

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE**

WALGREEN CO.,

Plaintiff,

V.

CVS PHARMACY, INC.,

Defendant.

C.A. No. 14-123-GMS

JURY TRIAL DEMANDED

First Amended Complaint and Demand for Jury Trial and Injunctive Relief Sought

Plaintiff Walgreen Co. (“Walgreens” and “Plaintiff”), hereby files this First Amended Complaint against Defendant CVS Pharmacy, Inc. (“CVS” or “Defendant”), and alleges as follows:

THE PARTIES

1. Walgreens is an Illinois corporation with a principal place of business at 200 Wilmot Road, Deerfield, Illinois, 60015.

2. On information and belief, CVS is a Rhode Island corporation with a principal place of business in Woonsocket, Rhode Island. On information and belief, CVS is registered to do business in the State of Delaware and regularly conducts business in this Judicial District.

NATURE OF ACTION AND JURISDICTION

3. This action arises under the Patent Laws of the United States, Title 35, United States Code, and more particularly under 35 U.S.C. §§ 271 et seq. This Court has jurisdiction

over the subject matter of this patent infringement action pursuant to 28 U.S.C. §§ 1331, 1338(a), and 35 U.S.C. §§ 271 and 281-285.

4. This Court has personal jurisdiction over CVS because it has committed acts giving rise to this action within Delaware and within this Judicial District. CVS has also purposefully availed itself of the rights and benefits of the laws of this State and this Judicial District. On information and belief, CVS is in the business of pharmaceutical and consumer retailing and employs residents of the State of Delaware and this Judicial District. On information and belief, CVS conducts business and has retail stores with pharmacies throughout the United States, including within the State of Delaware and in this Judicial District. On information and belief, CVS markets and sells pharmaceutical and consumer products throughout the United States, including within the State of Delaware and in this Judicial District.

5. On information and belief, CVS regularly conducts business in Delaware and in this Judicial District. On information and belief, several CVS controlled entities, including specific CVS stores, are registered to do business in the State of Delaware and have registered agents in this Judicial District. On information and belief, CVS has maintained continuous and systematic contacts with the State of Delaware, and plans to continue to maintain its systematic and continuous contacts with the State of Delaware, including but not limited to, its aforementioned business of marketing and selling pharmaceutical and consumer products in the State of Delaware. Accordingly, this Court has personal jurisdiction over CVS.

VENUE

6. Venue is proper in the District of Delaware pursuant to 28 U.S.C. §§ 1391(a), 1391(b), 1391(c), and 1400(b) at least in that CVS is registered to do business and does conduct business in the State of Delaware and in this Judicial District, and CVS has committed acts of infringement and has a regular and established place of business in this Judicial District.

FACTUAL BACKGROUND

7. United States Patent No. 8,626,530 (the “530 Patent”), titled “System and Method for Express Refill,” was duly and legally issued by the United States Patent and Trademark Office (“Patent Office”) on January 7, 2014. A true and correct copy of the 530 Patent is attached hereto as Exhibit A.

8. Walgreens is the sole owner, by assignment, of the entire right, title, and interest in the 530 Patent, including the right to sue for infringement of the 530 Patent.

9. Walgreens owns, offers and operates the Walgreens mobile apps available for at least the iPad®, iPhone®, Windows Phone®, Android™ devices, and BlackBerry® devices which implement, among other things, Refill by Scan technology for refilling a prescription, which is protected by the 530 Patent.

10. On information and belief, CVS owns, operates, offers, and/or disseminates or makes available for dissemination applications for mobile devices (“apps”), including the CVS/pharmacy myCVS Mobile Apps available for at least the iPad®, iPhone®, and Android™ devices (the “Accused Apps”), which implement, among other things, a refill by scan technology for refilling a prescription, which is accessible via a feature on the Accused Apps entitled “Scan Your Refill.”

11. On information and belief, CVS owns, operates, and/or disseminates or makes available the Accused Apps to its customers across the United States, including customers within the State of Delaware and in this Judicial District.

12. CVS does not have a license to the 530 Patent.

13. CVS has had actual knowledge of the 530 Patent since at least January 31, 2014, the filing date of Walgreens’ Original Complaint.

14. On January 31, 2014, Walgreens filed its Original Complaint, alleging that CVS and CVS Caremark Corporation infringed the 530 Patent by, among other things, its “making, using, offering, disseminating, operation, support, maintenance, and other use of the Accused Apps”; that CVS and CVS Caremark Corporation actively induced infringement by its customers “by intentionally inducing the use of the Accused Apps, intending to encourage, and in fact encouraging customers to directly infringe . . . one or more claims of the 530 Patent”; that CVS and CVS Caremark Corporation “contributed to, and is contributing to, direct infringement . . . by its customers” by “making, using, offering, disseminating, operating, supporting, maintaining, and otherwise encouraging the use of the Accused Apps, and/or through the importation of the Accused Apps before the expiration of the 530 Patent”; and that CVS and CVS Caremark Corporation “has had actual knowledge of its customers’ direct infringement . . . since at least as of the filing date of [the Original] Complaint.”

15. On information and belief, subsequent to January 31, 2014, CVS has updated its Accused Apps for at least the iPhone and Android platforms. CVS’s Accused App for the iPhone platform was updated on at least February 4, 2014 (v1.20), March 15, 2014 (v1.22), and April 7, 2014 (v1.23). CVS’s Accused App for the Android platform was updated on at least Feb. 3, 2014 (v1.20) and March 12, 2014 (v1.22). None of these updates represent any attempt to avoid infringement of the 530 Patent, of which CVS had knowledge since at least as early as the filing of the Original Complaint.

16. On information and belief, subsequent to January 31, 2014, CVS has not made any changes to its Accused Apps in response to the Original Complaint or CVS’s knowledge of the 530 Patent.

17. On information and belief, subsequent to January 31, 2014, CVS has not made any changes to any publicly available literature, descriptions or instructions related to the Accused Apps in response to the Original Complaint or CVS's knowledge of the 530 Patent.

18. On March 20, 2014, based on CVS's representation that CVS is the real party in interest regarding the subject matter of the above-captioned action, Walgreens stipulated to the voluntary dismissal of CVS Caremark Corporation without prejudice and with CVS Caremark Corporation's agreement that it would be bound by all orders and judgments entered in the above-captioned action for purposes of issue preclusion and claim preclusion.

19. On March 21, 2014, Walgreens filed a Motion for a Preliminary Injunction seeking to enjoin CVS from using refill by scan technology in its Accused Apps. The supporting brief and materials set forth detailed information explaining certain ways in which CVS's Accused Apps infringe the 530 Patent.

20. On information and belief, subsequent to March 21, 2014, CVS has not made any changes to its Accused Apps in response to the Motion for a Preliminary Injunction or CVS's knowledge of the 530 Patent.

21. On information and belief, subsequent to March 21, 2014, CVS has updated its Accused Apps for at least the iPhone platform. CVS's Accused App for the iPhone platform was updated on at least April 7, 2014 (v1.23). This update did not represent any attempt to avoid infringement of the 530 Patent, of which CVS had knowledge since at least as early as the filing of the Original Complaint.

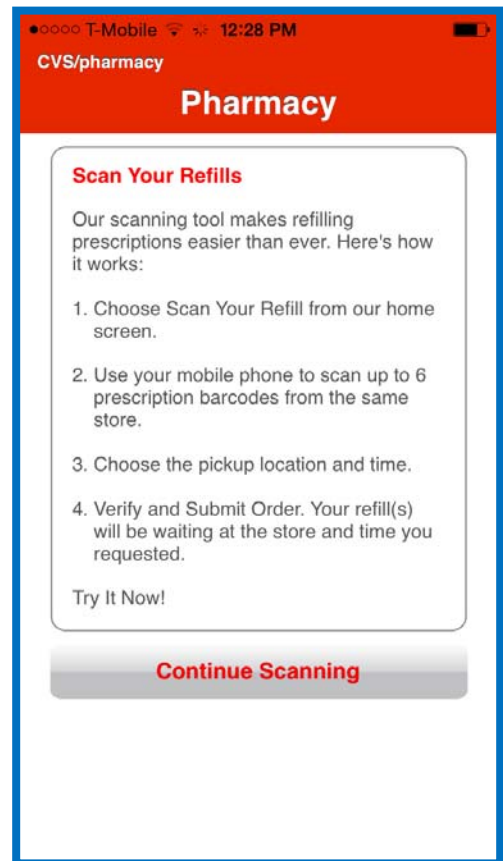
22. On information and belief, subsequent to March 21, 2014, CVS has not made any changes to any publicly available literature, descriptions or instructions related to the Accused Apps in response to the Motion for a Preliminary Injunction or CVS's knowledge of the 530 Patent.

23. Further, in the brief and materials supporting its March 21, 2014, Motion for a Preliminary Injunction, Walgreens explained how CVS could avoid infringement of the 530 Patent by removing the refill by scan technology from its Accused Apps and allowing its customers to continue refilling prescriptions by manual entry of a prescription number.

24. On information and belief, subsequent to March 21, 2014, CVS has not removed the refill by scan technology from its Accused Apps as described in Paragraph 23.

25. On information and belief, CVS knowingly and intentionally continues to provide its customers with its Accused Apps containing refill by scan technology and thereby continues to infringe the 530 Patent.

26. With full knowledge of the 530 Patent and the applicability of its claims, CVS has intentionally encouraged its customers to use the infringing refill by scan technology. For example, CVS touts in the “Description” for the Accused Apps on both the iTunes App Store and Google Play Store: “Scan to refill and refill without signing in.”¹ As illustrated in the screenshot to the right, the Accused Apps’ “Scan Your Refill” feature has associated information asserting that “[o]ur scanning tool makes refilling prescriptions easier than ever”; and encouraging a user to “[u]se your mobile phone to scan up to 6 prescription barcodes from the same store.” *CVS/pharmacy myCVS iPhone App*, version



¹ *CVS Pharmacy on the App Store on iTunes*, <https://itunes.apple.com/us/app/cvs-pharmacy/id395545555?mt=8> (last visited Apr. 14, 2014) (select “...More” hyperlink under “Description”); *CVS/pharmacy – Android Apps on Google Play*, <https://play.google.com/store/apps/details?id=com.cvs.launchers.cvs> (last visited Apr. 14, 2014).

v1.23.

27. On information and belief, customers cannot use the refill by scan technology embodied in the Accused App's "Scan Your Refill" feature without infringing the 530 Patent. With knowledge of the 530 Patent since at least the filing date of the Original Complaint, CVS knows that its customers infringe the 530 Patent when they use the refill by scan technology of the Accused Apps.

28. CVS has profited through its infringement of the 530 Patent. As a result of CVS's unlawful infringement of the 530 Patent, Walgreens has suffered harm. Unless CVS is enjoined from incorporating infringing refill by scan technology in its Accused Apps, Walgreens will continue to be harmed.

29. An actual controversy of such immediacy and reality as to warrant immediate injunctive relief exists between Walgreens and CVS, as discussed in more detail below.

COUNT I: Infringement of the 530 Patent Under 35 U.S.C. § 271

30. The allegations of the preceding paragraphs 1-29 are repeated, realleged, and incorporated herein by reference as if fully set forth herein.

31. Under 35 U.S.C. § 271, CVS's making, using, offering, disseminating, operation, support, maintenance, and other use of the Accused Apps, and/or importation of the Accused Apps before the expiration of the 530 Patent, constitutes direct infringement, either literal or under the doctrine of equivalents, of one or more claims of the 530 Patent.

32. On information and belief, under 35 U.S.C. § 271, CVS's making, using, offering, disseminating, operation, support, maintenance, and other use of the Accused Apps, and/or importation of the Accused Apps before the expiration of the 530 Patent, constitutes indirect infringement of one or more claims of the 530 Patent.

33. On information and belief, CVS, with knowledge of the 530 Patent since at least the filing date of the Original Complaint, and without authority, has actively induced, and continues to actively induce, infringement by its customers of one or more claims of the 530 Patent, in violation of 35 U.S.C. § 271(b), by intentionally inducing the use of the Accused Apps, intending to encourage, and in fact encouraging, customers to directly infringe, either literal or under the doctrine of equivalents, one or more claims of the 530 Patent.

34. On information and belief, as a result of CVS's inducement, CVS's customers have used, and continue to use, the Accused Apps to refill their prescriptions using refill by scan technology, which represents direct infringement, either literal or under the doctrine of equivalents, of one or more claims of the 530 Patent.

35. On information and belief, since at least the filing date of the Original Complaint, CVS has actively induced, and continues to actively induce, infringement by making, using, offering, and disseminating into the stream of commerce the Accused Apps, as well as by operating, supporting, maintaining, and otherwise encouraging the use of the Accused Apps, for example by publishing literature, descriptions or instructions encouraging the use of the Accused Apps and by offering support and technical assistance to its customers to encourage use of the Accused Apps in ways that infringe the claims of the 530 Patent. Since at least the filing date of the Original Complaint, CVS has: i) had actual knowledge of the 530 patent; ii) known or should have known that encouraging its customers use of the refill by scan technology in its Accused Apps would result in direct infringement, either literal or under the doctrine of equivalents; and iii) had specific intent to encourage its customers to use the refill by scan technology in its Accused Apps.

36. On information and belief, CVS, since at least the filing date of the Original Complaint, with knowledge of the 530 Patent, and without authority, has also contributed to, and

is contributing to, direct infringement, either literal or under the doctrine of equivalents, by its customers of one or more claims of the 530 Patent, in violation of 35 U.S.C. § 271(c). For example, on information and belief, CVS has contributed to, and is contributing to, infringement of the 530 Patent by making, using, offering, disseminating, operating, supporting, maintaining, and otherwise encouraging the use of the Accused Apps, and/or through the importation of the Accused Apps before the expiration of the 530 Patent. Given the unique methodology claimed in the 530 Patent, the refill by scan technology of the Accused Apps has no substantial non-infringing use. In addition, on information and belief, since at least the filing date of the Original Complaint, CVS has had actual knowledge i) of customers' direct infringement, either literal or under the doctrine of equivalents, and ii) that CVS's actions contributed to infringement.

37. The acts of infringement by CVS set forth above have caused Walgreens monetary damage and irreparable harm for which it has no adequate remedy at law, and until CVS's infringement is enjoined by this Court, it will continue to cause monetary and irreparable damage. Specifically, as a result of CVS's ongoing infringement, Walgreens has been, and will continue to be, irreparably harmed at least through the loss of customers who are drawn to CVS as a result of CVS's advertisements which promote the use of the infringing Accused Apps.

38. Unless Walgreens obtains an order enjoining further infringement by CVS, Walgreens faces significant harm. CVS will continue to make, use, offer, disseminate, operate, support, maintain, and otherwise provide access for its customers to the Accused Apps, thereby irreparably harming the protections accorded to Walgreens under the Patent Laws of the United States. Accordingly, CVS's infringement is of such immediacy and reality as to warrant immediate injunctive relief so as to protect Walgreens' patent rights.

PRAYER FOR RELIEF

Walgreens respectfully prays for the following relief:

A. An order adjudging that Defendant CVS Pharmacy, Inc. has infringed, directly and indirectly by way of inducing the infringement of and/or contributing to the infringement of, the 530 Patent under 35 U.S.C. § 271;

B. An order preliminarily and permanently enjoining, pursuant to 35 U.S.C. § 283 and Rule 65 of the Federal Rules of Civil Procedure, Defendant CVS Pharmacy, Inc., its officers, agents, servants, employees, parents, subsidiaries, divisions, affiliate corporations, other related business entities and all other persons acting in concert, participation, or in privity with them, and their successors and assigns, from further infringement of the 530 Patent, including, but not limited to, an order enjoining CVS from making, using, offering, disseminating, operation, support, maintenance, and any other use of any refill by scan technology of a mobile app, including without limitation the CVS/pharmacy myCVS Mobile Apps, that is covered by one or more claims of the 530 Patent;

C. A judgment awarding Walgreens damages, pursuant to 35 U.S.C. § 284, for Defendant CVS Pharmacy, Inc.'s infringement of the 530 Patent;

D. An award of pre- and post-judgment interest, costs, and disbursements;

E. An award of Walgreens' costs and expenses; and

F. An award to Walgreens of such other and further relief as this Court may deem just and proper.

DEMAND FOR JURY TRIAL

Walgreens demands a trial by jury of any and all issues triable of right before a jury, pursuant to Rule 38 of the Federal Rules of Civil Procedure and District of Delaware Local Rule 38.1.

Date: April 14, 2014

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CERTIFICATE OF SERVICE

I, Anne Shea Gaza, Esquire, hereby certify that on April 14, 2014, I caused to be electronically filed a copy of the foregoing document with the Clerk of the Court using CM/ECF, which will send notification of such filing to all registered participants.

I further certify that on April 14, 2014, I caused a copy of the foregoing document to be served by e-mail upon the following:

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Dated: April 14, 2014