

EXHIBIT D

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION**

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

**PLAINTIFF I/P ENGINE, INC.’S FIRST SUPPLEMENTAL RESPONSES AND
OBJECTIONS TO DEFENDANT
TARGET CORP.’S FIRST SET OF INTERROGATORIES**

Pursuant to Rules 26 and 33 of the Federal Rules of Civil Procedure, I/P Engine, Inc. (“I/P Engine”) hereby supplements its responses and objections to Target Corp.’s (“Target”) First Set of Interrogatories (“Interrogatories”). These responses are based on information reasonably available to I/P Engine at the present time. I/P Engine reserves the right to supplement these responses when, and if, additional information becomes available. I/P Engine also reserves the right to object on any ground at any time to such other or supplemental Interrogatories Target may propound involving or relating to the subject matter of these Interrogatories.

GENERAL OBJECTIONS

1. I/P Engine objects to the Interrogatories as overly broad and unduly burdensome to the extent that they purport to require I/P Engine to seek information or documents outside of I/P Engine’s possession, custody, or control as such information is beyond the permissible scope of the Federal Rules of Civil Procedure and applicable law, and would further pose an undue burden on I/P Engine.

2. I/P Engine objects to the Interrogatories to the extent that they seek information that is not relevant to the issues in this litigation or framed by the pleadings, or that is not reasonably calculated to lead to the discovery of relevant or admissible evidence.

3. I/P Engine objects to the Interrogatories to the extent that they seek information that, if furnished, would violate any domestic or judicial order, protective order, privacy interest, contractual obligation, non-disclosure agreement, confidentiality agreement or other such confidentiality obligation vis-à-vis to any third party. Absent third party permission, I/P Engine will not provide such information unless ordered to do so by the Court.

4. I/P Engine objects to the Interrogatories to the extent that they seek trade secrets and/or confidential documents or information. However, subject to the foregoing general objections, I/P Engine will provide the requested information to which Target is entitled in accordance with a Protective Order, when entered.

5. I/P Engine objects to the Interrogatories to the extent that they fail to describe the information requested with particularity, are indefinite as to time and scope, and/or seek information that is not relevant to the claims or defenses of the parties in this litigation.

6. I/P Engine objects to the Interrogatories to the extent that they seek information or documents protected by the attorney-client privilege, the work product doctrine, and/or any other privilege or immunity. I/P Engine will not produce such protected information. Moreover, any inadvertent disclosure of such information, or any disclosure of documents underlying that information, shall not be deemed a waiver of any privilege or immunity. Privileged documents that are otherwise responsive to any interrogatory will be identified on a privilege log in accordance with Rule 26(b)(5).

7. I/P Engine objects to the Interrogatories to the extent that they seek to impose an obligation of a continuing nature beyond that required by Rule 26(e).

8. I/P Engine objects to Target's definition of "'I/P ENGINE,' 'you,' 'your' and 'PLAINTIFF'" (set forth in Paragraph 1) because the phrase "affiliates, parents, divisions, joint ventures, licensees, franchisees, assigns, predecessors and successors in interest" is vague so as to not be clear and comprehensible and also is overly broad because the phrase purports to include independent third parties. In responding to these Interrogatories, I/P Engine will limit its responses to I/P Engine, Inc. Further, with respect to Interrogatories seeking information from individual persons within I/P Engine, I/P Engine will limit its responses to current employees.

9. I/P Engine objects to the Interrogatories as overly broad and unduly burdensome to the extent that they seek information beyond what is available from a reasonable search of I/P Engine's files likely to contain relevant or responsive documents and a reasonable inquiry of I/P Engine's current employees.

10. I/P Engine objects to Target's definition of "'664 PATENT" (set forth in Paragraph 2) because the phrase "all underlying patent applications, all continuations, continuations, continuations-in-part, divisionals, reissues, and any other patent applications in the '664 patent family" is overly broad and unduly burdensome as the phrase purports to include more than the claimed invention of U.S. Patent No. 6,775,664. In responding to these Interrogatories, I/P Engine will limit its responses to the claims of U.S. Patent No. 6,775,664 identified as asserted claims in either I/P Engine's Preliminary Disclosure of Asserted Claims and Pre-Discovery Infringement Contentions, dated November 7, 2011 or November 11, 2011 respectively, I/P Engine's Second Preliminary Disclosure of Asserted Claims and Infringement

Contentions, dated February 17, 2012 or I/P Engine's Third Preliminary Disclosure of Asserted Claims and Infringement Contentions, dated July 2, 2012.

11. I/P Engine objects to Target's definition of "'420 Patent" (set forth in Paragraph 3) because the phrase "all underlying patent applications, all continuations, continuations, continuations-in-part, divisionals, reissues, and any other patent applications in the '420 patent family" is overly broad and unduly burdensome as the phrase purports to include more than the claimed invention of U.S. Patent No. 6,314,420. In responding to these Interrogatories, I/P Engine will limit its responses to the claims of U.S. Patent No. 6,314,420 identified as asserted claims in either I/P Engine's Preliminary Disclosure of Asserted Claims and Pre-Discovery Infringement Contentions, dated November 7, 2011 or November 11, 2011 respectively, or I/P Engine's Second Preliminary Disclosure of Asserted Claims and Infringement Contentions, dated February 17, 2012 or I/P Engine's Third Preliminary Disclosure of Asserted Claims and Infringement Contentions, dated July 2, 2012.

12. I/P Engine objects to Target's definition of "Prior Art" (set forth in Paragraph 10) as overly broad to the extent that it includes "publications, patents, physical devices, prototypes, uses, sales, and offers for sale, and any DOCUMENTS or OTHER ITEMS evidencing any of the foregoing" not cited in Target's response to I/P Engine's Interrogatory No. 4.

13. I/P Engine objects to Target's definition of "ASSERTED CLAIMS" (set forth in Paragraph 17) as overly broad to the extent that it includes more than the claims identified as asserted claims in either I/P Engine's Preliminary Disclosure of Asserted Claims and Pre-Discovery Infringement Contentions, dated November 7, 2011 or November 11, 2011 respectively, I/P Engine's Second Preliminary Disclosure of Asserted Claims and Infringement

Contentions, dated February 17, 2012 or I/P Engine's Third Preliminary Disclosure of Asserted Claims and Infringement Contentions, dated July 2, 2012.

14. I/P Engine objects to Target's definition of "Accused Products" (set forth in Paragraph 18) because the phrase "each and every product that I/P Engine contends is directly infringing (or otherwise falling within, embodying, or meeting), or is inducing or contributing to the infringement" is overly broad so as to demand information that is not relevant to the issues framed by the pleadings.

15. I/P Engine objects to Target's definition of "PREDECESSORS-IN-INTEREST" (set forth in Paragraph 20) because the phrase "all persons or entities other than YOU that have ever held ownership rights to the PATENTS-IN-SUIT" is overly broad to the extent that it purports to only include independent third parties. In responding to these Interrogatories, I/P Engine will limit its responses to the knowledge of I/P Engine, Inc.

SPECIFIC OBJECTIONS

Statements made herein regarding I/P Engine's intention to provide information or documents responsive to any given Interrogatory do not necessarily indicate or imply the existence of any information or documents responsive thereto. Furthermore, any information provided or referred to herein is not deemed to be a waiver of I/P Engine's objections as to the authenticity, competency, relevancy, materiality, privilege or admissibility of evidence in this or any subsequent proceeding or trial in this or any other action for any purpose whatsoever. In addition, I/P Engine reserves the right to supplement or amend its responses to the Interrogatories based upon information, documents, and things it receives during discovery or obtains upon further investigation.

Discovery and trial preparation in this matter have not been completed. I/P Engine is continuing its investigation to obtain information responsive to the Interrogatories. Therefore, all responses will be given without prejudice to I/P Engine's right to introduce documents or information discovered or deemed responsive subsequent to the date of these responses.

In gathering relevant and responsive information, I/P Engine has interpreted the Interrogatories utilizing ordinary meanings of words and has expended reasonable efforts to identify information that appears responsive. To the extent that the Interrogatories purport to seek information other than as so interpreted, I/P Engine objects on the ground that the Interrogatories are vague, ambiguous and overbroad.

I/P Engine's responses to the Interrogatories are without waiver or limitation of I/P Engine's right to object on the grounds of authenticity, competency, relevancy, materiality, privilege, admissibility as evidence for any purpose, or any other grounds to the use of any documents or information in any subsequent proceeding in, or the trial of, this or any other action.

In accordance with an agreement between the parties, I/P Engine may produce responsive, third party documents previously received related to this litigation in response to the Interrogatories. I/P Engine's producing of such documents does not waive or limit I/P Engine's, or any other party's, right to object on the grounds of authenticity, competency, relevancy, materiality, privilege, admissibility as evidence for any purpose, or any other grounds to the use of any documents or information in any subsequent proceeding in, or the trial of, this or any other action. I/P Engine's producing of such documents also does not constitute an admission or representation that the information contained within the documents is known or reasonably

available to I/P Engine. Additionally, I/P Engine does not have a legal right to obtain or demand further documents from any third party, or have an established relationship with any third party.

INTERROGATORIES

INTERROGATORY NO. 1:

For each claim of the PATENTS-IN-SUIT you contend is infringed, identify every one of TARGET's products that you allege infringes each such claim, provided a detailed explanation, with all evidence and reasons, how each product meets each element of every claim, whether such alleged infringement is literal or by equivalents, an explanation of how 35 U.S.C. § 112 ¶ 6 is satisfied for any element you contend is drafted in means plus function form, including without limitation identification of corresponding structures in the patent specification and the ACCUSED PRODUCTS and an explanation of how they are the same or equivalent; an explanation of whether such alleged infringement is direct (i.e., under 35 U.S.C. § 271(a)) or indirect (i.e., under 35 U.S.C. §§ 271 (b) and (c)); and if indirect, an identification of each third party whose alleged infringement is direct, and identify all documents and evidence supporting any such contentions.

RESPONSE:

Plaintiff incorporates its general objections and specific objections. I/P Engine objects to this Interrogatory to the extent it seeks information that is protected by the attorney-client privilege, the work product doctrine, Rule 26(b)(4)(B) immunity, or any other applicable privilege or immunity. I/P Engine further objects to this Interrogatory as overly burdensome to the extent that it is duplicative of the expert opinion evidence served in this litigation, which has been provided in accordance with the Federal Rules of Civil Procedure, the Local Rules of the

Court, or the Court's scheduling orders. Subject to and without waiving the foregoing objections, I/P Engine responds:

I/P Engine served its Preliminary Disclosures of Asserted Claims and Pre-Discovery Infringement Contentions as to Google, Inc. on November 7, 2011 and its Preliminary Disclosure of Asserted Claims and Pre-Discovery Infringement Contention as to Target Corporation's Use of Google Adwords and Google Adsense for Search on November 11, 2011. I/P Engine also served its Second Preliminary Disclosure of Asserted Claims and Infringement Contentions as to Target Corporation's Use of Google Adwords and Google Adsense for Search on February 17, 2012 and its Third Preliminary Disclosure of Asserted Claims and Infringement Contentions as to Target Corporation's Use of Google Adwords and Google Adsense for Search on July 2, 2012. I/P Engine further served the Expert Report of Ophir Frieder on Infringement of U.S. Patent Nos. 6,314,420 and 6,775,664 on July, 25, 2012. I/P Engine hereby incorporates those contentions and disclosures by reference and submits that its response to this Interrogatory may be derived from those disclosures and contentions. I/P Engine's contentions and the Expert Report of Ophir Frieder are based on the knowledge known at this time, and are subject to change based on ongoing discovery, additional evidence, and/or further investigation. I/P Engine and its expert Dr. Frieder reserve the right to amend and/or supplement the infringement contentions or the expert report if and when further information becomes available.

FIRST SUPPLEMENTAL RESPONSE:

Plaintiff incorporates its general objections and specific objections. I/P Engine objects to this Interrogatory to the extent it seeks information that is protected by the attorney-client privilege, the work product doctrine, Rule 26(b)(4)(B) immunity, or any other applicable privilege or immunity. I/P Engine further objects to this Interrogatory as overly burdensome to

the extent that it is duplicative of the expert opinion evidence served in this litigation, which has been provided in accordance with the Federal Rules of Civil Procedure, the Local Rules of the Court, or the Court's scheduling orders. Subject to and without waiving the foregoing objections, I/P Engine responds:

I/P Engine served its Preliminary Disclosures of Asserted Claims and Pre-Discovery Infringement Contentions as to Google, Inc. on November 7, 2011 and its Preliminary Disclosure of Asserted Claims and Pre-Discovery Infringement Contention as to Target Corporation's Use of Google Adwords and Google Adsense for Search on November 11, 2011. I/P Engine also served its Second Preliminary Disclosure of Asserted Claims and Infringement Contentions as to Target Corporation's Use of Google Adwords and Google Adsense for Search on February 17, 2012 and its Third Preliminary Disclosure of Asserted Claims and Infringement Contentions as to Target Corporation's Use of Google Adwords and Google Adsense for Search on July 2, 2012. I/P Engine further served the Expert Report of Ophir Frieder on Infringement of U.S. Patent Nos. 6,314,420 and 6,775,664 on July, 25, 2012. I/P Engine further served the Updated Expert Report of Ophir Frieder on Infringement of U.S. Patent Nos. 6,314,420 and 6,775,664 on September 4, 2012. I/P Engine hereby incorporates those contentions and disclosures by reference and submits that its response to this Interrogatory may be derived from those disclosures and contentions. I/P Engine's contentions and the Expert Report of Ophir Frieder are based on the knowledge known at this time, and are subject to change based on ongoing discovery, additional evidence, and/or further investigation. I/P Engine and its expert Dr. Frieder reserve the right to amend and/or supplement the infringement contentions or the expert report if and when further information becomes available.

INTERROGATORY NO. 2:

If you contend that you are entitled to any monetary recovery as a result of alleged INFRINGEMENT of the PATENTS-IN-SUIT by TARGET, state whether you contend that you are entitled to lost profits or a reasonable royalty, and state all facts, evidence, and reasons upon which you rely in support of your contention, such that if you contend you are entitled to an award of lost profits damages, you identify each of your products you allege falls within the scope of any claim of the PATENTS-IN-SUIT and state the total sales annually in units and dollars from its introduction to the present, and if you contend you are entitled to an award of reasonable royalty damages, state what you assert to be a reasonable royalty to be paid by TARGET under 35 U.S.C. Section 284, including the complete factual bases on which you base your calculation of such royalty rate.

RESPONSE:

Plaintiff incorporates its general objections and specific objections. I/P Engine objects to this Interrogatory to the extent it seeks information that is protected by the attorney-client privilege, the work product doctrine, Rule 26(b)(4)(B) immunity, or any other applicable privilege or immunity. I/P Engine further objects to this Interrogatory as overly burdensome to the extent that it is duplicative of the expert opinion evidence served in this litigation, which has been provided in accordance with the Federal Rules of Civil Procedure, the Local Rules of the Court, or the Court's scheduling orders. Subject to and without waiving the foregoing objections, I/P Engine responds:

I/P Engine seeks compensatory damages, past and future, amounting to no less than reasonable royalties and prejudgment interest to compensate it for Target's infringement. I/P Engine served the Expert Report of Dr. Stephen L. Becker, Ph.D. on July 25, 2012. I/P Engine

hereby incorporates this disclosure by reference and submits that its response to this Interrogatory may be further derived from this disclosure. The Expert Report of Dr. Stephen L. Becker, Ph.D. is based on the knowledge known at this time, and is subject to change based on ongoing discovery, additional evidence, and/or further investigation. I/P Engine and its expert Dr. Becker reserve the right to amend and/or supplement the expert report if and when further information becomes available.

INTERROGATORY NO. 3:

In reference to TARGET's affirmative defense of laches, state whether YOU contend that any delay by YOU or the PREDECESSORS-IN-INTEREST in asserting the PATENTS-IN-SUIT against TARGET was reasonable or excusable, and for any such delay that YOU contend was reasonable or excusable, IDENTIFY the length of and all reasons or excuses for the delay, all facts that support any contention that this delay was reasonable or excusable, all DOCUMENTS that support any such contention, and all PERSONS with knowledge of the facts or the DOCUMENTS that support such contention.

RESPONSE:

Plaintiff incorporates its general objections and specific objections. I/P Engine objects to the premise of this Interrogatory, in that it assumes an unsupported legal conclusion, e.g., that there was a legally cognizable "delay . . . in asserting the PATENTS-IN-SUIT". I/P Engine further objects to this Interrogatory to the extent it seeks information that is protected by the attorney-client privilege, the work product doctrine, Rule 26(b)(4)(B) immunity, or any other applicable privilege or immunity. I/P Engine further objects to this Interrogatory to the extent that it seeks a legal conclusion or information not in I/P Engine's possession, custody or control. I/P Engine further objects to this Interrogatory as vague and overly burdensome, particularly to

the extent that it seeks whether I/P Engine contends that any delay by “PREDECESSORS-IN-INTEREST in asserting the PATENTS-IN-SUIT against TARGET was reasonable or excusable.” I/P Engine further objects to this Interrogatory as overly burdensome, particularly to the extent that Target has not set forth any facts as to how it has suffered any material prejudice as a result of any alleged delay, of which the burden of proof lies with Target. Subject to and without waiving the foregoing objections, I/P Engine responds:

I/P Engine contends that it did not unreasonably delay in asserting the patents-in-suit against Target or any other defendant. With respect to the alleged presumption of laches, it must be shown that the “patentee delayed filing suit for more than six years after actual or constructive knowledge of the defendant’s alleged infringing activity.” *Aukerman Co. v. R.L. Chaides Const. Co.*, 960 F.2d 1020, 1035-36 (Fed. Cir. 1992). Neither Target, nor any other defendant, has set forth any evidence showing that any entity knew or should have known of Defendants’ infringing activity for at least six years prior to filing the present litigation. To the extent Target relies upon Google’s laches defense as it is Google’s accused product in question, in Google’s response to I/P Engine’s Interrogatory No. 13 to Google, Google cites two unrelated documents from third parties as supposed evidence of “pervasive, open, notorious activities” by Google. The documents contain third party statements speculating that “Google apparently filters some AdWords”, and do not even appear to describe the “Quality Score” or “pCTR” that I/P Engine has accused of infringing its patents in this litigation. To the extent the documents can be said to describe anything, the documents appear to refer to prior, non-accused iterations of the AdWords system. These speculative documents do not reflect “pervasive, open, notorious activities” that could trigger a duty to investigate. This “evidence” is not sufficient to create a

presumption of laches. Absent a showing that the rebuttable presumption should attach, there is no presumption of laches for I/P Engine to rebut.

Further, Lycos was enforcing patents that are related to the patents-in-suit against others from at least January 2007 to January 2011. *See* Confidential Videotaped Deposition of Mark Blais, July 31, 2012, pages 53-94; *see also* LYCOS0000001-25; *see also* Complaint, *Lycos, Inc. v. Tivo, Inc. et al.*, No. 2:07-cv-3 (E. D. Va. Jan. 10, 2007), D.I. 1; ORDER Granting MOTION to Transfer Venue, *Lycos, Inc. v. Tivo, Inc. et al.*, No. 2:07-cv-3 (E. D. Va. Aug. 8, 2007), D.I. 37; Case Transferred In-District Transfer, *Lycos, Inc. v. Tivo, Inc. et al.*, No. 1:07-cv-11469(MLW) (D. Mass. Aug. 9, 2007), D.I. 38; Order Dismissing Case, *Lycos, Inc. v. Tivo, Inc. et al.*, No. 1:07-cv-11469(MLW) (D. Mass. Jan. 10, 2011), D.I. 224. Therefore, the application of laches is suspended for at least that time period. *Aukerman*, 960 F.2d at 1033 (“A court must also consider and weigh any justification offered by the plaintiff for its delay. Excuses which have been recognized in some instances . . . include: litigation . . .”).

Alex Berger of I/P Engine, Mark Blais of Lycos, Don Kosak and Ken Lang, agents, executives and employees of Target and Google have knowledge of the facts supporting the above contentions.

INTERROGATORY NO. 4:

In reference to TARGET’s affirmative defense of laches, state whether YOU contend that TARGET did not suffer prejudice as a result of the delay by YOU or the PREDECESSORS-IN-INTEREST in asserting the PATENTS-IN-SUIT against TARGET, and IDENTIFY all facts that support any contention that TARGET did not suffer prejudice, all DOCUMENTS that support any such contention, and all PERSONS with knowledge of the facts or the DOCUMENTS that support such contention.

RESPONSE:

Plaintiff incorporates its general objections and specific objections. I/P Engine objects to the premise of this Interrogatory, in that it assumes an unsupported legal conclusion, e.g., that there was a legally cognizable “delay . . . in asserting the PATENTS-IN-SUIT”. I/P Engine further objects to this Interrogatory to the extent it seeks information that is protected by the attorney-client privilege, the work product doctrine, Rule 26(b)(4)(B) immunity, or any other applicable privilege or immunity. I/P Engine further objects to this Interrogatory to the extent that it seeks a legal conclusion or information not in I/P Engine’s possession, custody or control. I/P Engine further objects to this Interrogatory as vague and overly burdensome, particularly to the extent that it seeks whether I/P Engine contends that “TARGET did not suffer prejudice as a result of the delay by...the PREDECESSORS-IN-INTEREST in asserting the PATENTS-IN-SUIT against TARGET.” I/P Engine further objects to this Interrogatory as overly burdensome, particularly to the extent that Target has not set forth any facts as to how it has suffered prejudice as a result of any alleged delay. I/P Engine further objects to this Interrogatory as overly burdensome, particularly to the extent that Target has not set forth any facts as to how it has suffered any material prejudice as a result of any alleged delay, of which the burden of proof lies with Target. Subject to and without waiving the foregoing objections, I/P Engine responds:

To prevail on a defense of laches, Target, or any of the other defendants, must prove that: (1) I/P Engine delayed filing suit for an unreasonable and inexcusable length of time from the time it knew or reasonably should have known of its claim against Target, or any of the other defendants, and (2) the delay operated to the prejudice or injury of Target, or any of the other defendants. Target and, based on its response to I/P Engine’s Interrogatory No. 13 to Google, Google have not alleged any facts that any alleged delay operated to the prejudice or injury of

Target, or any other defendant. Consequently, there is no evidence for I/P Engine to rebut as to whether Target, or any of the other defendants, suffered any prejudice.

With respect to the alleged presumption of laches, it must be shown that the “patentee delayed filing suit for more than six years after actual or constructive knowledge of the defendant’s alleged infringing activity.” *Aukerman Co. v. R.L. Chaides Const. Co.*, 960 F.2d 1020, 1035-36 (Fed. Cir. 1992). Neither Target, nor any other defendant, have set forth any evidence showing that any entity knew or should have known of Defendants’ infringing activity for at least six years prior to filing the present litigation. To the extent Target relies upon Google’s laches defense as it is Google’s accused product in question, in Google’s response to I/P Engine’s Interrogatory No. 13 to Google, Google cites two unrelated documents from third parties as supposed evidence of “pervasive, open, notorious activities” by Google. The documents contain third party statements speculating that “Google apparently filters some AdWords”, and do not even appear to describe the “Quality Score” or “pCTR” that I/P Engine has accused of infringing its patents in this litigation. To the extent the documents can be said to describe anything, the documents appear to refer to prior, non-accused iterations of the AdWords system. These speculative documents do not reflect “pervasive, open, notorious activities” that could trigger a duty to investigate. This “evidence” is not sufficient to create a presumption of laches. Absent a showing that the rebuttable presumption should attach, there is no presumption of laches for I/P Engine to rebut.

Further, Lycos was enforcing patents that are related to the patents-in-suit against others from at least January 2007 to January 2011. *See Confidential Videotaped Deposition of Mark Blais*, July 31, 2012, pages 53-94; *see also* LYCOS0000001-25; *see also* Complaint, *Lycos, Inc. v. Tivo, Inc. et al.*, No. 2:07-cv-3 (E. D. Va. Jan. 10, 2007), D.I. 1; ORDER Granting MOTION

to Transfer Venue, *Lycos, Inc. v. Tivo, Inc. et al.*, No. 2:07-cv-3 (E. D. Va. Aug. 8, 2007), D.I. 37; Case Transferred In-District Transfer, *Lycos, Inc. v. Tivo, Inc. et al.*, No. 1:07-cv-11469(MLW) (D. Mass. Aug. 9, 2007), D.I. 38; Order Dismissing Case, *Lycos, Inc. v. Tivo, Inc. et al.*, No. 1:07-cv-11469(MLW) (D. Mass. Jan. 10, 2011), D.I. 224. Therefore, the application of laches is suspended for at least that time period. *Aukerman*, 960 F.2d at 1033 (“A court must also consider and weigh any justification offered by the plaintiff for its delay. Excuses which have been recognized in some instances . . . include: litigation . . .”).

To the extent that a presumption of laches exists, which again, neither Target nor any other defendant has shown, the presumption may be eliminated by I/P Engine with “an offer of evidence sufficient to place the matters of defense prejudice and economic prejudice genuinely in issue.” *Id.* at 1037. This means that the “presumption of laches plays no role in the ultimate decision.” *Id.* Target has not been prejudiced.

Material prejudice to adverse parties resulting from the plaintiff’s delay is essential to the laches defense. Such prejudice may be either economic or evidentiary. *Id.* at 1033 (citing *Cornetta v. United States*, 851 F.2d 1372, 1378 (Fed. Cir. 1988)). Evidentiary prejudice arises by reason of a defendant’s inability to present a full and fair defense on the merits due to the loss of records, the death of a witness, or the unreliability of memories of long past events, thereby undermining the court’s ability to judge the facts. *Id.* (citing *Barrois v. Nelda Faye, Inc.*, 597 F.2d 881, 885 (5th Cir. 1979), *Smith v. Sinclair Ref. Co.*, 257 F.2d 328, 330 (2d Cir. 1958), *Gillons v. Shell Co.*, 86 F.2d 600, 608-09 (9th Cir. 1936), cert. denied, 302 U.S. 689, 58 S.Ct. 9, 82 L.Ed. 532 (1937) and VI Restatement Law of Torts § 939 (1936)). Economic prejudice arises where a defendant and possibly others will suffer the loss of monetary investments or incur damages which likely would have been prevented by earlier suit. *Id.* (citing *A.C. Aukerman Co.*

v. Miller Formless Co., 693 F.2d 697, 701 (7th Cir. 1982), *American Home Prods. Corp. v. Lockwood Mfg. Co.*, 483 F.2d 1120, 1124 (6th Cir. 1973) (opinion by Judge Stevens, later Justice Stevens), cert. denied, 414 U.S. 1158, 94 S.Ct. 917, 39 L.Ed.2d 110 (1974) and *Yates v. Smith*, 271 F. 27, 31 (D.N.J. 1920)). Such damages or monetary losses are not merely those attributable to a finding of liability for infringement. *Id.* (citing *Jenn-Air Corp. v. Penn Ventilator Co.*, 464 F.2d 48, 49-50 (3d Cir. 1972)). Economic prejudice would then arise in every suit. *Id.* (citing *Cornetta v. United States*, 851 F.2d 1372, 1380-82 (Fed. Cir. 1988)). Courts must look for a change in the economic position of the alleged infringer during the period of delay. *Id.* (citing *Lake Caryonah Improvement Ass'n. v. Pulte Home Corp.*, 903 F.2d 505, 510 (7th Cir. 1990)). “Economic prejudice is not a simple concept but rather is likely to be a slippery issue to resolve.” *Id.* (citing Chisum, § 19.05[2][c]).

Neither Target, nor any other defendant has claimed economic prejudice, nor has Target, or any other defendant suffered economic prejudice resulting from I/P Engine’s alleged delay. *See e.g.*, G-IPE-0218431-448; G-IPE-0218778-781; G-IPE-0867397; G-IPE-0867398; G-IPE-0867399; G-IPE-0867400; G-IPE-0867401-403; G-IPE-0867404-406; G-IPE-0867407-409; G-IPE-0867410-412; TAR-IPE-0000504; *see also* Confidential Videotaped Deposition of Sanja Datta, June 12, 2012, at pages 21-60, 86-101; Confidential Videotaped Deposition of James Christopherson, June 20, 2012, at pages 58-65; *see also* Expert Report of Stephen L. Becker, Ph.D., July 25, 2012. Further, neither Target, nor any other defendant has claimed evidentiary prejudice, nor has Target, or any other defendant suffered any evidentiary prejudice because of I/P Engine’s alleged delay. *See e.g.*, Confidential Videotaped Deposition of Ken Lang, May 17, 2012; Confidential Videotaped Deposition Donald Kosak, May 31, 2012; Confidential Videotaped Deposition of Jonathan Alferness, June 21, 2012; Rough Draft Transcript of

Bartholomew Furrow, August 3, 2012; Confidential Videotaped Deposition of James Christopherson, June 20, 2012.

Alex Berger of I/P Engine, Mark Blais of Lycos, Don Kosak and Ken Lang, agents, executives and employees of Target and Google have knowledge of the facts supporting the above contentions.

Dated: September 4, 2012

By: _____ /s/ Charles J. Monterio, Jr.
Jeffrey K. Sherwood
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

Donald C. Schultz
W. Ryan Snow
CRENSHAW, WARE & MARTIN PLC
150 West Main Street
Norfolk, VA 23510
Telephone: (757) 623-3000
Facsimile: (757) 623-5735

Counsel for Plaintiff I/P Engine, Inc.

CERTIFICATE OF SERVICE

I hereby certify that on this 4th day of September, 2012, the foregoing **PLAINTIFF I/P ENGINE, INC.'S FIRST SUPPLEMENTAL RESPONSES AND OBJECTIONS TO DEFENDANT TARGET CORP.'S FIRST SET OF INTERROGATORIES**, was served via email, 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/ Armands Chagnon
Senior Paralegal