

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

THE J. M. SMUCKER COMPANY)	
)	
Plaintiff,)	Civil Action No 2:12-cv-00012
)	
v.)	
)	
LODSYS GROUP, LLC)	
)	
Defendant.)	
)	

**THIRD AMENDED COMPLAINT
FOR DECLARATORY JUDGMENT**

Plaintiff, The J. M. Smucker Company (“Smucker”), by and through the undersigned counsel, files this amended complaint for a declaratory judgment against Defendant, Lodsys, Group, LLC (“Lodsys”), and alleges as follows:

NATURE OF ACTION

1. This is an action for a declaratory judgment that Smucker does not infringe any valid claim of United States Patent No. 5,999,908 (the “‘908 patent”) or United States Patent No. 7,222,078 (the “‘078 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 hereto as Exhibit A.
3. A true and correct copy of the ‘078 patent is attached hereto as Exhibit B.

THE PARTIES

4. Plaintiff, Smucker, is incorporated in Ohio and has a principal place of business at 1 Strawberry Lane, Orrville, OH 44667. Smucker is a manufacturer of fruit spreads, ice cream toppings, beverages, shortening, peanut butter and other products.

5. On information and belief, Defendant, Lodsys, is a Texas limited liability company and claims to have a principal place of business at 505 East Travis Street, Suite 207, Marshall, Texas, 75670. The Texas Secretary of State lists the corporate address of Lodsys as 800 Brazos, Suite 400, Austin, Texas 74701.

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

7. On information and belief, Mark Small is the Chief Executive Officer of Lodsys.

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

9. 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.

10. On information and belief, Lodsys, LLC owned the Asserted Patents when this case was instituted on January 4, 2012.

11. On information and belief, Lodsys, LLC entered into a patent sale agreement with Lodsys, whereby all rights, title and interest to the Asserted Patents were assigned to Lodsys as of February 1, 2012 (the "Patent Assignment Agreement").

12. On information and belief, the Patent Assignment Agreement assigned to Lodsys all rights to enforce the Asserted Patents and recover damages and any other remedies of any kind of past, current and future infringement, including all causes of action asserted by Lodsys, LLC. On information and belief, Lodsys acquired possession, custody and control of Lodsys, LLC's documents and information relevant to this action and the patents-in-suit.

JURISDICTION AND VENUE

13. This action arises under the patent laws of the United States, Title 35 of the United States Code (35 U.S.C. § 1, et seq.), and under the Federal Declaratory Judgment Act (28 U.S.C. §§ 2201 and 2202).

14. This Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. §§ 1331 (federal question) and 1338(a) (action arising under an Act of Congress relating to patents).

15. This Court has personal jurisdiction over Lodsys because it has constitutionally sufficient contacts with Wisconsin so as to make personal jurisdiction proper in this Court. Lodsys maintains an office within this district and conducts or solicits business within this district.

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

17. Twelve declaratory judgment actions against Lodsys relating to the Asserted Patents have been brought in this District, including this one—*Eset LLC v. Lodsys LLC* (Case No. 2:11-cv-650); *RightNow Technologies Inc. v. Lodsys LLC* (Case No. 2:11-cv-737); *Wolfram Alpha LLC et al. v. Lodsys LLC and Lodsys Group, LLC* (Case No. 2:11-cv-750); *LivePerson Inc. v. Lodsys LLC* (Case No. 2:11-cv-1030); *ForeSee Results Inc. v. Lodsys LLC* (Case No. 2:11-cv-1092); *PC Drivers Headquarters I Inc. et al. v. Lodsys LLC* (Case No. 2:11-cv-1099); *PCS Sales (USA) Inc. v. Lodsys LLC* (Case No. 2:11-cv-1113); *Oracle America Inc. v. Lodsys*

LLC and Lodsys Group, LLC (Case No. 2:12-cv-550); *Creative Mobile OU v. Lodsys Group, LLC* (Case No. 2:12-cv-702); *BuySeasons v. Lodsys LLC and Lodsys Group, LLC* (Case No. 2:12-cv-797); and *Confermit Inc. v. Lodsys LLC and Lodsys Group, LLC* (Case No. 2:12-cv-868). This action is the only one that is still pending; all of the others have been closed.

THE PRESENCE OF AN ACTUAL CONTROVERSY

18. On November 9, 2011, Mr. Small, sent a letter to Ms. Jeanette L. Knudsen, Vice President, General Counsel and Corporate Secretary, of Smucker. A copy of this letter is attached hereto as Exhibit C.

19. The November 9, 2011 letter stated:

[w]e 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 November 9, 2011 letter also stated:

[w]e are interested in reaching a negotiated non-litigation licensing arrangement with you for all of your uses of the Lodsys Patents under your brand names and would like to discuss this matter with you within 21 days of your receipt of this letter.

21. The November 9, 2011 letter also stated that Lodsys has “retained the firms of Kelley, Donion, Gill, Huck & Goldfarb PLLC (www.kdg-law.com) based in Seattle, Washington, and The Davis Firm, P.C. (www.bdfirm.com) based in Longview, Texas, to assist the company in licensing of the Lodsys Patents.”

22. The November 9, 2011 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 rates 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.

23. The November 9, 2011 letter also included an "Infringement Claim Chart," setting forth how Smucker's "Online Store Questions" form, on its website, allegedly infringes claim 1 of the '078 patent.

24. On November 23, 2011, Jaclyn A. Bryk, Corporate Attorney – Litigation at Smucker, responded to Mark Small's letter. She requested that Mr. Small contact her at his earliest convenience to discuss the matter further.

25. On December 7, 2011, Harry Snodgrass, Licensing Executive at Lodsys, responded to Ms. Bryk's letter via email. Mr. Snodgrass wrote that if Ms. Bryk wanted to discuss licensing, that is Mr. Snodgrass's "area," but if Ms. Bryk wanted to discuss "any specific areas of the patent and infringement" then he could "get [Lodsys's] in-house counsel and patent expert on the call." Mr. Snodgrass's email further commented that he normally "like[s] to discuss the licensing program and pricing before proceeding with a claims review as it can offer a reference point for further conversations."

26. Upon information and belief, Lodsys is solely a licensing entity, and without enforcement it receives no benefits from the Asserted Patents.

27. On February 11, 2011, Lodsys filed a lawsuit against 12 companies alleging infringement of the Asserted Patents. That case is styled *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.

28. On May 31, 2011, Lodsys filed another lawsuit in the Eastern District of Texas

against ten additional companies, all developers of Apple Inc. iPhone applications, alleging infringement of the Asserted Patents. The case is styled *Lodsys, LLC v. Combay, Inc., et al.*, C.A. No. 2:11-cv-272.

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

30. On July 7, 2011, Lodsys filed another lawsuit in the Eastern District of Texas against six additional companies, alleging infringement of the Asserted Patents. The case is styled *Lodsys, LLC v. DriveTime Automotive Group, Inc. et al.*, C.A. No. 2:11-cv-309.

31. In all four Texas cases, counsel of record to Lodsys are Kelley, Donion, Gill, Huck & Goldfarb, PLLC, based in Seattle, WA, and The Davis Firm, P.C., based in Longview, Texas.

32. By virtue of Lodsys's actions, Smucker was in reasonable apprehension of an imminent patent infringement suit relating to the Asserted Patents when it filed this declaratory judgment action on January 4, 2012.

33. Smucker denies that it infringes any valid claim of the Asserted Patents. Smucker now seeks a declaratory judgment that it does not infringe any valid claim of the Asserted Patents.

34. Smucker also seeks a declaratory judgment that the Asserted Patents are invalid for at least the reason that the claims of the Asserted Patents are anticipated by prior art, including but not limited to, California Institute of Technology's TOC/DOC system and Telebase System's EasyNet Knowledge Gateway.

COUNT I

DECLARATORY JUDGMENT OF NON-INFRINGEMENT OF THE '908 PATENT

35. The allegations of paragraphs 1-34 are incorporated by reference as if fully set forth herein.

36. Smucker's website does not infringe any valid claim of the '908 Patent.

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

38. The controversy is such that, pursuant to Federal Rule of Civil Procedure 57 and 28 U.S.C. § 2201 et seq., Smucker is entitled to a declaration, in the form of a judgment, that by its activities Smucker has not infringed and is not infringing any valid and enforceable claim of the '908 Patent; has not contributed to 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 determination and declaration is necessary and appropriate at this time.

COUNT II

DECLARATORY JUDGMENT OF NON-INFRINGEMENT OF THE '078 PATENT

39. The allegations of paragraphs 1-34 are incorporated by reference as if fully set forth herein.

40. Smucker's website does not infringe any valid claim of the '078 Patent.

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

infringement of the '078 Patent.

42. The controversy is such that, pursuant to Federal Rule of Civil Procedure 57 and 28 U.S.C. § 2201 et seq., Smucker is entitled to a declaration, in the form of a judgment, that by its activities Smucker has not infringed and is not infringing any valid and enforceable claim of the '078 Patent; has not contributed to 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 determination and declaration is necessary and appropriate at this time.

COUNT III

DECLARATORY JUDGMENT OF INVALIDITY OF THE '908 PATENT

43. The allegations of paragraphs 1-34 are incorporated by reference as if fully set forth herein.

44. Based on the above-stated conduct, Smucker is informed and believes that the Defendant contends that Smucker infringes one or more claims of the '908 Patent.

45. Smucker 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.

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

COUNT IV

DECLARATORY JUDGMENT OF INVALIDITY OF THE '078 PATENT

47. The allegations of paragraphs 1-34 are incorporated by reference as if fully set forth herein.

48. Based on the above-stated conduct, Smucker is informed and believes that the Defendant contends that Smucker infringes one or more claims of the '078 Patent.

49. Smucker 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.

50. Accordingly, an actual controversy exists between Smucker and the Defendant as to the validity of the '078 Patent. The controversy is such that, pursuant to Federal Rules of Civil Procedure 57 and 28 U.S.C. § 2201 et seq., Smucker is entitled to a declaration, in the form of a judgment, that the '908 Patent is invalid. Such a determination and declaration is necessary and appropriate at this time.

PRAYER FOR RELIEF

WHEREFORE, plaintiff Smucker prays that:

- A. The Court declare that Smucker's website does not infringe any valid claim of the '908 patent;
- B. The Court declare that the claims of the '908 patent are invalid under one or more of 35 U.S.C. §§ 101, 102, 103, and 112;
- C. The Court declare that Smucker's website does not infringe any valid claim of the

'078 patent;

- D. The Court declare that the claims of the '078 patent are invalid under one or more of 35 U.S.C. §§ 101, 102, 103, and 112;
- E. Smucker be awarded its costs in this action;
- F. Smucker be awarded its attorneys fees pursuant to 35 U.S.C. § 285; and
- G. Smucker be awarded such other and further relief as this Court deems is just and proper.

DEMAND FOR A JURY TRIAL

Smucker hereby demands a trial by jury in this action.

Dated: March 13, 2013

Respectfully Submitted,

/s/ Eugenia G. Carter

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