HONORABLE MARSHA J. PECHMAN

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF WASHINGTON

AT SEATTLE

INTERVAL LICENSING LLC,

Plaintiff,

v.

AOL, INC., et al.,

Defendants.

Case No. No. 2:10-cv-01385-MJP

FACEBOOK'S JOINDER IN DEFENDANTS GOOGLE INC. AND YOUTUBE, LLC'S REPLY IN SUPPORT OF THEIR MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED PURSUANT TO FED. R. CIV. R. 12(B)(6)

NOTED ON MOTION CALENDAR: November 12, 2010

ORAL ARGUMENT REQUESTED

Defendant Facebook Inc. ("Facebook") respectfully joins in defendants Google Inc. and YouTube, LLC's Reply in Support of Their Motion to Dismiss for Failure to State a Claim Upon Which Relief Can Be Granted Pursuant to Fed. R. Civ. R. 12(b)(6).

I. INTERVAL FAILS TO MEET EVEN THEIR OWN INTERPRETATION OF RULE 8 COMPLIANCE

Interval Licensing LLC's ("Interval") opposition brief accepts that Rule 8(a) compliance requires identification "with specificity, particular products that infringe Interval's patents." (Dkt. No. 123 at 7:28, 8:10-11). Interval further admits that Form 18 requires identification of "specified devices" accused of infringement. (Dkt. No. 123 at 4:17-21). However, Interval makes no specific identifications. Interval's generic references to "websites and associated

hardware and software" with respect to Facebook's alleged infringement does not identify specific accused products. (Dkt. No. 123 at 8:17-22).

Notably, Interval has even failed to identify *which* of the many websites owned by defendants are accused of infringing or which products offered on those websites are accused. For example, http://www.facebook.com can be used to access a multitude of products and services, from Groups and Pages to Messages, Chat and numerous third party offerings. Interval's Complaint never identifies any specific product or service that it accuses of infringement.

Nor does attaching the patent to the complaint provide notice of the accused products. Interval's argument to the contrary is specious, at best. If attaching the patent were enough to give a defendant notice of what is accused of infringement, there would be no need for even the information required by Form 18. It is not, and plaintiff's complaint is deficient.

II. FORM 18 DOES NOT SUPPLANT THE FEDERAL PLEADING STANDARDS

As Google points out in their reply, Interval's interpretation of the case law is incorrect – Form 18 has not been upheld by the Federal Circuit. *See Bender v. Motorola, Inc.*, No. C 09-1245, 2010 WL 726739, at *3 (N.D. Cal. Feb. 26, 2010); *Bender v. LG Elecs. U.S.A., Inc.*, No. C 09-02114, 2010 WL 889541, at *3 (N.D. Cal. Mar. 11, 2010). Interval also ignores that the Supreme Court in *Ashcroft v. Iqbal* held that the pleading standards of *Twombly* "appl[y] to any civil case." 129 S. Ct. 1937, 1953 (2009).

III. INTERVAL'S FAILURE TO COMPLY WITH RULE 8 PREJUDICES DEFENDANTS

By choosing not to include any specific accused products in its Complaint, Interval is improperly putting defendants at a disadvantage in defending this case. Rather than providing information that should have been set forth in its Complaint, Interval attempts to withhold such information until the time for serving infringement contentions. (Dkt. No. 123 at 11:1-4.) Ironically, Interval now complains of the delay it itself has caused. If Interval was truly concerned with delay, it should have pleaded sufficient facts in its original Complaint or amended its Complaint to conform to the requirements of Rule 8, at defendants' urging.

Despite Interval's attempt to rewrite the Federal Rules, Fed. R. Civ. P. 83(a)(1) mandates that local rules cannot trump the Federal Rules. As such, patent disclosures cannot remedy defective pleadings. Interval ignores the fundamental difference between the operative pleading in a case and information provided during discovery, which may be subject to multiple rounds of changes and amendments during the course of the case. Infringement contentions are not, and cannot be, the operative pleading in the case. Interval should not be rewarded for failing to properly plead its case by using a later filed discovery response to patch the holes – leaving defendants less time to prepare their case.

In contrast, Interval will not be prejudiced by having to comply with its pleading obligations. Interval misconstrues what defendants are asking for. Defendants are not asking for claim by claim, element by element, infringement contentions within the complaint, but for enough information to determine how Interval alleges defendants infringe and by what products or services. Interval's self-serving proposal to have the Court pardon its non-compliant Complaint in favor of preliminary infringement contentions should be rejected and Facebook's motion granted.

DATED this 12th day of November, 2010.

COOLEY LLP

/s/ Christopher B. Durbin

Christopher B. Durbin (WSBA #41159)
COOLEY LLP
719 Second Avenue, Suite 900
Seattle, WA 98104
Tel: (206) 452-8700
Fax: (206) 452-8800
Email: cdurbin@cooley.com

Michael G. Rhodes (*pro hac vice*)
Heidi L. Keefe (*pro hac vice*)
Mark R. Weinstein (*pro hac vice*)
Christen M.R. Dubois (*pro hac vice*)
Elizabeth L. Stameshkin (*pro hac vice*)
3175 Hanover St.
Palo Alto, CA 94304-1130
Tel: (650) 843-5000
Fax: (650) 849-7400

Attorneys for Defendant FACEBOOK, INC.

CERTIFICATE OF SERVICE

I hereby certify that on November 12, 2010, I electronically filed the following document(s): **Facebook's Joinder in Defendants Google Inc. and YouTube, LLC's Reply in Support of Their Motion to Dismiss for Failure to State a Claim upon which Relief Can Be Granted Pursuant to Fed. R. Civ. R. 12(b)(6)** with the Clerk of the Court using the CM/ECF system, which will send an email notification of such filing to the attorney(s) of record listed below:

Justin A. Nelson Matthew R. Berry Edgar Guy Sargent SUSMAN GODFREY 1201 Third Avenue, Suite 3800 Seattle, WA 98101	By Electronic CM/ECF: jnelson@susmangodfrey.com mberry@susmangodfrey.com esargent@susmangodfrey.com
Attorneys for Plaintiff Interval Licensing LLC	
Eric J. Enger Michael F. Heim Nathan J. Davis HEIM PAYNE & CHORUSH LLP 600 Travis Street, Suite 6710 Houston, TX 77002	By Electronic CM/ECF: eenger@hpcllp.com mheim@hpcllp.com ndavis@hpcllp.com
Attorneys for Plaintiff Interval Licensing LLC	
Max L. Tribble SUSMAN GODFREY 1000 Lousiana Street, Suite 5100 Houston, TX 77002	By Electronic CM/ECF: mtribble@susmangodfrey.com
Attorneys for Plaintiff Interval Licensing LLC	
Cortney S.Alexander Gerald F. Ivey Robert L. Burns Elliott C. Cook FINNEGAN, HENDERSON, FARABOW, GARRETT & DUNNER LLP Two Freedom Square 11955 Freedom Drive Reston, VA 20910	By Electronic CM/ECF: cortney.alexander@finnegan.com gerald.ivey@finnegan.com robert.burns@finnegan.com elliot.cook@finnegan.com

Brian M. Berliner Neil L. Yang O'MELVENY & MYERS LLP 400 South Hope Street, Suite 1050 Los Angeles, CA 90071 *Attorneys for Defendant Apple, Inc.*	By Electronic CM/ECF: bberliner@omm.com nyan@omm.com
David Almeling George A. Riley O'MELVENY & MYERS LLP Two Embarcadero Center, 28th Floor San Francisco, CA 94111 *Attorneys for Defendant Apple, Inc.*	By Electronic CM/ECF: dalmeling@omm.com griley@omm.com
Jeremy E. Roller Scott T. Wilsdon YARMUTH WILSDON CALFO PLLC 818 Stewart Street, Suite 1400 Seattle, WA 98101 *Attorneys for Defendant Apple, Inc.*	By Electronic CM/ECF: jroller@yarmuth.com wilsdon@yarmuth.com
J. Christopher Carraway John D. Vandenberg Kristin L. Cleveland Klaus H. Hamm KLARQUIST SPARKMAN 121SW Salmon Street, Suite 1600 Portland, OR 97204 *Attorneys for eBay, Inc.; Netflix, Inc.; Office Depot, Inc.; and Staples, Inc.*	By Electronic CM/ECF: chris.carraway@klarquist.com john.vandenberg@klarquist.com kristin.cleveland@klarquist.com klaus.hamm@klarquist.com
Arthur W. Harrigan, Jr. Christopher Wion DANIELSON HARRIGAN LEYH & TOLLEFSON 999 Third Avenue, Suite 4400 Seattle, WA 98104 *Attorneys for eBay, Inc.; Netflix, Inc.; Office Depot, Inc.; and Staples, Inc.*	By Electronic CM/ECF: arthurh@dhlt.com chrisw@dhlt.com

Aneelah Afzali Scott A.W. Johnson Shannon M. Jost STOKES LAWRENCE 800 5th Avenue, Suite 4000 Seattle, WA 98104-3179 *Attorneys for Defendants Google, Inc. and YouTube LLC*	By Electronic CM/ECF: aneelah.afzali@stokeslaw.com sawj@stokeslaw.com shannon.jost@stokeslaw.com
Dimitrios T. Drivas John Handy Kevin X. McGann Aaron Chase WHITE & CASE 1155 Avenue of the Americas New York, NY 10036 *Attorneys for Defendants Google, Inc. and YouTube LLC*	By Electronic CM/ECF: ddrivas@whitecase.com jhandy@whitecase.com kmcgann@whitecase.com aaron.chase@whitecase.com
Warren S. Heit Wendy Schepler WHITE & CASE 3000 El Camino Real Bldg. 5, 9th Floor Palo Alto, CA 94306 *Attorneys for Defendants Google, Inc. and YouTube LLC*	By Electronic CM/ECF: wheit@whitecase.com wschepler@whitecase.com
Kevin C. Baumgardner Steven W. Fogg CORR CRONIN MICHELSON BAUMGARDNER & PREECE 1001 4th Avenue, Suite 3900 Seattle, WA 98154 *Attorneys for Defendant OfficeMax Inc.*	By Electronic CM/ECF: kbaumgardner@corrcronin.com sfogg@corrcronin.com
Jeffrey D. Neumeyer OFFICEMAS INCORPORATED 1111 West Jefferson Street P.O. Box 50 Boise, ID 83728 *Attorneys for Defendant OfficeMax Inc.*	By Electronic CM/ECF: JeffNeumeyer@officemax.com

Douglas S. Rupert John L. Letchinger WILDMAN, HARROLD ALLEN & DIXON 225 West Wacker Drive, Suite 2700 Chicago, IL 60606 *Attorneys for Defendant OfficeMax Inc.*	By Electronic CM/ECF: rupert@wildman.com letchinger@wildman.com
Eric W. Ow Francis Ho Michael I. Kreeger Michael A. Jacobs Richard S. J. Hung MORRISON & FOERSTER 425 Market Street San Francisco, CA 94105 *Attorneys for Defendants Yahoo! Inc.*	By Electronic CM/ECF: eow@mofo.com fho@mofo.com mkreeger@mofo.com mjacobs@mofo.com rhung@mofo.com
Mark P. Walters Dario A. Machleidt FROMMER LAWRENCE & HAUG LLP 1191 Second Avenue Seattle, WA 98101 *Attorneys for Defendants Yahoo! Inc.*	By Electronic CM/ECF: dmachleidt@flhlaw.com mwalters@flhlaw.com

/s/Christopher B. Durbin
Christopher B. Durbin (WSBA #41159)
COOLEY LLP
719 Second Avenue, Suite 900
Seattle, WA 98104-1732
Telephone: (262) 452-8700
Facsimile: (262) 452-8800
Email: cdurbin@cooley.com

Attorneys for Defendant
FACEOOK, INC.