


Exhibit B



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January 21, 2011

Re: Wireless Ink v. Facebook, et al., Case No. 10 Civ. 1841 (PKC)

The Honorable P. Kevin Castel
Daniel Patrick Moynihan
United States Courthouse
Courtroom 12C
500 Pearl St.
New York, NY 10007-1312

Dear Judge Castel:

Plaintiff Wireless Ink Corp. (“Wireless Ink”) seeks leave to file a motion pursuant to Federal Rules of Civil Procedure (“Rule”) 12(c) for a motion for judgment on the pleadings regarding the Defendants’ counterclaims for a declaratory judgment and defense of invalidity, and thus requests a pre-motion conference pursuant to the rules of this Court.


The Patent and Trademark Office Has Soundly Rejected Defendants’ Invalidity Arguments

Wireless Ink requested the identification of all relevant prior art from the Defendants via interrogatories served on August 19, 2010. The Defendants sought to evade response by seeking a stay of discovery on their own counterclaims. On September 9, 2010, discovery was stayed in this case (except strictly related to claims construction) pending a claims construction ruling. *See* Docket Entry #36.

The Court ruled on claims construction on October 21, 2010 and twice confirmed that there was no longer any stay of discovery on November 2, 2010 (*see* Docket Entry #47) and again on November 4, 2010 (*see* Docket Entry #48). Shortly thereafter, Plaintiff requested responses to its long-ago served interrogatories.

On November 22, 2010, both Defendants served objections to the interrogatories without identifying any further prior art. Plaintiff demanded substantive responses. During a face-to-face meet and confer on discovery issues on December 3, 2010 (held pursuant to the Court’s Order of November 18, 2010), the Defendants finally agreed to produce all known relevant art.

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On December 14, 2010, the Defendants (through counsel for Google, Inc.) produced 1209 pages of prior art as individual .TIFF files. Plaintiff requested production of the prior art as .pdf files, which is the only format acceptable to the Patent and Trademark Office. One week later, right before the holidays on December 21, 2010, the Defendants produced the prior art files in .pdf format.

Plaintiff's patent application no. 12/548,928 is currently pending before the Patent and Trademark Office and claims priority to the patent-in-suit. The application is published and available publicly on the web site for the Patent and Trademark Office. The pending application has claims similar to those involved in the current litigation, including the following first claim:

1. A method for managing information content in a network-based communication system, the method comprising the steps of:

providing a content management web site identified by a first uniform resource locator and accessible to a user of the communication system, the content management web site being configured to permit the user to designate at least one data source that is external to the content management web site; and

generating a mobile web site identified by a second uniform resource locator different than the first uniform resource locator, the mobile web site being accessible independently of the content management web site via one or more mobile devices, the mobile web site being configured to receive data automatically from the external data source designated by the user at the content management web site.

On January 6, 2011, all prior art references identified by the Defendants were submitted to the Patent and Trademark Office by patent prosecution counsel for Plaintiff via an Information Disclosure Statement. The claims of the continuation patent application were allowed (found patentable) by the Examiner on January 10, 2011, less than a week after submission of those references. Thus, the 1200+ pages of prior art produced by the Defendants in this case were not sufficient to merit a rejection by the Examiner with respect to the claims in the pending application, and were obviously not deemed to be any more relevant than the prior art already considered by the Patent and Trademark Office during the prosecution of the patent-in-suit. The claims in the application are expected to issue shortly.

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Defendants Have Not Pleaded A Plausible Claim for Patent Invalidity

A pleading requires “enough facts to state a claim to relief that is plausible on its face.” *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007). “A claim has facial plausibility when the pleaded factual content allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1940 (2009) (citing *Twombly*, 550 U.S. at 556). A court should not accept “threadbare recitals of a cause of action’s elements, supported by mere conclusory statements.” *Iqbal*, 129 S. Ct. at 1940.

Counterclaims, like claims, are subject to the pleading requirements of Rule 8. *Management Assistance, Inc. v. Edelman*, 584 F. Supp. 1016, 1020 (S.D.N.Y. 1984). The Second Circuit has also held that “[a]ffirmative defenses which amount to nothing more than mere conclusions of law and are not warranted by any asserted facts have no efficacy.” *Shechter v. Comptroller of New York*, 79 F.3d 265, 270 (2d Cir. 1996) (citations omitted). “Mere conclusory assertions are not sufficient to give plaintiffs notice of the counterclaims and defenses and, thus, do not meet Rule 8(a)’s pleading standards.” *Aspex Eyewear, Inc. v. Clariti Eyewear, Inc.*, 531 F. Supp. 2d 620, 623 (S.D.N.Y. 2008).


Instead of pleading facts to support a plausible claim or defense that the patent-in-suit is invalid, the Defendants’ pleadings are nothing “more than labels and conclusions and a formulaic recitation of the elements of a cause of action.” *Twombly*, 550 U.S. at 555, 557. Moreover, a patent is presumed valid and the defendant bears the burden of proving invalidity by clear and convincing evidence. *See American Hoist & Derrick Co. v. Sowa & Sons, Inc.*, 725 F.2d 1350, 1360 (Fed. Cir. 1984). Where the prior art has been considered, and then rejected, by the Patent and Trademark Office, the Defendants should have to do something more than merely assert that the patent-in-suit is invalid. *See Qarbon.com Inc. v. eHelp Corp.*, 315 F. Supp. 2d 1046, 1051 (N.D. Cal. 2004) (holding that defendant eHelp, by alleging several grounds for invalidating and voiding the ‘411 patent, does not provide Qarbon with a basis for assessing the strength of eHelp’s counterclaim. Because the invalidity counterclaim did not provide “a more specific statement of the basis” of the counterclaim, the Court granted Qarbon’s motion to dismiss eHelp’s counterclaim for a declaratory judgment).

The Defendants seek to dismiss Plaintiff’s detailed Second Amended Complaint without the benefit of any discovery, yet seek to impose enormous costs on the Plaintiff without plausibly pleading that the patent-in-suit is invalid. For example, Defendants have already claimed the need to seek third party discovery in Europe and have argued for a lengthy fact discovery period based on patent invalidity. This is exactly the abuse *Iqbal* and *Twombly* were supposed to

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prevent, and Plaintiff respectfully requests permission to file a motion to dismiss Defendants' pleadings on invalidity pursuant to Rule 12(c).

Respectfully submitted,


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