

Civ. Action No. 2:11-cv-512

jury. I understood that the Court would accept laches evidence after the jury's verdict and that the Court would then rule on laches.

3. At no point prior to October 31 did the Court indicate that it would rule on laches before all evidence had been submitted or prior to the case being submitted to the jury.

4. On October 30, 2012, I understood that, after the end of the Court's afternoon session, the Court was going to review Defendants' proffer regarding laches in order to determine whether the Court would grant I/P Engine's Rule 50(a) motion on laches by dismissing Defendants' laches case. I understood that if the Court denied I/P Engine's rule 50(a) motion, I/P Engine would be allowed to rebut Defendants' laches evidence. On October 30, 2012 I did not expect the Court to rule on Defendants' Motion for Judgment as a Matter of Law Of Laches because that motion had not yet been made.

5. Because Defendants' Motion for Judgment as a Matter of Law Of Laches and the associated memorandum were filed at 12:26 AM and 12:28 AM (respectively) on October 31, 2012, I did not see these filing until after returning from the Court on October 31, 2012.

6. Aside from potentially granting I/P Engine's Rule 50(a) motion, I had no notice that the Court would rule on laches prior to the close of evidence at any time prior to when the Court announced its ruling on October 31, 2012.

7. In the Court's chambers on Thursday, October 25, Counsel for Defendants (Mr. Nelson) and Counsel for I/P Engine (me) discussed how to present the deposition testimony of Mr. Blais. Counsel for Defendants (Mr. Nelson) explained in chambers that Defendants wanted to play a portion of Mr. Blais's testimony to the jury, but have the Court separately review other portions of his testimony for laches. Mr. Nelson provided the Court with two separate binders of Mr. Blais' deposition testimony. I explained that I/P Engine had objected to portions of Mr.

Blais's proposed testimony, and provided the Court with a table of I/P Engine's objections. I also offered to the Court my own annotated copy of Mr. Blais's designated deposition testimony, which included handwritten notes of whether the testimony was intended for the jury, or the Court, and also listed I/P Engine's objections. Mr. Nelson reviewed those annotations and agreed that it could be provided to the Court.

8. On the morning of October 26th in chambers, the Court indicated that virtually all of the proffered Blais testimony to which I/P Engine had objected was inadmissible, lacking foundation and containing speculation. The Court invited Mr. Nelson to try to develop a revised set of designations. Instead, Defendants dropped their effort to play any Blais testimony to the jury. On Monday, October 29, Mr. Nelson indicated in chambers that Defendants might simply proffer a subset of the Blais testimony for laches purposes. I noted that such a proffer would be only for the Court, not the jury, and that I/P Engine would respond once it reviewed those new designations.

9. When Defendants provided their 87-page laches proffer to the Court on October 30 it was the first time that I saw it. I did not have an opportunity to review that laches proffer prior to Defendants resting. I understood that, consistent with the conversations with the Court in chambers, I/P Engine would have an opportunity to review and respond to Defendants' laches proffer (including any new Blais designations since the Court had rejected all of the previous designations), since Defendants bore the burden of proof on the laches affirmative defense.

10. During trial, I indicated that I/P Engine would call Mr. Carbonell as a rebuttal witness. My comments regarding rebuttal witnesses were limited to issues for the jury to consider. I understood that laches evidence would be received by the Court outside of the presence of the jury, and that the Court would decide the issue of laches after the jury's verdict.

11. During the charge conference, I/P Engine cited case law showing that laches was a personal defense that was applicable only to Google. The Court agreed that the non-Google defendants could not claim laches, and drafted an instruction to that effect.

I declare under penalty of perjury that the foregoing is true and correct.

Dated: December 18, 2012

By: /s/ Kenneth W. Brothers

Kenneth W. Brothers

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 18th day of December, 2012, the foregoing

**DECLARATION OF KENNETH W. BROTHERS IN SUPPORT OF I/P ENGINE INC.'S
MOTION FOR JUDGMENT UNDER RULE 52(B) AND A NEW TRIAL UNDER RULE**

59, 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

David Bilsker
David Perlson
Quinn Emanuel Urquhart & Sullivan LLP
50 California Street, 22nd Floor
San Francisco, CA 94111
davidbilsker@quinnemanuel.com
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

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

/s/ Jeffrey K. Sherwood _____