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Attorneys for Plaintiff
LIVEPERSON, INC.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

LIVEPERSON, INC., a Delaware corporation,

Plaintiff,

- against -

INSTANTSERVICE.COM, INC., a Washington
corporation, and ART TECHNOLOGY GROUP,
INC., a Delaware corporation,

Defendants.

CASE NO.: 09-cv-04621 (JGK)

SECOND AMENDED COMPLAINT

JURY TRIAL DEMANDED

Plaintiff LivePerson, Inc. ("LivePerson"), by and through its attorneys, Wilson Sonsini Goodrich & Rosati, Professional Corporation, for its complaint against Defendants InstantService.com, Inc. ("InstantService") and Art Technology Group, Inc. ("ATG") alleges on

personal knowledge as to its own activities and on information and belief as to the activities of others, as follows:

THE PARTIES

1. LivePerson is a Delaware corporation with its corporate headquarters and principal place of business at 462 7th Avenue, 3rd Floor, New York, New York 10018. LivePerson supplies real-time access to the world's experts and their knowledge. Using LivePerson, individuals can chat with live experts in a broad range of categories. Businesses use LivePerson to humanize the online experience and build relationships with their customers on the Internet through LivePerson's real-time chat platform.

2. InstantService is a Washington corporation with its principal place of business at 600 University Street, Suite 401, Seattle, Washington 98101. InstantService is an application service provider of integrated chat, email management, knowledge base, and lead capture solutions for businesses.

3. ATG is a Delaware corporation with its principal place of business at One Main Street, Cambridge, Massachusetts 02142. ATG provides e-commerce and cross-channel commerce software and optimization services across several industries. ATG's Live Help software products include Click to Chat, a live chat service to assist online customers.

4. During the pendency of this litigation, on or around January 12, 2010, InstantService was acquired by ATG. InstantService is now a wholly owned subsidiary of ATG.

JURISDICTION AND VENUE

5. This action involves claims for patent infringement arising under the patent laws of the United States, Title 35 of the United States Code, for damages and injunctive relief pursuant to 35 U.S.C. §§ 1 *et seq.* This Court has subject matter jurisdiction over the First and Second Causes of Action based on 28 U.S.C. §§ 1331 and 1338(a), as the action arises under

the patent laws of the United States.

6. This Court has subject matter jurisdiction over the Third and Fourth Causes of Action pursuant to 28 U.S.C. §§ 1331 and 1338(a), because the Third and Fourth Causes of Action involve a claim arising under the patent laws of the United States, 35 U.S.C. § 1, *et seq.* and under the Federal Declaratory Judgment Act, 28 U.S.C. §§ 2201 and 2202.

7. This Court has personal jurisdiction over Defendants because each transacts and otherwise does business in this District.

8. Venue is proper in this Court pursuant to 28 U.S.C. § 1391(b), as this is a judicial district in which a substantial part of the events or omissions giving rise to the claims asserted herein occurred.

THE LIVEPERSON PATENTS

9. LivePerson is the assignee of United States Patent No. 6,519,628 (“the ‘628 patent”), which was duly and legally issued by the United States Patent and Trademark Office on February 11, 2003.

10. LivePerson is the assignee to United States Patent No. 7,526,439 (“the ‘439 patent”), which was duly and legally issued by the United States Patent and Trademark Office on April 28, 2009.

THE INSTANTSERVICE PATENT

11. InstantService is the assignee to United States Patent No. 6,915,336 (“the ‘336 patent”), which was duly and legally issued by the United States Patent and Trademark Office on July 5, 2005.

FIRST CAUSE OF ACTION

(Infringement of U.S. Patent No. 6,519,628 under 35 U.S.C. § 271)

12. LivePerson repeats and re-alleges the allegations of paragraphs 1 through 11 of the Complaint as if fully set forth herein.

13. LivePerson is the assignee of the '628 patent, entitled "Method and System for Customer Service Using a Packet Switched Network," which originally issued on February 11, 2003, to Robert P. Locascio, a copy of which is attached to this Complaint as Exhibit A.

14. On information and belief, discovery will show that InstantService and ATG have infringed and are continuing to infringe the '628 patent, directly and/or indirectly, literally and/or by equivalents, in violation of 35 U.S.C. § 271, through their development, manufacture, use, and sale of customer service applications including the provision of live communication. Discovery is necessary to determine the first date upon which InstantService and ATG had notice of the '628 patent. At the least, InstantService is inducing and contributing to the infringement of the '628 patent as of the filing of the original Complaint in this action and will continue to contribute to and induce infringement in further violation of 35 U.S.C. § 271. At the least, ATG is inducing and contributing to the infringement of the '628 patent as of the date it acquired InstantService and will continue to contribute to and induce infringement in further violation of 35 U.S.C. § 271.

15. The activities of InstantService and ATG have been without express or implied license.

16. InstantService and ATG continue to infringe the '628 patent and, unless enjoined by this Court, will continue to infringe the '628 patent, and LivePerson has suffered and will continue to suffer irreparable harm for which there is no adequate remedy at law. Accordingly, LivePerson is entitled to temporary, preliminary, and/or permanent injunctive relief against such infringement pursuant to 35 U.S.C. § 283.

17. As a result of InstantService's and ATG's infringement of the '628 patent, LivePerson has been and will be damaged, and is entitled to be compensated for such damages pursuant to 35 U.S.C. § 284 in an amount to be determined at trial.

18. InstantService's and ATG's infringement of the '628 patent is deliberate and

willful, and this case is therefore an exceptional case which warrants an award of treble damages and attorney fees in accordance with 35 U.S.C. § 285.

SECOND CAUSE OF ACTION

(Infringement of U.S. Patent No. 7,526,439 under 35 U.S.C. § 271)

19. LivePerson repeats and re-alleges the allegations of paragraphs 1 through 18 of the Complaint as if fully set forth herein.

20. LivePerson is the assignee of the '439 patent, entitled "Systems and Methods to Facilitate Selling of Products and Services," which originally issued on April 28, 2009, to Gregg S. Freishtat, Paul Kaib, Stacey Doran, Jeffrey S. Dernavich, and Jackson L. Wilson, III, a copy of which is attached to this Complaint as Exhibit B.

21. On information and belief, further discovery will show that InstantService and ATG have infringed and are continuing to infringe the '439 patent, directly and/or indirectly, literally and/or by equivalents, in violation of 35 U.S.C. § 271, through their development, manufacture, use, and sale of customer service applications including the provision of live communication and proactive chat. Discovery is also necessary to determine the first date upon which InstantService and ATG had notice of the '439 patent. At the least, InstantService is inducing and contributing to the infringement of the '439 patent as of the filing of the original Complaint in this action and will continue to contribute to and induce infringement in further violation of 35 U.S.C. § 271. At the least, ATG is inducing and contributing to the infringement of the '439 patent as of the date it acquired InstantService and will continue to contribute to and induce infringement in further violation of 35 U.S.C. § 271.

22. The activities of InstantService and ATG have been without express or implied license.

23. InstantService and ATG continue to infringe the '439 patent and, unless enjoined by this Court, will continue to infringe the '439 patent, and LivePerson has suffered

and will continue to suffer irreparable harm for which there is no adequate remedy at law. Accordingly, LivePerson is entitled to temporary, preliminary, and/or permanent injunctive relief against such infringement pursuant to 35 U.S.C. § 283.

24. As a result of InstantService's and ATG's infringement of the '439 patent, LivePerson has been and will be damaged, and is entitled to be compensated for such damages pursuant to 35 U.S.C. § 284 in an amount to be determined at trial.

25. InstantService's and ATG's infringement of the '439 patent is deliberate and willful, and this case is therefore an exceptional case which warrants an award of treble damages and attorney fees in accordance with 35 U.S.C. § 285.

THIRD CAUSE OF ACTION

(Declaratory Judgment of Invalidity of U.S. Patent No. 6,915,336)

26. LivePerson repeats and re-alleges the allegations of paragraphs 1 through 25 of the Complaint as if fully set forth herein.

27. InstantService is listed as the assignee of the '336 patent, entitled "Real Time Internet Communication System" which originally issued on July 5, 2005, to Damion L. Hankejh, Jothan Frakes, Martin S. Rood, and Hoa Ton-That, a copy of which is attached to this Complaint as Exhibit C.

28. On or about June 2, 2009, a member of InstantService's Board of Directors informed the CEO of LivePerson that, among other things, InstantService believes that LivePerson's patents are weaker than the '336 patent, and that InstantService is gathering its attorneys and contemplating legal action. This conversation indicated that InstantService believes its patent is valid and infringed by LivePerson. On April 5, 2010, InstantService filed a counterclaim against LivePerson alleging infringement of the '336 patent.

29. Based upon the above conduct, this Court has jurisdiction over this action. This declaratory judgment action is the result of an actual controversy and seeks a prompt and

definitive resolution that LivePerson's products do not incorporate the inventions of any valid claim of the '336 patent.

30. Based on the above conduct, LivePerson is informed and believes, and on that basis avers, that InstantService contends that the '336 patent is valid.

31. LivePerson contends that the '336 patent is invalid for failure to satisfy the conditions and requirements for patentability as set forth, *inter alia*, in Sections 102, 103, and/or 112 of Title 35 of the United States Code.

32. On at least the basis that it believes the '336 patent is invalid, LivePerson has the right to continue selling its products without interference from InstantService's '336 patent.

33. Accordingly, a valid and justiciable controversy has arisen and exists between LivePerson and InstantService. LivePerson desires a judicial determination and declaration of the respective rights of the duties of the parties herein. Such a determination and declaration is necessary and appropriate at this time in order that the parties may ascertain their respective rights and duties.

FOURTH CAUSE OF ACTION

(Declaratory Judgment of Noninfringement of U.S. Patent No. 6,915,336)

34. LivePerson repeats and re-alleges the allegations of paragraphs 1 through 33 of the Complaint as if fully set forth herein.

35. As discussed above, LivePerson believes that the claims of the '336 patent are invalid because for failure to satisfy the conditions and requirements for patentability as set forth, *inter alia*, in Sections 102, 103, and/or 112 of Title 35 of the United States Code. Unless a patent claim is valid, there can be no finding of infringement.

36. LivePerson contends that it has not infringed, is not now infringing, directly or under the doctrine of equivalents, has not contributorily infringed, and has not induced infringement of any claim of the '336 patent.

37. Accordingly, a valid and justiciable controversy has arisen and exists between LivePerson and InstantService. LivePerson desires a judicial determination and declaration of the respective rights of the duties of the parties herein. Such a determination and declaration is necessary and appropriate at this time in order that the parties may ascertain their respective rights and duties.

PRAYER FOR RELIEF

WHEREFORE, LivePerson requests entry of judgment in its favor and against InstantService and ATG as follows:

A. Declaring that the '628 patent is valid and enforceable and that InstantService and ATG have infringed one or more claims of the '628 patent;

B. Declaring that the '439 patent is valid and enforceable and that InstantService and ATG have infringed one or more claims of the '439 patent;

C. Granting temporary, preliminary, and permanent injunctive relief enjoining InstantService and ATG, its officers, agents, representatives, distributors, wholesalers, retailers, licensees, servants, employees, attorneys, parent or subsidiary corporations, and affiliates, and all persons in active concert or participation with InstantService and ATG from engaging in further acts of infringement, contributing to or inducing the infringement of the '628 patent;

D. Granting temporary, preliminary, and permanent injunctive relief enjoining InstantService and ATG, its officers, agents, representatives, distributors, wholesalers, retailers, licensees, servants, employees, attorneys, parent or subsidiary corporations, and affiliates, and all persons in active concert or participation with InstantService and ATG from engaging in further acts of infringement, contributing to or inducing the infringement of the '439 patent;

E. Awarding LivePerson damages in an amount adequate to compensate LivePerson for InstantService's and ATG's acts of infringement, together with interest thereon, in an amount to be proven at trial, in accordance with 35 U.S.C. § 284;

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F. Increasing the damages to three times the amount found or assessed by virtue of the deliberate and willful nature of InstantService's and ATG's infringement, in accordance with 35 U.S.C. § 285;

G. Declaring that LivePerson has not infringed, is not infringing, directly or under the doctrine of equivalents, induced others to infringe or contributed to the infringement of any valid and/or enforceable claim of the '336 patent;

H. Declaring the claims of the '336 patent are invalid;

I. Enjoining InstantService, its officers, partners, employees, agents, parents, subsidiaries, attorneys, and anyone acting in concert or participation with any of them from making any claims that LivePerson infringes the '336 patent;

J. Awarding LivePerson its costs incurred in this action, together with reasonable attorney fees, in accordance with 35 U.S.C. § 285;

K. Awarding LivePerson prejudgment interest; and

L. Awarding such other and further relief as the Court deems just and proper.

Dated: Palo Alto, CA
August 24, 2010

WILSON SONSINI GOODRICH & ROSATI
Professional Corporation

By: _____



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DEMAND FOR JURY TRIAL

Pursuant to Federal Rule of Civil Procedure 38, plaintiff hereby demands a jury trial of all issues triable by a jury.

Dated: Palo Alto, CA
August 24, 2010

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