

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

Plaintiff I/P Engine, Inc. (“I/P Engine”) hereby submits the following proffer regarding the proposed rebuttal testimony of Donald Kosak. Mr. Kosak’s rebuttal testimony is intended to respond to the inaccurate and misleading statements by Defendants’ damages expert, Keith Ugone. Dr. Ugone said that Lycos has no ability to transfer technology with a patent license, testifying that:

it's not like Lycos would be able to say to Google, I can license you, the patents-in-suit, and I can give you some technological know-how to go along with that, and I can tell you how to implement the teachings of the patents-in-suit. So Lycos would not be able to turn over that sort of data.

(Tr. at 1577-1578) He asserted that Lycos and Google had a commercial relationship in which Lycos depended on revenue from Google's advertising services, and Lycos "didn't have a real preference" as to a lump-sum or a running-royalty payments. (Tr. at 1574-1576; 1579). ).

Relying on a story he found on the internet, Dr. Ugone also testified that as of the date of the hypothetical negation, Lycos was having “business problems” and “financial difficulties” and had laid off 20 percent of its U.S. staff. (Tr. at 1580). Dr. Ugone further testified that Lycos was

sold to Daum communications in 2004 for \$95 million. (Tr. at 1580-1581). As set forth below, Mr. Kosak will rebut each of these points.

**Mr. Kosak's proposed rebuttal testimony.** Mr. Kosak will testify in rebuttal to the incorrect factual assertions of Dr. Ugone. Mr. Kosak will testify that, in early 2004, he was the Vice President of Technology for Terra Lycos, and a member of the Lycos management team. He will testify based upon his personal knowledge of the following:

- Mr. Ugone's assertions that in 2004 Lycos lacked the source code, equations, algorithms and technical know-how to implement the teachings of the patents-in-suit are wrong. Mr. Kosak will testify that Lycos previously had implemented this technology, and in early 2004 Lycos was in a position to provide tens of thousands of lines of code to assist with implementation of the patents-in-suit. He will explain based upon his personal knowledge that Lycos code was for the machine learning, content and collaborative filtering, and relevance prediction software, and that it contained the algorithms, formulas, and technological basis for integrating the teachings of the patents into Google's products.
- The financial condition of Terra Lycos at the time of the hypothetical negotiation. Mr. Kosak participated in weekly meetings where he reviewed financial statements and reports, which showed that Lycos had about \$2 billion in cash reserves in early 2004.
- Mr. Ugone's characterizations of the relationship between Google and Lycos at the time of the hypothetical negotiation was that Lycos depended on Google. (Tr. p. 1579). Mr. Kosak will explain that, at the beginning of 2004, Yahoo, AOL and Microsoft were the top 3 sites on the Internet with around twice the audience of anyone else. Google and Lycos were rivals ranked 5 and 6 with about half the audience of the bigger companies.

- Mr. Kosak also will explain that the agreements that Lycos and Google entered into during the time were structured as revenue sharing deals, not lump sum payments. Mr. Kosak will explain that most of the deals Lycos entered into during this time period were revenue sharing agreements. He will explain that Lycos agreed with Google and other companies to a split a percentage of revenue (generally net revenue after costs are subtracted), and each month the company operating the service would pay its partner a percentage of that net revenue.
- Dr. Ugone's assertion that in February 2004 Lycos was laying off staff is inaccurate; Mr. Kosak supervised the consolidation of Lycos offices, and he will explain that the engineers in Lycos's Mountain View office were given the option of joining the Lycos San Francisco office, or relocating to Lycos headquarters in Waltham, Massachusetts.
- Mr. Ugone's assertion that the entire company was sold in October 2004 for \$95 million is wrong; in fact, a very small part of Lycos was sold to Daum Communications at that time.

Dr. Ugone's specific testimony on these points a surprise to I/P Engine. Dr. Ugone misstated the single internet story upon which he cited in his report (but did not show the jury, since it was rife with hearsay) regarding Lycos's alleged business difficulties. Prior to his testimony, I/P Engine had objected to the documents that Dr. Ugone had cited since they were unreliable, and counsel for Defendants agreed to withdraw them. I/P Engine thus had understood that Dr. Ugone would not testify regarding the content of those withdrawn documents. Dr. Ugone also disregarded the evidence when he said that Lycos lacked the ability to transfer technology, know-how, or provide Google with any other support to implement the patents-in-suit.

Presenting the brief rebuttal testimony of Mr. Kosak is appropriate to respond to the multiple factual misstatements of Dr. Ugone.

**Mr. Kosak's rebuttal testimony is proper and admissible.** Mr. Kosak's rebuttal testimony is consistent with case law. The Federal Circuit has stated that it "reviews procedural matters that are not unique to patent issues under the law of the particular regional circuit where appeals from the district court would normally lie." *DMI, Inc. v. Deere & Co.*, 802 F.2d 421, 428 (Fed. Cir. 1986) (using circuit case law to rule on the admission and exclusion of witness rebuttal testimony). Accordingly, Fourth Circuit case law governs on this issue.

The Fourth Circuit has stated that rebuttal evidence may include "evidence that explains, repels, counteracts, or disproves facts given in evidence by the opposing party." *United States v. Collins*, 272 Fed. Appx. 219, 223 (4th Cir. 2007). Thus, rebuttal testimony is appropriate where it is intended and relevant to "explain, repel, counteract, or disprove" facts or testimony presented in the opposing parties case-in-chief. *Id.* (holding that the district court did not abuse its discretion by allowing rebuttal testimony in a drug case from two witnesses that was "relevant to explain, repel, counteract, or disprove" an explanation provided by defendants during the presentation of their evidence). As long as there is "a nexus between the purported rebuttal evidence and the evidence that the purported rebuttal evidence seeks to rebut," then the rebuttal evidence is admissible. *United States v. Reddicks*, 237 Fed. Appx. 826, 830-831 (4th Cir. 2007), accord *United States v. Johnson*, 200 Fed. Appx. 254, 255 (4th Cir. 2006) (same).

Likewise, the fact that Mr. Kosak testified during I/P Engine's case in chief, was released, then listened to further testimony, does not preclude him from offering rebuttal testimony. In *DMI*, the court affirmed the district court's decision to permit the recall of two fact witnesses who previously had testified during plaintiff's case-in-chief. 802 F.2d at 428. And in

*United States v. Flowers*, 235 Fed. Appx. 965, 967 (4th Cir. 2007), the court held that the district court did not err in allowing a Government's in-court representative to offer rebuttal testimony despite having heard the other witnesses during the trial.

At the conclusion of his testimony, Mr. Kosak was released from the rule of exclusion. Tr. at 255. At that time, I/P Engine did not intend to recall him. Only when Dr. Ugone made repeated factual misstatements regarding matters on which Mr. Kosak had direct and personal knowledge did I/P Engine realize that Mr. Kosak would be a rebuttal witness. As set forth above, this is proper. Defendants' primary case, *United States v. Ell*, 718 F.2d 291 (9th Cir. 1983), is not controlling and inapposite because, unlike there, Mr. Kosak was released from the obligations of Rule 615.

Mr. Kosak is available to testify. His rebuttal testimony will take less than 15 minutes. Permitting him to testify is in the interests of justice. I/P Engine respectfully requests that the jury be permitted to have the most accurate and truthful information possible.

Dated: October 30, 2012

By: 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 30th day of October, 2012, the foregoing 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