

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WISCONSIN**

CREATIVE MOBILE O.U.,

Plaintiff,

Case No. _____

v.

LODSYS GROUP, LLC,

Defendant.

**COMPLAINT FOR DECLARATORY JUDGMENT
(JURY TRIAL DEMANDED)**

Plaintiff Creative Mobile O.U. (“Creative Mobile”) hereby alleges for its Complaint for Declaratory Judgment against Defendant Lodsys Group, LLC (“Lodsys” or “Defendant”) as follows:

NATURE OF THE ACTION

1. This is an action for a declaratory judgment that Creative Mobile does not infringe any valid claim of United States Patent Nos. 5,999,908 (the ‘908 patent); 7,222,078 (the ‘078 patent); 7,620,565 (the ‘565 patent); or 7,133,834 (the ‘834 patent); (collectively, the “Asserted Patents”) and for a declaratory judgment that the claims of each of the Asserted patents are invalid.

2. A true and correct copy of the ‘908 patent is attached as Exhibit A.

3. A true and correct copy of the ‘078 patent is attached as Exhibit B.

4. A true and correct copy of the ‘565 patent is attached as Exhibit C.

5. A true and correct copy of the ‘834 patent is attached as Exhibit D.

6. The United States Patent and Trademark Office has instituted reexamination proceedings for the '078 patent and the '565 patent.

THE PARTIES

7. Plaintiff Creative Mobile is an Estonia private limited company, with its principal place of business at Pärnu maantee 130-46, 11317 Tallinn, Estonia. Creative Mobile develops and publishes mobile games for use on mobile devices including but not limited to Apple, Inc.'s ("Apple") iPhone and iPad, as well as Android-based devices. Creative Mobile creates creative, fun, and entertaining gaming software solutions for the widespread enjoyment of mobile device users. Creative Mobile's products are distributed through Internet marketplaces such as Google Inc.'s ("Google") Android-based Google Play store and Apple's iOS-based iTunes App Store.

8. On information and belief, Defendant Lodsys Group, LLC, formerly Lodsys, LLC, is a Texas limited liability company and claims to have its principal place of business at 505 East Travis Street, Suite 207, Marshall, Texas 75670. On information and belief, Defendant is solely a patent licensing entity and does not create any products.

9. On information and belief, Lodsys owns the Asserted Patents.

10. On information and belief, Mark Small is the Chief Executive Officer at Lodsys.

11. On information and belief, Mr. Small conducts Lodsys' business from an office located in Oconomowoc, Wisconsin, within this jurisdictional district. Accordingly, on information and belief, Lodsys' primary place of business and/or headquarters is located within this jurisdictional district.

12. On information and belief, Mr. Small lives and works in Wisconsin, holds a Wisconsin driver's license, is registered to vote in Wisconsin, and is a resident and citizen of Wisconsin.

JURISDICTION AND VENUE

13. This is an action under the Federal Declaratory Judgment Act, 28 U.S.C. §§ 2201 and 2202, for a declaration pursuant to the patent laws of the United States, 35 U.S.C. § 1 et seq., that the Asserted Patents are not infringed by Creative Mobile. This Court has subject matter jurisdiction pursuant to 28 U.S.C. §§ 1331, 1338(a), 2201 and 2202.

14. Upon information and belief, this Court has personal jurisdiction over Lodsys because it has sufficient contacts with Wisconsin as to make personal jurisdiction proper in this court. Lodsys maintains an office within this district and conducts business related to licensing and enforcement of the Asserted Patents, including licensing and enforcement actions, from its location within this judicial district.

15. Venue is proper in this judicial district pursuant to 28 U.S.C. §§ 1391(b), (c) and 1400(b).

ALLEGATIONS SUPPORTING DECLARATORY JUDGMENT JURISDICTION

16. Creative Mobile realleges and incorporates herein by reference each and every allegation contained in paragraphs 1-15.

17. On or about August 4, 2011, Defendant sent a threatening letter by Federal Express to Creative Mobile's founder, Mr. Vladimir Funtikov, at the Estonian office headquarters expressly charging that Creative Mobile had infringed Defendant's Asserted Patents (the "Threat Letter"). A true and correct copy of this letter is attached as Exhibit E.

18. The Threat Letter accused Creative Mobile of infringing the Asserted Patents. Specifically, the Threat Letter began by expressing that it regarded Creative Mobile's games as "Infringement[s] of U.S. Patent Nos. 5,998,908, 7,133,834, 7,222,078, and 7,620,565 (Abelow)" in the Threat Letter's subject line.

19. The Threat Letter stated: “We have reviewed your use of the Lodsys Patents and have prepared the enclosed claim chart demonstrating at least one instance of how you utilize the inventions embodied in the Lodsys Patents. The images used in the charts are representative only and in addition to the charted claim of the referenced patent, you should consider the remaining claims of that patent and the other Lodsys Patents both with respect to the charted utilization and to other products and services offered by you.”

20. The Threat Letter demanded that Creative Mobile respond to Lodsys within twenty-one (21) days of the receipt of the letter.

21. The Threat Letter also stated: “Lodsys LLC reserves all rights with regard to the ‘908, ‘834, ‘078, and ‘565 patents, including: (1) the right to seek damages anytime within the last six years that your company started to make use of Lodsys’ patented technology; (2) the right to change its royalty rate at any time; (3) the right to change this licensing program at any time without notice, including variance to conform to applicable laws. You should not rely on any communication or lack of communication from Lodsys, Kelley, Donion, Gill, Huck & Goldfarb, PLLC, or The Davis Firm Group as a relinquishment of any of Lodsys’ rights.”

22. The Threat Letter also included an “Infringement Claim Chart,” setting forth how Creative Mobile’s Drag Racing game allegedly infringes claim 1 of the ‘078 patent.

23. On or about April 12, 2012, Defendant, through its licensing agent, sent a threatening email to Mr. Funtikov (the “Threat Email”). A true and correct copy of this email is attached as Exhibit F.

24. The Threat Email was sent by Michael Welley, Licensing Executive at Idessence AG. Mr. Welley wrote that he was contacting Mr. Funtikov “on behalf of Idessence AG, the

licensing agent for Lodsys LLC, in regards to a patent infringement claim that was brought against Creative Mobile in August of 2011.”

25. The Threat Email also stated: “As you may already know patent infringement claims may carry legal implications and a [sic] serious matters.”

26. The Threat Email also stated: “Our licenses are calculated using a 0.575% license rate applied to infringing applications sold between 2007 and September of 2012 in the US.”

27. Through communications and conduct, Defendant has repeatedly threatened assertion of the ‘908 patent, the ‘565 patent, the ‘078 patent, and/or the ‘834 patent against Creative Mobile.

28. Upon information and belief, Lodsys is solely a licensing entity whose revenue is generated through its enforcement of the Asserted Patents. Defendant has commenced law suits against numerous entities in the Eastern District of Texas, alleging infringement of the Asserted Patents.

29. On February 11, 2011, Lodsys filed a lawsuit against twelve (12) companies alleging infringement of the Asserted Patents. The case is entitled *Lodsys, LLC v. Brother International Corporation, et al.*, Case No. 2:11-cv-90 and is pending in the Eastern District of Texas, Marshall Division.

30. On May 31, 2011, Lodsys filed another lawsuit in the Eastern District of Texas against ten (10) additional companies, all of which are developers of mobile software applications, alleging infringement of the Asserted Patents. The case is entitled *Lodsys, LLC v. Combay, Inc., et al.*, C.A. No. 2:11-cv-272.

31. On June 10, 2011, Lodsys filed another lawsuit in the Eastern District of Texas against ten (10) additional companies, alleging infringement of the Asserted Patents. The case is entitled *Lodsys, LLC v. Adidas America, Inc., et al.*, C.A. No. 2:11-cv-283.

32. On July 5, 2011, Lodsys filed another lawsuit in the Eastern District of Texas against six (6) additional companies, alleging infringement of the Asserted Patents. The case is entitled *Lodsys, LLC v. DriveTime Automotive Group, Inc. et. al.*, C.A. No. 2:11-cv-309.

33. By virtue of Lodsys' actions towards Creative Mobile and other entities, Creative Mobile is in reasonable apprehension of an imminent patent infringement suit relating to the Asserted Patents.

34. Other entities have also sued Defendant for declaratory judgment on the Asserted Patents in this and other districts.

35. On June 13, 2011, The New York Times Company filed a complaint for declaratory judgment against Defendant in the Northern District of Illinois seeking a declaratory judgment of noninfringement and invalidity of the Asserted Patents. The case is entitled *The New York Times Co. v. Lodsys, LLC*, No. 1:11-cv-04004 and has been dismissed.

36. On June 13, 2011, OpinionLab, Inc. filed a complaint for declaratory judgment against Defendant in the Northern District of Illinois seeking a declaratory judgment of noninfringement and invalidity of the Asserted Patents. The case is entitled *OpinionLab, Inc. v. Lodsys, LLC*, No. 1:11-cv-04015 and has been dismissed.

37. On June 15, 2011, LivePerson, Inc. filed a complaint for declaratory judgment against Defendant in the Northern District of Illinois seeking a declaratory judgment of noninfringement and invalidity of the Asserted Patents. The case is entitled *LivePerson, Inc. v.*

Lodsys, LLC, No. 1:110-cv-04088 and was transferred on November 8, 2011 to the Eastern District of Wisconsin as *LivePerson, Inc. v. Lodsys, LLC*, No. 2:11-cv-01030.

38. On June 30, 2011, DriveTime Automotive Group Incorporated filed a complaint for declaratory judgment against Defendant in the District of Arizona seeking a declaratory judgment of noninfringement and invalidity of the Asserted Patents. The case is entitled *DriveTime Auto. Group Inc. v. Lodsys, LLC*, No. 2:11-cv-01307-NVW and has been dismissed.

39. On July 6, 2011, ESET, LLC filed a complaint for declaratory judgment against Defendant in the Eastern District of Wisconsin seeking a declaratory judgment of noninfringement and invalidity of the Asserted Patents. The case is entitled *ESET LLC v. Lodsys, LLC*, No. 2:11-cv-00650-JPS and has been dismissed.

40. On August 4, 2011, Rightnow Technologies, Inc. filed a complaint for declaratory judgment against Defendant in the Eastern District of Wisconsin seeking a declaratory judgment of noninfringement and invalidity of the Asserted Patents. The case is entitled *Rightnow Techs., Inc. v. Lodsys, LLC*, No. 2:11-cv-00737-CNC.

41. On August 9, 2011, Wolfram Alpha, LLC filed a complaint for declaratory judgment against Defendant in the Eastern District of Wisconsin seeking a declaratory judgment of noninfringement and invalidity of the Asserted Patents. The case is entitled *Wolfram Alpha LLC, et al. v. Lodsys, LLC*, No. 2:11-cv-00750-LA.

42. On December 2, 2011, PC Drivers Headquarters 1, Inc. filed a complaint for declaratory judgment against Defendant in the Eastern District of Wisconsin seeking a declaratory judgment of noninfringement and invalidity of the Asserted Patents. The case is entitled *PC Drivers Headquarters 1 Inc., et al. v. Lodsys, LLC*, No. 2:11-cv-01099-LA and has been dismissed.

43. On December 8, 2011, PCS Sales (USA) Inc. filed a complaint for declaratory judgment against Defendant in the Eastern District of Wisconsin seeking a declaratory judgment of noninfringement and invalidity of the Asserted Patents. The case is entitled *PCS Sales (USA) Inc. v. Lodsys, LLC*, No. 2:11-cv-01113-CNC.

44. On January 4, 2012, The JM Smucker Company filed a complaint for declaratory judgment against Defendant in the Eastern District of Wisconsin seeking a declaratory judgment of noninfringement and invalidity of the Asserted Patents. The case is entitled *The JM Smucker Co. v. Lodsys, LLC*, No. 2:11-cv-00012-CNC.

45. On June 1, 2012, Oracle America, Inc. filed a complaint for declaratory judgment against Defendant in the Eastern District of Wisconsin seeking a declaratory judgment of noninfringement and invalidity of the Asserted Patents. The case is entitled *Oracle America Inc. v. Lodsys, LLC et al.*, No. 2:12-cv-00550-CNC.

46. On information and belief, third party Apple is licensed to the Asserted Patents (“Apple’s License”) and is expressly permitted, among other things, to use, sell, offer to sell, or otherwise distribute to its developers, such as Creative Mobile, products and services that embody the technology covered by the Asserted Patents.

47. On information and belief, Defendant purchased the Asserted Patents subject to Apple’s License. On information and belief, Apple’s ability to use the technology embodied by the Asserted Patents is the purported value of Apple’s License.

48. Apple offers products and services to Creative Mobile to enable Creative Mobile to offer its products to end users of Apple products. The products and services Apple provides to Creative Mobile consist, among other things, of Apple application program interfaces, Apple software development kits, and Apple’s operating system through which Creative Mobile’s

programs access Apple hardware and software that permit interaction between Creative Mobile and Apple end users. Apple also provides a comprehensive set of Apple hosting, marketing, sales, agency, and delivery services that allow Creative Mobile to provide its products such as Drag Racing to millions of Apple end users.

49. On information and belief, third party Google is licensed to the Asserted Patents (Google's License) and is expressly permitted, among other things, to use, sell, offer to sell, or otherwise distribute to its software developers, such as Creative Mobile, products and services that embody the technology covered by the Asserted Patents

50. On information and belief, Defendant purchased the Asserted Patents subject to Google's License. On information and belief, Google's ability to use the technology embodied by the Asserted Patents is the purported value of Google's License.

51. Google offers products and services to Creative Mobile to enable Creative Mobile to offer its products to end users of Google products. The products and services Google provides to Creative Mobile consist, among other things, of Google application program interfaces, Google software development kits, and Google's operating system through which Creative Mobile's programs access Google hardware and software that permit interaction between Creative Mobile and Google end users. Google also provides a comprehensive set of Google hosting, marketing, sales, agency, and delivery services that allow Creative Mobile to provide its products such as Drag Racing to millions of Google end users.

COUNT I

DECLARATORY JUDGMENT OF NON-INFRINGEMENT OF THE '908 PATENT

52. The allegations of paragraphs 1-51 are incorporated by reference as if fully set forth herein.

53. Neither Drag Racing nor any other Creative Mobile product infringes any valid claim of the '908 patent asserted by Defendant.

54. An actual controversy exists between Creative Mobile and Defendant as to whether or not Creative Mobile has infringed, or is infringing, the '908 patent; has contributed to infringement, or is contributing to infringement of the '908 patent; and/or has induced infringement, or is inducing infringement of the '908 Patent.

55. This controversy is such that, pursuant to Federal Rule of Civil Procedure 57 and 28 U.S.C. §§ 2201 *et. seq.*, Creative Mobile is entitled to a declaration, in the form of a judgment, that Creative Mobile has not infringed and is not infringing any valid and enforceable claim of the '908 patent; has not contributed to the infringement and is not contributing to infringement of the '908 patent; and/or has not induced infringement and is not inducing infringement of the '908 patent. Such a declaration is necessary and appropriate at this time.

COUNT II

DECLARATORY JUDGMENT OF NON-INFRINGEMENT OF THE '078 PATENT

56. The allegations of paragraphs 1-55 are incorporated by reference as if fully set forth herein.

57. Neither Drag Racing nor any other Creative Mobile product infringes any valid claim of the '078 patent asserted by Defendant.

58. An actual controversy exists between Creative Mobile and Defendant as to whether or not Creative Mobile has infringed, or is infringing, the '078 patent; has contributed to infringement, or is contributing to infringement of the '078 patent; and/or has induced infringement, or is inducing infringement of the '078 Patent.

59. This controversy is such that, pursuant to Federal Rule of Civil Procedure 57 and 28 U.S.C. §§ 2201 *et. seq.*, Creative Mobile is entitled to a declaration, in the form of a judgment, that Creative Mobile has not infringed and is not infringing any valid and enforceable claim of the '078 patent; has not contributed to the infringement and is not contributing to infringement of the '078 patent; and/or has not induced infringement and is not inducing infringement of the '078 patent. Such a declaration is necessary and appropriate at this time.

COUNT III

DECLARATORY JUDGMENT OF NON-INFRINGEMENT OF THE '565 PATENT

60. The allegations of paragraphs 1-59 are incorporated by reference as if fully set forth herein.

61. Neither Drag Racing nor any other Creative Mobile product infringes any valid claim of the '565 patent asserted by Defendant.

62. An actual controversy exists between Creative Mobile and Defendant as to whether or not Creative Mobile has infringed, or is infringing, the '565 patent; has contributed to infringement, or is contributing to infringement of the '565 patent; and/or has induced infringement, or is inducing infringement of the '565 Patent.

63. This controversy is such that, pursuant to Federal Rule of Civil Procedure 57 and 28 U.S.C. §§ 2201 *et. seq.*, Creative Mobile is entitled to a declaration, in the form of a judgment, that Creative Mobile has not infringed and is not infringing any valid and enforceable claim of the '565 patent; has not contributed to the infringement and is not contributing to infringement of the '565 patent; and/or has not induced infringement and is not inducing infringement of the '565 patent. Such a declaration is necessary and appropriate at this time.

COUNT IV

DECLARATORY JUDGMENT OF NON-INFRINGEMENT OF THE '834 PATENT

64. The allegations of paragraphs 1-63 are incorporated by reference as if fully set forth herein.

65. Neither Drag Racing nor any other Creative Mobile product infringes any valid claim of the '834 patent asserted by Defendant.

66. An actual controversy exists between Creative Mobile and Defendant as to whether or not Creative Mobile has infringed, or is infringing, the '834 patent; has contributed to infringement, or is contributing to infringement of the '834 patent; and/or has induced infringement, or is inducing infringement of the '834 Patent.

67. This controversy is such that, pursuant to Federal Rule of Civil Procedure 57 and 28 U.S.C. §§ 2201 *et. seq.*, Creative Mobile is entitled to a declaration, in the form of a judgment, that Creative Mobile has not infringed and is not infringing any valid and enforceable claim of the '834 patent; has not contributed to the infringement and is not contributing to infringement of the '834 patent; and/or has not induced infringement and is not inducing infringement of the '834 patent. Such a declaration is necessary and appropriate at this time.

COUNT V

DECLARATORY JUDGMENT OF INVALIDITY OF THE '908 PATENT

68. The allegations of paragraphs 1-67 are incorporated by reference as if fully set forth herein.

69. Based on the above-stated conduct, Creative Mobile is informed and believes that the Defendant contends that Creative Mobile infringes one or more claims of the '908 patent.

70. Creative Mobile denies that it infringes any valid and enforceable claim of the '908 patent, and avers that the assertions of infringement cannot be maintained consistently with

statutory conditions of patentability and the statutory requirements for disclosure and claiming that must be satisfied for patent validity under at least one of 35 U.S.C. §§ 101, 102, 103, and 112.

71. Accordingly, an actual controversy exists between Creative Mobile and Defendant as to the validity of the '908 patent. The controversy is such that, pursuant to Federal Rule of Civil Procedure 57 and 28 U.S.C. § 2201 *et. seq.*, Creative Mobile is entitled to a declaration, in the form of a judgment, that the '908 patent is invalid. Such a declaration is necessary and appropriate at this time.

COUNT VI

DECLARATORY JUDGMENT OF INVALIDITY OF THE '078 PATENT

72. The allegations of paragraphs 1-71 are incorporated by reference as if fully set forth herein.

73. Based on the above-stated conduct, Creative Mobile is informed and believes that the Defendant contends that Creative Mobile infringes one or more claims of the '078 patent.

74. Creative Mobile denies that it infringes any valid and enforceable claim of the '078 patent, and avers that the assertions of infringement cannot be maintained consistently with statutory conditions of patentability and the statutory requirements for disclosure and claiming that must be satisfied for patent validity under at least one of 35 U.S.C. §§ 101, 102, 103, and 112.

75. Accordingly, an actual controversy exists between Creative Mobile and Defendant as to the validity of the '078 patent. The controversy is such that, pursuant to Federal Rule of Civil Procedure 57 and 28 U.S.C. § 2201 *et. seq.*, Creative Mobile is entitled to a

declaration, in the form of a judgment, that the '078 patent is invalid. Such a declaration is necessary and appropriate at this time.

COUNT VII

DECLARATORY JUDGMENT OF INVALIDITY OF THE '565 PATENT

76. The allegations of paragraphs 1-75 are incorporated by reference as if fully set forth herein.

77. Based on the above-stated conduct, Creative Mobile is informed and believes that the Defendant contends that Creative Mobile infringes one or more claims of the '565 patent.

78. Creative Mobile denies that it infringes any valid and enforceable claim of the '565 patent, and avers that the assertions of infringement cannot be maintained consistently with statutory conditions of patentability and the statutory requirements for disclosure and claiming that must be satisfied for patent validity under at least one of 35 U.S.C. §§ 101, 102, 103, and 112.

79. Accordingly, an actual controversy exists between Creative Mobile and Defendant as to the validity of the '565 patent. The controversy is such that, pursuant to Federal Rule of Civil Procedure 57 and 28 U.S.C. § 2201 *et. seq.*, Creative Mobile is entitled to a declaration, in the form of a judgment, that the '565 patent is invalid. Such a declaration is necessary and appropriate at this time.

COUNT VIII

DECLARATORY JUDGMENT OF INVALIDITY OF THE '834 PATENT

80. The allegations of paragraphs 1-79 are incorporated by reference as if fully set forth herein.

81. Based on the above-stated conduct, Creative Mobile is informed and believes that the Defendant contends that Creative Mobile infringes one or more claims of the '834 patent.

82. Creative Mobile denies that it infringes any valid and enforceable claim of the '834 patent, and avers that the assertions of infringement cannot be maintained consistently with statutory conditions of patentability and the statutory requirements for disclosure and claiming that must be satisfied for patent validity under at least one of 35 U.S.C. §§ 101, 102, 103, and 112.

83. Accordingly, an actual controversy exists between Creative Mobile and Defendant as to the validity of the '834 patent. The controversy is such that, pursuant to Federal Rule of Civil Procedure 57 and 28 U.S.C. § 2201 *et. seq.*, Creative Mobile is entitled to a declaration, in the form of a judgment, that the '834 patent is invalid. Such a declaration is necessary and appropriate at this time.

COUNT IX

PATENT EXHAUSTION AND FIRST SALE

84. On information and belief, Apple is a licensee to the Asserted Patents. On information and belief, Apple's License expressly permits Apple to offer and otherwise make available to its developers, such as Creative Mobile, products and services that relate to the inventions disclosed in the Asserted Patents. On information and belief, Defendant's infringement claims against Creative Mobile are based on Creative Mobile's use of products and services that Apple is authorized to provide to Creative Mobile under Apple's License.

85. On information and belief, Google is a licensee to the Asserted Patents. On information and belief, Google's License expressly permits Google to offer and otherwise make available to its developers, such as Creative Mobile, products and services that relate to the

inventions contained in the Asserted Patents. On information and belief, Defendant's infringement claims against Creative Mobile are based on Creative Mobile's use of products and services that Google is authorized to provide to Creative Mobile under Google's License.

86. Under the patent law doctrines of exhaustion and first sale, Creative Mobile can use the products and services that Apple and Google provide to Creative Mobile free from claims of infringement of the Asserted Patents. Therefore, Creative Mobile is entitled to a declaration that Lodsys' claims of infringement of the Asserted Patents are barred by at least the doctrines of patent exhaustion and first sale.

PRAYER FOR RELIEF

WHEREFORE, plaintiff Creative Mobile prays that:

- A. The Court declares that Creative Mobile's Drag Racing or any other products do not infringe any valid claim of the Asserted Patents;
- B. The Court declares that one or more claims of the Asserted Patents are invalid under one or more of 35 U.S.C. §§ 101, 102, 103, and 112;
- C. The Court makes a determination declaring that Defendant's claims against Creative Mobile are barred by the doctrines of patent exhaustion and first sale;
- D. Creative Mobile be awarded for reasonable attorneys' fees and costs, including costs for experts, pursuant to state and federal law, including 35 U.S.C. § 285;
- E. Creative Mobile be awarded such other and further relief as this Court deems just and proper.

DEMAND FOR A JURY TRIAL

Plaintiff hereby demands a trial by jury on all counts so triable.

Dated: July 10, 2012

Respectfully Submitted,

s/Michael T. Griggs

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