

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF TEXAS  
MARSHALL DIVISION**

MYMAIL, LTD.,	§	
<i>Plaintiff,</i>	§	
	§	
vs.	§	Civil Action No. 2:13-cv-00961-JRG/RSP
	§	
CONDUIT LTD., CONDUIT INC.,	§	
CONDUIT USA INC.,	§	
CLIENTCONNECT LTD.,	§	
CLIENTCONNECT INC., and	§	
PERION NETWORK LTD.	§	
<i>Defendants.</i>	§	

**SECOND AMENDED COMPLAINT AND JURY DEMAND**

Plaintiff MyMail, Ltd. files its Second Amended Complaint and Jury Demand against Conduit Ltd., Conduit Inc., Conduit USA Inc., ClientConnect Ltd., ClientConnect Inc., and Perion Network Ltd. (collectively “Defendants”), and alleges as follows:

**PARTIES**

1. Plaintiff MyMail, Ltd. (“MyMail”) is a limited partnership organized under the laws of the State of Texas with its principal place of business in Athens, Henderson County, Texas. On or about Septebmer 25, 2012, the United States Patent and Trademark Office issued it Patent Number 8,275,863 (hereinafter “the ‘863 patent” or “asserted patent”).

2. Defendant Conduit Ltd. (“Conduit”) is a company formed under the laws of Israel with its principal place of business at 5 Golda Meir Street, Ness-Ziona, Israel. Defendant Conduit waived formal service of process,<sup>1</sup> but has yet to answer suit.

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<sup>1</sup> Defendants’ Agreed Motion Regarding Defendants’ Time to Answer [Dkt. No. 30], p. 1, n. 1.

3. Defendant Conduit Inc. is an entity located at 950 Tower Lane, Suite 1788, Foster City, CA 94404. Until recently, Conduit's webpage listed Conduit Inc. as its US office located in Foster City, California. Defendant Conduit Inc. waived formal service of process,<sup>2</sup> but has yet to answer suit.

4. Defendant Conduit USA Inc. was a Delaware corporation with its principal place of business located at 950 Tower Lane, Suite 1788, Foster City, CA 94404. Pursuant to filings made with the Delaware Division of Corporations on August 14, 2013 and the Virginia State Corporation Commission on November 5, 2013, Conduit USA Inc. recently changed its name to ClientConnect Inc., an entity upon which service of process has been perfected.

5. Defendant ClientConnect, Ltd. is a newly formed Israeli entity located at 5 Golda Meir Street, Ness-Ziona, Israel. Defendant ClientConnect Ltd. waived formal service of process,<sup>3</sup> but has yet to answer suit.

6. Defendant ClientConnect, Inc. is a Delaware corporation with its principal place of business located at 950 Tower Lane, Suite 1788, Foster City, CA 94404; and service of process has been perfected.

7. Defendant Perion Network Ltd. ("Perion") is a company formed under the laws of Israel with its principal place of business at 4 HaNechoshet Street, Tel Aviv, Israel. Upon information and belief, Defendant Perion may be served through its authorized agent Smilebox Inc., 15809 Bear Creek Parkway, Suite 320, Redmond, Washington 98052 or its registered agent Corporation Service Company, 300 Deschutes Way SW, Suite 304, Tumwater, Washington 98501.

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<sup>2</sup> *Defendants' Agreed Motion Regarding Defendants' Time to Answer [Dkt. No. 30]*, p. 1, n. 1.

<sup>3</sup> *Id.*

## JURISDICTION AND VENUE

8. This action for patent infringement arises under the patent laws of the United States of America, Title 35 of the United States Code. The Court has subject-matter jurisdiction under 28 U.S.C. § 1331, § 1338(a), and § 1367.

9. Commencing its operations in March of 2005, Conduit eventually established “Conduit USA Inc. (Conduit Inc.) in Delaware” during 2008.<sup>4</sup> Conduit referred to Defendant Conduit USA Inc. as “Conduit Inc.”, and Conduit USA Inc.’s name was recently changed to ClientConnect Inc with various secretaries of state in the United States. Thus, upon information and belief, Defendants Conduit Inc., Conduit USA Inc., and ClientConnect Inc. are all the same entity (hereinafter collectively referred to as “ClientConnect business”).

10. The ClientConnect business “supports the Company’s [Conduit] business activities in the United States.”<sup>5</sup> Prior to this suit being filed, Conduit Ltd. held itself out as “*a global company*’ [singular] with offices in the US and Israel,” and listed its US office as located at Conduit Inc., 950 Tower Lane, Suite 1788, Foster City, CA 94404.<sup>6</sup> Accordingly, upon information and belief, its ClientConnect business was Conduit’s alter ego in the United States from the time the asserted patent was issued through, at least, December 31, 2013. On or about December 31, 2013, Conduit spun off its ClientConnect business to ClientConnect Ltd. Conduit’s shareholders<sup>7</sup> then held shares of the new entity, ClientConnect Ltd., in the same proportion to their ownership interest in Conduit.

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<sup>4</sup> Perion Network Ltd., Form 6-K, Report No. 2 for the Month of October 2013, Commission File No.: 000-51694, filed with the United States Securities and Exchange Commission on or about October 15, 2013, at Exhibit F-9, note 1 (hereinafter “Perion Form 6-K”).

<sup>5</sup> *Id.*

<sup>6</sup> Conduit’s “Locations” Webpage, <http://www.conduit.com/aboutus/locations>, 11/12/13.

<sup>7</sup> Almost 80% of Conduit’s outstanding stock is held by seven shareholders. *Perion Form 6-K.*, at Proxy, p. 134.

11. On or about January 2, 2014, Defendant Perion “purchased” the ClientConnect business in a reverse merger (a/k/a reverse takeover). Perion purchased Conduit’s ClientConnect’s business by issuing its shareholders eight-one percent (81%) of Perion’s stock on a pro-rated basis to their ownership in Conduit. The remaining nineteen percent (19%) of Perion’s then outstanding stock was issued pro rata to Perion’s shareholders on a diluted basis. Having integrated the ClientConnect business into its operation, Perion now operates the ClientConnect business.

12. Conduit had described its ‘ClientConnect business’ as follows:

[A] proprietary cloud-based toolbar generating platform (the “platform”), which allows online publishers to create, implement and distribute web browser toolbars and other software products and services to targeted audiences, and to subsequently administer such toolbars. The platform includes software applications and tools that provide comprehensive solutions for the full customization of the toolbar graphical user interface, as well as additional features, tools and services....<sup>8</sup>

By distributing these customized toolbars to publishers, Defendants are able to take all the information collected about the Internet searches made by end-users, who have installed said toolbars on their computing device, and sell it to search providers (e.g., Microsoft and Google).<sup>9</sup> Under Conduit’s operation, search providers paid it per search executed on a ClientConnect business supplied toolbar.<sup>10</sup> By accessing end-user’s Internet devices through its toolbar offering, Conduit was able to generate the “vast majority of its revenues” from its ClientConnect business.<sup>11</sup> Indeed, its revenues “have historically been concentrated within the U.S. market.”<sup>12</sup> Upon information and belief, after the reverse merger on or about January 2, 2014, Perion now collects the revenues generated by the ClientConnect business.

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<sup>8</sup>*Perion Form 6-K*, at Proxy, p. 74.

<sup>9</sup>*Id.*

<sup>10</sup>*Id.* at Proxy, p. 87-88.

<sup>11</sup>*Id.*, at Proxy, p. 23.

<sup>12</sup>*Id.*, at Proxy, p. 28.

13. From the date the asserted patent issued on September 25, 2012 through the present, the ClientConnect business has regularly and deliberately been conducted in the forum, including but not limited to the use, distribution, maintenance, and/or import of infringing toolbars in the State of Texas and in this judicial district. For instance, one of its few publicly identified “big brand” online toolbar publishers has been Travelocity, which is headquartered in Texas. In addition, many of the end-users, who have installed and used these allegedly infringing toolbars, are located throughout the State of Texas and in this judicial district. Because Defendants have purposefully availed themselves of the privileges and protections of Texas law, this Court also has personal jurisdiction over the Defendants.

14. Venue is proper in this district pursuant to 28 U.S.C. §§ 1391.

### **FACTUAL BACKGROUND**

#### **A. History of the Inventions Claimed by U.S. Patent 8,275,863 (the ‘863 patent).**

15. In 1996, Inventors Thomas Selgas, Michael Massing, and John Gmuender worked together at a startup tech company called NetSafe, Inc. in Richardson, Texas, where they developed NEAT!<sup>TM</sup> Software, a suite of integrated Internet tools (hereinafter “NEAT!”). Their NEAT! product offered Internet Service Providers, Content Providers (i.e., ‘publishers’), and Affinity Marketers (i.e. ‘Advertisers’) with the means to provide easy access and a customized experience to their customers (i.e., ‘end-users’) on the Internet. On June 19, 1997, they filed a provisional patent application with the USPTO<sup>13</sup>, seeking to patent the various inventions embodied in NEAT! Among its many features, NEAT! offered businesses the ability to customize toolbars, web browsers, and homepages in a way meant to generate brand loyalty, but that could be updated

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<sup>13</sup> U.S. Provisional Application No. 60/050,186 filed with the PTO on June 19, 1997 (“the ‘186 provisional application”).

transparently and could track an end-users' activities so advertisers could then use the demographic information to better target audiences. Despite its efforts to secure capital and market NEAT!, NetSafe went out of business long before the '863 patent issued as the market was not yet ready to embrace such inventions.

16. On April 3, 2003, the USPTO issued patent no. 6,571,290 on one aspect of their NEAT! invention. On the same day, MyMail filed a divisional patent application claiming priority back to the filing of the '186 provisional application with the USPTO. After a thorough prosecution of this application, the USPTO eventually issued U.S. Patent 8,275,863 on September 25, 2012.<sup>14</sup> The '863 patent claims a process fundamental to establishing and modifying a customized dynamic and persistent toolbar over the Internet.

**B. Eight Years After NEAT! Was Developed, Conduit Offers Same Toolbar.**

17. On February 9, 2005, inventors Ronen Shilo ("Shilo"), Dror Erez ("Erez"), Gabriel Bilezyk ("Bilezyk"), Ehud Zagury ("Zagury"), and Guy Malachi ("Malachi") filed a patent application with the USPTO, describing a customizable toolbar to be delivered via cloud computing technology (the "Conduit patent application").<sup>15</sup> Shilo, Erez, and Bilezyk then founded Conduit to offer its customized toolbars, which are created and maintained using the allegedly infringing technology to web publishers, who in turn distribute it to end-users for installation on their Internet devices. As one author noted, Conduit's browser toolbar concept was not new, but its approach to packaging it as a dynamic platform and available market place seemed

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<sup>14</sup> A true and correct copy of U.S. Patent No. 8,275,863 is attached as **Exhibit "A."**

<sup>15</sup> U.S. Patent Application No. 11/053,662, filed with the PTO on February 9, 2005.

novel.<sup>16</sup> In reality, however, Conduit's alleged idea had already been invented and reduced to practice by the inventors of the '863 patent in 1996.

18. Conduit described its 'toolbar platform' as a "cloud-based toolbar and app generation platform, which allows for the creation, implementation and administration of web browser toolbars for distribution by publishers to targeted audiences. The Toolbar Platform includes, without limitation, software applications and tools that provide comprehensive solutions for the full customization of toolbar GUI, features and services..."<sup>17</sup> Comparing the available information reveals that Conduit's customized toolbar offerings (a/k/a ClientConnect business) operate using the identical methodology described in the '863 patent as disclosed in the infringement contentions disclosed by Plaintiff; or, in the alternative, they operate substantially similar to the technology claimed by the '863 patent so as to be the equivalent. In fact, the only true difference between NEAT! toolbar offering, which is claimed by the '863 patent and the toolbars offered by the ClientConnect business appear to be the timing of their market entry. By 2005, when Conduit began to market the ClientConnect business, Internet usage had become the norm, not a novelty, for the average person. Thus, Conduit experienced great success with its toolbar business, including booking record net profits of \$314.7 million in FY 2012.

**C. Marketplace Changes Eviscerate Conduit's Toolbar Business.**

19. But 2013 saw changes industry changes that adversely impacted the revenues Conduit generated through its ClientConnect business. Early in the first fiscal quarter of 2013, the two main search providers -- Google and Microsoft for Conduit's ClientConnect business

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<sup>16</sup>Jon Fortt, "Browser toolbars are back", CNNMoney, June 3, 2010, at p. 1, located at: <http://tech.fortune.cnn.com/2010/06/03/the-underground-internet-economy/>

<sup>17</sup> Perion Form 6-K, at Proxy, p. 52.

instituted adverse changes in the terms or policies in their underlying contracts. By the end of the first quarter in 2013, the revenues generated by Conduit's ClientConnect business had experienced a dramatic drop.<sup>18</sup> Within weeks of realizing the economic impact in the search provider's change of terms, Conduit started devising an exit plan. On May 16, 2013, a Conduit Board Member and major stockholder, approached Perion's CEO to discuss a possible reverse-merger.<sup>19</sup>

**D. Conduit's Exit Strategy Designed as Reverse Takeover.**

20. A reverse takeover (a/k/a "reverse merger") occurs when a private company merges into a public shell company as a means for the private party to enter the U.S. stock exchange without have to go through the formal registration process associated with an initial public offering. As noted by the SEC, FBI, and FINRA, significant allegations of fraud have surfaced relative to this practice, especially where the private entity is foreign. In this case, Perion presented the perfect shell company. Historically, Perion's stock prices have struggled and usually sell for between \$6 and \$14 US. Since Perion's acquisition of the ClientConnect business was made public to date, Perion's stock price has hovered between approximate \$10 and \$13.50. While Conduit's major shareholders are subject to a temporary lockup agreement, barring them from selling their Perion shares, Conduit shareholders seek to maximize any value in the once profitable toolbar business by selling their newly obtained Perion stock on the United States stock market before the full impact of the industry changes are understood.<sup>20</sup>

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<sup>18</sup> *Perion Form 6-K*, at Proxy, p. 87-89, 93, 95 & at Ex. F, F-33; *see also id.* at p. 23-33 (disclosing risks associated with ClientConnect's ongoing business).

<sup>19</sup> *Id.*, at Proxy p. 36-39.

<sup>20</sup> Barry Levine, "VB Browser tool, meet SmileBox: Conduit division merges with Perion Network," September 16, 2013, Conduit News & Events, at p. 2 located at: <http://www.conduit.com/mediacoverage/item/browser-tool-meet-smilebox-conduit-division-merges-with-perion-network>.



**COUNT I: INFRINGEMENT OF U.S. PATENT NO. 8,275,863**

21. As the Assignee of the '863 patent, Plaintiff MyMail owns the entire right, title, and interest in and to the '863 patent, including the sole right to sue for its past and present patent infringement.

22. Defendants' toolbar platform, the ClientConnect business, employs the methods covered by one or more claims of the '863 patent, or methods that are substantially similar to one or more claims of the '863 patent under the doctrine of equivalents, in order to produce and maintain infringing customized toolbars on end-user's Internet devices. Thus, their conduct infringes one or more claims of the '863 patent. (All processes and/or resulting customized toolbars covered by this paragraph are collectively referred to as "Accused Products").

23. MyMail is informed and believes, and thereon alleges, that the applicable requirements of 35 U.S.C. § 287 are not applicable as the '863 patent covers a method. *Crown Packaging Tech., Inc. v. Rexam Beverage Can Co.*, 559 F.3d 1308, 1316 (Fed. 2009).

24. MyMail is informed and believes, and thereon alleges, that Defendants either have infringed or continue to infringe one or more claims of the '863 patent in violation of 35 U.S.C. § 271 by, among other things, making, using, offering to sell, selling and/or importing in and/or into the United States the Accused Products without authority or license from MyMail.

25. Defendants' acts of infringement have caused and continue to cause substantial and irreparable damage to MyMail.

26. As a result of Defendants' past and/or ongoing infringement of the '863 patent, MyMail has been damaged, and therefore, is entitled to recover damages pursuant to 35 U.S.C. §

284 in an amount that presently cannot be pled, but, in any event, is not less than a reasonable royalty, which will be determined at trial.

**COUNT II: DECLARATORY JUDGEMENT [DROPPED]**

**COUNT III: MONEY HAD AND RECEIVED**

27. Under the planned ‘Split Agreement’, Defendant Conduit will transfer “its entire activities and operations, and [certain] related assets and liabilities, of its ‘ClientConnect business’” to Defendant ClientConnect Ltd.<sup>21</sup> In actuality, Defendant Conduit plans to retain all cash and cash equivalent assets of retain its ClientConnect business before transferring the remaining assets and its associated liabilities.<sup>22</sup> At the last accounting of the ClientConnect business, which is Conduit’s toolbar division, it had cash and cash equivalent assets of \$285 million.<sup>23</sup> However, after the split, the ClientConnect business will show tangible assets of only \$3.5 million.<sup>24</sup> As stated in the Perion Form 6-K, “ClientConnect’s net working capital [defined as its “total current assets less its total current liabilities . . . as of the close of business on December 31, 2013 . . .”] is required to be zero.”<sup>25</sup> This transaction allows Defendant Conduit to retain \$281.5 million, the vast majority of which represent profits from infringing activities.

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<sup>21</sup> *Perion Form 6-K*, Proxy, at p. 1, *but cf. id.*, Ex. F, at p. F-34 (the same statement made in the notes of Conduit’s Consolidated Financial Statements also includes the word ‘certain’ before related assets whereas the statement in the Proxy does not include this limiting adjective).

<sup>22</sup> “Conduit’s cash and cash equivalents will not be transferred to ClientConnect upon consummation of the contemplated Split, and instead ClientConnect will need to fund its initial working capital needs upon the Credit Line. *Perion Form 6-K*, Proxy, at p. 95.

<sup>23</sup> The “Adjustments (Note 3)” column purports to reflect the balance sheet just for its ClientConnect business as of June 30, 2013, and it shows total assets of \$285 million. *Id.* Ex. F, at p. PF-2.

<sup>24</sup> The Adjustments” (Note 4)” column, which purports to represent the state of its ClientConnect business’ balance sheet immediately after the planned split, using the figures from June 30, 2013, shows its assets totaling only about \$3.5 million after factoring that the listed total of \$37.8 million also includes the \$5 million Conduit loan and another \$29.3 million attributed to ‘Goodwill.’ *Id.*

<sup>25</sup> *Perion Form 6-K*, Proxy, at p. 62.

28. Pursuant to 35 U.S.C. §§ 283 and 284, Plaintiff MyMail is entitled to equitable relief and damages adequate to compensate for any infringement of its '863 patent, but in no event less than a reasonable royalty for the use made of the invention by the infringer, together with interest and costs as fixed by the court upon the rendition of a favorable judgment on Count 1: Infringement of United States Patent No. 8,275,863 of this Complaint. As such, MyMail should be entitled to an accounting and damages from Defendants. However, the planned transfer of the ClientConnect business, which is to be merged with Perion, seeks to make Conduit judgment proof for any such infringement while allowing it to retain approximately \$281.5 million of mostly ill-gotten profits

29. As detailed herein, the \$281.5 million represents net profits had and received from the ClientConnect business (toolbars) which operated in the United States by infringing MyMail's '863 patent. The retention of ill-gotten infringement profits without payment of a reasonable royalty necessarily includes money (i.e., an amount for a reasonable royalty) which, in equity and good conscience, belongs to MyMail. Accordingly, MyMail makes this equitable claim for any and all money had and received by Defendant Conduit Ltd. or any other Defendant that it may show was received for infringing activities and some portion thereof necessarily represents a reasonable royalty for Defendants' infringing activities.

#### **COUNT IV: FRAUDULENT TRANSFER**

30. MyMail realleges and incorporates herein by reference each and every allegation contained in the preceding paragraphs of the Complaint as if fully set forth herein.

31. By diverting or transferring the profits made from infringing activity, Defendants engaged in "transfer[s]" within the meaning prescribed in TEX. BUS. & COM. CODE § 24.002.

32. Defendants have entered into a scheme or plan to transfer these profits to Defendant Conduit Ltd. while correspondingly transferring all associated liabilities to Defendant ClientConnect Ltd. without adequate capital to cover said liabilities, and this scheme/plan was made with the actual intent to hinder, delay or defraud MyMail and Defendants' other creditors, in violation of TEX. BUS. & COM. CODE § 24.005.

33. Defendants' intent to hinder, delay or defraud is demonstrated by, among other things, their refusal to provide adequate assurances that the new entity, ultimately Perion, will have satisfactory assets to cover liability for the alleged infringement or to expressly retain said liability. Additionally, Perion's Proxy contains various statements related to the underlying scheme/plan and the viability or lack thereof of the on-going new Perion. As detailed herein, those representations do not give the full picture and are intended to induce investors to buy shares in the new Perion entity. Defendants made false and misleading representations in their public disclosures in order to induce unwitting investors to purchase shares in the new Perion entity.

34. Defendants' conduct represents fraudulent transfers under TEX. BUS. & COM. CODE § 24.001 et seq. MyMail is entitled to avoid all such transfers, to obtain a writ of attachment against funds in possession of Defendants and third parties, and to damages against Defendants in an amount to be proven at trial.

#### **PRAYER FOR RELIEF**

WHEREFORE, Plaintiff MyMail, Ltd. respectfully prays that this Court enter judgment against each Defendant as follows:

A. That Defendants infringed the '863 patent under 35 U.S.C. § 271(a) and/or (g);

B. That Defendants provide to MyMail an accounting of all gains, profits and advantages derived by each Defendant's infringement of the '863 patent, and that MyMail be

**Second Amended Complaint & Jury Demand -**

awarded damages in accordance with 35 U.S.C. §§ 283 and 284 to compensate it adequately for the wrongful infringement by each Defendant;

C. That MyMail be awarded any other damages, costs, and interest on its damages, including but not limited to, attorney fees available under 35 U.S.C. § 285;

D. That the Court permanently enjoin Defendants and all those in privity with them from making, having made, selling, offering for sale, distributing and/or using processes that infringe the '863 patent to produce and/or providing the resulting customized toolbars (the Accused Products) in the United States; and

E. That MyMail be awarded such other and further relief as this Court may deem just and proper, including but not limited to equitable relief and all remedies available at law.

**DEMAND FOR JURY TRIAL**

Pursuant to Federal Rule of Civil Procedure 38(b), Plaintiff MyMail, Ltd. hereby demands a trial by jury on all issues triable to a jury.

**Dated:** July 8, 2014

Respectfully submitted,

MYMAIL, LTD

By and through its attorneys,

/s/ Eve L. Henson

Eve L. Henson - *Lead Attorney*

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**ATTORNEYS FOR PLAINTIFF  
MYMAIL, LTD.**

**CERTIFICANT OF SERVICE**

The undersigned attorney hereby certifies that a true and correct copy of the foregoing document was delivered to the registered participants as identified on the Notice of Electronic Filing (NEF) and paper copies will be sent to those indicated as non-registered participants, if any, as of this 8<sup>th</sup> day of July, 2014.

/s/ Eve L. Henson

Eve L. Henson