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IN THE UNITED STATES DISTRICT COURT
DISTRICT OF UTAH, CENTRAL DIVISION

ISYS TECHNOLOGIES, INC., a Nevada
Corporation,

Plaintiff,

v.

GOOGLE INC., a Delaware Corporation;
SAMSUNG ELECTRONICS USA, INC., a
Delaware Corporation; ACER AMERICA CORP.,
a California Corporation; AMAZON.COM, INC.,
a Delaware Corporation; and BEST BUY CO.,
INC., a Minnesota Corporation,

Defendants.

Case No. 2:11-CV-507 CW**OBJECTIONS OF GOOGLE INC. TO
DECLARATION OF JASON SULLIVAN****Judge Clark Waddoups**

Defendant Google Inc. hereby objects to several statements made in the Declaration Of Jason Sullivan In Support Of Isys' Motion For Temporary Restraining Order And Preliminary Injunction dated 6 June 2011 (hereinafter "Sullivan Declaration" or "Sullivan Decl."). The objections are set forth below following each of the several statements from the Sullivan

Declaration. None of the statements is admissible under the Federal Rules of Evidence (“FRE”) for the reasons stated.

STATEMENTS AND OBJECTIONS

All the following statements repeated from the Sullivan Declaration are in *italics*.

1. *In the Fall of 2009, ISYS began promoting its Modular Computer as an Xi3 product including the brand name CHROMIUMPC.* (Sullivan Decl. at ¶ 5)

OBJECTIONS

- a. Inadmissible Conclusion. This statement presents a conclusion without any underlying facts. For example, it does not state how or where the product was promoted. It does not identify or describe the audience for the purported promotions and does not state that any audience was actually reached or how it reacted to the purported promotions, if at all.
- b. No Foundation. This statement does not present the qualifications of the declarant to present the statement nor does it present directly or indirectly the time frame or the vehicle(s) used to promote. It therefore lacks a proper foundation.
- c. Best Evidence. The promoting of a mark would necessarily involve perceivable communications from the promoter to the market. No such material was presented. The statement therefore lacks original documents that should be presented under FRE 1002, and the statement should be excluded because it is not the best evidence.

2. *Since 2009, ISYS has continuously promoted its new computers under the CHROMIUMPC brand at trade shows.* (Sullivan Decl. at ¶ 6)

OBJECTIONS

- a. Inadmissible Conclusion. This statement presents a conclusion without any underlying facts. For example, it does not identify any particular trade shows, nor does it identify how or where the computers were promoted, let alone the brand. It does not identify or describe the audience for the purported promotions and does not state that any audience was actually reached or how it reacted to the purported promotions, if at all.
- b. No Foundation. This statement does not present any information showing where, when, how or to whom the purported promotions were made or set forth the declarant's basis for knowing about the purported promotions. It therefore lacks a proper foundation.
- c. Best Evidence. The promoting of a mark would necessarily involve perceivable communications from the promoter to the market. No such material was presented. The statement therefore lacks original documents that should be presented under FRE 1002, and the statement should be excluded because it is not the best evidence.
3. *Since 2009, ISYS has continuously promoted its new computers under the CHROMIUMPC brand in discussions with customers in different parts of the United States.* (Sullivan Decl. at ¶ 7)

OBJECTIONS

- a. Inadmissible Conclusion. This statement presents a conclusion without any underlying facts. For example, it does not identify the purported customers, nor does it

identify how or where the computers were promoted. It does not state that the purported promotions actually reached any purported customer or what the reaction, if any, to the purported promotions was. It also makes a conclusory reference to “customers” with no evidence whatsoever of any sales.

b. No Foundation. This statement does not present any information establishing where, when, how or to whom the purported promotions were made or set forth the declarant’s basis for knowing about the purported promotions. It therefore lacks a proper foundation.

c. Best Evidence. The promoting of a mark would necessarily involve perceivable communications from the promoter to the market. No such material was presented. The statement therefore lacks original documents that should be presented under FRE 1002, and the statement should be excluded because it is not the best evidence.

4. *Since 2009, ISYS has continuously promoted its new computers under the CHROMIUMPC brand in electronic communications about its business including marketing and sales emails to potential customers, Internet blogs, Twitter, Facebook, and its own www.chromiumpc.com website, beginning in November 2009. (Sullivan Decl. at ¶ 8)*

OBJECTIONS

a. Inadmissible Conclusion. This statement presents a conclusion without any underlying facts. For example, it does not identify the potential customers to whom the communications were directed and does not attach examples of any communications or

otherwise provide any details about the communications. It does not identify or describe the audience for the purported promotions and does not state that any audience was actually reached or how it reacted to the purported promotions, if at all.

b. No Foundation. This statement does not present any information establishing where, when, how and to whom the purported communications were made or set forth the declarant's basis for knowing about them. It therefore lacks a proper foundation.

c. Best Evidence. This statement should be excluded as an improper introduction of the contents of writings (the "electronic communications") without providing the communications themselves. The statement therefore lacks original documents that should be presented under FRE 1002 and should be excluded because it is not the best evidence.

5. *ISYS is senior user and the owner of the mark CHROMIUMPC for use in connection with computer hardware. On June 21, 2010, ISYS filed United States Trademark Application Serial No. 85/067977 for CHROMIUMPC for use in connection with computer hardware including computer carrying cases, computer chassis, computer expansion boards, computer interface boards, computer peripherals and computers ("CHROMIUMPC Application"). (Sullivan Decl. at ¶ 9)*

OBJECTIONS

a. Inadmissible Opinion/Hearsay. This statement includes an opinion asserting that plaintiff is the "senior user" and "owner" of the mark CHROMIUMPC for use in connection with computer hardware, both of which are conclusions inadmissible as

opinions of a lay witness under FRE 701. Alternatively, the statement is inadmissible hearsay under FRE 802 as a conclusion of another that was communicated to Mr.

Sullivan by an unknown third party and is offered for the truth of the matter asserted.

b. No Foundation. This statement lacks a proper foundation because it does not identify the other marks or users to whom ISYS claims to be “senior,” or otherwise provide facts sufficient to establish priority of use or trademark ownership.

c. Not Competent. The declarant provides no basis for his having sufficient knowledge of trademark law to be able to present statements of this type.

6. *In November 2010, the Consumer Electronics Association, owner of the International Consumer Electronics Show, announced that ISYS’ Xi3 Modular Computer was to be recognized as a 2011 International CES Innovations Design and Engineering Award winner in the computer hardware category. (Sullivan Decl. at ¶ 10)*

OBJECTIONS

a. Hearsay. To the extent the statement is offered to prove that ISYS’ Xi3 Modular Computer was to be recognized as a 2011 International CES Innovations Design and Engineering Award winner in the computer hardware category, it is inadmissible as hearsay under FRE 802.

b. No Foundation. To the extent the statement is offered to prove that the Consumer Electronics Association made the asserted announcement, it lacks foundation as to the declarant’s knowledge of any such announcement.

c. Best Evidence. This statement should be excluded as an improper introduction of the contents of writings (the announcement) without providing the announcement itself.

The statement therefore lacks original documents that should be presented under FRE 1002 and should be excluded because it is not the best evidence.

d. Irrelevant. This statement is not relevant under FRE 401 because any announcement about the Xi3 Modular Computer is of no consequence to the determination of the action. The statement does not refer to the CHROMIUMPC mark or any issues of consequence to the determination of the action. It is therefore inadmissible under FRE 402.

7. *Images of the approximately 4" x 3½" Xi3 Modular Computer include:*



(Sullivan Decl. at ¶ 11)

OBJECTIONS

No Foundation. This statement lacks any information as to when these products were made, when the photograph was taken, or whether the products have ever been seen by the public.

8. *The Xi3 Modular Computer and other Xi3 Technology products thereafter received rave reviews at the January 6-9, 2011 International Consumer Electronics Show in Las Vegas, Nevada (“CES 2011”).* (Sullivan Decl. at ¶ 12)

OBJECTIONS

- a. Hearsay. To the extent the statement is offered to prove that individuals or entities favorably received the Xi3 Technology products at CES 2011, it is inadmissible as hearsay under FRE 802.
- b. No Foundation. To the extent the statement is offered to prove that communications were made to declarant regarding Xi3 Technology products at CES 2011, it lacks foundation as to the declarant’s knowledge of any such communications, including who made them, when, and under what circumstances.
- c. Best Evidence. This statement should be excluded as an improper introduction of the contents of writings (the “rave reviews”) without providing the reviews themselves. The statement therefore lacks original documents that should be presented under FRE 1002 and should be excluded because it is not the best evidence.
- d. Irrelevant. This statement is not relevant under FRE 401 because the critical reception to the Xi3 Modular Computer is of no consequence to the determination of the action. The statement does not refer to the CHROMIUMPC mark or any issues of consequence to the determination of the action. It is thus inadmissible under FRE 402.

9. *A Business Wire New [sic] Release covering the CES 2011 show characterized the impact of the Xi3 Technology as “Xi3 Corporation Rocks CES 2011.”* (Sullivan Decl. at ¶ 13)

OBJECTIONS

- a. Hearsay. To the extent the statement is offered to prove the impact of Xi3 Technology at CES 2011, it is inadmissible as hearsay under FRE 802.
- b. No Foundation. To the extent the statement is offered to prove that the news release was issued, it lacks foundation as to the declarant’s knowledge of the release, including who authored and released it, when, and to what media outlets.
- c. Best Evidence. This statement should be excluded as an improper introduction of the contents of writings (the news release) without providing the release itself. The statement therefore lacks original documents that should be presented under FRE 1002 and should be excluded because it is not the best evidence.
- d. Irrelevant. This statement is not relevant under FRE 401 because the impact of Xi3 Technology at CES 2011 of no consequence to the determination of the action. The statement does not refer to the CHROMIUMPC mark or any facts of consequence to the determination of the action. It is therefore inadmissible under FRE 402.

10. *A version of the Xi3 Modular computer is being branded and promoted as the CHROMIUMPC computer.* (Sullivan Decl. at ¶ 14)

OBJECTIONS

No Foundation. This statement lacks a proper foundation because it does not identify or describe what constitutes the purported “brand[ing] and promot[ion]” or what the basis of declarant’s knowledge of the purported “brand[ing] and promot[ion]” is.

11. *One example of the Xi3 CHROMIUMPC computer is depicted as follows:*



(Sullivan Decl. at ¶ 15)

OBJECTIONS

No Foundation. This statement lacks any information as to when this product was made, when the photograph was taken, and whether the image represents a true and correct photograph of an actual product bearing the CHROMIUMPC mark. The statement also lacks a foundation as to what it means to “depict” an “example” of “the Xi3 CHROMIUMPC computer.”

12. *In 2008, Google initiated an open-source software development project named Chromium. Google invited independent third parties to participate.* (Sullivan Decl. at ¶ 16)

OBJECTIONS

- a. Not Competent. There is nothing to show that the declarant has any competence to testify about Google's CHROMIUM open-source development projects, and the statement is therefore inadmissible under FRE 601.
- b. No Foundation. This statement lacks a proper foundation because it does not provide the basis for the declarant's purported knowledge about Google's open-source development projects.
13. *This Chromium software initiative was for software development by third parties for an internet operating system.* (Sullivan Decl. at ¶ 17)

OBJECTIONS

- a. Not Competent. There is nothing to show that the declarant has any competence to testify about Google's CHROMIUM software initiative, and the statement is therefore inadmissible under FRE 601.
- b. No Foundation. This statement lacks a proper foundation because it does not provide the basis for the declarant's purported knowledge about Google's software initiatives.

14. *During the second extension period, on May 11, 2011 Google announced a new hardware product bearing the brand CHROMEBOOK.* (Sullivan Decl. at ¶ 18)

OBJECTIONS

- a. Not Competent. There is nothing to show that the declarant has any competence to testify about Google's hardware announcements, and the statement is therefore inadmissible under FRE 601.
- b. No Foundation. This statement lacks a proper foundation because it does not provide a basis for what the "second extension period" refers to and does not provide the basis for the declarant's purported knowledge about Google's announcement.
- c. Best Evidence. This statement should be excluded as an improper introduction of the contents of writings (the announcement) without providing the announcement itself. The statement therefore lacks original documents that should be presented under FRE 1002 and should be excluded because it is not the best evidence.

15. *A [sic] term "PC" is a commonly used term for hardware products.* (Sullivan Decl. at ¶ 19)

OBJECTIONS

- a. Not Competent. There is nothing to show that the declarant has any particular knowledge as to the meaning of the term "PC," and the statement is therefore inadmissible under FRE 601.
- b. No Foundation. The statement lacks any foundation as to the basis for the declarant's knowledge as to how the term "PC" is commonly used.

c. Improper Opinion. This statement represents an improper opinion of a lay witness under FRE 701.

16. *The term “book” is a commonly used term for hardware products.* (Sullivan Decl. at ¶ 20)

OBJECTIONS

a. Not Competent. There is nothing to show that the declarant has any particular knowledge as to the meaning of the term “book” in the context of hardware products, and the statement is therefore inadmissible under FRE 601.

b. No Foundation. The statement lacks any foundation as to the basis for the declarant’s knowledge as to how the term “book” is commonly used in the context of hardware products.

c. Improper Opinion. This statement represents an improper opinion of a lay witness under FRE 701.

17. *The term “box” is a commonly used term for hardware products.* (Sullivan Decl. at ¶ 21)

OBJECTIONS

a. Not Competent. There is nothing to show that the declarant has any particular knowledge as to the meaning of the term “box” in the context of hardware products, and the statement is therefore inadmissible under FRE 601.

- b. No Foundation. The statement lacks any foundation as to the basis for declarant's knowledge as to how the term "box" is commonly used in the context of hardware products.
 - c. Improper Opinion. This statement represents an improper opinion of a lay witness under FRE 701.
18. *The terms "pc," "book" and "box" equally connote hardware products for personal computers in the computer industry.* (Sullivan Decl. at ¶ 22)

OBJECTIONS

- a. Not Competent. There is nothing to show that the declarant has any particular knowledge as to the connotation of the terms "pc," "book," or "box" in the context of the computer industry, and the statement is therefore inadmissible under FRE 601.
- b. No Foundation. The statement lacks any foundation as to the basis for the declarant's knowledge of the connotation of the terms "pc," "book," or "box" in the context of the computer industry or what it means for terms to "equally connote" something.
- c. Improper Opinion. This statement represents an improper opinion of a lay witness under FRE 701.

19. *Google's conduct has caused and is causing immediate and irreparable harm to Plaintiff and unless enjoined will continue to cause Plaintiff immediate and irreparable harm.*

(Sullivan Decl. at ¶ 23)

OBJECTIONS

Plaintiff's contention of immediate and irreparable harm is based solely on the allegation that "permitting the June 15, 2011 sales to go forward will irreparably and irretrievably extinguish Isys [sic] ability to survey the market status quo before CHROMEBOOK PC products flood the market." (Plaintiff's MPA at p. 8)

- a. Improper Opinion. This is opinion offered to prove a fact when it has not been shown that the witness is an expert. Thus the statement is an inadmissible opinion of a lay person under FRE 701.
- b. No Foundation. There is no foundation suggesting that Mr. Sullivan has any expertise in conducting forensic consumer surveys.

Dated this 13th day of June, 2011.

/s/ Craig Buschmann
Robert Stolebarger
Craig Buschmann
HOLME ROBERTS & OWEN, LLP
299 South Main Street, Suite 1800
Salt Lake City, Utah 84101

Attorneys for Google Inc.

CERTIFICATE OF SERVICE

I hereby certify that on the 13th day of June, 2011, I caused a true and correct copy of the **OBJECTIONS OF GOOGLE INC. TO DECLARATION OF JASON SULLIVAN** to be served as follows:

Todd E. Zenger
Dax D. Anderson
Joshua S. Rupp
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U.S. Mail, postage prepaid
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 E-Mail and/or CM/ECF

By: /s/ Sherice L. Atterton