

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

WALGREEN CO.,)	
)	
Plaintiff,)	
)	C.A. No. 14-125-GMS
v.)	
)	
SHOPKO STORES OPERATING CO., LLC and MSCRIPTS, LLC,)	JURY TRIAL DEMANDED
)	
Defendants.)	
)	
)	

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 Defendants Shopko Stores Operating Co., LLC (“Shopko”) and mscripts, LLC (“mscripts”) (collectively, “Defendants”), 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, Shopko Stores Operating Co., LLC is a Delaware limited liability company with a principal place of business in Green Bay, Wisconsin.
3. On information and belief, mscripts, LLC is a Delaware limited liability company with a principal place of business in San Francisco, CA.

NATURE OF ACTION AND JURISDICTION

4. 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.

5. Shopko has purposefully availed itself of the rights and benefits of the laws of this State and this Judicial District. On information and belief, Shopko is a Delaware limited liability company in the business of pharmaceutical and consumer retailing. On information and belief, Shopko conducts business by marketing and selling pharmaceutical and consumer products throughout the United States and has retail stores with pharmacies throughout the United States.

6. On information and belief, Shopko 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 continued status as a Delaware limited liability company. Accordingly, this Court has personal jurisdiction over Shopko.

7. mscripts has purposefully availed itself of the rights and benefits of the laws of this State and this Judicial District. On information and belief, mscripts is a Delaware limited liability company in the business of developing mobile pharmacy applications for customers throughout the United States, including Shopko, which implement, among other things, a refill by scan technology for refilling a prescription.

8. On information and belief, mscripts 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 continued status as a Delaware limited liability company. Accordingly, this Court has personal jurisdiction over mscripts.

JOINDER

9. On information and belief, mscripts developed for Shopko the accused mobile pharmacy application, which implements, among other things, a refill by scan technology for refilling a prescription. On information and belief, the right to relief asserted against mscripts and Shopko under Count I of this Complaint arises out of the same transaction, occurrence, or series of transactions or occurrences relating to the making, using, offering, disseminating, operation, support, maintenance, and other use of at least the Shopko mobile application, and questions of fact common to all defendants will arise in this action. Joinder of Shopko and mscripts under 35 U.S.C. § 299 is proper.

VENUE

10. Venue is proper in the District of Delaware pursuant to 28 U.S.C. §§ 1391(a), 1391(c), and 1400(b) at least in that Shopko and mscripts are Delaware limited liability companies residing in this Judicial District.

FACTUAL BACKGROUND

11. 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.

12. 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.

13. 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.

14. On information and belief, Shopko owns, operates, offers, and/or disseminates or makes available for dissemination applications for mobile devices (“apps”), including the Shopko 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 “refill now.”

15. On information and belief, mscripts owns, licenses, operates, sells, offers for sale, and/or disseminates or makes available for apps, including the Accused Apps and other apps, which implement, among other things, a refill by scan technology for refilling a prescription.

16. Shopko and mscripts do not have a license to the 530 Patent.

17. Shopko and mscripts have had actual knowledge of the 530 Patent since at least January 31, 2014, the filing date of Walgreens’ Original Complaint.

18. On January 31, 2014, Walgreens filed its Original Complaint, alleging that Shopko and mscripts infringed the 530 Patent by, among other things, their “making, using, offering, disseminating, operation, support, maintenance, and other use of the Accused Apps”; that Shopko and mscripts actively induced infringement by Shopko’s 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 Shopko and mscripts “contributed to, and are contributing to, direct infringement . . . by Shopko’s 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 Shopko and mscripts “have had actual knowledge of Shopko’s customers’ direct infringement . . . since at least as of the filing date of [the Original] Complaint.”

19. On information and belief, subsequent to January 31, 2014, Shopko and mscripts have not made any changes to their Accused Apps in response to the Original Complaint or Shopko's or mscripts's knowledge of the 530 Patent.

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

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

22. On information and belief, subsequent to March 21, 2014, Shopko and mscripts have not made any changes to their Accused Apps in response to the Motion for a Preliminary Injunction or Shopko's or mscripts's knowledge of the 530 Patent.

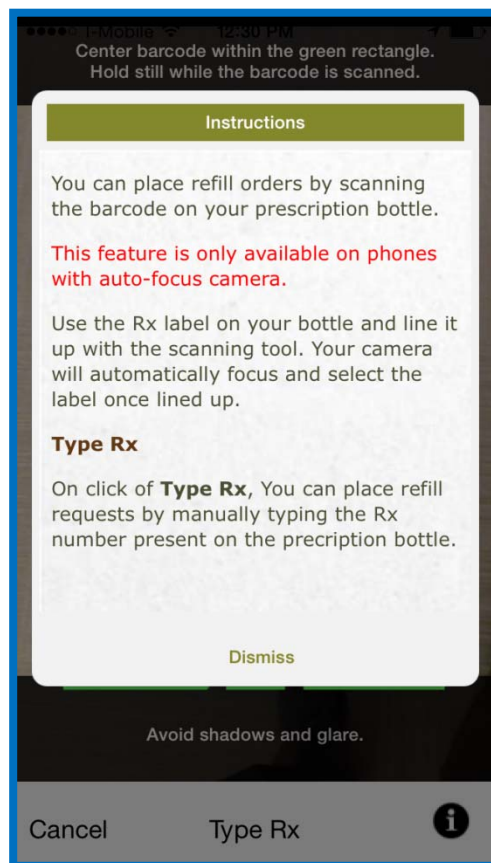
23. On information and belief, subsequent to March 21, 2014, Shopko and mscripts have not made any changes to any publicly available literature, descriptions or instructions related to the Accused Apps in response to the Motion for a Preliminary Injunction or Shopko's or mscripts's knowledge of the 530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

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

25. On information and belief, subsequent to March 21, 2014, Shopko and mscripts have not removed the refill by scan technology from their Accused Apps as described in Paragraph 24.

26. On information and belief, Shopko and mscripts knowingly and intentionally continues to provide Shopko's customers with their Accused Apps containing refill by scan technology and thereby continue to infringe the 530 Patent.

27. With full knowledge of the 530 Patent and the applicability of its claims, Shopko and mscripts have intentionally encouraged Shopko's customers to use the infringing refill by scan technology. For example, Shopko touts in the "Description" for the Accused Apps on both the iTunes App Store and Google Play Store: "The Shopko application allows our customers to manage their prescriptions including request for prescription refills, refill by scanning your label"¹ As illustrated in the screenshot to the right, the Shopko Accused Apps' "refill now" feature has associated instructions explaining that "[y]ou can place refill orders by scanning the barcode on your



prescription bottle," and additionally describing a "Type Rx" feature which describes a manual entry alternative to using refill by scan technology. *Shopko iPhone App*, version v3.2.

¹ *Shopko on the App Store on iTunes*, <https://itunes.apple.com/us/app/shopko/id477712076?mt=8> (last visited Apr. 14, 2014) (select "...More" hyperlink under "Description"); *Shopko – Android Apps on Google Play*, <https://play.google.com/store/apps/details?id=com.shopko.android> (last visited Apr. 14, 2014).

28. On information and belief, Shopko's customers cannot use the refill by scan technology embodied in the Accused App's "refill now" feature without infringing the 530 Patent. With knowledge of the 530 Patent since at least the filing date of the Original Complaint, Shopko and mscripts know that Shopko's customers infringe the 530 Patent when Shopko's customers use the refill by scan technology of the Accused Apps.

29. Shopko and mscripts have profited through their infringement of the 530 Patent. As a result of Shopko's and mscripts's unlawful infringement of the 530 Patent, Walgreens has suffered harm. Unless Shopko and mscripts are enjoined from incorporating infringing refill by scan technology in their Accused Apps, Walgreens will continue to be harmed.

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

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

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

32. Under 35 U.S.C. § 271, Shopko's making, using, offering, licensing, disseminating, operation, support, maintenance, and other use of the Accused Apps, and/or importation of the Accused Apps, and mscripts's making, using, offering, licensing, disseminating, operation, maintenance, selling, offering for sale, and other use of the Accused Apps or other apps, and/or importation of the Accused Apps or other 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.

33. On information and belief, under 35 U.S.C. § 271, Shopko's making, using, offering, licensing, disseminating, operation, support, maintenance, and other use of the Accused

Apps, and/or importation of the Accused Apps, and mscrypts's making, using, offering, licensing, disseminating, operation, maintenance, selling, offering for sale, and other use of the Accused Apps or other apps, and/or importation of the Accused Apps or other apps, before the expiration of the 530 Patent, constitutes indirect infringement of one or more claims of the 530 Patent.

34. On information and belief, Shopko and mscrypts, with knowledge of the 530 Patent since at least the filing date of the Original Complaint, and without authority, have actively induced, and continue to actively induce, infringement by Shopko's 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, Shopko's customers to directly infringe, either literal or under the doctrine of equivalents, one or more claims of the 530 Patent.

35. On information and belief, as a result of Shopko's and mscrypts's inducement, Shopko'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.

36. On information and belief, since at least the filing date of the Original Complaint, Shopko and mscrypts have actively induced, and continue 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 Shopko's 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, Shopko and mscrypts have: i) had actual knowledge of the 530 patent; ii) known or should have known that encouraging Shopko's

customers use of the refill by scan technology in the Accused Apps would result in direct infringement, either literal or under the doctrine of equivalents; and iii) had specific intent to encourage Shopko's customers to use the refill by scan technology in the Accused Apps.

37. On information and belief, Shopko and mscripts, since at least the filing date of the Original Complaint, with knowledge of the 530 Patent, and without authority, have also contributed to, and are contributing to, direct infringement, either literal or under the doctrine of equivalents, by Shopko's 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, Shopko and mscripts have contributed to, and are 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, Shopko and mscripts have had actual knowledge i) of Shopko's customers' direct infringement, either literal or under the doctrine of equivalents, and ii) that Shopko's and mscripts's actions contributed to infringement.

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

39. Unless Walgreens obtains an order enjoining further infringement by Shopko and mscripts, Walgreens faces significant harm. Shopko and mscripts will continue to make, use, offer, disseminate, operate, support, maintain, and otherwise provide access for Shopko's customers to the Accused Apps, thereby irreparably harming the protections accorded to Walgreens under the Patent Laws of the United States. Accordingly, Shopko's and mscripts'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 Defendants Shopko Stores Operating Co., LLC and mscripts, LLC have 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, Defendants Shopko Stores Operating Co., LLC and mscripts, LLC, their 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 Defendants 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 Shopko 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 Defendants Shopko Stores Operating Co., LLC's and mscripts, LLC'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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