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11 Attorneys for Plaintiff
MSHIFT, INC.

12 UNITED STATES DISTRICT COURT
13 NORTHERN DISTRICT OF CALIFORNIA
14 SAN FRANCISCO DIVISION

16 MSHIFT, INC., a Delaware corporation,)
17 Plaintiff,)
18 v.)
19 DIGITAL INSIGHT CORPORATION d/b/a)
INTUIT FINANCIAL SERVICES, a Delaware)
20 corporation; COMMUNITY TRUST BANK, a)
Louisiana corporation; MOBILE MONEY)
21 VENTURES, LLC, a Delaware Limited Liability)
corporation; MERITRUST CREDIT UNION, a)
22 Kansas corporation; PROFESSIONAL FEDERAL)
CREDIT UNION, an Indiana corporation;)
23 SANFORD INSTITUTION FOR SAVINGS, a)
Maine corporation; FORT WORTH)
24 COMMUNITY CREDIT UNION, a Texas)
corporation; USE CREDIT UNION, a California)
25 corporation; GATE CITY BANK, a Minnesota)
corporation; BUSEY BANK, an Illinois)
26 corporation; DENSSION STATE BANK, a Kansas)
corporation; FIDELITY BANK, a Massachusetts)
27 corporation; FIRST INTERNET BANK OF)
INDIANA, an Indiana corporation; and VISION)
28 BANK, a Florida corporation;)

CASE NO.: C10-00710 WHA

**FIRST AMENDED COMPLAINT
FOR PATENT INFRINGEMENT**

DEMAND FOR JURY TRIAL

Judge: Hon. William H. Alsup
Dept: Courtroom 9, 19th Floor

Date Filed: February 19, 2010
Trial Date: May 23, 2011

1 5. Defendant Meritrust is a corporation organized and existing under the laws of the
2 state of Kansas, with its principal place of business at 8710 E 32nd St N., Wichita, Kansas
3 67226.

4 6. Defendant PFCU is a corporation organized and existing under the laws of the
5 state of Indiana, with its principal place of business at 1710 St. Joe River Drive, Fort Wayne,
6 Indiana 46805.

7 7. Defendant Sanford is a corporation organized and existing under the laws of the
8 state of Maine, with its principal place of business at 900 Main Street, Sanford, Maine 04073.

9 8. Defendant Fort Worth is a corporation organized and existing under the laws of
10 the state of Texas, with its principal place of business at 1905 Forest Ridge Drive, Bedford,
11 Texas 76021.

12 9. Defendant USE is a corporation organized and existing under the laws of the state
13 of California, with its principal place of business at 10120 Pacific Heights Blvd., San Diego,
14 California 92121.

15 10. Defendant Gate City is a corporation organized and existing under the laws of the
16 state of Minnesota, with its principal place of business at 500 2nd Avenue N, Fargo, North
17 Dakota 58102.

18 11. Defendant Busey is a corporation organized and existing under the laws of the
19 state of Illinois, with its principal place of business at 201 West Main Street, Urbana, Illinois
20 61803.

21 12. Defendant Denison is a corporation organized and existing under the laws of the
22 state of Kansas, with its principal place of business at 421 New York Avenue, Holton, Kansas
23 66436.

24 13. Defendant Fidelity is a corporation organized and existing under the laws of the
25 state of Massachusetts, with its principal place of business at 675 Main Street, Fitchburg,
26 Massachusetts 01420.

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1 14. Defendant First Internet is a corporation organized and existing under the laws of
2 the state of Indiana, with its principal place of business at 7820 Innovation Blvd., Suite 210,
3 Indianapolis, Indiana 46278.

4 15. Defendant Vision is a corporation organized and existing under the laws of the
5 state of Florida, with its principal place of business at 2200 Stanford Road, Panama City, FL
6 32405.

7 **JURISDICTION AND VENUE**

8 16. This Court has subject matter jurisdiction of this action pursuant to 28 U.S.C.
9 §§ 1331 and 1338(a), because this action involves a claim arising under the patent laws of the
10 United States, 35 U.S.C. § 1, *et seq.* This Court has supplemental jurisdiction over Plaintiff’s
11 state law claims pursuant to 28 U.S.C. §1367(a) because they are part of the same case and
12 controversy described by Plaintiff’s federal claim.

13 17. Each defendant is subject to this Court’s specific and general personal jurisdiction
14 because: IFS and MMV have their headquarters and principal places of business in California;
15 all of the other defendants regularly conduct business in the state of California, including but not
16 limited to, entering into agreements and doing business with IFS and/or MMV, and selling and
17 offering to sell products and/or services to consumers in the state of California through
18 interactive websites, including without limitation the following websites:

19 <https://m.diginsite.com/ctb/login.jsp>

20 <http://www.meritrustcu.mobi>

21 <https://m.diginsite.com/meritrust/login.jsp>

22 <https://m.diginsite.com/profedcu/login.jsp>

23 <https://m2.banksisonline.com/banksisonline/login.jsp>

24 <https://mobile.ftwccu.org/ftwccu/login.jsp>

25 <https://buseymobile.com>

26 <http://go.gatecitybank.com>

27 <https://m.diginsite.com/gatecitybank/login.jsp>

28 <https://m.diginsite.com/denisonstatebank/login.jsp>

1 <https://m.diginsite.com/fidelitybank/login.jsp>

2 <https://m.diginsite.com/visionbankfsb/login.jsp>

3 <https://m.diginsite.com/firstib/login.jsp>

4 <https://m.diginsite.com/usecu/login.jsp>

5 In addition, MShift's causes of action arise directly from defendants' business contacts and other
6 activities in the state of California. Upon information and belief, each defendant has committed
7 patent infringement in the state of California, has contributed to patent infringement in the state
8 of California, and/or has induced others to commit patent infringement in the state of California.

9 18. Venue is proper in this Court pursuant to 28 U.S.C. §§ 1391(b), 1391(c), and
10 1400(b), in that each defendant has committed acts of infringement in this judicial district and a
11 substantial part of the events giving rise to this action occurred in this judicial district.

12 **FIRST CAUSE OF ACTION**
13 **(Patent Infringement of U.S. Patent No. 6,950,881 against all Defendants)**
14 **(35 U.S.C. § 271)**

15 19. MShift repeats and realleges the allegations of paragraphs 1 through 18 in their
16 entirety.

17 20. On September 27, 2005, the United States Patent and Trademark Office
18 ("USPTO") duly and legally issued U.S. Patent No. 6,950,881 ("the '881 Patent"), entitled
19 "System for Converting Wireless Communications for a Mobile Device," to Awele Ndili. A true
20 and correct copy of the '881 Patent is attached hereto as Exhibit A. The '881 Patent was
21 assigned to MShift, and MShift is the owner of all rights, title and interest in and to the '881
22 Patent.

23 21. Defendants have infringed and are continuing to infringe the '881 Patent, directly,
24 contributorily, and/or by inducement, in violation of 35 U.S.C. § 271, by making, using,
25 marketing, distributing, selling, and/or offering to sell products and/or services that fall within
26 one or more claims of the '881 Patent.

27 22. Upon information and belief, defendants had knowledge of the '881 Patent prior
28 to the filing of this First Amended Complaint but have engaged in their infringing conduct
nonetheless.

1 23. Unless enjoined by this Court, defendants will continue to infringe the '881
2 Patent, and MShift will continue to suffer irreparable harm for which there is no adequate
3 remedy at law. Accordingly, MShift is entitled to preliminary and/or injunctive relief against
4 such infringement pursuant to 28 U.S.C. § 283.

5 24. As a result of defendants' infringement of the '881 Patent, MShift has been and
6 will continue to be injured in its business and property rights, and is entitled to recover damages
7 for such injuries pursuant to 35 U.S.C. § 284 in an amount to be determined at trial.

8 25. Defendants' infringement of the '881 Patent has been and continues to be
9 deliberate and willful, thereby rendering this an exceptional case pursuant to 35 U.S.C. §§ 284
10 and 285.

11 **SECOND CAUSE OF ACTION**
12 **(Breach of Contract against IFS)**

13 26. MShift repeats and realleges the allegations of paragraphs 1-25 in their entirety.

14 27. Founded in 1999 by Scott Moeller, MShift is a pioneer and leader in mobile
15 solutions. MShift provides mobile banking services to hundreds of financial institutions ("FI's").

16 28. MShift's former Chief Executive Officer ("CEO"), Awele Ndili, on behalf of
17 MShift, signed an agreement called the "Mobile Banking Reseller Agreement" (the "Reseller
18 Agreement") with IFS on October 14, 2008. Before Mr. Ndili signed the Reseller Agreement,
19 the majority of MShift's directors and executives had not reviewed it. Mr. Ndili was
20 removed from his office on December 1, 2008.

21 29. IFS breached the Reseller Agreement by not promoting and marketing MShift's
22 mobile banking services to prospective customers, as required under the Reseller Agreement.

23 30. IFS further breached the Reseller Agreement by failing to bill at least two
24 customers for their use of MShift's mobile banking services and failing to timely pay MShift's
25 revenue share for their use of the mobile banking services in June 2009.

26 31. VeriSign, which is not a party to the Reseller Agreement, provides SSL
27 Certificate technology that enables encryption of sensitive information during online
28 transactions. MShift advance-pays the SSL Certificate fees on behalf of the FI's to VeriSign

1 before MShift receives the fees from the FI's. MShift had the right to bill and collect from the
2 FI's the SSL Certificate fees that it had advance-paid to VeriSign on their behalf. IFS further
3 breached the Reseller Agreement by interfering with MShift's right to collect SSL Certificate
4 fees.

5 32. Even if IFS had the right to bill and collect SSL Certificate fees from the FI's
6 (instead of MShift) under the Reseller Agreement, IFS breached the Reseller Agreement and
7 interfered with MShift's hosting and maintenance of the mobile banking services by failing to
8 timely forward to MShift the SSL Certificate fees that it had collected from the FI's.

9 33. On September 2, 2009, as a result of IFS's material breach, MShift sent IFS a
10 notice of material breach.

11 34. On October 5, 2009, as a result of IFS's failure to cure its material breach,
12 MShift sent IFS a notice of termination. The Reseller Agreement has been terminated since
13 October 5, 2009.

14 35. Except for those obligations excused as a result of IFS's breach of the Reseller
15 Agreement, MShift has performed all of its obligations under the Reseller Agreement.

16 36. As a direct and proximate result of IFS's breach of the Reseller Agreement,
17 MShift has been damaged in an amount to be determined at trial.

18 37. As a direct and proximate result of IFS's breach of the Reseller Agreement,
19 MShift has suffered and will continue to suffer irreparable harm, including but not limited to
20 harm to its business reputation and goodwill. MShift has no adequate remedy at law for
21 IFS's continuing violation of MShift's rights and seeks preliminary and permanent injunctive
22 relief.

23 **THIRD CAUSE OF ACTION**
24 **(Unfair Competition against IFS)**

25 38. MShift repeats and realleges the allegations of paragraphs 1-37 in their
26 entirety.

1 39. IFS made false statements about MShift to certain FI's, including stating that
2 IFS has no official vendor support relationship with MShift, that MShift is "struggling," and
3 that MShift plans to no longer do business in the mobile banking space.

4 40. These FI's reasonably understood that these statements meant that the mobile
5 banking services they were receiving from MShift might cease or be interrupted. The FI's
6 contacted MShift seeking clarification of IFS's statements.

7 41. As set forth above, IFS has engaged in unfair competition including unlawful
8 and/or unfair business practices in violation of MShift's rights and in violation of California
9 Business and Professions Code §§ 17200 *et seq.*

10 42. IFS's acts are in violation and derogation of MShift's rights and have and are
11 likely to cause disruption to MShift's business.

12 43. As a direct and proximate result of IFS's wrongful conduct, MShift has been
13 damaged in an amount to be determined at trial.

14 44. As a direct and proximate result of IFS's wrongful conduct, MShift has suffered
15 and will continue to suffer irreparable harm, including but not limited to harm to its business
16 reputation and goodwill. MShift has no adequate remedy at law for IFS's continuing violation
17 of MShift's rights and seeks preliminary and permanent injunctive relief.

18 **PRAYER FOR RELIEF**

19 WHEREFORE, plaintiff MShift requests entry of judgment in its favor and against
20 defendants as follows:

- 21 a. Declaring that the '881 Patent is valid and enforceable, and that each defendant
22 has infringed one or more claims of the '881 Patent;
- 23 b. Declaring that defendants' infringement of the '881 Patent has been willful;
- 24 c. Preliminarily and/or permanently enjoining defendants and their officers, agents,
25 servants, employees and attorneys, and all persons acting in active concert or participation with
26 them, from further infringing, contributing to and/or inducing the infringement of the '881
27 Patent, in accordance with 35 U.S.C. § 283;
- 28

- 1 d. Awarding MShift damages in an amount adequate to compensate for defendants’
2 infringement of the ’881 Patent, in accordance with 35 U.S.C. § 284;
- 3 e. Increasing the damages to three times the amount found or assessed by virtue of
4 the deliberate and willful nature of defendants’ infringement, in accordance with 35 U.S.C. §
5 284;
- 6 f. Declaring that IFS has breached its agreement with MShift;
- 7 g. Preliminarily and/or permanently enjoining IFS and its officers, agents, servants,
8 employees and attorneys, and all persons acting in active concert or participation with them,
9 from making defamatory statements about MShift to the financial institutions;
- 10 h. Awarding MShift restitution, unjust enrichment, actual damages, statutory
11 damages and compensatory damages according to proof at trial;
- 12 i. Awarding MShift its costs of suit, including reasonable attorneys’ fees; and
- 13 j. Granting such other and further relief as this Court may deem just and
14 appropriate.

15
16 Dated: June 23, 2010

AGILITY IP LAW

17
18 By: /s/James C. Otteson
19 James C. Otteson

20 Daniel J. Bergeson
21 Melinda M. Morton
BERGESON, LLP

22 Attorneys for Plaintiff
23 MSHIFT, INC.
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DEMAND FOR JURY TRIAL

Pursuant to Rule 38(b) of the Federal Rules of Civil Procedure and Rule 3-6(a) of the Local Rules of the United States District Court for the Northern District of California, plaintiff MShift demands a trial by jury of this action.

Dated: June 23, 2010

AGILITY IP LAW

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