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 13 GRAPHON CORPORATION

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IN THE UNITED STATES DISTRICT COURT  
 NORTHERN DISTRICT OF CALIFORNIA – SAN FRANCISCO DIVISION

<p>12 MYSPACE, INC.,</p> <p style="text-align: center;">13 Plaintiff,</p> <p style="text-align: center;">14 v.</p> <p>15 GRAPHON CORPORATION,</p> <p style="text-align: center;">16 Defendant.</p> <hr style="border: 0.5px solid black;"/> <p>17 CRAIGSLIST, INC.,</p> <p style="text-align: center;">18 Plaintiff,</p> <p style="text-align: center;">19 v.</p> <p>20 GRAPHON CORPORATION,</p> <p style="text-align: center;">21 Defendant.</p>	<p>Case No. 3:10-CV-00604-CRB          Case No. 3:10-CV-01156-CRB          Consolidated Actions</p> <p style="text-align: center;"><b>ANSWER TO FIRST AMENDED          COMPLAINT</b></p>
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23 Defendant GraphOn Corporation (“GraphOn”), by and through its undersigned counsel,  
 24 hereby answers the First Amended Complaint of Plaintiff craigslist, Inc. (“craigslist”) as follows:

25 **THE PARTIES**

26 1. GraphOn admits that craigslist is a Delaware corporation; GraphOn lacks

1 sufficient knowledge or information sufficient to form a belief as to the truth of the remaining  
2 allegations in Paragraph 1 of the First Amended Complaint and on that basis, denies the same.

3 2. Admitted.

4 **JURISDICTION**

5 3. With respect to Paragraph 3 of the First Amended Complaint, GraphOn admits  
6 that this Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. §§ 1331 and  
7 1338(a) inasmuch as the First Amended Complaint purports to state claims for declaratory relief  
8 under the patent laws of the United States. However, GraphOn denies that craigslist has in fact  
9 adequately stated such claims for relief or that craigslist's claims have any merit and as such  
10 denies the remaining allegations contained in Paragraph 3.

12 4. With respect to Paragraph 4, GraphOn will not contest venue in the Northern  
13 District of California; GraphOn denies the remaining allegations of Paragraph 4 of the First  
14 Amended Complaint.

15 **INTRA-DISTRICT ASSIGNMENT**

16 5. Admitted.

17 **BACKGROUND**

18 6. GraphOn lacks sufficient knowledge or information sufficient to form a belief as  
19 to the truth of the remaining allegations in Paragraph 6 of the First Amended Complaint and on  
20 that basis, denies the same.

21 7. Admitted.

22 8. Admitted.

23 9. In answer to the allegations contained in Paragraph 9 of the First Amended  
24 Complaint, GraphOn admits only that it sent a letter to craigslist on January 18, 2010, and that  
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1 the terms of the letter speak for themselves; GraphOn denies each and every other allegation  
2 contained in Paragraph 9 of the First Amended Complaint.

3 10. In answer to the allegations contained in Paragraph 10 of the First Amended  
4 Complaint, GraphOn admits only that it sent a letter to craigslist on January 18, 2010, and that  
5 the terms of the letter speak for themselves; GraphOn denies each and every other allegation  
6 contained in Paragraph 10 of the First Amended Complaint.

7 11. In answer to the allegations contained in Paragraph 11 of the First Amended  
8 Complaint, GraphOn admits only that it commenced litigation against other parties alleging  
9 infringement of some or all of its patents-in-suit as follows:  
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11 a. Admitted.

12 b. Admitted.

13 c. Admitted.

14 12. Admitted.

15 13. Admitted.

16 14. GraphOn admits that craigslist seeks a declaratory judgment and has alleged that  
17 there is an actual and justiciable controversy between the parties, but otherwise denies each and  
18 every other allegation of Paragraph 14 of the First Amended Complaint.  
19

20 **COUNT I**

21 **DECLARATORY JUDGMENT OF NONINFRINGEMENT**

22 15. Answering the allegations incorporated in Paragraph 15, GraphOn incorporates  
23 herein by reference each and every allegation, admission and denial set forth in its Answer to  
24 Paragraphs 1 through 14 inclusive.  
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26 16. GraphOn denies the allegations contained in Paragraph 16 of the First Amended  
27

1 Complaint.

2 17. Admitted.

3 18. GraphOn admits that craigslist seeks a declaratory judgment of noninfringement  
4 of the claims of the patents-in-suit, but otherwise denies each and every other allegation of  
5 Paragraph 18 of the First Amended Complaint.

6 **COUNT II**

7 **DECLARATORY JUDGMENT OF INVALIDITY**

8  
9 19. Answering the allegations incorporated in Paragraph 19, GraphOn incorporates  
10 herein by reference each and every allegation, admission and denial set forth in its Answer to  
11 Paragraphs 1 through 18 inclusive.

12 20. Admitted.

13 21. GraphOn denies the allegations contained in Paragraph 21 of the First Amended  
14 Complaint.

15 22. GraphOn admits that craigslist seeks a declaratory judgment that the patents-in-  
16 suit are invalid, but otherwise denies each and every other allegation of Paragraph 22 of the First  
17 Amended Complaint.

18 **COUNT III**

19 **DECLARATORY JUDGMENT OF UNENFORCEABILITY**

20  
21 23. Answering the allegations incorporated in Paragraph 23, GraphOn incorporates  
22 herein by reference each and every allegation, admission and denial set forth in its Answer to  
23 Paragraphs 1 through 22 inclusive.

24 24. Admitted.

25 25. On information and belief, GraphOn admits that Robert J. Irvine of McDonnell  
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1 Boehnen Hulbert Berghoff LLP (“MBHB”) was involved in prosecuting the ‘956 application;  
2 but otherwise denies each and every other allegation of Paragraph 25 of the First Amended  
3 Complaint.

4 26. GraphOn lacks sufficient knowledge or information sufficient to form a belief as  
5 to the truth of the allegations contained in Paragraph 26 of the First Amended Complaint and on  
6 that basis, denies the same.

7 27. GraphOn admits that Timothy Brisson left Sierra Patent Group to work as in-  
8 house counsel for GraphOn in or around July of 2005. On information and belief, GraphOn  
9 admits that the Cardinal Law Group and the Sierra Patent Group prosecuted the application that  
10 issued as the ‘940 patent; GraphOn lacks sufficient knowledge or information sufficient to form  
11 a belief as to the truth of the remaining allegations contained in Paragraph 27 of the First  
12 Amended Complaint and on that basis, denies the same.

13 28. On information and belief, GraphOn admits that the Sierra Patent Group  
14 prosecuted the application that issued as the ‘034 patent; GraphOn lacks sufficient knowledge or  
15 information sufficient to form a belief as to the truth of the allegations contained in Paragraph 28  
16 of the First Amended Complaint and on that basis, denies the same.

17 29. On information and belief, GraphOn admits that the Sierra Patent Group  
18 prosecuted the application that issued as the ‘591 patent; GraphOn lacks sufficient knowledge or  
19 information sufficient to form a belief as to the truth of the allegations contained in Paragraph 29  
20 of the First Amended Complaint and on that basis, denies the same.

21 30. GraphOn denies the allegations contained in Paragraph 30 of the First Amended  
22 Complaint.

23 31. GraphOn denies the allegations contained in Paragraph 31 of the First Amended  
24 Complaint.

1 Complaint.

2 32. On information and belief, GraphOn admits that the '034 and '591 patents issued  
3 as continuations of the '538 and '940 patents and that all four patents belong to the same family,  
4 share a specification, and claim priority from the filing date of the '367 patent; GraphOn denies  
5 the remaining allegations in Paragraph 32 of the First Amended Complaint.

6 33. Admitted.

7 34. Admitted.

8 35. GraphOn admits that the application for the '538 patent was filed in July 1998,  
9 and assigned to a different examiner than the '956 application; GraphOn denies the remaining  
10 allegations in Paragraph 35 of the First Amended Complaint.

11 36. Admitted.

12 37. GraphOn admits that the U.S. Patent and Trademark Office issued a Notice of  
13 Allowance for the '538 patent in April 1999. GraphOn also admits that Wesinger and Coley  
14 requested acceptance of a Continued Prosecution Application, abandoned the allowed  
15 application, and filed a preliminary amendment; GraphOn denies the remaining allegations in  
16 Paragraph 37 of the First Amended Complaint.

17 38. GraphOn admits only that abandonment occurred; GraphOn denies each and  
18 every other allegation in Paragraph 38 of the First Amended Complaint.

19 39. In answer to the allegations contained in Paragraph 39 of the First Amended  
20 Complaint, GraphOn admits that the terms and claims of the '538, '940, '034 and '591 patents  
21 speak for themselves. GraphOn also admits that its Interrogatory Responses, which also speak  
22 for themselves, pertained only to the '538 and '940 patents involved in the Autotrader suit and  
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1 that they were not GraphOn's final position in that litigation; GraphOn denies each and every  
2 other remaining allegation in Paragraph 39 of the First Amended Complaint.

3 **The '538 Patent**

4 40. GraphOn denies the allegations in Paragraph 40 of the First Amended Complaint.

5 41. GraphOn admits that the '538 patent issued on November 27, 2001 and that the  
6 terms and claims of the patent speak for themselves; GraphOn denies each and every other  
7 remaining allegation in Paragraph 41 of the First Amended Complaint.  
8

9 **The '940 Patent**

10 42. GraphOn denies the allegations in Paragraph 42 of the First Amended Complaint.

11 43. GraphOn admits that the application for the '940 patent was filed on September  
12 14, 2001 and was assigned to a different examiner than the examiner on the '956 application;  
13 GraphOn denies each and every other remaining allegation in Paragraph 43 of the First Amended  
14 Complaint.  
15

16 44. GraphOn admits that any response made to the U.S. Patent and Trademark Office  
17 is the best evidence of said response and that the allegations contained in Paragraph 44 of the  
18 Complaint only contain a portion of said response; GraphOn denies each and every other  
19 allegation contained in Paragraph 44 of the First Amended Complaint.  
20

21 45. GraphOn denies the allegations in Paragraph 45 of the First Amended Complaint.

22 **The '034 and '591 Patent**

23 46. GraphOn admits only that the '034 and '591 patent applications were filed on  
24 May 11, 2004 after the '956 application was abandoned; but otherwise denies each and every  
25 other allegation contained in Paragraph 46 of the First Amended Complaint.  
26

27 47. In answer to the allegations contained in Paragraph 47 of the First Amended  
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1 Complaint, GraphOn admits only that the terms and claims of the '034 and '591 patents speak  
2 for themselves; GraphOn denies each and every other allegation contained in Paragraph 47 of the  
3 First Amended Complaint.

4 48. In answer to the allegations contained in Paragraph 48 of the First Amended  
5 Complaint, GraphOn admits only that the terms and claims of the '034 and '591 patents speak  
6 for themselves; GraphOn denies each and every other allegation contained in Paragraph 48 of the  
7 First Amended Complaint.

8 49. GraphOn denies the allegations in Paragraph 49 of the First Amended Complaint.

9 50. GraphOn denies the allegations in Paragraph 50 of the First Amended Complaint.

10 51. GraphOn admits the allegations in Paragraph 51 of the First Amended Complaint.

11 52. GraphOn admits that craigslist seeks a declaratory judgment that the '538, '940,  
12 '034 and '591 patents are unenforceable, but otherwise denies each and every other allegation of  
13 Paragraph 52 of the First Amended Complaint.

14 51. Admitted.

15 52. GraphOn admits that craigslist seeks a declaratory judgment that the patents are  
16 unenforceable, but otherwise denies each and every other allegation of Paragraph 52 of the First  
17 Amended Complaint.

#### 18 **COUNT IV**

#### 19 **DECLARATORY JUDGMENT OF UNENFORCEABILITY**

20 53. Answering the allegations incorporated in Paragraph 53, GraphOn incorporates  
21 herein by reference each and every allegation, admission and denial set forth in its Answer to  
22 Paragraphs 1 through 52 inclusive.

23 54. GraphOn denies the allegations contained in Paragraph 54 of the First Amended  
24



1 Complaint.

2 55. GraphOn denies the allegations contained in Paragraph 55 of the First Amended  
3 Complaint.

4 56. On information and belief, GraphOn admits that the '034 and '591 patents issued  
5 as continuations of the '538 and '940 patents and that all four patents belong to the same family,  
6 share a specification, and claim priority from the filing date of the '367 patent; GraphOn denies  
7 the remaining allegations in Paragraph 56 of the First Amended Complaint.  
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9 **Duty to Disclose Related Litigation**

10 57. With respect to Paragraph 57 of the First Amended Complaint, GraphOn admits  
11 only that the regulations of the PTO, if any such exist as alleged by craigslist in Paragraph 57,  
12 speak for themselves; the remaining allegations of Paragraph 57 call for a legal conclusion, and  
13 on that basis, GraphOn lacks sufficient knowledge or information sufficient to form a belief as to  
14 the truth of the remaining allegations contained in Paragraph 57 of the First Amended Complaint  
15 and denies the same.  
16

17 **The eBay Litigation**

18 58. On information and belief, GraphOn admits that NES filed a complaint against  
19 eBay during prosecution of the '538 patent. GraphOn also admits on information and belief, that  
20 MBHB was NES's litigation counsel in the eBay litigation and its prosecution counsel for its  
21 patent applications and that Robert J. Irvine was involved in prosecuting the '956 application and  
22 signed some of the office action responses. GraphOn denies each and every other allegation in  
23 Paragraph 58 of the First Amended Complaint.  
24

25 59. The allegations of Paragraph 59 call for a legal conclusion, and on that basis,  
26 GraphOn lacks sufficient knowledge or information sufficient to form a belief as to the truth of  
27

1 the allegations in Paragraph 59 of the First Amended Complaint and on that basis, denies the  
2 same.

3 60. GraphOn admits that Robert J. Irvine signed a terminal disclaimer for the '538  
4 patent, but otherwise denies the allegations in Paragraph 60 of the First Amended Complaint.

5 61. GraphOn admits that 238 references were submitted to the U.S. Patent and  
6 Trademark Office, but otherwise denies the allegations contained in Paragraph 61 of the First  
7 Amended Complaint.

8 62. On information and belief, GraphOn admits that NES filed a patent infringement  
9 action against eBay on March 13, 1999 regarding the '367 patent and that the applicants filed  
10 terminal disclaimers in the applications for the '538 and '034 patents over the '367 patent.

11 GraphOn denies each and every other allegation in Paragraph 62 of the First Amended  
12 Complaint.

13 63. GraphOn admits the allegations in Paragraph 63 of the First Amended Complaint.

14 64. GraphOn admits that the motions described in Paragraph 64 of the First Amended  
15 Complaint were not addressed by the court and that the eBay litigation was ultimately dismissed  
16 by stipulation. GraphOn denies the remaining allegations in Paragraph 64 of the First Amended  
17 Complaint.

18 65. On information and belief, GraphOn admits that the applicants and their patent  
19 counsel apparently did not rely on the court's refusal to consider the summary judgment motions  
20 in connection with any decision to submit material prior art to the Examiner. Otherwise,  
21 GraphOn denies the remaining allegations in Paragraph 65 of the First Amended Complaint.

22 66. GraphOn denies the allegations contained in Paragraph 66 of the First Amended  
23 Complaint.



1 '538, '940, '034 and '591 patents, but denies the remaining allegations in Paragraph 76 of the  
2 First Amended Complaint.

3 77. GraphOn admits that craigslist seeks a declaratory judgment that the patents are  
4 unenforceable, but otherwise denies each and every other allegation of Paragraph 77 of the First  
5 Amended Complaint.

6 **COUNT V**

7 **DECLARATORY JUDGMENT OF UNENFORCEABILITY**

8  
9 78. Answering the allegations incorporated in Paragraph 78, GraphOn incorporates  
10 herein by reference each and every allegation, admission and denial set forth in its Answer to  
11 Paragraphs 1 through 77 inclusive.

12 79. GraphOn denies the allegations contained in Paragraph 79 of the First Amended  
13 Complaint.

14 80. GraphOn denies the allegations contained in Paragraph 80 of the First Amended  
15 Complaint.

16 81. GraphOn denies the allegations contained in Paragraph 81 of the First Amended  
17 Complaint.

18 82. Admitted.

19 83. GraphOn admits that craigslist seeks a declaratory judgment that the Patents are  
20 unenforceable, but otherwise denies each and every other allegation of Paragraph 83 of the First  
21 Amended Complaint.  
22  
23

24 **PRAYER FOR RELIEF**

25 GraphOn denies that craigslist is entitled to the relief requested or to any relief  
26 whatsoever.

1 **AFFIRMATIVE DEFENSES**

2 All possible affirmative defenses may or may not have been asserted herein insofar as  
3 sufficient facts were not available to GraphOn after reasonable inquiry upon the filing of this  
4 pleading and therefore, GraphOn asserts the following defenses based in fact or upon reasonable  
5 belief and hereby reserves the right to amend this Answer to allege appropriate or additional  
6 defenses, if subsequent investigation or discovery so warrants.

7 **First Affirmative Defense**

8  
9 The First Amended Complaint of craigslist fails to state a claim upon which relief may be  
10 granted.

11 **Second Affirmative Defense**

12 The claims of craigslist are barred, in whole or in part, because the patents are valid and  
13 enforceable.

14 **Third Affirmative Defense**

15 The claims of craigslist are barred, in whole or in part, because craigslist has infringed  
16 and continues to infringe GraphOn's patents.

17 **Fourth Affirmative Defense**

18 The relief sought by craigslist is barred, in whole or in part, because at all times,  
19 GraphOn's conduct was lawful and privileged.

20 **Fifth Affirmative Defense**

21 The claims of craigslist are barred, in whole or in part, to the extent that GraphOn is not  
22 required to disclose prior art or information which is not material to a determination of  
23 patentability.  
24

25 **Sixth Affirmative Defense**

1  
2 The claims of craigslist are barred, in whole or in part, to the extent that the conduct of  
3 GraphOn toward the U.S. Patent and Trademark Office was reasonable, justified, equitable,  
4 lawful and in good faith and without fraud.

5 **Seventh Affirmative Defense**

6 The claims of craigslist are barred, in whole or in part, to the extent that GraphOn at all  
7 times acted in good faith with reasonable and probable cause.

8 **Eighth Affirmative Defense**

9  
10 The claims of craigslist for attorneys' fees are barred, in whole or in part, to the extent  
11 that craigslist has failed to allege an exceptional case as to support an award of attorneys' fees  
12 pursuant to 35 U.S.C. § 285.

13 **PRAYER FOR RELIEF**

14 WHEREFORE, GraphOn respectfully requests that this Court enter judgment against  
15 craigslist as follows:

16  
17 (a) That craigslist take nothing by its First Amended Complaint and that craigslist's  
18 First Amended Complaint be dismissed with prejudice;

19 (b) That craigslist has infringed and continues to infringe the '538, '940, '034 and  
20 '591 patents;

21 (c) For preliminary and permanent injunctions under 35 U.S.C. § 283 against  
22 craigslist and its directors, officers, employees, agents, subsidiaries, parents, attorneys, and all  
23 persons acting in concert, on behalf of, in joint venture, or in partnership with craigslist from  
24 further acts of infringement;

25  
26 (d) For damages to be paid by craigslist adequate to compensate GraphOn for its  
27

1 infringement of the patents-in-suit, including interests, costs and disbursements as the Court may  
2 deem appropriate under 35 U.S.C. § 284;

3 (e) That this is an exceptional case and awarding GraphOn attorneys' fees under 35  
4 U.S.C. § 285; and

5 (f) For such other and further relief at law and in equity as the Court may deem just  
6 and proper.

7 **DEMAND FOR JURY TRIAL**

8 Pursuant to the Federal Rules of Civil Procedure Rule 38, GraphOn Corporation hereby  
9 demands a trial by jury on all issues.

10 Dated: May 24, 2010

11 By: /s/ Michael D. Rounds

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23 Attorneys for GraphOn Corporation  
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**CERTIFICATE OF SERVICE**

The undersigned certifies that, on this date, he caused this document to be electronically filed with the Clerk of Court using the CM/ECF system, which will send notification of filing to counsel of record for each party.

Dated: May 24, 2010

/s/ Robert Hunter  
An Employee of Watson Rounds