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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

**DEFENDANTS' ANSWER TO
PLAINTIFF'S COMPLAINT AND
COUNTERCLAIMS AGAINST ISYS
TECHNOLOGIES, INC.**

JUDGE CLARK WADDOUPS

Defendants Google Inc. (“Google”), Samsung Electronics America, Inc. (“Samsung”) (erroneously sued herein as Samsung Electronics USA, Inc.), Acer America Corp. (“Acer”), Amazon.com, Inc. (“Amazon”), and Best Buy Co., Inc. (“Best Buy”), by and through their

counsel, answer the Complaint of Plaintiff Isys Technologies, Inc. (“Isys”) as set forth below. Unless specifically admitted, Defendants deny each of the allegations in Plaintiff’s Complaint.

ANSWER
INTRODUCTION

With respect to the Introduction in Plaintiff’s Complaint, Defendants admit that Plaintiff filed an intent-to-use (“ITU”) trademark application with the U.S. Patent and Trademark Office (“PTO”) for the CHROMIUMPC mark on June 21, 2010; that Google filed an application for the SPEEDBOOK mark on February 19, 2010; that Google asked Plaintiff not to use the CHROMIUMPC mark and to abandon its CHROMIUMPC application; that Google announced on May 11, 2011 the availability of CHROME OS software on two versions of a CHROMEBOOK laptop to be distributed by Acer and Samsung; and that Google filed a Notice of Opposition against Plaintiff’s CHROMIUMPC application on May 23, 2011. Defendants deny the remaining allegations of the Introduction, including any of Plaintiff’s allegations that (a) it has established any enforceable trademark rights in CHROMIUMPC, and (b) Google abandoned its rights to the CHROMIUM mark.

PARTIES

1. Defendants lack knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 1, and on that basis, deny the same.
2. Defendants admit that Google is a corporation organized under the laws of the State of Delaware.
3. Defendants admit that Samsung Electronics USA, Inc. was once a corporation organized under the laws of the State of Delaware, but now is void. Samsung Electronics America, Inc. is a corporation organized under the laws of the State of New York.
4. Defendants admit that Acer is a corporation organized under the laws of the State of California.
5. Defendants admit that Amazon is a corporation organized under the laws of the State of Delaware.

6. Defendants admit that Best Buy is a corporation organized under the laws of the State of Minnesota.

7. Defendants lack knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 7, and on that basis, deny the same.

8. Google, Samsung, Acer, Amazon, and Best Buy admit that they are collectively referred to in the Complaint as “Defendants.” Defendants lack knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 8 relating to “John Does 1-10”, and on that basis, deny the same. For purposes of this Answer, the term “Defendants” shall not include “John Does 1-10”.

JURISDICTION AND VENUE

9. The allegations in Paragraph 9 are legal conclusions to which no response is required. To the extent a response is required, Defendants admit that Plaintiff purports to assert claims under the Lanham Act, Utah state law, and common law. Defendants do not dispute this Court’s subject matter jurisdiction over Plaintiff’s federal law claims and supplemental jurisdiction over the Utah state law claims.

10. Defendants admit that the CHROMEBOOK product is being offered for sale to customers located in Utah.

11. The allegation in Paragraph 11 is a legal conclusion to which no response is required. To the extent a response is required, Defendants do not dispute this Court’s personal jurisdiction over Defendants.

12. The allegation in Paragraph 12 is a legal conclusion to which no response is required. To the extent a response is required, Defendants do not dispute venue in this action.

FACTUAL ALLEGATIONS

13. Defendants lack knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 13, and on that basis, deny the same.

14. Defendants lack knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 14, and on that basis, deny the same.

15. Defendants lack knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 15, and on that basis, deny the same.

16. Defendants lack knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 16, and on that basis, deny the same.

17. Defendants lack knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 17, and on that basis, deny the same.

18. Denied.

19. Denied.

20. Denied.

21. Defendants admit that, on June 21, 2010, Plaintiff filed an ITU application with the PTO for the CHROMIUMPC mark (Ser. No. 85/067,977) in connection with “computer carrying cases; computer chassis; computer expansion boards; computer hardware; computer interface boards; computer peripherals; computers” in Class 9. Defendants deny the remaining allegations in Paragraph 21.

22. Defendants Samsung, Acer, Amazon, and Best Buy lack knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 22, and on that basis, deny the same. Google admits the allegations in Paragraph 22.

23. Defendants admit that, prior to publication of the CHROMIUMPC Application for opposition, the PTO did not cite any trademark applications or registrations as barriers to registration of the CHROMIUMPC mark. Defendants deny the remaining allegations in Paragraph 23.

24. Defendants lack knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 24, and on that basis, deny the same.

25. Defendants lack knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 25, and on that basis, deny the same.

26. Defendants lack knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 26, and on that basis, deny the same.

27. Defendants lack knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 27, and on that basis, deny the same.

28. Defendants lack knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 28, and on that basis, deny the same.

29. Defendants lack knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 29, and on that basis, deny the same.

30. Defendants deny that the CHROMIUMPC application was published for opposition in “December 2010.”¹

31. Defendants Samsung, Acer, Amazon, and Best Buy lack knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 31, and on that basis, deny the same. Google admits that in 2008, Google announced an open-source software project under the CHROMIUM mark, that code was made available to third party software developers via license, and that those developers were invited to participate in further development of the code. Google denies the remaining allegations in Paragraph 31.

32. Defendants Samsung, Acer, Amazon, and Best Buy lack knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 32, and on that basis, deny the same. Google admits that the CHROMIUM open-source software project allows for the development of code relating to surfing the web (*i.e.*, accessing, navigating, searching, browsing, running web applications, and/or communicating via the Internet). Google denies the remaining allegations in Paragraph 32.

33. Defendants Samsung, Acer, Amazon, and Best Buy lack knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 33, and on that basis, deny the same. Google denies the allegations in Paragraph 33.

¹ To the extent that any of the headers in the Complaint may be construed to be allegations, Defendants deny the same.

34. Defendants Samsung, Acer, Amazon, and Best Buy lack knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 34, and on that basis, deny the same. Google denies the allegations in Paragraph 34.

35. Defendants Samsung, Acer, Amazon, and Best Buy lack knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 35, and on that basis, deny the same. Google denies the allegations in Paragraph 35.

36. Defendants Samsung, Acer, Amazon, and Best Buy lack knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 36, and on that basis, deny the same. Google denies the allegations in Paragraph 36.

37. Defendants Samsung, Acer, Amazon, and Best Buy lack knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 37, and on that basis, deny the same. Google denies the allegations in Paragraph 37.

38. Defendants Samsung, Acer, Amazon, and Best Buy lack knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 38, and on that basis, deny the same. Google denies the allegations in Paragraph 38.

39. Defendants admit that Google filed a trademark application for the CHROMIUM mark in connection with “computer software” in Class 9, “educational services” in Class 41, and “technical support services” in Class 42. Defendants deny the remaining allegations in Paragraph 39.

40. Defendants Samsung, Acer, Amazon, and Best Buy lack knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 40, and on that basis, deny the same. Google denies the allegations in Paragraph 40.

41. Defendants Samsung, Acer, Amazon, and Best Buy lack knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 41, and on that basis, deny the same. Google denies the allegations in Paragraph 41.

42. Defendants Samsung, Acer, Amazon, and Best Buy lack knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 42, and on that basis, deny the same. Google denies the allegations in Paragraph 42.

43. Defendants Samsung, Acer, Amazon, and Best Buy lack knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 43, and on that basis, deny the same. Google denies the allegations in Paragraph 43.

44. The allegations in Paragraph 44 are legal conclusions to which no response is required. To the extent a response is required, denied.

45. Denied.

46. Denied.

47. Denied.

48. Denied.

49. Defendants Samsung, Acer, Amazon, and Best Buy lack knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 49, and on that basis, deny the same. Google denies the allegations in Paragraph 49.

50. Admitted.

51. Denied.

52. Defendants Samsung, Acer, Amazon, and Best Buy lack knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 52, and on that basis, deny the same. Google denies the allegations in Paragraph 52.

53. Denied.

54. Denied.

55. Defendants Samsung, Acer, Amazon, and Best Buy lack knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 55, and on that basis, deny the same. Google admits that Google has maintained under penalty of perjury that the SPEEDBOOK mark it proposed to use in connection with certain hardware would not cause confusion with a previously registered SPEEDBOOK mark for certain software. Google denies the remaining allegations in Paragraph 55.

56. Defendants Samsung, Acer, Amazon, and Best Buy lack knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 56, and on that basis, deny the same. Google denies the allegations in Paragraph 56.

57. Defendants Samsung, Acer, Amazon, and Best Buy lack knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 57, and on that basis, deny the same. Google denies the allegations in Paragraph 57.

58. Defendants lack knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 58, and on that basis, deny the same.

59. Defendants Samsung, Acer, Amazon, and Best Buy lack knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 59, and on that basis, deny the same. Google admits that Google considered adopting the SPEEDBOOK mark in connection with computer hardware and filed an application for the mark in the Kingdom of Tonga. Google further admits that applications filed with the trademark office of Tonga are not available to the public for searching online. Google denies the remaining allegations of Paragraph 59.

60. Defendants Samsung, Acer, Amazon, and Best Buy lack knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 60, and on that basis, deny the same. Google admits the allegations in Paragraph 60.

61. Defendants admit that on August 18, 2010, Google filed a U.S. application for the SPEEDBOOK mark in connection with “computer hardware” in Class 9 based on both its intent to use the mark in the U.S. and its priority rights under Section 44(d) of the Lanham Act, 15 U.S.C. § 1126(d), as a result of its application for the mark in Tonga. Defendants deny the remaining allegations in Paragraph 61.

62. Defendants Samsung, Acer, Amazon, and Best Buy lack knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 62, and on that basis, deny the same. Google denies the allegations in Paragraph 62.

63. Defendants Samsung, Acer, Amazon, and Best Buy lack knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 63, and on that basis, deny the same. Google denies the allegations in Paragraph 63.

64. Admitted.

65. Defendants Samsung, Acer, Amazon, and Best Buy lack knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 65, and on that basis, deny the same. Google admits that it learned that Plaintiff's CHROMIUMPC application was published for opposition in November 2010.

66. Admitted.

67. Defendants Samsung, Acer, Amazon, and Best Buy lack knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 67, and on that basis, deny the same. Google admits the allegations in Paragraph 67.

68. Defendants Samsung, Acer, Amazon, and Best Buy lack knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 68, and on that basis, deny the same. Google denies the allegations in Paragraph 68.

69. Defendants admit that in March 2011, with Plaintiff's consent, Google filed a second request for an extension of time to oppose the CHROMIUMPC application, seeking an extension of time up to May 22, 2011, and that the PTO granted that request. Defendants deny the remaining allegations in Paragraph 69.

70. Defendants Samsung, Acer, Amazon, and Best Buy lack knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 70, and on that basis, deny the same. Google denies the allegations in Paragraph 70.

71. Admitted.

72. Defendants Samsung, Acer, Amazon, and Best Buy lack knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 72, and on that basis, deny the same. Google denies the allegations in Paragraph 72.

73. Defendants Samsung, Acer, Amazon, and Best Buy lack knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 73, and on that basis, deny the same. Google denies the allegations in Paragraph 73.

74. Denied.

75. The allegation in Paragraph 75 is a legal conclusion to which no response is required. To the extent a response is required, Defendants deny the allegation in Paragraph 75.

76. Denied.

77. Denied.

78. Denied.

79. Defendants admit that “PC” is a commonly used acronym for “personal computer.”

Defendants deny the remaining allegations in Paragraph 79.

80. Denied.

81. Denied.

82. Denied.

83. Defendants admit that the CHROMEBOOK mark would be used by Google’s partners to identify laptops installed with the CHROME OS software and to be distributed by Acer and Samsung. Defendants further admit that Google is considering adopting the CHROMEBOX mark to identify a desktop computer currently in development. Defendants deny the remaining allegations in Paragraph 83.

84. Defendants Samsung, Acer, Amazon, and Best Buy lack knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 84, and on that basis, deny the same. Google denies the allegations in Paragraph 84.

85. Denied.

86. Denied.

87. Denied.

88. Defendants admit that on May 11, 2011, Google announced the availability of CHROME OS on two versions of a CHROMEBOOK laptop to be distributed by Acer and Samsung, and referenced CHROMEBOX as the possible name for another computer hardware product. Defendants deny the remaining allegations in Paragraph 88.

89. Defendants admit that Samsung and Acer are promoting and advertising the CHROMEBOOK products in the U.S. pursuant to agreements with Google. Defendants deny the remaining allegations in Paragraph 89.

90. Denied.

91. Defendants admit that Samsung, Acer, Best Buy, and Amazon are promoting and advertising the sale of CHROMEBOOK products in the U.S. pursuant to agreements with Google. Defendants deny the remaining allegations in Paragraph 91.

92. Defendants admit that beginning on June 15, 2011, Best Buy and Amazon sold CHROMEBOOK products distributed by Samsung in the U.S. Defendants deny the remaining allegations in Paragraph 92.

93. Defendants admit that all uses of the CHROMEBOOK mark in commerce by Defendants occurred after Plaintiff filed its CHROMIUMPC application on June 21, 2010. Defendants deny the remaining allegations in Paragraph 93.

94. Defendants admit that Google sent a letter to Plaintiff on May 27, 2011 requesting Plaintiff's confirmation that Plaintiff "cease all use and plans to use the CHROMIUMPC mark, . . . abandon its trademark application for CHROMIUMPC, and . . . cease representing that any of its products will run the Chrome OS software." Defendants admit that in the letter, Google stated that "[a]bsent such confirmation, Google will have no choice but to pursue legal remedies." Defendants deny the remaining allegations of Paragraph 94.

95. Defendants admit that in the May 27, 2011 letter, Google asserted that its "ownership of trademark rights in the CHROMIUM mark affords it the exclusive right to use and authorize others to use the mark." Defendants deny the remaining allegations in Paragraph 95.

96. Denied.

97. Denied.

98. Denied.

99. Denied.

100. Denied.

101. Denied.

102. Denied.

103. Denied.

104. Denied.

105. Denied.

106. Denied.

107. Denied.

108. Denied.

109. Denied.

110. Denied.

CAUSES OF ACTION

FIRST CAUSE OF ACTION

(Declaration of Lack of Rights of Google in the Mark CHROMIUM - Google)

111. Defendants hereby incorporate as though fully set forth herein their responses to the allegations in the Introduction and Paragraphs 1-110.

112. The allegation in Paragraph 112 is a legal conclusion to which no response is required.

113. Denied.

114. Denied.

SECOND CAUSE OF ACTION

(Declaration of Invalidity of Pending Trademark Applications for the Mark CHROMIUM – Google)

115. Defendants hereby incorporate as though fully set forth herein their responses to the allegations in the Introduction and Paragraphs 1-114.

116. The allegation in Paragraph 116 is a legal conclusion to which no response is required.

117. Denied.

118. Denied.

119. Denied.

THIRD CAUSE OF ACTION

(Declaration that Isys Does Not Infringe Any Trademark Right of Google in the Mark Chromium -- Google)

120. Defendants hereby incorporate as though fully set forth herein their responses to the allegations in the Introduction and Paragraphs 1-119.

121. The allegation in Paragraph 121 is a legal conclusion to which no response is required.

122. Denied.

123. Defendants lack knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 123, and on that basis, deny the same.

124. Denied.

125. Denied.

FOURTH CAUSE OF ACTION
(Unfair Competition Under the Lanham Act, 15 U.S.C. § 1125
– Google, Samsung, Acer, Best Buy, and Amazon.com)

126. Defendants hereby incorporate as though fully set forth herein their responses to the allegations in the Introduction and Paragraphs 1-125.

127. Denied.

128. Denied.

129. Denied.

130. Denied.

131. Denied.

132. Denied.

133. Denied.

134. Denied.

135. Denied.

136. Denied.

137. Denied.

138. Denied.

139. Denied.

140. Paragraph 140 does not contain any text and thus requires no response.

FIFTH CAUSE OF ACTION
(Unfair Competition Under the Utah Truth in Advertising Statute
13-11a-1 *et seq.* and Utah Unfair Practices Act 13-5-1 *et seq.* –
Google, Samsung, Acer, Best Buy, and Amazon.com)

141. Defendants hereby incorporate as though fully set forth herein their responses to the allegations in the Introduction and Paragraphs 1-140.

142. Denied.

143. Denied.

144. Denied.

145. Denied.

146. Denied.

147. Denied.

148. Denied.

149. Denied.

150. Denied.

151. Denied.

152. Denied.

153. Denied.

SIXTH CAUSE OF ACTION

(Trademark Infringement Under the Lanham Act, 15 U.S.C. § 1125 – Google, Samsung, Acer, Best Buy, and Amazon.com)

154. Defendants hereby incorporate as though fully set forth herein their responses to the allegations in the Introduction and Paragraphs 1-153.

155. Denied.

SEVENTH CAUSE OF ACTION

(Trademark Infringement Under Common Law – Google, Samsung, Acer, Best Buy, and Amazon.com)

156. Defendants hereby incorporate as though fully set forth herein their responses to the allegations in the Introduction and Paragraphs 1-155.

157. Denied.

EIGHTH CAUSE OF ACTION

(Unjust Enrichment – Google, Samsung, Acer, Best Buy, and Amazon.com)

158. Defendants hereby incorporate as though fully set forth herein their responses to the allegations in the Introduction and Paragraphs 1-157.

159. Denied.

160. Denied.

AFFIRMATIVE DEFENSES

Defendants assert the following separate and additional defenses to Plaintiffs' Complaint, without assuming the burden of proof on such defenses that would otherwise fall on Plaintiff. Defendants reserve the right to seek leave to amend these defenses based on its ongoing investigation and discovery into the matters alleged in the Complaint. Defendants do not knowingly or intentionally waive any applicable defense.

FIRST AFFIRMATIVE DEFENSE (Failure to State a Claim)

1. Plaintiff fails to state in the Complaint facts sufficient to constitute a cause of action upon which relief may be granted.

SECOND AFFIRMATIVE DEFENSE (Lack of Standing)

2. Plaintiff lacks standing to assert the claims alleged in the Complaint as Plaintiff does not own any enforceable trademark rights in the term CHROMIUMPC.

THIRD AFFIRMATIVE DEFENSE (No Damage)

3. Defendants are informed and believe, and therefore allege without admitting that the Complaint states a claim, that Plaintiff has not sustained any loss, damage, harm, or detriment in any amount as a result of any acts alleged against Defendants in the Complaint.

FOURTH AFFIRMATIVE DEFENSE (Unclean Hands)

4. Plaintiff's claims are barred by the doctrine of unclean hands.

FIFTH AFFIRMATIVE DEFENSE (Lack of Irreparable Harm)

5. Plaintiff's claims for injunctive relief are barred because Plaintiff cannot show that it will suffer any irreparable harm from Defendants' actions. Plaintiff has a complete and adequate

remedy at law and thus is not entitled to seek equitable relief because the alleged injury or damage suffered by Plaintiff, if any, would be compensated by damages.

**SIXTH AFFIRMATIVE DEFENSE
(Failure to Mitigate)**

6. Plaintiff's claims made in the Complaint are barred, in whole or in part, because of a failure to mitigate damages, if such damages exist.

**SEVENTH AFFIRMATIVE DEFENSE
(Duplicative Claims)**

7. Without admitting that the Complaint states a claim, any remedies are limited to the extent Plaintiff seeks overlapping and duplicative recovery based on various claims against Defendants for any alleged single wrong.

PRAYER FOR RELIEF ON ISYS' COMPLAINT

WHEREFORE, Defendants pray for relief and judgment as follows:

1. That the Court deny Plaintiff's prayer for relief in its entirety and that the Court dismiss the Complaint with prejudice and enter judgment in Defendants' favor and against Plaintiff;
2. That the Court award Defendants their costs and expenses incurred in this action and attorneys' fees as permitted by law; and
3. That the Court award Defendants such other and further relief that it deems appropriate.

COUNTERCLAIMS

Google asserts each of the following counterclaims against Isys. Defendants Samsung, Acer, Amazon and Best Buy join in and assert the counterclaims set forth in the Second Cause of Action below, as well as the specific allegations that directly relate to and support that counterclaim.

PARTIES

1. Google is a corporation organized and existing under the laws of the State of Delaware, with its principal place of business in Mountain View, California.
2. Samsung is a corporation organized under the laws of the State of New York.
3. Acer is a corporation organized under the laws of the State of California.
4. Amazon is a corporation organized under the laws of the State of Delaware.
5. Best Buy is a corporation organized under the laws of the State of Minnesota.
6. On information and belief, Isys is a corporation organized and existing under the laws of the State of Nevada, with its principal place of business in Salt Lake City, Utah.

JURISDICTION AND VENUE

7. These counterclaims arise under, respectively, the Lanham Act, 15 U.S.C. § 1051 *et seq.*, the Declaratory Judgment Act, 28 U.S.C. § 2201 *et seq.*, and Utah's Truth in Advertising Act, § 13-11a-1, *et seq.*

8. This Court has jurisdiction over the subject matter of these counterclaims under 15 U.S.C. § 1121 and 28 U.S.C. §§ 1331, 1338, 1367, and 2201.

9. On information and belief, this Court has personal jurisdiction over Isys because, among other reasons, Isys' principal place of business is in this judicial district. Further, by filing its complaint in this judicial district, Isys has submitted to this Court's personal jurisdiction over Isys.

10. On information and belief, venue is proper in this judicial district pursuant to 28 U.S.C. §1391 because, among other reasons, Isys' principal place of business is in this judicial

district. Further, by filing its complaint, Isys has consented that this Court is a proper venue for this litigation.

FACTUAL BACKGROUND

OWNERSHIP OF THE CHROMIUM MARK

11. Over several years, beginning in or about 2006, Google developed a new web browser software product offering enhanced functionality. The browser was designed to allow users to access programs and applications available on the Internet and effectively utilize even very complex programs via the browser alone.

12. In 2008, Google launched the web browser product – identified as CHROME - and also released an “open source” version of the browser under the CHROMIUM name and trademark.

13. In or about this same period of time, Google also developed a new operating system designed to meet the needs of users active on the Internet. In July 2009, Google announced its CHROME OS operating system.

14. In November 2009, Google released source code for its CHROMIUM OS operating system to the CHROMIUM open source community.

15. Software developers wishing to participate in the CHROMIUM open software project must obtain a license to use the CHROMIUM source code from Google.

16. Once licensed, developers have access to the CHROMIUM source code, which enables them to develop additional features, participate in discussion groups, improve the software by finding and reporting bugs, and submit patches for known bugs.

17. Google reviews the work product of the CHROMIUM community both to monitor the CHROMIUM and CHROMIUM OS products and to assess possible future features for its other products.

18. Central to the CHROMIUM open source project, Google has implemented a program whereby certain dedicated software developers become “reviewers” and “committers” within the CHROMIUM open source community. These developers are responsible for, among other tasks,

the review of code, ensuring that code contributed to the CHROMIUM code base is of high-quality, and the resolution of any issues associated with the software.

19. At all times, Google has affirmatively monitored and policed its rights in the CHROMIUM trademark by, for example, (a) taking actions to address and curtail improper uses of the CHROMIUM mark by third parties, and (b) filing a Notice of Opposition against Isys' federal ITU application for the CHROMIUMPC mark.

20. The speed, simplicity and security of the CHROMIUM web browser and operating system software has garnered widespread attention and use.

21. Google has continuously used the CHROMIUM mark in connection with its open source web browser and operating system software. In addition, Google has publicly used the "TM" symbol with the CHROMIUM mark and listed CHROMIUM as a Google brand under its "Guidelines for Third Party Use of Google Brand Features."

22. On September 2, 2008, Google filed a trademark application with the U.S.P.T.O. for the mark CHROMIUM in connection with computer software and related technical support services (Application Serial No. 77/980,388), which the PTO allowed for registration on June 9, 2011.

23. Notwithstanding Google's continuous use of the CHROMIUM mark and its trademark application, Isys has alleged that Google has abandoned its rights in the CHROMIUM mark by using the mark in connection with its open source software project. Isys' allegations lack factual foundation and demonstrate a misunderstanding of the CHROMIUM open source software project.

LITERALLY FALSE STATEMENTS MADE BY ISYS

24. Google does not permit other parties to use its CHROME OS operating system without a license from Google.

25. The CHROME OS operating system is cryptographically signed by Google, making it impossible for a third party to implement it without Google's permission and cooperation.

26. Isys has not been granted a license to install CHROME OS on any of its computer hardware products; nor has Isys asked Google for such a license.

27. Notwithstanding that it lacks a license or permission of any kind to use or implement the CHROME OS operating system, Isys has made several false statements to the public that one of Isys' anticipated computer hardware products, apparently to be offered under the CHROMIUMPC name, would run Google's CHROME OS operating system. For example, on or about December 28, 2009, Isys posted a blog entry on its website proclaiming that "ChromiumPC.com is taking pre-orders for the first Google Chrome OS based desktop PC" and encouraging users to "pre-order the first Google Chrome OS desktop PC at www.chromiumPC.com". A true and correct copy of this blog post is attached as Exhibit A.

28. Further, in late 2009 and 2010, Isys published materials on third party Internet sites including Twitter and YouTube indicating that Isys planned to offer a desktop computer product loaded with Google's CHROME OS operating system. See <http://twitter.com/#!/chromiumpc> and <http://www.youtube.com/chromiumpc>, printouts from which are attached as Exhibit B.

29. On or about May 18, 2011, Google notified Isys that it could not run Google's CHROME OS operating system software on Isys' CHROMIUMPC product without a license from Google.

30. Despite that knowledge, on May 20, 2011, Isys issued a press release again falsely proclaiming through its subsidiary Xi3 Corporation that "Xi3 Corporation Announces its ChromiumPC Modular Computer – the World's First Desktop Computer Running Google's Chrome Operating System." A true and correct copy of the May 20, 2011 press release is attached as Exhibit C.

31. Isys has perpetuated this factual inaccuracy and fostered confusion by featuring its May 20, 2011 press release on its website, along with several online news articles from third parties that reported the false information Isys disseminated.

32. On May 27, 2011, Google formally notified Isys in writing that Isys' false representations constituted false advertising and demanded that Isys cease representing that any

of its products would run the CHROME OS operating system. More than ten days after Google so notified Isys, the false advertising remained on Isys' web site.

33. Isys' acts of unfair competition and false advertising have damaged the Defendants.

CAUSES OF ACTION

FIRST CAUSE OF ACTION

DECLARATORY JUDGMENT OF TRADEMARK OWNERSHIP (GOOGLE ONLY)

34. Google realleges and incorporates herein by reference its allegations in Paragraphs 1-33 of its Counterclaims.

35. An actual case or controversy exists between Google and Isys as to whether Google owns trademark rights in the mark CHROMIUM.

36. Google owns valid and protectable rights in the CHROMIUM mark based on its continuous use of the mark in commerce since at least as early as December 2008.

37. Despite Google's stringent quality control standards governing the open source CHROMIUM web browser and operating system, Isys alleges in its Complaint that Google abandoned its rights in the CHROMIUM mark.

38. A judicial declaration is necessary and appropriate so that Google may continue to protect and enforce its rights in the CHROMIUM mark.

SECOND CAUSE OF ACTION

UNFAIR COMPETITION & FALSE ADVERTISING (ALL DEFENDANTS)

39. Defendants restate and incorporate herein by reference the allegations in Paragraphs 1-10 and 24-33 of the counterclaims.

40. Isys' actions described above constitute unfair competition and false advertising in violation of 15 U.S.C. § 1125(a).

41. Consumers are likely to be misled and deceived by Isys' material misrepresentations regarding its computers.

42. On information and belief, Isys knew or should have known that its statements about its CHROMIUMPC computer running the CHROME OS operating system were false and likely to mislead consumers.

43. As an actual and proximate result of Isys' willful and intentional actions, Defendants have suffered damages in an amount to be determined at trial, and unless Isys is enjoined from making such false statements, Defendants will continue to suffer irreparable harm and damage to its business, reputation, and goodwill. Defendants are therefore entitled to injunctive relief pursuant to 15 U.S.C. § 1116.

44. Pursuant to 15 U.S.C. § 1117, Defendants are entitled to any profits made by Isys as a result of its violations of the Lanham Act, damages sustained by Defendants in an amount to be determined at trial, and the costs of this action. Furthermore, on information and belief, the actions of Isys were undertaken willfully and with the intention of causing confusion, mistake, or deception, thus making this an exceptional case entitling Defendants to recover treble damages and reasonable attorneys' fees.

THIRD CAUSE OF ACTION
VIOLATION OF UTAH TRUTH IN ADVERTISING ACT (UCA § 13-11a-1, *ET SEQ.*)
(GOOGLE ONLY)

45. Google restates and incorporates herein by reference the allegations in Paragraphs 1-10, 24-33 and 39-44 of the counterclaims.

46. The actions of Isys in falsely representing that its computers would implement Google's CHROME OS operating system constitute deceptive trade practices under Utah's Truth in Advertising Act, § 13-11a-1, *et seq.*, in that Isys has caused a likelihood of confusion or misunderstanding as to the source, sponsorship, approval, or certification of its purported goods; caused a likelihood of confusion as to affiliation, connection, association with, or certification by another; represented that its purported goods have sponsorship, approval, characteristics, ingredients, uses, benefits, or qualities that they do not have or that Isys has sponsorship, approval, affiliation, or connection that it does not have; falsely represented that its purported goods are of a particular standard, quality, or grade; and engaged in other conduct similarly creating a likelihood of confusion or misunderstanding.

47. Google formally notified Isys in writing of the acts in violation of Utah Code Ann. § 13-11a-4(3) on May 27, 2011, but Isys had promulgated no correction notice within ten days of receipt of that notice.

48. Pursuant to Utah Code Ann. § 13-11a-4(2)(a), Google is entitled to an injunction against the continuance of Isys' acts in violation of Utah's Truth in Advertising Act.

49. Google has been injured by the actions of Isys and is therefore entitled to recover its actual damages or \$2,000, whichever is greater; its separate costs; and its attorneys fees as provided in Utah Code Ann. § 13-11a-4(2)(b)-(c).

50. Google is entitled to corrective advertising by the same media and with the same distribution and frequency as Isys' advertisements containing the false representations described in Paragraphs 24 - 33.

PRAYER FOR RELIEF ON COUNTERCLAIMS

WHEREFORE, Defendants request that judgment be entered in their favor and against Isys as follows:

- a. A judgment in favor of Defendants on all counterclaims;
- b. A declaration that Google owns valid and protectable rights in its CHROMIUM mark;
- c. A preliminary and permanent injunction against Isys, its respective officers, agents, servants, employees, parent and subsidiary corporations, assigns and successors in interest, and those persons in active concert or participation with them, enjoining them from acts of unfair competition and false advertising;
- d. An accounting and award of Isys' profits, damages sustained by Defendants as a result of Isys' acts of unfair competition and false advertising, and the costs of this action;
- e. That, due to Isys' willful, intentional, and deliberate acts in violation of the Lanham Act, all damages and profits be trebled and awarded to Defendants, along with Defendants' attorneys' fees;
- f. That the Court declare that the deceptive acts of Isys violate Chapter 11a of Title 13 of the Utah Code Annotated;

g. That the Court enjoin and restrain Isys and each and all of its officers, employees, agents, representatives, servants, employees, parent and subsidiary corporations, assigns and successors in interest, and those persons in active concert or participation with them, having actual notice hereof by service or otherwise, from committing the deceptive acts in violation of Utah Code Ann. § 13-11a-3;

h. That the Court award Google its actual damages or \$2000, whichever is greater, plus costs of court, as provided in Utah Code Ann. § 13-11a-4(2)(b);

i. That the Court award Google its attorneys fees as provided in Utah Code Ann. § 13-11a-4(2)(c);

j. That Defendants be granted pre-judgment and post-judgment interest; and

k. That the Court grant Defendants such other relief as it deems just and proper.

Dated: July 5, 2011

/s/ Peter J. Willsey

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