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13 UNITED STATES DISTRICT COURT  
 14 NORTHERN DISTRICT OF CALIFORNIA  
 15 SAN JOSE DIVISION

**CV 12-00121 DMR**

16 KNO, INC., a Delaware corporation,  
 17 Plaintiff,  
 18 v.  
 19 CENGAGE LEARNING, INC., a Delaware  
 20 corporation,  
 21 Defendant.

22 **CASE NO.:**  
 23 **KNO, INC.'S COMPLAINT FOR**  
 24 **DECLARATORY JUDGMENT AND**  
 25 **BREACH OF CONTRACT**  
 26 **JURY TRIAL DEMANDED**

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1 This is an action to redress the breach of a license agreement by Cengage Learning, Inc.  
2 (“Cengage”). Plaintiff Kno Inc. (“Kno”) has developed cutting edge technology for accessing  
3 electronic books that includes features to enhance the learning experience for students and their  
4 professors. Cengage entered into an agreement licensing Kno to distribute Cengage’s textbooks  
5 electronically. Recently, without cause, Cengage attempted to terminate the parties’ agreement,  
6 and threatened Kno with allegations of copyright infringement. Kno brings this Complaint  
7 against Cengage for a declaration that the parties’ license agreement remains valid and in effect,  
8 that Cengage’s allegations of infringement are without merit, and to enforce Cengage’s  
9 performance under the parties’ contract. Kno alleges on personal knowledge as to its own  
10 actions and on information and belief as to the actions of others as follows:

11 1. Technology is transforming the way students learn, including how they buy and  
12 interact with their textbooks. More and more textbooks are being made available in electronic  
13 form. This trend has many benefits for students and for the educational process. E-textbooks are  
14 considerably more portable, more durable, and more affordable than traditional hardcopy  
15 textbooks. Further, with texts in digital form, students now have access to a host of related  
16 features that can add value to their learning experience – from allowing quick cross-referencing  
17 of information (searching within a book) to improving the age-old art of note-taking. A  
18 burgeoning market is developing around the provision of e-textbooks and these value-added,  
19 interactive features.

20 2. Kno is a leader in transitioning education into the digital world. Kno has worked  
21 hard to develop a popular e-reader that gives student-users access to thousands of e-textbooks.  
22 Kno’s e-reader software makes the learning experience more interactive, adding a host of  
23 valuable features to the standard textbook. This groundbreaking technology has propelled Kno’s  
24 success – making Kno’s e-reader application the most frequently downloaded education  
25 application for the iPad during the back-to-school season. In developing its e-reader, Kno has  
26 worked closely with numerous publishers who seek to leverage Kno’s software and value-added  
27 features to enhance their texts by making them more interactive.

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1           3.       Cengage is a major textbook publisher that controls thousands of titles, and makes  
2 certain of those titles available in electronic form.

3           4.       In September 2010, Kno and Cengage entered into a license agreement for certain  
4 Cengage textbooks (the "Agreement"). Pursuant to the Agreement, Kno is licensed to convert  
5 Cengage's textbooks into its e-reader format, then make them available for purchase by its  
6 student-users and share the revenues with Cengage. The Agreement is not due to expire until  
7 September 2012.

8           5.       In September 2011, Cengage complained to Kno about some of the features that  
9 Kno provides through its e-reader. Given the high value that Kno places on its relationships with  
10 publishers, Kno worked with Cengage in good faith to address those complaints, notwithstanding  
11 Kno's right to offer those features. Kno made a significant investment and redesigned its system  
12 in order to disable the features about which Cengage expressed concern. Although Kno provided  
13 the fix Cengage requested, which was acknowledged by Cengage, Cengage later claimed not to  
14 be satisfied, and has attempted to terminate the Agreement. Cengage had no right to terminate  
15 the Agreement. Yet it is now threatening Kno with a copyright infringement suit if Kno  
16 continues to offer Cengage's textbooks to its users.

17           6.       Cengage's purported termination will cause Kno irreparable harm. With students  
18 heading back to school to start a new semester in early January 2012, this is the one of the most  
19 popular periods for the sale of e-texts, and Kno's lost sales will be substantial. Moreover, each  
20 selling season in the nascent but quickly growing market for e-readers is critical as technology  
21 providers compete to attract new users. By denying Kno the right to sell a significant number of  
22 e-texts at this critical point in time, Cengage will impair Kno's ability to attract and keep users  
23 whose loyalty to Kno's technology would generate incalculable revenues over time.

24           7.       There is a real and actual controversy between Kno and Cengage regarding  
25 whether Kno's continued sale of Cengage's textbooks to its users, and offering of its value-added  
26 features in connection with those textbooks, infringes Cengage's alleged rights in those  
27 textbooks. Kno brings this action to obtain a declaration that the license Agreement between the  
28 parties remains in effect and thus Kno, as a licensee, is not liable for infringing Cengage's

1 copyrights by distributing Cengage textbooks, and offering its Journal feature for use with those  
2 textbooks. Kno further seeks an order requiring Cengage to continue to perform under the  
3 Agreement.

4 **THE PARTIES, JURISDICTION AND VENUE**

5 8. Plaintiff Kno, Inc. is a Delaware corporation with its principal place of business at  
6 5155 Old Ironsides Drive, Santa Clara, California 95054.

7 9. Defendant Cengage Learning, Inc. is a Delaware corporation with an office at 5  
8 Maxwell Drive, Clifton Park, New York 12065.

9 10. Kno's declaratory judgment claims arise under federal law, in particular the  
10 Copyright Act, 17 U.S.C. §§ 101 *et seq.* and the Declaratory Judgment Act, 28 U.S.C. § 2201-02.  
11 This Court has jurisdiction under 17 U.S.C. § 501 and 28 U.S.C. §§ 1331, 1338(a), and 2201-02.  
12 This Court also has jurisdiction over Kno's claim for breach of contract and specific performance  
13 pursuant to 28 U.S.C. § 1367 because Kno's breach of contract claim is part of the same case and  
14 controversy as its declaratory judgment copyright claim.

15 11. This Court has personal jurisdiction over Cengage because, *inter alia*, Cengage  
16 maintains an office and conducts business in this judicial District, including with Kno.

17 12. Venue is proper in this District pursuant to 28 U.S.C. §§ 1391(b), (c) and 1400  
18 (a). The license agreement between Kno and Cengage was made, performed, and breached in  
19 this District, and Cengage's allegations of infringement have been directed to Kno in this  
20 District. The majority of Kno's employees and infrastructure are located in this District.

21 **INTRADISTRICT ASSIGNMENT**

22 13. Assignment to the San Jose Division of this Court is appropriate under Civil L.R.  
23 3-2, in that the claims asserted herein arose in Santa Clara County. Kno is headquartered in  
24 Santa Clara County, and a substantial part of the events giving rise to the claims herein occurred  
25 in Santa Clara County.

1 **GENERAL ALLEGATIONS**

2 **A. Kno and Cengage's Business Dealings**

3 14. On or around September 24, 2010, Kno and Cengage entered into the Agreement.  
4 Pursuant to the Agreement, Cengage agreed to provide Kno with certain textbooks and granted  
5 Kno the right to distribute them. Kno, in turn, agreed to convert those textbooks into an e-  
6 textbook format compatible with Kno's e-reader and make them available to its e-reader student-  
7 users. Cengage and Kno agreed to split the proceeds from Kno's sales of the e-textbooks.

8 15. Pursuant to the Agreement, Cengage began providing certain of its textbook titles  
9 to Kno. Kno converted those titles to the appropriate e-book format, and offered them for sale in  
10 connection with its e-reader. Sales of Cengage's e-texts generated substantial revenue that the  
11 parties shared pursuant to the terms of the Agreement. Kno made all required payments to  
12 Cengage in a timely manner and otherwise fulfilled all of its material obligations under the  
13 Agreement.

14 **B. Kno's Value-Added E-reader Features**

15 16. As part of its e-reader, Kno offers various functionalities to enhance the user  
16 experience. The "Smart Links" feature provides the user with easy access to instructional  
17 videos, photos and images that are relevant to the concepts contained within each text. "Quiz  
18 Me" turns certain diagrams in the textbook into a study aid for the individual user in the form of  
19 a matching game. "Journal" allows the user to create a digital notebook by recording notes and  
20 identifying for later reference what she considers to be important images and portions of texts  
21 she has purchased. Those identified excerpts are then made available in a separate view, within  
22 the same digital application, along with the user's notes on the content, solely for the user's  
23 personal use. Kno first began making these value-added features available in connection with its  
24 e-reader in August 2011.

25 17. On or around September 6, 2011, Cengage informed Kno that it believed Kno's  
26 offering of Smart Links, Journal and Quiz Me for use with Cengage's e-textbooks violated the  
27 Agreement, and that at least the use of the Journal feature without Cengage's express permission  
28 infringed Cengage's copyrights through the creation of a derivative work. Cengage claimed that,

1 pursuant to Paragraph 8(b)(i) of the Agreement, Kno had thirty days to cure the alleged breach or  
2 the Agreement would terminate.

3 18. Kno disagreed that these features were in any way prohibited by the Agreement,  
4 or that its provision of Journal violated Cengage's alleged copyrights. In a show of good faith,  
5 however, Kno worked with Cengage's representatives to address their concerns. Kno offered to  
6 disable use of Smart Links, Journal and Quiz Me with any Cengage e-textbook. Kno also  
7 suggested the parties arrange a series of meeting so that Kno could demonstrate to Cengage not  
8 only that its features did not violate the Agreement, but also that they added significant value to  
9 the user experience in a way that would be beneficial to both parties.

10 19. On October 6, 2011, while Kno and Cengage were still working to determine  
11 exactly how to address Cengage's concerns, Kno voluntarily removed Cengage's textbooks from  
12 its e-textbook catalog. Kno took this action out of an abundance of caution because it was still in  
13 the process of implementing a technical fix that would allow Kno to offer Cengage's textbooks  
14 through the Kno e-reader with Smart Links, Journal and Quiz Me disabled. Kno's temporary  
15 removal of Cengage's textbooks cured any concern Cengage had regarding Kno's value-added  
16 functionalities. Cengage acknowledged such removal the very next day without any mention  
17 that these actions failed to cure the alleged breach, much less that Cengage considered the  
18 Agreement terminated.

19 **C. Cengage Breaches the Parties' Agreement by Asserting Early Termination**

20 20. Throughout October 2011, Kno worked diligently to implement its technical fix,  
21 and designed a solution specifically for Cengage that would allow features that Cengage found  
22 objectionable to be selectively turned off in only their texts. This engineering effort represented  
23 a major investment in time and capital and enabled Kno to offer Cengage's textbooks through its  
24 e-reader without the Smart Links, Journal and Quiz Me features.

25 21. Throughout October 2011, Kno reached out to Cengage to arrange a meeting  
26 during which the parties could discuss Smart Links, Journal and Quiz Me in more detail.  
27 Cengage repeatedly agreed to and then cancelled those meetings. At the end of October 2011,  
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1 when Kno specifically tried to determine the appropriate steps to complete the implementation of  
2 the fix for Cengage, Cengage claimed for the first time that the Agreement had been terminated.

3 22. Kno was confused by Cengage's claim, since it had and continues to fulfill all of  
4 its obligations under the Agreement. According to Paragraph 8, except under limited and  
5 inapplicable circumstances, the Agreement remains in effect until at least September 24, 2012.

6 23. Throughout November 2011, Kno again tried to arrange a meeting during which  
7 the parties could address Cengage's concerns regarding Kno's value-added features. Kno  
8 withheld Cengage's textbooks from its catalog out of respect for the parties' ongoing  
9 discussions, in the hope that the e-textbooks could be released again soon with Smart Links,  
10 Journal and Quiz Me enabled.

11 24. On December 9, 2011, Cengage sent a letter to Kno unequivocally asserting that  
12 Cengage believed the Agreement terminated as of October 6, 2011. Cengage claimed, therefore,  
13 that Kno no longer had the right to distribute Cengage's textbooks. Cengage further asserted that  
14 any subsequent distribution of its textbooks would constitute copyright infringement, and subject  
15 Kno to stiff penalties.

16 25. Kno did not breach the parties' Agreement by offering its Smart Links, Journal  
17 and Quiz Me features in connection with Cengage's textbooks. But even if Cengage's claims of  
18 breach had merit, Kno cured any such alleged breach by temporarily removing Cengage's  
19 textbooks from Kno's sales catalog by October 6, 2011.

20 **D. Kno Will Suffer Irreparable Harm If The Agreement is Prematurely**  
21 **Terminated**

22 26. Kno makes the majority of its e-textbook sales at the start of each school  
23 semester. For most of Kno's student-users, their next semester will begin in January 2012.

24 27. Historically, Cengage's textbooks have made up about a quarter of Kno's sales.

25 28. If Kno cannot offer Cengage's unique collection of textbooks to its student-users  
26 in January 2012 and through the end of Agreement's term, it will suffer monetary and irreparable  
27 harm. Among other things, Kno will not be able to provide its users with the textbooks they  
28 need, which will cause some current users to leave the service, and will cause potential new users

1 to look elsewhere for their e-reader technology. It would be impossible to determine exactly  
2 how much future business Kno would lose as a result of this substantial reduction in its textbook  
3 offerings at this critical time.

4 29. Kno would not be able to replace Cengage's unique textbook collection by  
5 contracting with another textbook provider. Student-users must buy the books assigned by their  
6 teachers or professors. To the extent those teachers and professors assign Cengage's titles, there  
7 is no substitute for the student-user or Kno.

8 **FIRST CLAIM FOR RELIEF**  
9 (Declaration of Subsisting Contract)

10 30. Kno realleges Paragraphs 1 through 29, inclusive, as if fully set forth herein.

11 31. Kno and Cengage entered into the written Agreement, as set forth above.

12 Pursuant to the Agreement, Cengage contracted to allow Kno to sell certain of its textbooks for  
13 use with Kno's e-reader.

14 32. Cengage has prematurely and improperly repudiated the Agreement and claims  
15 that Kno no longer has the right to sell Cengage's textbooks.

16 33. Kno has performed all conditions, covenants, and promises required on its part to  
17 be performed in accordance with the terms and conditions of the Agreement, except as Cengage  
18 waived, prevented or excused such obligations of Kno. All conditions required for performance  
19 by Cengage under the Agreement have occurred.

20 34. Cengage is obligated under the Agreement to continue to allow Kno to sell  
21 Cengage's textbooks for use with its e-reader.

22 35. An actual and justiciable controversy exists because of Cengage's refusal to  
23 comply with its obligations, and Cengage's assertion that Kno would be committing copyright  
24 infringement if it continued to offer Cengage's textbooks for sale.

25 36. Kno has no adequate remedy at law if Cengage continues to refuse to allow Kno  
26 to sell Cengage's unique catalog of textbooks because of, *inter alia*, the irreparable and  
27 unquantifiable harm such refusal would cause to Kno's business.

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**THIRD CLAIM FOR RELIEF**

(Breach of Contract and Specific Performance Under New York Law)

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3 44. Kno realleges Paragraphs 1 through 43, inclusive, as if fully set forth herein.

4 45. Kno and Cengage entered into the binding, written Agreement, as set forth above.  
5 Pursuant to that Agreement, Cengage contracted to allow Kno to sell certain of its textbooks for  
6 use with Kno's e-reader, as set forth above.

7 46. Cengage has breached the Agreement by, *inter alia*, refusing to allow Kno to  
8 continue to sell Cengage's textbooks.

9 47. Kno has performed all conditions, covenants, and promises required on its part to  
10 be performed in accordance with the terms and conditions of the Agreement, except as Cengage  
11 waived, prevented or excused such obligations of Kno. All conditions required for performance  
12 by Cengage under the Agreement have occurred.

13 48. Kno is ready, willing and able to continue to perform under the Agreement,  
14 including by making continued payments to Cengage pursuant to Agreement.

15 49. It is within Cengage's power to continue to perform under the Agreement by,  
16 *inter alia*, allowing Kno to distribute any textbooks to which Cengage has intellectual property  
17 rights.

18 50. Kno has no adequate remedy at law if Cengage continues to refuse to allow Kno  
19 to sell Cengage's unique catalog of textbooks because of, *inter alia*, the irreparable and  
20 unquantifiable harm such refusal would cause to Kno's business.

21 51. This Court should order Cengage to specifically perform its contractual  
22 obligations under the Agreement, including allowing Kno to sell Cengage's textbooks, in a form  
23 compatible with Kno's e-reader, to users of Kno's e-reader.

24 52. Kno further seeks damages as a result of Cengage's breach, to the extent they are  
25 quantifiable, and in an amount to be determined at trial.

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1 **PRAYER FOR RELIEF**

2 Wherefore, Kno prays the Court:

3 a) enter judgment in Kno's favor and against Cengage on all claims for relief  
4 stated herein;

5 b) issue a declaratory judgment declaring that:

6 i. a valid Agreement remains in effect between Kno and Cengage,  
7 which allows Kno to distribute Cengage's textbooks, in a form  
8 compatible with Kno's e-reader, to users of Kno's e-reader;

9 ii. Kno does not infringe Cengage's copyrights by continuing to  
10 distribute Cengage's textbooks in accordance with the Agreement;

11 iii. Kno does not infringe Cengage's copyrights by offering Journal  
12 for use with Cengage's texts because Journal does not create a  
13 derivative work pursuant to 17 U.S.C. §106; and

14 iv. Kno does not infringe Cengage's copyrights by offering Journal  
15 for use with Cengage's texts because any use Journal makes of  
16 Cengage's content is a fair use pursuant to 17 U.S.C. §107.

17 c) issue an injunction preliminarily and permanently ordering Cengage to  
18 comply with its obligations under the Agreement, including allowing Kno to distribute  
19 Cengage's textbooks, in a form compatible with Kno's e-reader, to users of Kno's e-reader;


20 d) award Kno damages arising from Cengage's breach of contract;

21 e) award Kno its reasonable attorneys' fees and costs of suit herein; and

22 f) award such other and further relief as this Court deems just and  
23 appropriate under the circumstances.

24 Dated: January 6, 2012

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