

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF VIRGINIA  
NORFOLK DIVISION

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I/P ENGINE, INC.,		)	
	Plaintiff,	)	
	v.	)	Civ. Action No. 2:11-cv-512
		)	
AOL, INC. et al.,		)	
	Defendants.	)	
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**BRIEF IN SUPPORT OF PLAINTIFF I/P ENGINE, INC.’S  
FIRST MOTION *IN LIMINE* TO EXCLUDE INADMISSIBLE EVIDENCE**

**I. INTRODUCTION**

Pursuant to Federal Rules of Evidence 401 through 403, Plaintiff I/P Engine, Inc. (“I/P Engine”) requests that this Court preclude any evidence of, reference to, or suggestion of the following topics in the trial of this case:

1. the recently filed reexamination of U.S. Patent No. 6,314,420;
2. recent offers and other negotiations, and the 2011 purchase price of, the patent portfolio that included the patents-in-suit;
3. the fee arrangement between I/P Engine and its counsel;
4. claim construction arguments that were not adopted by this Court;
5. claims that were previously included in this case but are no longer asserted, including claims against Google Search and defendants AOL and IAC’s Ask Sponsored Listings;

6. derogatory, inflammatory, confusing and irrelevant terms such as “patent troll,” “shell corporation,” “paper patent” holder, or “non-practicing entity”;
7. any testimony or opinions about evidence or any other subject beyond the scope of the discussion and analysis in their expert report;
8. any reference to discussions or correspondence between counsel that did not go to the Court, including discovery disputes, negotiations, claims of privilege, for motions or relief sought but not granted; and
9. any reference to courtroom observers or jury consultants.

## **II. DISCUSSION**

### **A. Pending Reexamination Evidence Should be Precluded as it Has No or Little Probative Value to any Issue in this Case, But Would be Highly Prejudicial to Plaintiff’s Claims of Infringement and Validity**

A U.S. patent is presumed to be valid. 28 U.S.C. § 282. Google recently petitioned the U.S. Patent and Trademark Office to reexamine U.S. Patent No. 6,314,420 (“the ‘420 patent”). That request is pending. Defendants have identified a U.S. Patent & Trademark Office (“USPTO”) communication regarding Google’s Request for Reexamination of the ‘420 patent document as Defendants’ Exhibit (DEX) 76 in their Trial Exhibit List, served September 19, 2012.

Until and unless the USPTO issues a final decision cancelling that patent, the patentee is entitled to rely upon the presumption of validity. Well established case law holds that evidence regarding pending patent reexamination proceedings, including the grant of reexamination and subsequent office actions, is inadmissible for *any* purpose because it has little probative value, and is highly prejudicial.

Google filed its petition for reexamination in May 2012. The PTO granted Google’s petition for reexamination of the ‘420 patent less than two months ago. The PTO has not issued

any Office Action or taken any other action related to that petition. The PTO could confirm the '420 patent, or it could reopen the examination of the patent. The reexamination proceedings typically take years; there is no chance that it will be completed until after completion of the trial.<sup>1</sup> As this Court has reasoned in a similar case, such “evidence is not relevant, and, to the extent that it is relevant, its probative value is substantially outweighed by the risk of jury confusion, delay and unfair prejudice under Fed. R. Evid. 403.” *ePlus, Inc. v. Lawson Software, Inc.*, No. 3:09-cv-620, D.I. 375, slip op. (E.D. Va. Jul. 23, 2010) (excluding evidence regarding reexamination proceedings) (attached as Ex. 1).

The relatively low threshold for the USPTO in granting a reexamination request (i.e., a “substantial new question of patentability”) offers virtually no probative value regarding an issued patent’s validity at trial. “The grant of a request for reexamination, although surely evidence that the criterion for reexamination has been met . . . , does not establish a likelihood of patent invalidity.” *Id.*; see also *Acoustical Design, Inc. v. Control Elecs. Co.*, 932 F.2d 939, 942 (Fed. Cir. 1991) (“initial rejection by the [PTO] of original claims that later were confirmed on reexamination hardly justifies a good faith belief in the invalidity of the claims”). Yet “telling the jury that the patent has been called into question by the Patent Office may significantly influence the jury’s application of the presumption of validity and significantly prejudice [I/P Engine].” *Amphenol T & M Antennas, Inc. v. Centurion Intern., Inc.*, 2002 WL 32373639, at \*2 (N.D.Ill. Jan. 17, 2002).

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<sup>1</sup> The PTO reports that the average reexamination process takes 25.4 months from the filing date to the reexamination certificate issue date. Ex. 2. This includes rejected reexaminations and patents confirmed without an Office Action. In the unlikely event that the '420 patent was cancelled during reexam, I/P Engine would have the right of appeal to the Board of Patent Appeals and Interferences and then to the Federal Circuit, before any proceeding would be complete.

“[T]he risk of jury confusion if evidence of the non-final PTO proceedings were introduced [is] high.” *Callaway Golf Co. v. Acushnet Co.*, 576 F.3d 1331, 1343 (Fed. Cir. 2009); *see also Pharmastem Therapeutics, Inc. v. Viacell, Inc.*, No. 02-148, 2003 WL 22244704, at \*3 (D. Del. Sept. 30, 2003) (noting that “there is a strong likelihood that the jury would be confused as to the reexaminations’ relevance and thereby give the evidence of reexamination undue weight”). Presenting the jury with evidence of the pending reexaminations would no doubt present a danger of “undue tendency to suggest decision on an improper basis.” Fed. R. Evid. 403, *official commentary*. Further, “because it is standard practice for the PTO to broadly interpret claims during . . . reexamination,” the jury would likely afford undue weight to a seemingly “expert” opinion on issues such as validity and infringement – an opinion based on a completely different interpretation of the prior art and application of a much lower standard of proof. *E.I. duPont*, 706 F. Supp. at 1141. “The prejudicial potential of this evidence far outweighs any probative value it may have.” *Amphenol*, 2002 WL 32373639, at \*2.<sup>2</sup>

Accordingly, Defendants should be precluded from making any reference to the pending reexamination proceeding of the ‘420 patent, including DEX # 76.

**B. Evidence Relating to Recent Negotiations For the Patent Portfolio that Included the Patents-In-Suit, Including the Ultimate Purchase Price of the Patent Portfolio, Offers or Bids to Purchase the Patent Portfolio, and Details About the Parties Involved in the Negotiations, Should be Precluded as it has Little, if any, Probative Value to any Issue in this Case, But Would be Highly Prejudicial to Plaintiff’s Damages Claims**

The measure of damages for patent infringement is “damages adequate to compensate for the infringement, but in no event less than a reasonable royalty for the use made of the invention

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<sup>2</sup> The legal standards applied in patent reexamination proceedings are also much less deferential to issued patents than the proper standard to be applied by this Court in this case. While the jury would need to find clear and convincing evidence to invalidate an issued patent, reexamination requires only a preponderance of the evidence suggesting invalidity. *Ethicon, Inc. v. Quigg*, 849 F.2d 1422, 1427 (Fed. Cir. 1988). And the PTO’s interim determinations do not apply the presumption of validity accorded to issued patents under 35 U.S.C. § 282. *Id.*

by the infringer.” 28 U.S.C. § 284. This is determined in primary part by applying the 15-part *Georgia Pacific* test, which focuses on a hypothetical negotiation as of the date of first infringement. In this case, the date of the hypothetical negotiation is in 2004.

Defendants, however, apparently intend to introduce evidence relating to the price that I/P Engine paid to purchase a patent portfolio from Lycos, Inc., which included the asserted ‘420 and ‘664 patents. Defendants have identified in their trial exhibit list multiple documents on this subject, including DEX # 9-11, 13, 16, 19, 29, 82, 102-105 and 126. Defendants’ damages expert also has included in his damages report evidence of various discussions and offers that third parties purportedly made between 2009 and 2011 for some or all of the patent family of the asserted patents. Ex. 3 at ¶ 12.

In determining damages under § 284 and *Georgia Pacific*, a reasonable royalty is based on “the fact of infringement,” *Transclean Corp. v. Bridgewood Services, Inc.*, 290 F.3d 1364, 1375-76 (Fed. Cir. 2002), and **not** the patent owner’s purchase of intellectual property assets. How much I/P Engine paid Lycos for the patent portfolio is not relevant to the reasonable royalty analysis. Neither does it account in any way for the use made by the Defendants of the invention. The “[p]urchase price is simply not a reasonable or sufficiently reliable approximation of the value of the allegedly misappropriated intellectual property . . . .” *Alcatel USA, Inc. v. Cisco Systems, Inc.*, 239 F. Supp. 2d 660, 669-71 (E.D. Tex. 2002).

Defendants apparently intend to rely upon the 2011 purchase amount, as well as other offers between 2009 and 2011, to devalue the patents-in-suit. Defendants’ damages expert, Dr. Ugone, relies on the purchase amount as a “reasonableness check” asserting that the purchase price may be considered as a “royalty received by the patentee for the licensing of the patents-in-

suit”<sup>3</sup> and is informative “as to the economic mindset of the parties at the time of the hypothetical negotiation.” Ex. 3 at ¶ 12 and page 1 of Appendix A. He likewise refers to various discussions that Lycos had with other prospective purchasers, to bolster his opinions. *Id.*

Referring specifically to the 2011 sale of a patent portfolio that included the patents-in-suit by Lycos, Defendants also apparently intend to present evidence regarding: (1) Dickstein Shapiro’s involvement with various interested parties, including Altitude Capital Partners, Eidos, and Hudson Bay Capital, (2) the negotiations and bidding details related to the acquisition of the patent portfolio, and (3) other aspects of Dickstein Shapiro’s extremely limited involvement with this process. During Defendants deposition of Lycos’s General Counsel, Mark Blais, Defendants spent considerable time exploring the negotiations surrounding the 2011 sale of the patent portfolio including the patents-in-suit, including questions about Altitude Capital Partners, Eidos and Hudson Bay Capital. Defendants’ have designated portions of Mr. Blais’ deposition testimony on that subject. Defendants likewise have included in their trial exhibits DEX 11 and 13, which are emails between Alex Berger and Mark Blais about the negotiation process. Further, Dr. Ugone refers to the bidding details between Altitude Capital Partners and Hudson Bay Capital in his expert report. Ex. 3 at ¶ 12.

Nothing about the amount of the Lycos sale in 2011, the negotiations and bidding associated with that sale, Dickstein Shapiro’s introduction of the parties involved to Lycos or the other discussions regarding a possible sale of the patent-in-suit between 2009 and 2011, is informative as to the economic mindset of the parties in June 2004 (the hypothetical negotiation date that the jury must consider). The Lycos sale occurred in 2011, seven years after the hypothetical negotiation date. Lycos had been sold twice in the interim. During his deposition,

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<sup>3</sup> Defendants do not raise any other issues that would merit allowing this evidence to go to the jury. For example, there is no dispute regarding ownership of the patents-in-suit.

Lycos's General Counsel, Mark Blais, testified about a myriad of internal and external pressures that led to the sale of the Lycos portfolio, none of which related to the value of the patents-in-suit. Ex. 4 at pages 122-156. Nothing regarding the 2011 sale, or the various discussions Lycos had between 2009 and 2011 regarding a possible sale, is "a reasonable or sufficiently reliable approximation of the value of the allegedly misappropriated intellectual property" *Alcatel*, 239 F. Supp. 2d at 669-71.

Assuming *arguendo* there is any marginal relevance to this evidence, it is far outweighed by the prejudice and juror confusion that would result from mudding the reasonable royalty determination, including putting on evidence as to the myriad of reasons why Lycos sold the patents for the amount that it did versus Section 284's mandate that the adequate compensation for infringement be no less than a reasonable royalty based *on the use made of the invention by the infringer*. *Transclean*, 290 F.3d at 1375-76.

To allow evidence of the purchase price, bidding for the right to purchase the patents-in-suit, the bidding parties or other possible sale considerations in 2009-11 to go before the jury would be highly prejudicial. There would be a strong likelihood that the jury would be confused as to the relevance of the purchase price of the patent portfolio or the bidding that occurred and thereby give the evidence of the amount of that purchase or the bidding process undue weight. This is particularly true as Dr. Ugone is only using these amounts as a "reasonableness check," and not as a basis for his damages range, which further reduces any putative probative value while increasing the prejudice. Excluding this information will not prevent Dr. Ugone from expressing his opinions or otherwise conducting his *Georgia Pacific* analysis.

Accordingly, Defendants should be precluded from making any reference to the amount I/P Engine paid to acquire the patent portfolio that included the patents-in-suit, the offers or bids

given during the Lycos sale in 2011 or during the various other discussions Lycos had between 2009 and 2011 regarding a possible sale, details about Dickstein Shapiro's introduction of interested parties to Lycos prior to the Lycos sale in 2011, including Altitude Capital Partners, Eidos or Hudson Bay Capital, and any other aspects of Dickstein Shapiro's extremely limited involvement with the Lycos sale in 2011. Defendants should further be precluded from introducing any evidence relating to these topics, including DEX # 9-11, 13, 16, 19, 29, 82, 102-105 and 126, as well as the designated deposition testimony from Mr. Blias.

**C. Evidence about the Fee Arrangement Between I/P Engine and its Counsel Should be Precluded as it has No Probative Value to Any Issues in this Case, But would be Prejudicial to Plaintiff**

Defendants should be precluded from making any references or suggestions of the fee agreement between I/P Engine and its attorneys. In particular, I/P Engine is concerned that the Defendants may attempt to improperly influence the jury's verdict suggesting that there may be a contingency fee arrangement between I/P Engine and its counsel. This Court has held that such matters are generally inadmissible, irrelevant and prejudicial to the right to a fair and impartial trial. *DNT, LLC v. Sprint Spectrum, LP*, No. 3:09-CV-00021, 2010 WL 582164 at \*4 (E.D. Va. Feb. 12, 2010) ("Such information is not relevant to the issues of invalidity or infringement of the patent suit."). The probative value, if any, of such matter would be greatly outweighed by the danger of unfair prejudice, confusion of the issues, and/or misleading the jury. Accordingly, such information should be excluded under Federal Rules of Evidence 401, 402, and 403.

**D. Arguments Or Evidence Regarding Claim Construction Terms or Arguments That Were Rejected By this Court Should be Precluded**

I/P Engine submits that Defendants and especially their experts should be precluded from offering any arguments, opinions or evidence at trial regarding any claim constructions proposed during the *Markman* process that were not adopted by the Court and are inconsistent with the

Court's constructions. This Court has excluded such evidence in the past reasoning that "[t]he parties' proposed claim constructions which were not adopted by the Court are not relevant and would certainly increase the risk of jury confusion." *DNT, LLC*, 2010 WL 582164 at \*2 (excluding evidence or argument relating to claim construction positions not adopted by the court). The same holds true in this case. The Court has issued its Claim Construction Order, as amended, and the jury's task is now limited to applying the claims as construed to the accused products and making a factual determination as to whether the claims cover, or "read on", the products. *See Sulzer Textil A.G. v. Picanol N.V.*, 358 F.3d 1356, 1366 (Fed. Cir. 2004) (it is "the jury's obligation to adopt and apply the court's determined meanings of disputed claim terms to the jury's deliberation of the facts"). This Court's claim constructions are now the law of the case, and claim construction positions rejected by the Court have no evidentiary weight. *See id.* In other words, the parties' arguments and evidence relating to claim construction issues not adopted by this Court are irrelevant to the trial of this matter. *See Liquid Dynamics Corp. v. Vaughan Co.*, 449 F.3d 1209, 1224 n.2 (Fed. Cir. 2006) (testimony properly excluded as irrelevant when based on an impermissible claim construction).

Even if such evidence or arguments related to positions not accepted by this Court during claim construction have some probative value (although none are readily discernible), they would mislead or confuse the jury about the issues before them. Fed. R. Evid. 403. Accordingly, evidence or testimony at trial should be limited to the claim construction adopted by the Court. Any arguments or evidence regarding proposed claim constructions that were not adopted, or arguments or evidence that the Defendants opposed the claim construction ultimately adopted by the Court, should be precluded.

**E. Defendants Should Be Precluded From Referencing or Discussing Claims That Are No Longer Part of This Case**

I/P Engine submits that Defendants should be precluded from referring to or introducing evidence relating to patents and claims that may have previously been included in this case, but that are no longer asserted. Specifically, Defendants should be precluded from introducing into evidence or making reference to previously dismissed claims directed at certain product lines, including Google Search, and defendants AOL and IAC's Ask Sponsored Listings. *See* D.I. 203.

These claims are no longer at issue in this case. As potential evidence, any reference to them is irrelevant and lacks probative value, and is inadmissible under Federal Rule of Evidence 401. *See, e.g., DNT, LLC*, 2010 WL 582164 at \*2 (parties' positions not adopted by the court are not relevant); *Johnson v. O'Brien*, Case No. 7:09-CV-00165, 2011 WL 5402105 at \*2 (W.D. Va. Nov. 4, 2011) (excluding evidence related to previously dismissed claims because "[t]hose claims have been dismissed from this suit and are thus not relevant to the matters to be decided at trial"); *Bell v. Bryant*, Case No. 08-CV-0456, 2012 WL 3028106 at \*2 (W.D. Mo. Jul. 24, 2012) ("The previous rulings issued in this case are legal determinations which are irrelevant to the issues the jury will be asked to decide.").

References to these dismissed claims and products should be barred because of the high likelihood that such references would unduly prejudice I/P Engine. For example, discussing voluntarily dismissed claims "could improperly lead the jury to think that [Plaintiff's] claims are weak generally." *3Com Corp. v. Realtek Semiconductor Corp.*, Case No. 03-cv-2177, 2008 WL 783383, at \*4 (N.D. Cal. Mar. 24, 2008) (granting plaintiff's motion *in limine* to preclude defendant "from referring to or introducing evidence relating to patents and claims no longer asserted").

In a case including five defendants and a range of complex technologies, reference to these dismissed products and claims is barred by Federal Rule of Evidence 403, because its value is clearly outweighed by its likelihood to confuse the jury and waste the time of the parties and the Court. *CardioVention, Inc. v. Medtronic, Inc.*, 483 F. Supp. 2d 830, 839 (D. Minn. 2007) (excluding reference to dismissed patent invalidity claims because, “to the extent that this evidence may have some relevance . . . , that slight probative value is substantially outweighed by the danger of confusion and misleading the jury” into a “side-issue”).

Accordingly, Defendants should be precluded from making any reference to or introducing into evidence previously dismissed claims directed at certain product lines including Google Search and defendants AOL and IAC’s Ask Sponsored Listings.

**F. Defendants Should Be Precluded From Referring To I/P Engine As A “Patent Troll,” “Shell Corporation,” “Paper Patent” Holder, “Non-Practicing Entity,” Or Other Derogatory, Inflammatory, Confusing or Irrelevant Names**

I/P Engine submits that Defendants should be precluded, under Fed. R. Evid. 403, from using the terms “patent troll,” “shell corporation,” “paper patent” holder, “non-practicing entity” or any other confusing or derogatory term to refer to I/P Engine. Such terms are unfairly prejudicial to I/P Engine. Although Defendants may state facts, Defendants should be limited to reciting those facts without resorting to the use of confusing and derogatory names. If allowed to do so, the prejudicial impact greatly outweighs any probative value. *See DNT, LLC*, 2010 WL 582164 at \*4 (granting a motion *in limine* precluding the use of the term “patent troll” because “the prejudicial impact outweighs any probative value.”). Any use of derogatory terms – such as “patent troll,” “shell corporation,” “non-practicing entity,” “paper patent” holder, “pirates,” “playing the lawsuit lottery,” “corporate shell game,” or any similar derogatory terms – to identify I/P Engine, I/P Engine’s patents-in-suit, or companies comparable to I/P Engine – has no

probative value to any of the issues to be tried in this case and therefore must be excluded. *See i4i Ltd. Partnership v. Microsoft Corp.*, 670 F. Supp. 2d 568, 596 (E.D. Texas 2009) (explaining in jury instructions that “[t]he law recognizes no distinction among types of patent owners”); *Bright Response LLC v. Google Inc.*, No. 2:07-CV-371 (CE), D.I. 571, slip op., 2 (E.D. Tex. July 30, 2010) (granting motion *in limine* No. 22 to exclude Google’s references to the plaintiff as “patent trolls,” “pirates,” “playing the lawsuit lottery,” and “corporate shell game.”) (Ex. 5).

**G. Defendants’ Expert Witnesses Should Be Limited to Their Expert Report**

The Federal Rules of Civil Procedure require an expert to provide in their written report “a complete statement of all opinions the witness will express and the basis and reasons for them.” Fed. Rule. Civ. Pro. 26(a)(2)(B)(i). Accordingly, direct testimony by an expert witness at trial should be limited to the contents of his expert report, and nothing more. *See, e.g., ePlus, Inc. v. Lawson Software, Inc.*, 2011 U.S. Dist. LEXIS 89950, at \*24-26 (E.D. Va. Aug. 11, 2011) (precluding expert testimony about a theory that was not supported or disclosed in the expert report and stating that “[t]he exclusion of the theory was a result of [defendant’s] own making”); *Voda v. Cordis Corp.*, 506 F. Supp. 2d 868, 881 (W.D. Okla. 2007) (limiting expert witness testimony to the opinions disclosed in his expert report is not error); *Dow Chem. Co. v. Mee Indus.*, 341 F.3d 1370, 1379 (Fed. Cir. 2003) (limiting the scope of the presentation at trial to what was provided in the expert reports).

Defendants previously had disclosed non-infringement and invalidity theories that they later abandoned in their expert disclosures. For example, Defendants had identified more than 17 different potential prior art references; however, Dr. Ungar relies on only 7 of those references. Despite their absence from Dr. Ungar’s report, Defendants have still listed several of these other prior art references on their Trial Exhibit List as DEX # 33, 47, 48, 51, 53, 54, 55 and 57. Likewise, Defendants previously had asserted various non-infringement theories that are not

set forth in Dr. Ungar's non-infringement disclosure. Likewise, Defendants' damages expert, Dr. Ugone, has not endorsed certain damages theories previously suggested by Defendants. Consistent with Rule 26, Defendants' expert witnesses should be precluded from offering any testimony or opinions about evidence or any other subject beyond the scope of the discussion and analysis in their expert report. Defendants should further be precluded from introducing any evidence relating to these topics, including DEX # 33, 47, 48, 51, 53, 54, 55 and 57.

**H. Reference To Discussions Or Correspondence Between Counsel That Did Not Go To The Court, Including Discovery Disputes, Negotiations, Claims Of Privilege, Or Motions Or Relief Sought But Not Granted**

None of the pretrial proceedings or disputes should be referenced to the jury without leave of Court, since it is both not relevant and unduly prejudicial.

**I. Reference To Courtroom Observers Or Jury Consultants**

No party should draw the jury's attention to members of the audience, including courtroom observers or jury consultants, since doing so would have no probative value and would be unduly prejudicial.

### III. CONCLUSION

For the reasons discussed above, I/P Engine's First Motion *In Limine* to Exclude Inadmissible Evidence should be granted.

Dated: September 21, 2012

By: /s/ Jeffrey K. Sherwood  
Donald C. Schultz (Virginia Bar No. 30531)  
W. Ryan Snow (Virginia Bar No. 47423)  
CRENSHAW, WARE & MARTIN PLC  
150 West Main Street  
Norfolk, VA 23510  
Telephone: (757) 623-3000  
Facsimile: (757) 623-5735

Jeffrey K. Sherwood (Virginia Bar No. 19222)  
Frank C. Cimino, Jr.  
Kenneth W. Brothers  
Dawn Rudenko Albert  
Charles J. Monterio, Jr.  
DICKSTEIN SHAPIRO LLP  
1825 Eye Street, NW  
Washington, DC 20006  
Telephone: (202) 420-2200  
Facsimile: (202) 420-2201

Counsel for Plaintiff I/P Engine, Inc.

**CERTIFICATE OF SERVICE**

I hereby certify that on this 21st day of September, 2012, the foregoing **BRIEF IN SUPPORT OF I/P ENGINE, INC.'S FIRST MOTION *IN LIMINE* TO EXCLUDE INADMISSIBLE EVIDENCE** was served via the Court's CM/ECF system, on the following:

Stephen Edward Noona  
Kaufman & Canoles, P.C.  
150 W Main St  
Suite 2100  
Norfolk, VA 23510  
[senoona@kaufcan.com](mailto:senoona@kaufcan.com)

David Bilsker  
David Perlson  
Quinn Emanuel Urquhart & Sullivan LLP  
50 California Street, 22nd Floor  
San Francisco, CA 94111  
[davidbilsker@quinnemanuel.com](mailto:davidbilsker@quinnemanuel.com)  
[davidperlson@quinnemanuel.com](mailto:davidperlson@quinnemanuel.com)

Robert L. Burns  
Finnegan, Henderson, Farabow, Garrett & Dunner, LLP  
Two Freedom Square  
11955 Freedom Drive  
Reston, VA 20190  
[robert.burns@finnegan.com](mailto:robert.burns@finnegan.com)

Cortney S. Alexander  
Finnegan, Henderson, Farabow, Garrett & Dunner, LLP  
3500 SunTrust Plaza  
303 Peachtree Street, NE  
Atlanta, GA 94111  
[cortney.alexander@finnegan.com](mailto:cortney.alexander@finnegan.com)

/s/ Jeffrey K. Sherwood \_\_\_\_\_