996.
24. All disclosures and filings made with any governmental authority regarding the corporate status, corporate governance, and/or assets of SITE/TECHNOLOGIES/INC.
25. All DOCUMENTS identifying any assets of SITE TECHNOLOGIES as of January 1, 1996.
26. All DOCUMENTS identifying any assets of SITE/TECHNOLOGIES/INC. at any time.
27. All DOCUMENTS RELATING TO any royalties or other consideration paid by SITE TECHNOLOGIES to SITE/TECHNOLOGIES/INC.
28. All DOCUMENTS RELATING TO any alleged conveyance, assignment, license, or other transfer of any rights in the PATENTS-IN-SUIT and any RELATED PATENTS OR APPLICATIONS.
29. ALL DOCUMENTS (including manuals, compiled and uncompiled code, and computer files) relating to any software described in Paragraph 7 of the alleged

September 1998 Bill of Sale, Assignment, and License Agreement from SITE TECHNOLOGIES to Daniel Egger.

30. All DOCUMENTS RELATING TO "V-Search," "SiteSweeper," and any technology RELATING TO object links or hyperlinks.
31. All DOCUMENTS RELATING TO Starbase and the sale of any technology to Starbase.