

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

LIVEPERSON, INC.,)	
)	
Plaintiff,)	Case No. 2:11-cv-01030-RTR
)	
v.)	
)	
LODSYS, LLC,)	JURY TRIAL DEMANDED
)	
Defendant.)	
)	

AMENDED COMPLAINT FOR DECLARATORY JUDGMENT

LivePerson, Inc. (“LivePerson”), for the Amended Complaint for Declaratory Judgment against Lodsys, LLC (“Lodsys”), states:

JURISDICTION AND VENUE

1. This action arises under the patent laws of the United States, Title 35, United States Code.
2. Jurisdiction is predicated upon 28 U.S.C. §§ 1331 and 1338(a).
3. Upon information and belief, this Court has personal jurisdiction over Lodsys because Lodsys’ Chief Executive Officer resides in, and conducts business related to licensing and enforcement of the patents-in-suit from, this Judicial District.
4. Venue over this action is proper pursuant to the provisions of 28 U.S.C. §§ 1391(b), 1391(c) and 1400.
5. Plaintiff herein seeks a declaratory judgment under the provisions of 28 U.S.C. § 2201.

PARTIES

6. Plaintiff LivePerson is a leading provider of online intelligent engagement products. LivePerson is a publicly traded Delaware Corporation with its corporate headquarters and principal place of business at 462 7th Avenue, 3rd Floor, New York, NY 10018-7832.

7. On information and belief, Lodsys is a Texas limited liability company having a place of business at 505 East Travis Street, Suite 207, Marshall, Texas 75670.

8. On information and belief, Mark Small is the Chief Executive Officer of Lodsys, conducting Lodsys' business from an office located in Oconomowoc, Wisconsin, within this judicial district.

PATENTS-IN-SUIT

9. Lodsys is the alleged owner of several United States patents, including U.S. Patent Nos. 5,999,908 ("the '908 patent"), 7,133,834 ("the '834 patent"), 7,222,078 ("the '078 patent") and 7,620,565 ("the '565 patent"), attached as Exhibits A, B, C, and D, respectively (collectively, the "Lodsys Patents"). The Lodsys Patents relate generally to gathering information from units of a commodity.

10. On or about August 12, 2011, Google, Inc. requested *inter partes* reexamination of certain claims of the '078 patent, which was accorded Control Number 95/000,639 ("the '078 reexam"). On or about September 28, 2011, the Patent Office ordered reexamination of the '078 patent, determining U.S. Patent No. 5,077,582 to Kravette et al. ("Kravette"), U.S. Patent No. 4,992,940 to Dworkin et al. ("Dworkin") and U.S. Patent No. 5,956,505 to Manduley ("Manduley") raise a substantial new question of patentability of claims of the '078 patent. On or about September 28, 2011 the Patent Office mailed an Office Action in the '078 reexam that rejected claims of the '078 patent as being anticipated under 35 U.S.C. § 102 based on separate

rejections for each of Kravette, Dworkin and Manduley. The Office Action also rejected a claim of the '078 patent under 35 U.S.C. § 103 as being unpatentable over Dworkin.

11. On or about August 12, 2011, Google, Inc. requested *inter partes* reexamination of certain claims of the '565 patent, which was accorded Control Number 95/000,638 ("the '565 reexam"). On or about October 11, 2011, the Patent Office ordered reexamination of the '565 patent, determining U.S. Patent No. 5,003,384 to Durden et al. ("Durden"), U.S. Patent No. 5,083,271 to Thatcher et al. ("Thatcher"), U.S. Patent No. 5,291,416 to Hutchins ("Hutchins"), Kravette, and Manduley raise a substantial new question of patentability of claims of the '565 patent. On or about October 11, 2011 the Patent Office mailed an Office Action in the '565 reexam that rejected claims of the '565 patent as being anticipated under 35 U.S.C. § 102 based on separate rejections for each of Durden, Kravette, Thatcher, Manduley, and Hutchins. The Office Action also rejected a claim of the '565 patent under 35 U.S.C. § 103 as being unpatentable over Kravette in view of U.S. Patent No. 4,435,068 to Landa ("Landa").

RELATED FACTS IN SUPPORT OF DECLARATORY JUDGMENT JURISDICTION

12. Lodsys has lodged accusations of infringement of the '908 patent, the '834 patent, the '078 patent and the '565 patent against a number of LivePerson's customers. As an example of how those customers infringe, Lodsys referred to the customers' use of LivePerson products.

13. On various occasions in 2011, Lodsys sent letters alleging that LivePerson's customers "utilize the inventions embodied in the Lodsys Patents," defining "Lodsys Patents" as including the '908, '834, '078, and '565 patents. The subject line of these letters read "[i]nfringement of" the Lodsys Patents. Some letters included claim charts that compared each customer's use of LivePerson's live chat products to a claim from the '078 patent. The letters further stated that each customer "should consider the remaining claims of that patent and the

other Lodsys Patents both [with] [sic] respect to the charted utilization and with respect to other products and services offered by you.”

14. Based on the foregoing facts, a justiciable controversy has arisen and exists between LivePerson and Lodsys concerning the infringement and invalidity of the Lodsys Patents.

COUNT I

DECLARATORY JUDGMENT OF NONINFRINGEMENT OF THE ‘908 PATENT

15. Plaintiff incorporates by reference herein all allegations set forth in ¶¶ 1- 14 of this Complaint.

16. LivePerson’s products do not infringe any valid claim of the ‘908 patent.

COUNT II

DECLARATORY JUDGMENT OF INVALIDITY OF THE ‘908 PATENT

17. Plaintiff incorporates by reference herein all allegations set forth in ¶¶ 1 - 16 of this Complaint.

18. On information and belief, the ‘908 patent is invalid under one or more provisions of Title 35 of the U.S. Code, §§ 101, 102, 103 and 112. Claims 1-37 of the ‘908 patent are invalid at least under 35 U.S.C. §§ 102 and 103 based upon prior art to the ‘908 patent, given Lodsys’ apparent attempt to read the claims on customer use of LivePerson’s products. At a minimum, the claims of the ‘908 patent are invalid under 35 U.S.C. §§ 102 and 103 based upon at least the following pieces of prior art: Durden, Kravette, Thatcher, Manduley, Hutchins, Dworkin, Landa, U.S. Patent No. 5,124,911 to Sack (“Sack”), U.S. Patent No. 6,850,892 to Shaw (“Shaw”), U.S. Patent No. 5,740,035 to Cohen et al. (“Cohen”), U.S. Patent No. 7,693,748 to Mesaros (“Mesaros”), and U.S. Patent No. 5,634,101 to Blau (“Blau”). These examples of

prior art are intended to be illustrative and not exhaustive, and LivePerson reserves the right to assert other specific pieces of prior art.

19. In light of these exemplary prior art references, under Lodsys' apparent application of the claims and the knowledge and experience of one of ordinary skill in the art at the time of the alleged invention, the claims of the '908 patent are invalid under 35 U.S.C. §§ 102 and 103. To the extent that Lodsys contends that any limitation of the claims of the '908 patent is not expressly disclosed in these or any other exemplary prior art references, LivePerson alleges that it would have been obvious to one of ordinary skill in the art at the time of the alleged invention that led to the '908 patent to arrive at such limitations.

20. These examples of invalidity are intended to be illustrative and not exhaustive, and LivePerson reserves the right to assert other specific claims of invalidity.

COUNT III

DECLARATORY JUDGMENT OF NONINFRINGEMENT OF THE '834 PATENT

21. Plaintiff incorporates by reference herein all allegations set forth in ¶¶ 1 - 20 of this Complaint.

22. LivePerson's products do not infringe any valid claim of the '834 patent.

COUNT IV

DECLARATORY JUDGMENT OF INVALIDITY OF THE '834 PATENT

23. Plaintiff incorporates by reference herein all allegations set forth in ¶¶ 1 - 22 of this Complaint.

24. On information and belief, the '834 patent is invalid under one or more provisions of Title 35 of the U.S. Code, §§ 101, 102, 103 and 112. Claims 1-22 of the '834 patent are invalid at least under 35 U.S.C. §§ 102 and 103 based upon prior art to the '834 patent, given

Lodsys' apparent attempt to read the claims on customer use of LivePerson's products. At a minimum, the claims of the '834 patent are invalid under 35 U.S.C. §§ 102 and 103 based upon at least the following pieces of prior art: Durden, Kravette, Thatcher, Manduley, Hutchins, Dworkin, Landa, Sack, Shaw, Cohen, Mesaros, and Blau. These examples of prior art are intended to be illustrative and not exhaustive, and LivePerson reserves the right to assert other specific pieces of prior art.

25. In light of these exemplary prior art references, under Lodsys' apparent application of the claims and the knowledge and experience of one of ordinary skill in the art at the time of the alleged invention, the claims of the '834 patent are invalid under 35 U.S.C. §§ 102 and 103. To the extent that Lodsys contends that any limitation of the claims of the '834 patent is not expressly disclosed in these or any other exemplary prior art references, LivePerson alleges that it would have been obvious to one of ordinary skill in the art at the time of the alleged invention that led to the '834 patent to arrive at such limitations.

26. These examples of invalidity are intended to be illustrative and not exhaustive, and LivePerson reserves the right to assert other specific claims of invalidity.

COUNT V

DECLARATORY JUDGMENT OF NONINFRINGEMENT OF THE '078 PATENT

27. Plaintiff incorporates by reference herein all allegations set forth in ¶¶ 1 - 26 of this Complaint.

28. LivePerson's products do not infringe any valid claim of the '078 patent.

COUNT VI

DECLARATORY JUDGMENT OF INVALIDITY OF THE '078 PATENT

29. Plaintiff incorporates by reference herein all allegations set forth in ¶¶ 1 - 28 of this Complaint.

30. On information and belief, the '078 patent is invalid under one or more provisions of Title 35 of the U.S. Code, §§ 101, 102, 103 and 112. Claims 1-74 of the '078 patent are invalid at least under 35 U.S.C. §§ 102 and 103 based upon prior art to the '078 patent, given Lodsys' apparent attempt to read the claims on customer use of LivePerson's products. At a minimum, the claims of the '078 patent are invalid under 35 U.S.C. §§ 102 and 103 based upon at least the following pieces of prior art: Durden, Kravette, Thatcher, Manduley, Hutchins, Dworkin, Landa, Sack, Shaw, Cohen, Mesaros, and Blau. These examples of prior art are intended to be illustrative and not exhaustive, and LivePerson reserves the right to assert other specific pieces of prior art.

31. The U.S. Patent and Trademark office has reexamined the '078 patent and has rejected certain claims based on 35 U.S.C. §§ 102 and 103 using Kravette, Dworkin and Manduley.

32. In light of these exemplary prior art references, under Lodsys' apparent application of the claims and the knowledge and experience of one of ordinary skill in the art at the time of the alleged invention, the claims of the '078 patent are invalid under 35 U.S.C. §§ 102 and 103. To the extent that Lodsys contends that any limitation of the claims of the '078 patent is not expressly disclosed in these or any other exemplary prior art references, LivePerson alleges that it would have been obvious to one of ordinary skill in the art at the time of the alleged invention that led to the '078 patent to arrive at such limitations.

33. These examples of invalidity are intended to be illustrative and not exhaustive, and LivePerson reserves the right to assert other specific claims of invalidity.

COUNT VII

**DECLARATORY JUDGMENT OF
NONINFRINGEMENT OF THE '565 PATENT**

34. Plaintiff incorporates by reference herein all allegations set forth in ¶¶ 1 - 33 of this Complaint.

35. LivePerson's products do not infringe any valid claim of the '565 patent.

COUNT VIII

DECLARATORY JUDGMENT OF INVALIDITY OF THE '565 PATENT

36. Plaintiff incorporates by reference herein all allegations set forth in ¶¶ 1 - 35 of this Complaint.

37. On information and belief, the '565 patent is invalid under one or more provisions of Title 35 of the U.S. Code, §§ 101, 102, 103 and 112. Claims 1-32 of the '565 patent are invalid at least under 35 U.S.C. §§ 102 and 103 based upon prior art to the '565 patent, given Lodsys' apparent attempt to read the claims on customer use of LivePerson products. At a minimum, the claims of the '565 patent are invalid under 35 U.S.C. §§ 102 and 103 based upon at least the following pieces of prior art: Durden, Kravette, Thatcher, Manduley, Hutchins, Dworkin, Landa, Sack, Shaw, Cohen, Mesaros, and Blau. These examples of prior art are intended to be illustrative and not exhaustive, and LivePerson reserves the right to assert other specific pieces of prior art.

38. The U.S. Patent and Trademark office has reexamined the '565 patent and has rejected certain claims based on 35 U.S.C. §§ 102 and 103 using Durden, Kravette, Thacher, Manduley, Hutchins, and Landa.

39. In light of these exemplary prior art references, under Lodsys' apparent application of the claims and the knowledge and experience of one of ordinary skill in the art at the time of the alleged invention, the claims of the '565 patent are invalid under 35 U.S.C. §§ 102 and 103. To the extent that Lodsys contends that any limitation of the claims of the '565 patent is not expressly disclosed in these or any other exemplary prior art references, LivePerson alleges that it would have been obvious to one of ordinary skill in the art at the time of the alleged invention that led to the '565 patent to arrive at such limitations.

40. These examples of invalidity are intended to be illustrative and not exhaustive, and LivePerson reserves the right to assert other specific claims of invalidity.

WHEREFORE, LivePerson requests the following relief in conjunction with the allegations set forth above in this Complaint:

- A. Entry of an Order of this Court declaring that the Plaintiff's product does not infringe any of the Lodsys Patents, and that Plaintiff, by its actions neither infringes, induces nor contributes to the infringement of the patent by others;
- B. Entry of an Order of this Court declaring the Lodsys Patents invalid under one or more provisions of Title 35 U.S. Code, §§ 101, 102, 103 and 112;
- C. Entry of an Order enjoining Lodsys, its agents, servants, officers, directors, employees, attorneys, privies, representatives, successors, assigns, and parent and subsidiary entities, and any and all persons in act of concert or participation with any of them, from threatening to assert or asserting any of the Lodsys Patents against LivePerson, its agents, employees, or customers;

- D. Entry of an Order of this Court assessing all costs associated with this action to LivePerson, Inc.;
- E. Entry of an Order of this Court declaring this case exceptional and awarding Plaintiff reasonable attorney fees; and
- F. All other relief, both interim and permanent, as is just and proper.

DEMAND FOR JURY TRIAL

LivePerson hereby makes a demand for a trial by jury as to all issues in this lawsuit so triable.

Dated: January 27, 2012

By: /s/ Melanie J. Reichenberger

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