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FABLETICS, LLC

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

FABLETICS, LLC,

Plaintiff,

v.

LANDMARK TECHNOLOGY LLC,

Defendant.

Case No. 3:17-cv-00075-WHO

FIRST AMENDED COMPLAINT FOR (1) DECLARATORY JUDGMENT OF INVALIDITY AND (2) DECLARATORY JUDGMENT OF NON-INFRINGEMENT of U.S. PATENT NO. 6,289,319

JURY TRIAL DEMANDED

Pursuant to Federal Rule of Civil Procedure 15(a)(1)(B), Plaintiff Fabletics, LLC ("Plaintiff" or "Fabletics") Amends its Complaint for Declaratory Judgment of Non-Infringement and Declaratory Judgment of Invalidity of U.S. Patents No. 6,289,319 (the "'319 Patent") against Defendant Landmark Technology, LLC, stating as follows:

THE PARTIES

1. Plaintiff Fabletics is a Delaware limited liability company based in California.

2. Fabletics is an athleisure company that sells stylish women's sportswear and accessories. It is headquartered in El Segundo, California.

3. On information and belief, Defendant Landmark Technology LLC ("Landmark Technology") was a Delaware limited liability company and has its principal place of business at 329 Laurel Street, San Diego, California 92102.

4. On information and belief, PanIP, LLC was a California Limited Liability Company with its principal place of business at 329 Laurel Street, San Diego, California 92102.

5. On information and belief, Lawrence B. Lockwood, inventor of the '319 Patent, was the only named member or manager for both PanIP, LLC and Landmark Technology's company filings with the California Secretary of State.

6. On information and belief, both PanIP, LLC and Landmark Technology were and are used to extract licensing fees from companies regardless of whether they infringe the '319 Patent.

7. On information and belief, Landmark Technology is no longer a Delaware limited liability company, its status being canceled on November 2, 2016, for failure to appoint a registered agent.

8. On information and belief, Landmark Technology is not registered as a domestic for foreign company authorized to transact business in California and it does not have a certificate of registration to transact intrastate business in California.

9. On information and belief, Landmark Technology is not registered as an active limited liability company that is in good standing anywhere in the United States.

10. Mr. Lockwood's liability for his actions on behalf of Landmark Technology is no longer limited the law, unless or until, Landmark Technology is brought back into good standing.

JURISDICTION AND VENUE

11. This Court has jurisdiction over these claims pursuant to 28 U.S.C. § 1338 because the Complaint and Amended Complaint state claims arising under an Act of Congress relating to patents, 35 U.S.C. § 271.

12. This Complaint also arises under the Federal Declaratory Judgment Act, 28 U.S.C. §§ 2201 *et seq.* based on Defendants' accusations towards Plaintiff for patent infringement, its demands that Plaintiff take a license, and pattern of actual litigation, give rise to an actual case or controversy under 28 U.S.C. §§ 2201 and 2202.

13. This Court has personal jurisdiction over Landmark Technology. Upon information and belief, Landmark Technology conducts substantial business in this judicial district, including regularly doing or soliciting business, engaging in other persistent courses of conduct, and deriving substantial revenue from individuals and entities in California.

14. More specifically, since September 2008, Landmark Technology has been involved in 40 lawsuits asserting the '319 Patent, of which three suits, excluding this one, have been or are being litigated in California.

15. And as PanIP, LLC, Mr. Lockwood has filed 16 additional lawsuits in California involving the '319 Patent and other related patents.

16. As "PanIP, LLC," Mr. Lockwood regularly, continuously, and systematically availed his company of the California federal district courts, and repeatedly used these courts as a preferred forum for asserting the '319 Patent.

17. By its own admission, Landmark Technology files patent infringement lawsuits against companies that refuse to pay the requested sum in Landmark's licensing demand letters. *See, e.g.*, *Landmark Technology, LLC v. G Stage Love.com Inc.*, S.D. Cal. Case No. 3:16-cv-00760, Dkt. No. 1, ¶ 11 ("Plaintiff sent Defendant a letter informing Defendant of the '319 Patent that Defendant's actions, as more fully described below, constituted infringement of the '319 Patent."); *Landmark Technology, LLC v. Canada Drugs LP*, S.D. Cal. Case No. 3:16-cv-00558,

Dkt. No. 1, ¶ 11 ("On or about November 16, 2015, [Landmark Technology] sent Defendant a letter informing Defendant of the '319 Patent that Defendant's actions, as more fully described below, constituted infringement of the '319 Patent."); *Landmark Technology, LLC v. YOOX Corp.*, E.D. Tex. Case No. 6:15-cv-00069, Dkt. No. 1, ¶ 8 ("On or about September 19, 2014, [Landmark Technology] provided notice to Defendant informing Defendant of the '319 Patent and that Defendant's actions, as more fully described below, constituted infringement of the '319 Patent.").

18. Not one of the 57 lawsuits involving Landmark Technology or PanIP, LLC has made it as far as claim construction. In fact, only seven defendants have ever filed an Answer: five consolidated defendants filed answers in U.S. District Court for the Eastern District of Texas, one defendant filed its answer in U.S. District Court for Eastern District of North Carolina, and Landmark Technology answered and counterclaimed in its cases pending before this Court. Aside from one other pending case in the Northern District of Texas,[1] the 48 remaining cases appear to have been resolved prior to Defendant filing an answer.

19. On information and belief, Landmark Technology has sent letters to numerous other companies, including numerous other companies based in California, asserting infringement of the '319 Patent and demanding payment of money.

20. On information and belief, as "PanIP, LLC," Mr. Lockwood sent letters to numerous companies, including companies based in California, asserting infringement of the '319 Patent and demanding payment of money.

21. Venue is proper in this Court pursuant to 28 U.S.C. § 1391 because a substantial part of the events or omissions giving rise to the claims herein occurred in this judicial district.

[1] *Collin Street Bakery, Inc. v. Landmark Technology, LLC*, No. 3:17-cv-00256 (N.D. Tex. Jan. 27, 2017).

FACTUAL BACKGROUND

A. The Patent-in-suit

22. On September 11, 2001, U.S. Patent No. 6,289,319 (the "'319 Patent"), entitled Automatic Business and Financial Transaction Processing System, was issued.

23. The '319 Patent is directed to an automatic data processing system for processing business and financial transactions between entries from remote sites.

24. Subsequently, the '319 Patent went through two *Ex Parte* Reexaminations during which 22 new dependent claims were added. Certificates for the Ex Parte Reexaminations Issued on July 17, 2007 and January 9, 2013.

25. Both *Ex Parte* Reexaminations issued their respective Reexamination Certificate prior to the Supreme Court's *Alice Corporation v. CLS Bank International* decision, which "significantly changed the law on patentable subject matter under Section 101." *Tatcha, LLC v. Landmark Technology, LLC*, No. 3:16-04831, Landmark's Opp'n to Mot. for J. on the Pleadings, Dkt. No. 40, 25:9-10 (N.D. Cal. Jan. 10, 2017) (hereinafter *Tatcha*, ct. stamped p. no.: l. no.).

26. As a representative claim, Claim 1 of the '319 Patent claims as follows:

> 1. ***An automatic data processing system*** for processing business and financial transactions between entities from remote sites which comprises:
>
> ***a central processor programmed and connected to process a variety of inquiries and orders*** transmitted from said remote sites;
>
> ***said central processor including:***
>
> ***means for receiving information*** about said transactions from said remote sites;
>
> ***means for retrievably storing*** said information;
>
> at least one terminal at each of said remote sites including a data processor and operational sequencing lists of program instructions;
>
> ***means for remotely linking said terminal to said central processor and for transmitting data back and forth between said central processor and said terminal;***
>
> said terminal further comprising ***means for dispensing*** information and

services for at least one of said entities including:

a video screen;

means for holding operational data including programing, informing, and inquiring sequences of data;

means for manually entering information;

means for storing information, inquiries and orders for said transactions entered by one of said entities via said means for manually entering information, and data received through and from said central processor;

on-line means for transmitting said information, inquiries, and orders ***to said central processor***;

on-line means for receiving data comprising operator-selected information and orders ***from said central processor*** via said linking means;

means for outputting said informing and inquiring sequences on said video screen in accordance with preset routines and in response to data entered through said means for entering information;

means for controlling said means for storing, means for outputting, and means for transmitting, including ***means for fetching*** additional inquiring sequences in response to a plurality of said data entered through said means for entering and in response to information received from said central processor;

said informing sequences including directions for operating said terminal, and for presenting interrelated segments of said operational data describing a plurality of transaction operations;

said programming sequences including ***means for interactively controlling*** the operation of said video screen, data receiving and transmitting means; and for selectively retrieving said data from said means for storing;

said means for storing comprising means for retaining said operational sequencing list and means responsive to the status of the various means for controlling their operation;

said central processor further including:

means responsive to data received from one of said terminals for immediately transmitting selected stored information to said terminal; and

means responsive to an order received from a terminal for updating data in said means for storing;

> whereby said system can be used by said entities, each using one of said terminals to exchange information, and to respond to inquiries and orders instantaneously and over a period of time.

'319 Patent, Claim 1 (emphasis added).

27. In other words, to infringe this means plus function claim, one must at the very least have a central processor programed to process data in a specific manner, such as a web server, and remote site terminals that employ the hardware architecture disclosed in Figures 2 using components from the mid-1980s.

28. Fabletics does not infringe Claim 1, or any other claim of the '319 Patent, for at least the following reasons: (1) Fabletics does not use mid-1980s hardware to employ the hardware architecture disclosed in Figure 2; and, (2) Claim 1 is invalid for claiming an abstract idea.

29. Additionally, in its opposition to Tatcha, LLC's Motion for Judgment on the Pleadings, Landmark Technology identified specific hardware, hardware architecture, and functionality that the '319 Patent claims. *See generally Tatcha*, *passim*.

30. Paragraphs 31 through 61 are some, but by no means all, of the narrowly tailored definitions, constructions, and positions Landmark took in opposing a rule 12(c) *Alice* Motion.

i. Hardware

31. To infringe the '319 Patent, an accused infringer must have "a Direct Memory Access unit ("DMA") positioned independently along a second information handling connection." *Tatcha*, 5:23-24.

32. The '319 Patent claims an "interactive multimedia terminal capable of providing a ***video-based user interface*** while dynamically sending and fetching remote information in order to formulate new questions to the user." *Id.* at 13:25-27 (emphasis added).

33. The '319 Patent "claim[s] novel functionality in the 'means for interactively controlling' and 'means for controlling' (including 'means for fetching') limitations of Claim 1." *Id.* at 14:5-7.

34. "The '319 Patent's hardware improvement—the unconventional arrangement of a DMA unit along its own independent information handling connection—is required by [each and every] claim." *Id.* at 19: 1-2.

35. "In both the 'means for controlling' and 'means for interactively controlling' limitations" of the '319 Patent, "**multiple terminal systems are controlled at once**." *Id.* at 20:12-13.

36. "The 'means for controlling' allegedly controls both the 'means for outputting' and 'means for transmitting' concurrently" in the '319 Patent. *Id.* at 20:14-15.

37. "The 'means for interactively controlling' allegedly controls 'the operation of said video screen' together with the 'data receiving and transmitting means" found in the '319 Patent. *Id.*

38. During prosecution of the '319 Patent, the patentee defined "the 'automatic data processing' limitation, which . . . requires a terminal to 'perform . . . based on conditions or status other than the last user entry.'" *Id.* at 20:2-25.

39. The '319 Patent's "'means for fetching' require that the terminal obtain user data by prompting the user via the display, as well as obtain remote information (*e.g.*, a credit profile) via the communication system, in order to fetch "additional inquiring sequences." Id. at 20:25-28.

ii. Hardware Architecture

40. The '319 Patent allegedly claims structures and algorithms for the 'means for interactively controlling,' 'controlling,' and 'fetching' limitations that require the hardware architecture disclosed in Figure 2 of the '319 Patent. *Id.* at 14:17-21.

41. Figure 2 of the '319 Patent discloses a Direct Memory Access ("DMA") unit positioned independently along its own information handling connection." *Id.* at 15:10-11 & 18:10-14.

42. Figure 2 shows "the terminal of the '319 Patent utilize[ing] a . . . hardware architecture [that] incorporates a video playback system running along the information handling connection from Video Disk 14 to Data Processor 13 to Video Screen 18, but arranges its communication system so that the DMA is positioned **independently**, along its own information

handling connection running from Modem 15 to DMA 16 to RAM Memory 17. *Id.* at 15:14-18 (emphasis in original). As a result, the DMA could store data immediCately into memory without having to traverse the first information handling connection which is fully engaged with video playback. *Id.* at 18:10-14.

43. To infringe the '319 Patent, the claimed structure must include "automatic data processing," "means for controlling," and "means for fetching" limitation. *Id.* at 17:2-4.

44. The 'means for controlling' of the '319 Patent requires the hardware architecture reflected in Figure 2.

45. The 'means for interactively controlling' of the '319 Patent requires the hardware architecture reflected in Figure 2.

46. Claim 1 requires the hardware architecture depicted in Figure 2 because it is the only terminal the patent discloses and is described before any mention of the preferred embodiment, which nonetheless requires that architecture.

iii. Functionality

47. To infringe the '319 Patent, the self-service terminal must be able to "engage in concurrent video playback and communication operations that are necessary to perform the novel functionality claimed." *Id.* at 5:26 to 6:1.

48. The '319 Patent is not infringed if communication between the user and terminal is "guided by rigid search and retrieval routines," such as "menu selection,' involving a 'fixed menu tree' with a 'rigid, pre-ordained sequence.'" *Id.* at 12:2-4.

49. To infringe the '319 Patent, the accused device must "engage users in the level of give-and-take appropriate to high-level commercial transactions," which "require[s] a terminal capable of 'interpreting the information provided by the user in combination with data obtained from a remote source'—*e.g.*, a credit rating from a credit bureau, 'in order to generate pertinent new inquiries to be put to the user.'" *Id.* at 12:5-11.

50. To infringe the '319 Patent and carry out its claimed functions, "the [remote site] terminal's video playback and communication systems [are] required to operate 'concurrently.'" *Id.* at 13:2-3.

51. To infringe the '319 Patent, the accused terminal must be capable of simultaneously operating its communication and video playback capabilities while formulating new inquires based on local input and third party data. *Id.* at 12:14-20.

52. To infringe the '319 Patent, "the [remote site] terminal [is] required 'to alter the sequential execution of instructions in a program and perform a statement other than the last one in sequence based on conditions or status other than the last user entry.'" *Id.* at 14:10-12.

53. To infringe the '319 Patent, the accused "terminal was required 'to alter the sequential execution of instructions in a program and perform a statement other than the last one in sequence based on conditions or status other than the last user entry'—a capability not present in the prior art terminal of '631, where the 'iteration of the inquiry sequence is determined' **solely** by 'the user's entry.'" *Tatcha*, Dkt. No. 14 at 14:10-14.

54. And in Patentee's Appeal Brief, appealing examiner's final rejection, Patentee summarized "the invention, as recited in Claim 1, resid[ing] in the improved decision-making capability of a satellite station in a computerized network designed to accept and process loan applications, purchase and sale of securities and other business or financial transactions." '319 Patent Image File Wrapper, Appeal Brief § V. SUMMARY OF THE INVENTION (B.P.A.I. filed on July 12, 1996.)

55. The '319 Patent claims "a terminal that can **interpret the information provided by the user in combination with data obtained from a remote source in order to generate pertinent new inquiries to be put to the user,** request specific machine-selected additional data from a remote source, or make on-site decisions pertaining to the nature and degree of services to which the user may be entitled." *Id*. at 15:2-6.

56. The '319 Patent claims a terminal that "offered an on-going, individualized user experience, and was capable of additional fetching inquiring sequences—*e.g.*, individualized questions—based on ***both*** local user data entered in response to video prompts and information received remotely (*e.g.*, a user's credit profile)." *Id.* at 14:14-17 & 22-26.

iv. Other Aspects of the '319 Patent

57. A single entity cannot directly infringe the '319 Patent on its own because claim 1 states multiple "entities" at remote sites working together to find infringement.

58. During prosecution of the '319 Patent, the Patentee expressly disclaimed conventional computing hardware to overcome a § 101 rejection. *Id.* at 17:1-2.

59. "The claims [of the '319 Patent] require that the terminal be capable of being used 'to respond to inquiries and orders instantaneously,' which means that the terminal systems work in tandem." *Id.* at 20:28 to 21:1-2.

60. The "means for interactively controlling" and "means for controlling" of Claim 1 are limited to the very specific implementation of the algorithms disclosed.

61. Figure 5 of the '319 Patent requires simultaneous notification of the applicant and institution and requiring simultaneously the video playback and communication systems to operate concurrently.

62. Multiple parties are necessary to infringe the '319 Patent.

C. Landmark Technology's Multiple Letters Threatening Fabletics with Litigation

63. Upon information and belief, Landmark Technology is in the business of patent licensing through the threat of litigation—commonly referred to as a patent troll.

64. Upon information and belief, a key part of Landmark Technology's business model is sending letters threatening patent litigation and following through on that threat.

65. On or about October 13, 2016, Landmark Technology sent a form letter (the "First Landmark Letter") to Don Ressler and Adam Goldenberg, Fabletics' Co-CEOs, asserting that Fabletics infringes the '319 Patent, and claims that "the specific functionalities implemented by Fabletics using [Fabletic's] servers and devices interfaced to Fabletics' web servers constitutes use of the technology taught within the meaning of Claim 1 of the '319 patent." A true and correct copy of the First Landmark Letter is attached as Exhibit A.

66. The First Landmark Letter concludes with an offer for a "non-litigation" and non-exclusive license to Landmark's patent portfolio, which includes the '319 Patent, in exchange for

$45,000. Immediately following the offer, the First Landmark Letter threatens to withdraw the offer in the event of litigation to discourage Fabletics from defending itself.

67. On or about December 2, 2016, Landmark Technology sent a second form letter (the "Second Landmark Letter") to Messrs. Ressler and Goldenberg again accusing Fabletics of infringing Landmark Technology's patent rights, reminding Fabletics that the prior offer had elapsed, and offering a non-exclusive license to its patent portfolio, which includes the '319 Patent, in exchange for $45,000. The offer in the Second Landmark Letter was to expire on December 31, 2016. A true and correct copy of the Second Landmark Letter is attached as Exhibit B.

68. Nowhere in the Second Landmark Letter did Landmark Technology indicate that the offer was negotiable. In fact, the Second Landmark Letter's brevity and lack of facts presents a take it or leave it—read "litigate it"—approach designed to extract a payment that would be significantly cheaper than defending a questionable patent infringement claim in court.

69. Based on a review of Complaints filed by Landmark against other, similarly situated, e-commerce companies, Landmark's infringement theory appears to be based on a claim of contributory or induce infringement.

D. Landmark Technology's Patent Portfolio

70. The Landmark Technology Patent Portfolio includes, but is not necessarily limited to, U.S. Patent Nos. 6,239,319 and 7,010,508.

COUNT I – DECLARATION OF INVALIDITY
(U.S. Patent No. 6,289,319)

71. Fabletics restates and incorporates by reference the allegations in paragraphs 1 through 70 of this Complaint as if fully set forth herein.

72. Landmark Technology claims to have exclusive rights, title, and interest to the '319 Patent.

73. Landmark Technology has demanded that Fabletics take a license to the '319 Patent, as well as to the entire Landmark Technology Patent Portfolio.

74. Landmark Technology, or its predecessor in interest, has asserted the '319 Patent 50 of the 56 times it has been litigated. And Landmark Technology, or its predecessor in interest, has asserted in court one or more patents from its portfolio 110 times. Not only does this demonstrate a pattern of litigious zeal, but the fact that roughly half of Landmark Technology's patent litigation involves the '319 Patent creates a reasonable fear that Fabletics was Landmark Technology's next target.

75. Accordingly, a substantial, immediate, and real controversy exists between Fabletics and Landmark Technology regarding whether the claims of the '319 Patent are valid.

76. The claims of the '319 Patent are invalid under at least 35 U.S.C. §§ 101, 102, 103, and 112.

77. The claims of the '319 Patent do not constitute patentable subject matter pursuant to 35 U.S.C. § 101, and therefore are an invalid patent on an abstract idea. The '319 Patent claims the abstract idea of automated data processing of business transactions. Nothing in the claims, "transform the nature of the claims" into patent eligible subject matter. *Mayo Collaborative Services v. Prometheus Labs., Inc.*, 566 U.S. 10 (2012). Furthermore, "[t]he mere visitation of a generic computer cannot transform a patent-ineligible abstract idea into a patent-eligible invention." *Alice Corp. v. CLS Bank Int'l*, 134 S. Ct. 2347 (2014).

78. Additionally, the '319 Patent is invalid as anticipated pursuant to § 102 or as obvious pursuant to § 103. Prior art that renders the '319 Patent anticipated and/or obvious includes, but is not necessarily limited to:

- U.S. Patent No. 4,994,964 (Wolfberg); and
- U.S. Patent No. 6,105,007 (Norris).

79. The claims of '319 Patent are invalid because the specification does not provide any structure for the numerous means plus function clauses recited in the claims other than generic computer parts.

80. Based on Landmark Technology's letter, its threat of litigation for patent infringement, its pattern of carrying out its threat, and other characteristics typical of a patent troll, as well as Fabletics' denial of infringement, an actual case or controversy exists as to whether

Fabletics infringes any valid claim of the '319 Patent, and Fabletics is entitled to a declaration that the claims of the '319 Patent are invalid.

COUNT II – DECLARATION OF NON-INFRINGEMENT
(U.S. Patent No. 6,289,319)

81. Fabletics restates and incorporates by reference the allegations in paragraphs 1 through 80 of this Complaint as if fully set forth herein.

82. Landmark Technology claims to have exclusive rights, title, and interest in the '319 Patent.

83. Landmark Technology has demanded that Fabletics take a license to the '319 Patent, as well as to the entire Landmark Technology Patent Portfolio.

84. Based on Landmark Technology's letters, its repeated accusations of patent infringement, its pattern of and fondness for litigation, and Fabletics' denial of infringement, a substantial, immediate, and real controversy exists between Fabletics and Landmark Technology regarding whether Fabletics directly or indirectly infringes or has infringed the '319 Patent. A judicial declaration is necessary to determine the parties' respective rights regarding the '319 Patent.

85. Fabletics seeks a judgment declaring that Fabletics does not directly or indirectly infringe any claim of the '319 Patent.

PRAYER FOR RELIEF

WHEREFORE, Fabletics respectfully prays for the following relief:

A. A declaration that Fabletics' services, systems, and practices do not infringe the '319 Patent;

B. A declaration that '319 Patent is invalid;

C. That Landmark Technology be enjoined from enforcing any Patent related to the '319 Patent against Fabletics;

D. A determination that this is an exceptional case and an award of all costs and attorneys' fees to Fabletics;

E. That Fabletics be awarded its costs of suit, and pre- and post-judgment interest on any money amount; and

F. Any other relief as this Court deems just and proper.

Dated: March 4, 2017

Respectfully submitted,

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DEMAND FOR JURY TRIAL

Plaintiff demands a jury trial on all claims as to which it has a right to a jury.

Dated: March 4, 2017

Respectfully submitted,

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