

When a Troll Comes Knocking

September 14, 2023



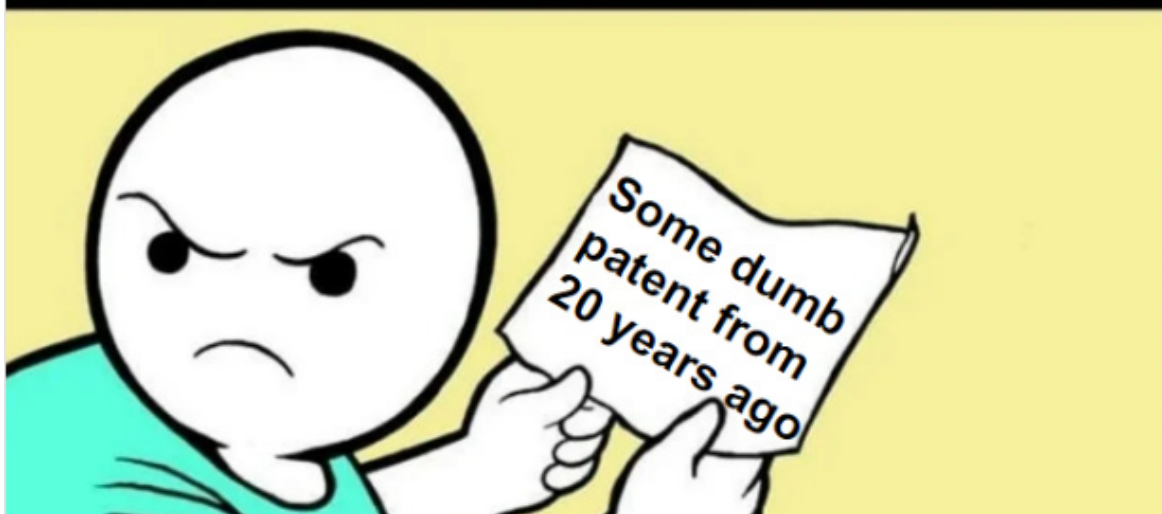
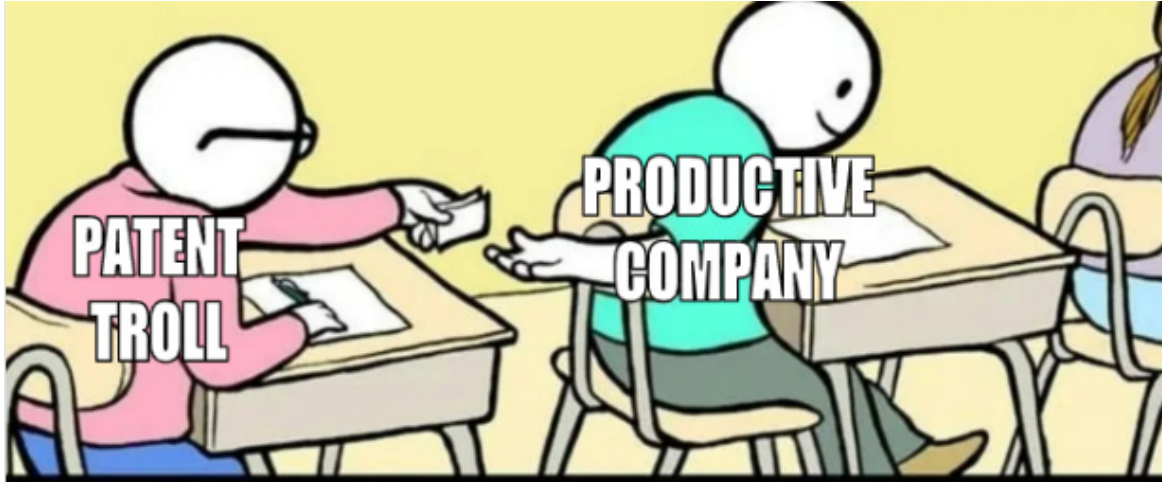
David Hoffman
Fish



Jeremy Jones
PayPal



Michael Headley
Fish



Why Should I Care?

- Since May, an NPE named Patent Armory has filed 69 patent infringement cases.
- Who's who of Bay Area companies, but that only goes so far:

| IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF DELAWARE | |
|---|---------------------|
| Patent Armory Inc., | Case No. |
| Plaintiff, | Patent Case |
| v. | Jury Trial Demanded |
| Chili's, Inc., | |
| Defendant. | |
| COMPLAINT FOR PATENT INFRINGEMENT | |

No one is immune

(12) **United States Patent**
Wu et al.

(10) **Patent No.:** **US 7,269,253 B1**
(45) **Date of Patent:** ***Sep. 11, 2007**

(54) **TELEPHONY CONTROL SYSTEM WITH INTELLIGENT CALL ROUTING**

(76) Inventors: **Wai Wu**, 238 N. Delaware Ave., Massapequa, NY (US) 11758; **Toby Heller**, 235 Parkside Dr., Roslyn Heights, NY (US) 11577; **Steven M. Hoffberg**, 29 Buckout Rd., West Harrison, NY (US) 10604

| | | |
|-------------|---------|-------------------|
| 4,737,983 A | 4/1988 | Frauenthal et al. |
| 4,757,529 A | 7/1988 | Glapa et al. |
| 4,768,221 A | 8/1988 | Green et al. |
| 4,797,911 A | 1/1989 | Szlam et al. |
| 4,807,279 A | 2/1989 | McClure et al. |
| 4,852,149 A | 7/1989 | Zwick et al. |
| 4,866,754 A | 9/1989 | Hashimoto |
| 4,878,243 A | 10/1989 | Hashimoto |
| 4,893,301 A | 1/1990 | Andrews et al. |
| 4,894,857 A | 1/1990 | Szlam et al. |
| 4,934,501 A | 5/1990 | Changman et al. |

No one is immune

Infringement Claim Chart for U.S. Pat. No. US7269253B1 v. Chili's ("Defendant")

| Claim 10 | Evidence |
|--|---|
| 10. A communication method comprising: | <p>The Chili's Customer Service performs a method for communicating in a communication network.</p> <p>For Example, Chili's Customer Service performs a method of communicating by establishing, over a communication network, a call between callers with a request to the appropriate department for assistance.</p> <div data-bbox="554 760 1549 1334" style="border: 2px solid green; padding: 10px;"><p style="text-align: center;">Comments or Questions</p><p><small>Please submit the form below and a member of our Guest Engagement Team will respond as quickly as possible.</small></p><p><small>(Any information you provide is handled per our privacy policy).</small></p><p><small>*COMMENTS: * REQUIRED INFO</small></p><div style="border: 1px solid gray; height: 60px; width: 100%;"></div><p style="text-align: right;"><small>600 characters remaining</small></p><p><small>*TOPIC:</small></p><div style="border: 1px solid red; padding: 2px;"><p style="text-align: center;"><small>—Select Topic—</small></p></div><p><small>Please select a topic:</small></p><p><small>*RESTAURANT:</small></p><div style="border: 1px solid gray; padding: 2px;"><p><small>Search by City, State, ZIP OR Delivery Address</small></p></div><div style="border: 1px solid gray; padding: 2px;"><p style="text-align: center;"><small>—Select a Chili's Location—</small></p></div></div> <p>Source: https://chilis.com/frequently-asked-questions</p> |



How it Starts

You receive a letter

ALOFT MEDIA, LLC

211 W TYLER ST SUITE C
LONGVIEW, TX 75601-6398

RECEIVED
2017

2017

Re: Aloft Media, LLC Patent Portfolio
Notice of Possible Patent Infringement and Offer of License

Dear Ms.

Our company, Aloft Media, LLC ("Aloft") is the owner of full right title and interest in a portfolio of patents that we believe may be relevant to your business. Our active patent portfolio includes fifteen issued U.S. Patents and thirteen applications²⁹.

It has come to our attention that your company may be presently practicing, and potentially infringing, at least one of the patented inventions. In disclosure of the basis for our conclusions, and for your examination and comment, I am attaching to this letter the enclosed Claim Chart for your review.³⁰ This Claim Chart is not exhaustive of your possible infringements, but rather they are exemplary of patent claims we believe may be presently infringed, based on our current due diligence research.

We urge you to consult with your counsel and technical staff regarding the correctness of our analysis and conclusions. These claim charts are based on our independent investigations based on publicly accessible information. We are very open to receive and discuss with you any additional information you may believe to be relevant.

If you have evidence or arguments that your company's practices do not fall within any of the patent portfolio's claims, or if you believe your products or technology is already licensed through Aloft's existing business relationships, please let us know. We consider this letter as the beginning of a two-way exchange of information – a notice of our conclusions, but also an invitation to a discussion with you if you believe our conclusions are inaccurate.

We are contacting and offering licenses to you and other companies like yours that we believe may be infringing one or more claims of the patents in the portfolio. We are writing to you at this time to initiate a mutually beneficial and amicable business discussion. Some of these patents have already been licensed to over 35 large international corporations, and we trust you will want to join them.

²⁹ A complete listing of Aloft Media, LLC's patents and applications, including provisional and abandoned applications and expired patents, is attached to this letter as Exhibit 1.

³⁰ The enclosed Claim Charts are designated as CONFIDENTIAL pursuant to Federal Rule of Evidence 408 and PRIVILEGED – all Privileges are asserted including Attorney Client and Attorney Work Product Privileges. The Claim Charts are DRAFTS ONLY, based on the best available information and reasonable conclusions drawn therefrom, and the Claim Charts are subject to revision at any time.

Even if you are not presently practicing any of the inventions in the portfolio, we believe you will find them to be useful and valuable inventions and that can keep you competitive with other companies in your field. However, if you agree with our conclusion (of the relevancy of these patent assets to your company), then this is an opportunity to amicably resolve any past infringement and clear the path for your future, properly licensed, development. Finally, any patent in the portfolio that you are not presently practicing are offered to you for licensing now, such that you will have confidence that your future technology will not necessitate the negotiation of additional licenses.

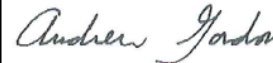
George Street Partners ("GSP") is our authorized licensing agent. Todd Schmidt, an agent of GSP, will be contacting you within the next few days regarding this licensing opportunity. Aloft Media, LLC, through GSP, is presently willing discuss licensing terms at preferential rates for your prompt resolution of this matter, thereby avoiding costly legal entanglements for both sides. If you have any immediate questions, please contact Todd Schmidt directly. Their contact information is below.

Todd Schmidt
Agent for Aloft Media, LLC
todd@georgesps.com
Work #: 317.344.0721
Cell #: 773.575.3964

In the interest of enabling open and frank discussion, a standard Mutual Non-Disclosure Agreement ("NDA") is enclosed or, if your company has a preferred NDA format, we are willing to consider your agreement form.

We look forward to working with you and resolving this matter quickly and to our mutual benefit.

Sincerely,



Andrew Gordon, Manager

Or, you get sued

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY**

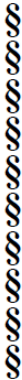
SYMBOLOGY INNOVATIONS, LLC

Plaintiff,

v.

FEDERAL EXPRESS CORPORATION

Defendant.



CIVIL ACTION NO.

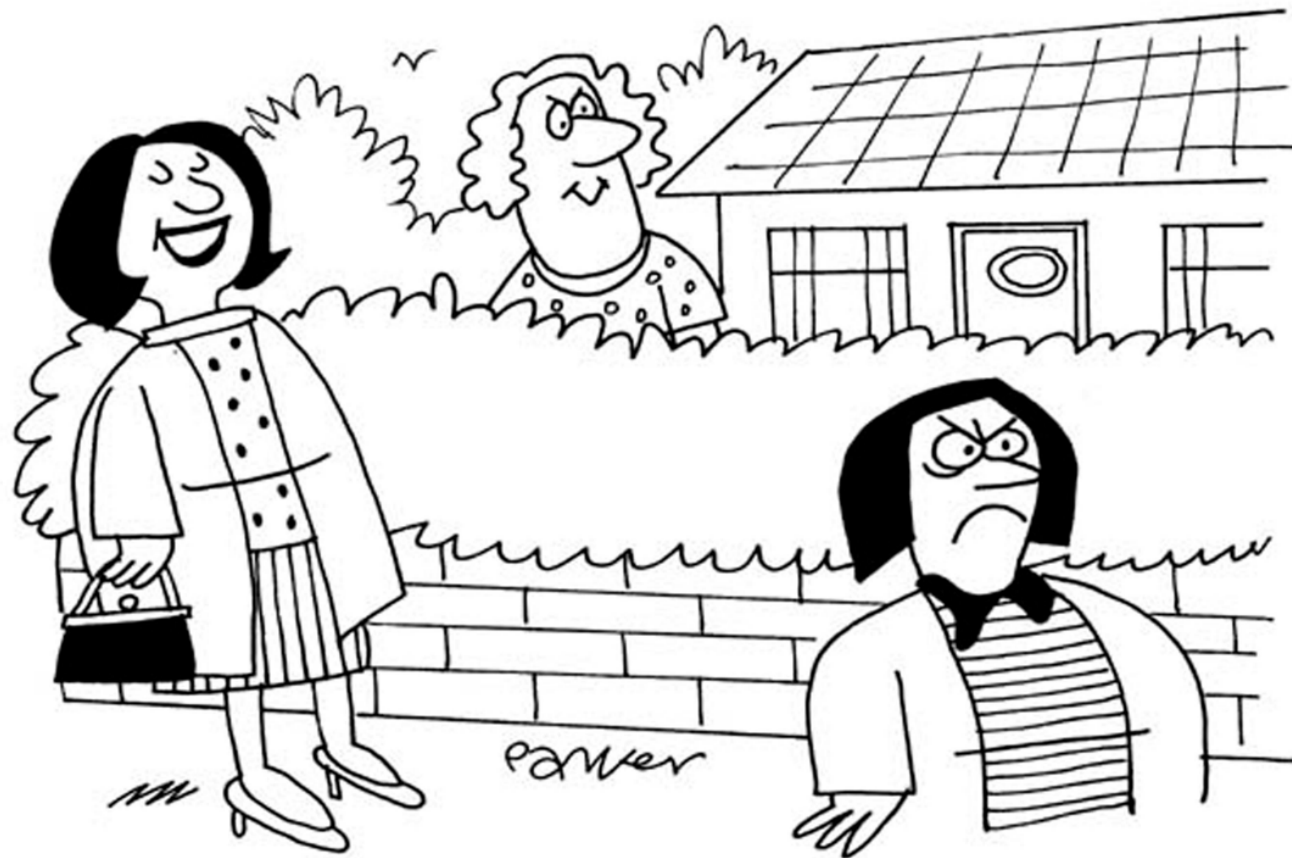
JURY TRIAL DEMANDED

COMPLAINT FOR INFRINGEMENT OF PATENT

COMES NOW, Plaintiff Symbology Innovations, LLC (“Symbology” or Plaintiff), through the undersigned attorneys, and respectfully alleges, states, and prays as follows:



You receive a letter



“There goes a lady of letters - poison pen mainly.”

Huh? Who is this?

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LONGVIEW, TX 75601-6398

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ALOFT MEDIA

[Home](#) [Portfolios](#) [Background](#) [Contact](#)

Aloft Media, LLC is an intellectual property licensing company. Its patent portfolio includes approximately 18 granted and pending patents. The technologies covered by the portfolio relate to website technology, online messaging, and mobile media services. All of the patents in the Aloft Media, LLC portfolio are available for licensing on reasonable terms.



What Do They Want?

It has come to our attention that your company **may be presently practicing**, and potentially infringing, at least one of the patented inventions. In disclosure of the basis for our conclusions, and for your examination and comment, I am attaching to this letter the enclosed Claim Chart for your review.³⁰ **This Claim Chart is not exhaustive of your possible infringements**, but rather they are exemplary of patent claims we believe may be presently infringed, based on our current due diligence research.

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If you have evidence or arguments that your company's practices do not fall within any of the patent portfolio's claims, or if you believe your products or technology is already licensed through Aloft's existing business relationships, please let us know. We consider this letter as the beginning of a two-way exchange of information – a notice of our conclusions, but also an invitation to a discussion with you if you believe our conclusions are inaccurate.

You Infringe

Tell us why you think you do not

They say we infringe...

- First Priority...Think Like a Lawyer
 - Who knows about the letter?
 - What are they doing to investigate?
 - Who is involved?
- Stop any and all discussions not involving you
- Define the circle
 - At least one technical person (if you are going to investigate)
- Consider outside counsel involvement

They say we infringe...

- What is their evidence?
 - Do they have a “claim chart”?
 - Why does it matter?
 - They don’t
 - Oh no, they have a claim chart, that cannot be good, right?

9. A system, comprising:
at least one component configured for:
identifying a first content portion associated with a first content source;
identifying a second content portion associated with a second content source;
identifying a third content portion associated with a third content source;
processing the first content portion associated with the first content source, the second content portion associated with the second content source, and the third content portion associated with the third content source;
assembling the first content portion associated with the first content source, the second content portion associated with the second content source, and the third content portion associated with the third content source, utilizing at least one web page;
publishing content including the first content portion associated with the first content source, the second content portion associated with the second content source, and the third content portion associated with the third content source, utilizing the at least one web page;
wherein the system is operable to publish the content to a plurality of first users associated with a first on-line community, by a first web publisher;
receiving, by the first web publisher, different user textual inputs associated with at least part of the published content from the first users associated with the first on-line community;
policing, by the first web publisher, the different user textual inputs associated with the at least part of the published content from the first users associated with the first on-line community;
receiving, by the first web publisher, ratings from the first users associated with the first on-line community;
wherein operation of the system results in communication of at least a first portion of the content for publishing by a second web publisher that is different from the first web publisher by transfer of the at least first portion of the content, for publishing by the second web publisher to thereby allow access to the at least first portion of the content by second users associated with a second on-line community that is different from the first on-line community;
wherein the operation of the system further results in communication of at least one first user textual input with the first portion of the content by transfer of the at least one first user textual input with the first portion of the content, for publishing by the second web publisher to thereby allow access to the at least one first user textual input with the first portion of the content by the second users associated with the second on-line community that is different from the first on-line community; and
wherein the operation of the system further results in communication of at least a second portion of the content for publishing by a third web publisher that is

different from the first web publisher and different from the second web publisher by transfer of the at least second portion of the content, for publishing by the third web publisher to thereby allow access to the at least second portion of the content by third users associated with a third on-line community that is different from the first on-line community and different from the second on-line community;
wherein the operation of the system further results in communication of at least one second user textual input with the second portion of the content by transfer of the at least one second user textual input with the second portion of the content, for publishing by the third web publisher to thereby allow access to the at least one second user textual input with the second portion of the content by the third users associated with the third on-line community that is different from the first on-line community and different from the second on-line community.

They say we infringe...

- Identify products accused of infringement
 - Are they your products?
 - Customer's product?
 - Multiple subsidiaries?
 - US sales v. Foreign?
- Find subject matter experts at the company
 - Person that you would feel comfortable being deposed
 - Level-headed and able to follow instructions
- Assess exposure
- Document holds – yes or no

What do they want?

- Money, but most of them don't say that exactly

We are contacting and offering licenses to you and other companies like yours that we believe may be infringing one or more claims of the patents in the portfolio. We are writing to you at this time to initiate a mutually beneficial and amicable business discussion. Some of these patents have already been licensed to over 35 large international corporations, and we trust you will want to join them.

- Is this really a “business discussion?”
- How to know if there is a real business component?

Should you engage?

- Factors in Favor
 - Possible delay / forestall litigation
 - Gather additional information
 - Possibility to convince them to go away
- Factors Against
 - Squeaky wheel phenomenon
 - More engagement = more willful
 - More information could help the NPE

Should you license now?

- Factors in Favor
 - Possible saving in litigation costs
 - Possible lower cost license
 - Possible “peace”
- Factors Against
 - You have to pay for “nothing”
 - Reputation in NPE industry as an “easy mark”
 - Potentially Justice and Fairness

Should You Be Aggressive?

- NPE letters are often sufficient to trigger declaratory judgment (DJ) jurisdiction.
 - Can respond to the letter by filing suit for non-infringement or invalidity.
 - Avoids popular NPE forums like EDTX or WDTX.
 - Forces NPE to defend its patent and assertions
 - Can result in NPE giving up and providing a free or very cheap license.
- However, most companies want to avoid litigation
 - NPE likely to counterclaim for infringement
 - Usually more expensive than licensing from the NPE
 - Guaranteed outside counsel legal spend
 - What is ROI from being aggressive?

Agreements with NPEs

Ask for everything possible

- Cover entire patent portfolio, current and future-acquired
- Cover principals and managing entities
 - **It is unlikely, but it has happened**
- Protect customers
- Protect those in the supply chain

Be careful with tricky provisions

- Definitions of “Affiliate” and “Control”
- Scope of “Licensed Patents” or “Covenant Not To Sue”
- Terms of dismissal (with prejudice vs without prejudice)
- Confidentiality terms



Trends in NPE Litigation



PATENT TROLL

Nonpracticing Entity
(It doesn't actually make anything)



The troll's
primary weapon
is the threat of
massive legal fees.

You don't always get a letter

- Many NPEs don't bother with the letters; they are not required.
- High volume complaint filers
- Cost tilts heavily towards Defendant for first year of NPE litigation

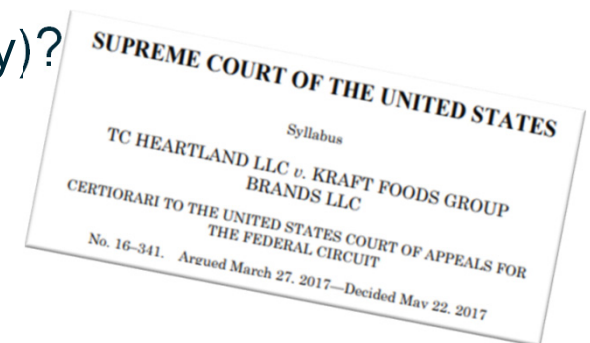
A Typical NPE Complaint

32. For example, on information and belief, Defendant has at least internally tested the functionality of its QR codes in connection with its promotional material. On information and belief, Defendant has captured a digital image of a QR code associated with promotional material, an example of which is shown below.



Responding to NPEs

- Did they sue the right party?
 - Non-operating entity, subsidiary, etc.?
 - Proper venue (for either the named or proper party)?
- Does the accused product exist?
 - NPEs have sued over
 - **Mockup materials online**
 - **Brochures boasting prototypes that were never built**
 - **Exaggerations in online resumes**



Responding to NPEs

- Can a declaration be procured to support dismissal?
 - Low volume of sales
 - Inescapable non-infringement position
 - Accused product does not operate as alleged in the complaint
 - Do not focus on claim construction issues
 - Invalidity arguments work less well for this
 - Exception: client's own prior art
- Are the claims susceptible to Section 101?
 - Be well aware of *Berkheimer*, *Aatrix*, and *Cellspin*

Responding to NPEs

- Motions to dismiss along with an answer
 - Filing motion to dismiss without answer risks:
 - **Dismissal without prejudice**
 - **Delays getting a scheduling conference**
 - **Inability to pursue fees (see *O.F. Mossberg & Sons, Inc. v. Timney Triggers, LLC* (Fed. Cir. Apr. 13, 2020))**
 - Extensions on oppositions to motions to dismiss
 - **Be clear that extension does not affect the Rule 15 deadline**
 - Other side may use any extra time to find an expert and draft a declaration
- Schedules are usually not suspended while motions are pending
 - May need to fund 6 months of litigation even for a meritorious motion



The “No Win” Scenario

- Defendants in NPE cases often feel like it is a “no win” scenario.
- Being “right” is expensive and holds considerable risk
 - Plaintiff can usually just dismiss if things look bad
 - Little chance of recovering fees from NPEs
- No in-house counsel was ever fired for recommending a \$30K settlement

If you want to be aggressive

Opal Run v. Overnightprints

- Plaintiff was seeking (and obtained, in many cases) quick settlements
- But 3 strategic positions allowed Overnightprints (“ONP”) to win the case and recoup all of its fees
 - **Filing an answer (preventing possible dismissal without prejudice)**
 - Another defendant was unilaterally dismissed without prejudice after a failed mediation because that defendant had not yet answered in the case (though it had filed a motion to dismiss)
 - **Pushing for the opportunity to seek fees**
 - Plaintiff several times offered to dismiss the case in exchange for agreement ONP would not seek fees
 - Sensing the weakness of the case and observing Plaintiff’s lackluster attempts to prosecute, ONP refused
 - **Using Plaintiff’s refusal to drop claims to support the exceptionality finding**
 - Effective use of declarations to show the Plaintiff’s conduct persuaded the court that the case was exceptional under § 285

The Impact of Litigation Funding



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Stay at the leading edge of innovation and competition by gaining access to the resources like patent litigation finance and legal advice to mount a successful case against parties infringing on your patents, trade secrets, copyrights and trademarks.

Omni Bridgeway's intellectual property financing is designed to help you cover the significant expenses associated with IP cases, which typically involve law firms, multiple defendants, substantial discovery and expert expenses, parallel proceedings, complex appeals and years of patent litigation. It can be used to pay legal finance that would otherwise deplete capital intended for research, development and other types of company purposes.

Let us empower you to drive advancement while protecting the intellectual property that fuels your success.

Thank You!



David Hoffman
Fish



Jeremy Jones
PayPal



Michael Headley
Fish

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FISH.
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