HONORABLE MARSHA J. PECHMAN

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF WASHINGTON

AT SEATTLE

INTERVAL LICENSING LLC,

Plaintiff,

v.

AOL, INC., et al.,

Defendants.

Case No. No. 2:10-cv-01385-MJP

FACEBOOK'S JOINDER IN DEFENDANTS GOOGLE INC. AND YOUTUBE, LLC'S REPLY IN SUPPORT OF THEIR MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED PURSUANT TO FED. R. CIV. R. 12(B)(6)

NOTED ON MOTION CALENDAR: November 12, 2010

ORAL ARGUMENT REQUESTED

Defendant Facebook Inc. ("Facebook") respectfully joins in defendants Google Inc. and YouTube, LLC's Reply in Support of Their Motion to Dismiss for Failure to State a Claim Upon Which Relief Can Be Granted Pursuant to Fed. R. Civ. R. 12(b)(6).

I. INTERVAL FAILS TO MEET EVEN THEIR OWN INTERPRETATION OF RULE 8 COMPLIANCE

Interval Licensing LLC's ("Interval") opposition brief accepts that Rule 8(a) compliance requires identification "with specificity, particular products that infringe Interval's patents." (Dkt. No. 123 at 7:28, 8:10-11). Interval further admits that Form 18 requires identification of "specified devices" accused of infringement. (Dkt. No. 123 at 4:17-21). However, Interval makes no specific identifications. Interval's generic references to "websites and associated

hardware and software" with respect to Facebook's alleged infringement does not identify specific accused products. (Dkt. No. 123 at 8:17-22).

Notably, Interval has even failed to identify *which* of the many websites owned by defendants are accused of infringing or which products offered on those websites are accused. For example, http://www.facebook.com can be used to access a multitude of products and services, from Groups and Pages to Messages, Chat and numerous third party offerings. Interval's Complaint never identifies any specific product or service that it accuses of infringement.

Nor does attaching the patent to the complaint provide notice of the accused products. Interval's argument to the contrary is specious, at best. If attaching the patent were enough to give a defendant notice of what is accused of infringement, there would be no need for even the information required by Form 18. It is not, and plaintiff's complaint is deficient.

II. FORM 18 DOES NOT SUPPLANT THE FEDERAL PLEADING STANDARDS

As Google points out in their reply, Interval's interpretation of the case law is incorrect – Form 18 has not been upheld by the Federal Circuit. *See Bender v. Motorola, Inc.*, No. C 09-1245, 2010 WL 726739, at *3 (N.D. Cal. Feb. 26, 2010); *Bender v. LG Elecs. U.S.A., Inc.*, No. C 09-02114, 2010 WL 889541, at *3 (N.D. Cal. Mar. 11, 2010). Interval also ignores that the Supreme Court in *Ashcroft v. Iqbal* held that the pleading standards of *Twombly* "appl[y] to any civil case." 129 S. Ct. 1937, 1953 (2009).

III. INTERVAL'S FAILURE TO COMPLY WITH RULE 8 PREJUDICES DEFENDANTS

By choosing not to include any specific accused products in its Complaint, Interval is improperly putting defendants at a disadvantage in defending this case. Rather than providing information that should have been set forth in its Complaint, Interval attempts to withhold such information until the time for serving infringement contentions. (Dkt. No. 123 at 11:1-4.) Ironically, Interval now complains of the delay it itself has caused. If Interval was truly concerned with delay, it should have pleaded sufficient facts in its original Complaint or amended its Complaint to conform to the requirements of Rule 8, at defendants' urging.

Despite Interval's attempt to rewrite the Federal Rules, Fed. R. Civ. P. 83(a)(1) mandates that local rules cannot trump the Federal Rules. As such, patent disclosures cannot remedy defective pleadings. Interval ignores the fundamental difference between the operative pleading in a case and information provided during discovery, which may be subject to multiple rounds of changes and amendments during the course of the case. Infringement contentions are not, and cannot be, the operative pleading in the case. Interval should not be rewarded for failing to properly plead its case by using a later filed discovery response to patch the holes – leaving defendants less time to prepare their case.

In contrast, Interval will not be prejudiced by having to comply with its pleading obligations. Interval misconstrues what defendants are asking for. Defendants are not asking for claim by claim, element by element, infringement contentions within the complaint, but for enough information to determine how Interval alleges defendants infringe and by what products or services. Interval's self-serving proposal to have the Court pardon its non-compliant Complaint in favor of preliminary infringement contentions should be rejected and Facebook's motion granted.

DATED this 12th day of November, 2010.

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CERTIFICATE OF SERVICE

I hereby certify that on November 12, 2010, I electronically filed the following document(s): **Facebook's Joinder in Defendants Google Inc. and YouTube, LLC's Reply in Support of Their Motion to Dismiss for Failure to State a Claim upon which Relief Can Be Granted Pursuant to Fed. R. Civ. R. 12(b)(6)** with the Clerk of the Court using the CM/ECF system, which will send an email notification of such filing to the attorney(s) of record listed below:

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