

U.S. DISTRICT COURT
DISTRICT OF VERMONT
FILED

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF VERMONT

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MPHJ TECHNOLOGY INVESTMENTS,)
LLC, inclusive of its subsidiaries,)
Plaintiff)

v.)

Docket No. 2:14-cv-191

WILLIAM H. SORRELL, in his official)
capacity as Attorney General of the State of)
Vermont,)
Defendant)

FIRST AMENDED COMPLAINT

Plaintiff MPHJ Technology Investments, LLC, on behalf of itself and its subsidiaries (hereinafter "MPHJ" or "Plaintiff"), by way of this First Amended Complaint against Defendant William H. Sorrell, in his official capacity as Attorney General of the State of Vermont ("Defendant Sorrell"), states and alleges as follows:

Parties

1. Plaintiff MPHJ Technology Investments, LLC is a limited liability company organized under the laws of Delaware with a registered agent for service at 1013 Centre Road, Suite 403S, Wilmington, DE 19805. MPHJ also has operations in Texas at 166 S. Belknap, Stephenville, Texas 76401. This suit is brought by MPHJ Technology Investments, LLC on behalf of itself and its subsidiaries (collectively and/or individually, "MPHJ").

2. Upon information and belief, Defendant William H. Sorrell ("Defendant Sorrell") is the Attorney General for the State of Vermont and in his official capacity has a place of business at 109 State Street, Montpelier, Vermont 05609, and may be served at that address.

3. MPHJ filed the Original Complaint in this case (Dkt. No. 1) on September 9, 2014, and served it on October 20, 2014.

4. Defendant Sorrell filed a Motion to Dismiss under Rule 12(b) on December 10, 2014. MPHJ thus files and serves this First Amended Complaint as a matter of course pursuant to FED. R. CIV. P. 15(a)(1)(B).

Nature of the Case

5. In the present case, MPHJ is a patent owner who has previously sent certain letters inquiring about infringement of its patents to companies in Vermont reasonably suspected of infringing its patents. Examples of those letters are attached hereto as Exhibits B-1, B-2 and B-3.

6. MPHJ now wishes to send letters inquiring about infringement of its patents related to claims whose validity was recently upheld by the U.S. Patent & Trademark Office following an *Inter Partes* Review (“IPR”) that was concluded with a decision on November 19, 2014. These new letters, referred to herein as “post-IPR letters” are different than the letters previously sent by MPHJ referred to in the preceding paragraph. Among other things, they make express reference to the results of the IPR, and advise recipients of MPHJ’s agreements with Canon and Sharp. A sample of such a post-IPR letter is attached hereto as Exhibit F.

7. As this Court and other Courts have held, the sending of such patent infringement inquiry letters is protected under the First Amendment unless a challenger both pleads and proves that the conduct was objectively baseless on the merits of validity and infringement, and subjectively baseless on the merits of validity and infringement.

8. Defendant Sorrell has deprived MPHJ of its First Amendment rights to send patent infringement inquiry letters by bringing suit against MPHJ under the Vermont Consumer

Protection Act. Defendant Sorrell has persisted in the pursuit of the suit even after this Court made a finding of law that conclusively establishes that Defendant Sorrell's actions violate MPHJ's rights under the First Amendment.

9. Defendant Sorrell has also taken actions that have served to chill MPHJ's exercise of its First Amendment rights in sending letters in the future, such as the post-IPR letter of Exhibit F. He has done so at least in part by subjecting MPHJ to threats of fines and sanctions, and to needless litigation expense for MPHJ's enforcement of its patents. Defendant Sorrell has also taken positions on the Vermont Consumer Protection Act that would also apply to MPHJ's sending of post-IPR letters. Further, Defendant Sorrell has made it clear that he would assert the newly passed Vermont Bad Faith Assertions of Patent Infringement Act, 9 V.S.A. §§ 4195-4199, against MPHJ for sending new letters. Defendant Sorrell has even taken the position that the Vermont Bad Faith Patent Assertions of Patent Infringement Act was passed in part to prevent MPHJ from enforcing its patents.

10. Defendant Sorrell has taken these actions in the past, and threatens to take similar actions in the future, at least in part for the very reason the First Amendment was established, because Defendant Sorrell disfavors the First Amendment rights in which MPHJ is engaged, and he has taken such actions to discriminate against MPHJ as being a class of patent owners disfavored by Defendant Sorrell, a class distinction not recognized by federal patent law.

11. MPHJ's First Amendment rights in these circumstances are based on well-settled law.

12. MPHJ's First Amendment rights with respect to its specific conduct accused by Defendant Sorrell, and in view of the specific allegations that have been made by Defendant Sorrell, have been expressly and specifically upheld and confirmed by the federal courts.

13. MPHJ is forced to bring this action to secure its First Amendment rights in order to continue exercising those rights, and to secure relief from the unlawful acts of Defendant Sorrell who seeks to chill, or impair, MPHJ's exercise of its rights.

14. A quick and early resolution of this matter is in the interests of justice, and in the interest of the taxpayers of Vermont, as MPHJ will be entitled to payment of its fees and costs it has incurred in connection with this matter, as has already been upheld and awarded by the U.S. District Court of Nebraska in a similar action by the Attorney General of Nebraska.

Jurisdiction and Venue

15. This Complaint comprises an action and claims arising under the patent laws of the United States, Title 35, U.S. Code, because it necessarily requires resolution of federal issues of patent law, and under 28 U.S.C. § 2201, and the First, Fifth and Fourteenth Amendments and Art. VI, Cl. 2 ("the Supremacy clause"), and Art. I, Sec. 8, Cl. 3 ("the Commerce clause"), and Art. I, Sec. 8, Cl. 8 ("the Patent clause") of the U. S. Constitution, for: (1) declaratory judgment that the Vermont Bad Faith Assertions of Patent Infringement Act, 9 V.S.A. §§4195-4199 (referred to herein for convenience as "the Vermont Patent Assertions Act"), is invalid, on its face and as applied, and further is preempted; (2) declaratory judgment that the Vermont Consumer Protection Act, 9 V.S.A. § 2451 *et seq.* (Chap. 63) (referred to herein for convenience as "the VCPA" or "the Vermont CPA"), as applied, is invalid or preempted; (3) declaratory judgment that Plaintiff MPHJ has not violated the VCPA at least in part because the relevant conduct of MPHJ, as further described below, did not constitute activity where it was objectively baseless as to either infringement or validity of the subject patents in accordance with Title 35 of the U.S. Code; and (4) claims an action for relief under 42 U.S.C. §§ 1983 & 1988, the First, Fifth and Fourteenth Amendments to the U.S. Constitution, the Supremacy Clause, and the

Dormant Commerce Clause seeking remedy for violations of Plaintiff MPHJ's constitutional rights and rights under federal law.

16. This Court has subject matter jurisdiction over this Amended Complaint under at least 28 U.S.C. §§ 1331, 1332, 1338(a), 1338(b), 1343, 1367; and 28 U.S.C. § 2201.

17. Jurisdiction over any appeal related to this matter shall lie in the U.S. Court of Appeals for the Federal Circuit, under at least 28 U.S.C. §§ 1295(a)(1) and 1292(c).

18. MPHJ has standing to bring this Amended Complaint because, among other reasons, its First Amendment right to send future letters related to enforcing its patents, such as the post-IPR letters, has been chilled by the actions of Defendant Sorrell. Those actions have served, under color of statutes of Vermont: to subject MPHJ to deprivation of its rights, privileges, or immunities secured by the U.S. Constitution and laws of the United States; to establish a case or controversy over whether the intended conduct of MPHJ in sending the post-IPR letters may be asserted to violate the VCPA, or would violate the VCPA; and to establish a case or controversy over whether MPHJ's sending of the post-IPR letters would violate the Vermont Patent Assertions Act; and whether the VCPA as applied, and the Vermont Patent Assertions Act, violates MPHJ rights under the U.S. Constitution and the laws of the United States.

19. Plaintiff MPHJ additionally has standing to bring this Complaint because it has been adversely affected by the actions of Defendant Sorrell which, as set forth in more detail herein, have served, under color of statutes of Vermont, to subject MPHJ to deprivation of its rights, privileges, or immunities secured by the U.S. Constitution and laws of the United States; and have served to establish a case or controversy over whether certain conduct of MPHJ may be asserted to violate the VCPA because the allegations made with respect to MPHJ fail to meet the

prerequisites for asserting state law against MPHJ's patent enforcement activity, and separately because the VCPA as applied is invalid or preempted under the U.S. Constitution and Title 35 of the U.S. Code; and have served to establish a case or controversy over whether subjecting MPHJ to an injunction requiring compliance with the Vermont Patent Assertions Act violates MPHJ's rights under the U.S. Constitution and the laws of the United States, at least in part because that Act is invalid or preempted on its face under the U.S. Constitution and the laws of the United States; and has served to unlawfully and unconstitutionally chill MPHJ's exercise of its rights under at least the First and Fourteenth Amendments of the U.S. Constitution.

20. The claims presented by the First Amended Complaint are ripe for adjudication because Plaintiff MPHJ has been, is presently, and will in the future be adversely affected by actions of Defendant Sorrell, inclusive of suffering from the "chilling effect" of those actions upon MPHJ's exercise of its rights under the First and Fourteenth Amendments.

21. This Court has personal jurisdiction over Defendant Sorrell at least because, on information and belief, the Defendant respectively in his official capacity has ongoing and systematic contacts with this District, has and maintains an office in this District, resides in this District, and has committed wrongful acts which both occurred within this District, and which have had an impact or effect in this District.

22. Venue is proper in this District under 28 U.S.C. §§ 1400(b), 1391(b), and 1391(c). Venue as to Defendant Sorrell is proper on the basis of the allegations provided in the preceding paragraphs.

Facts

23. Plaintiff repeats and realleges the allegations of all of the preceding paragraphs as though fully set forth herein.

The Relevant Patents

24. On July 26, 2011, United States Patent No. 7,986,426 (“the ’426 Patent”) entitled “Distributed Computer Architecture and Process for Document Management” was duly and legally issued by the United States Patent and Trademark Office, identifying Laurence C. Klein as the inventor. A true and correct copy of the ’426 Patent is attached as Exhibit A-1 to this First Amended Complaint.

25. On January 13, 2009, United States Patent No. 7,477,410 (“the ’410 Patent”) entitled “Distributed Computer Architecture and Process for Virtual Copying” was duly and legally issued by the United States Patent and Trademark Office, identifying Laurence C. Klein as the inventor. A true and correct copy of the ’410 Patent is attached as Exhibit A-2 to this First Amended Complaint.

26. On August 3, 2004, United States Patent No. 6,771,381 (“the ’381 Patent”) entitled “Distributed Computer Architecture and Process for Virtual Copying” was duly and legally issued by the United States Patent and Trademark Office, identifying Laurence C. Klein as the inventor. A true and correct copy of the ’381 Patent is attached as Exhibit A-3 to this First Amended Complaint.

27. On February 6, 2001, United States Patent No. 6,185,590 (“the ’590 Patent”) entitled “Process and Architecture for Use on Stand-Alone Machine and in Distributed Computer Architecture for Client Server and/or Intranet and/or Internet Operating Environments for Migrating a Program Specific Application Programmer Interface (API) From an Original State into a Generic Interface by Building an Object” was duly and legally issued by the United States Patent and Trademark Office, identifying Laurence C. Klein as the inventor. A true and correct copy of the ’590 Patent is attached as Exhibit A-4 to this First Amended Complaint.

28. On July 16, 2013, United States Patent No. 8,488,173 (“the ’173 Patent”) entitled “Distributed Computer Architecture and Process for Document Management” was duly and legally issued by the United States Patent and Trademark Office, identifying Laurence C. Klein as the inventor. A true and correct copy of the ’173 Patent is attached as Exhibit A-5 to this First Amended Complaint.

29. The ’426 Patent, ’410 Patent, ’381 Patent, ’590 Patent and the ’173 Patent are collectively referred to herein as “the Klein Patents.”

30. Plaintiff MPHJ, is the assignee and owner of the Klein Patents, and together with its exclusive licensees, has the right to assert causes of action arising under said patents and the right to any remedies for infringement thereof, and to license any and all of the Klein Patents, and to send notice and enforcement-related correspondence to third parties regarding the same, and to enjoy and exercise all rights and privileges pertaining to an owner of a U.S. patent under Title 35 of the U.S. Code and the laws and Constitution of the United States.

31. The ’426 Patent was examined by the U.S. Patent and Trademark Office (“Patent Office”) before issuance, and by law was presumed valid at the time MPHJ originally sent its patent infringement inquiry letters to Vermont infringers.

32. The ’426 Patent was reexamined by the Patent Office in the *Inter Partes Review* process, which entered its final written decision on the validity of the claims of the ’426 Patent on November 19, 2014. In its final written decision, the Patent Office upheld the validity of claim 6 of the ’426 Patent. A true and correct copy of the Patent Office’s final written decision is attached as Exhibit A-6 to this First Amended Complaint.

33. The ’410 Patent was examined by the Patent Office before issuance, and by law is presumed valid until a determination by lawful authority to the contrary. On March 25, 2014, a

petition for *Inter Partes Review* of certain claims of the '410 Patent was filed in the Patent Office. On August 25, 2014, the Patent Office instituted the requested *Inter Partes Review*, but has not yet reached a final written decision regarding the validity of the claims of the '410 Patent.

34. The '381 Patent was examined by the Patent Office before issuance, and by law was presumed valid at the time MPHJ originally sent its patent infringement inquiry letters.

35. The '381 Patent was reexamined by the Patent Office in the *Inter Partes Review* process, which entered its final written decision on the validity of the claims of the '381 Patent on November 19, 2014. In its final written decision, the Patent Office upheld the validity of claim 13 of the '381 Patent. A true and correct copy of the Patent Office's final written decision is attached as Exhibit A-7 to this First Amended Complaint.

36. The '590 Patent was examined by the Patent Office before issuance, and by law is presumed valid until a determination by lawful authority to the contrary.

37. The '173 Patent was examined by the Patent Office before issuance, and by law is presumed valid until a determination by lawful authority to the contrary. On March 25, 2014, a petition for *Inter Partes Review* of the '173 Patent was filed in the Patent Office. On August 25, 2014, the Patent Office instituted the requested *Inter Partes Review*, but has not yet reached a final written decision regarding the validity of the claims of the '173 Patent.

Reasonable Suspected Infringement of the Relevant Patents

38. The claims of the Klein Patents generally cover an entire networked system having certain components and features.

39. The Klein Patents relate to networked scanning systems having certain specific claim attributes related to the scanning and transmission of images.

40. At least some commonly used networked scanning systems would employ a Local Area Network (or “LAN”), and have connected thereto components in communication with the LAN, including a scanner, and computers running email or other application software, and a memory storing interface protocols, and a processor for processing such protocols, where the system permits a document to be scanned and transmitted via the LAN directly as an attachment into the email or application software.

41. With the exception of an IT provider who provides an entire networked system to a customer, in general no individual manufacturer of a scanner, or a server, or any employee computer, or any application software, has liability for direct infringement of any claim of the Klein Patents.

42. Only the businesses that have sold, assembled or used the entire claimed networked scanning system could directly infringe a claim of a Klein Patent.

43. Certain companies can be identified as being reasonably suspected to have at least one networked scanning system that would satisfy at least one claim of the Klein Patents. Such companies are referred to herein as “Reasonably Suspected Infringers.”

44. Because a Reasonably Suspected Infringer’s networked scanner system typically is internal to the business, public proof of infringement is not ordinarily available.

45. Unless a Reasonably Suspected Infringer has made public the relevant details of its networked scanner system(s), proof of infringement by any particular company is not available from public sources. Such a Reasonably Suspected Infringer is referred to herein as a Reasonably Suspected Private Infringer.

46. There are at least some Reasonably Suspected Private Infringers in Vermont.

Relevant Patent Rights and Obligations With Respect to Reasonably Suspected Private Infringers

47. Where a patent owner, and any relevant exclusive licensee, has reasonably concluded that a third party infringes, it may bring suit in federal district court for patent infringement provided it satisfies the requirements of the Patent Laws, and the Federal Rules of Civil Procedure, including Rule 11.

48. To bring suit for infringement against an infringer, the Federal Rules of Civil Procedure require, as a predicate, that an adequate pre-suit investigation be conducted to confirm the infringement.

49. Where a Reasonably Suspected Private Infringer's infringing product or process cannot be definitively ascertained from publicly available sources, a patent owner, and any relevant exclusive licensee, may satisfy its pre-suit investigation obligation under Rule 11 by communicating to the Reasonably Suspected Private Infringer an inquiry regarding the suspected infringement.

50. A Rule 11 inquiry, such as described in the prior paragraph, may, by law, require asking the Reasonably Suspected Private Infringer whether it denies any infringement, and in the event of such denial, may seek such support for such denial as may be reasonably required for confirmation.

51. In the event a Reasonably Suspected Private Infringer refuses to respond to an inquiry as described in the prior paragraph, filing suit for infringement would not then violate Rule 11.

52. A patent owner may provide one or more entities exclusive licenses defined by subject matter and/or geographic fields.

53. A patent owner may provide one or more entities exclusive licenses defined by a specific potential sublicensee.

Notice, License, And Pre-Suit Inquiry Letters of MPHJ

54. Consistent with the rights set forth above, respective exclusive licensees of MPHJ sent correspondence to certain of these Reasonably Suspected Private Infringers beginning in the Fall of 2012.

55. The correspondence referenced in the preceding paragraph included at least a First Letter from a relevant exclusive licensee to a Reasonably Suspected Private Infringer in Vermont. An example of one such First Letter is attached hereto as Exhibit B-1.

56. At least some of the recipients of this First Letter did not provide any response, and at the request of the relevant exclusive licensee, counsel for that licensee sent a Second Letter. An example of one such Second Letter is attached hereto as Exhibit B-2.

57. At least some of the recipients of the Second Letter did not provide a response, and at the request of the relevant exclusive licensee, counsel for that licensee sent a Third Letter. An example of one such Third Letter is attached hereto as Exhibit B-3.

58. At least some of the Third Letters such as represented by Exhibit B-3 included as an attachment a draft complaint for patent infringement, and the example of such a complaint represented by the Exhibit B-3, shall be referenced herein as Exhibit B-3(A).

Agreements MPHJ Has Reached With Other Entities

59. MPHJ had previously sent similar letters to those described in the previous paragraphs to suspected infringers of its patents in states other than Vermont.

60. On January 13, 2014, MPHJ reached an agreement with the State of New York regarding its patent enforcement efforts. Within that agreement, MPHJ did not admit to any wrongdoing and did not pay money. MPHJ did agree to allow a licensee in New York to negate

its license and have its license payment returned, but the licensee elected to keep the license. The purpose of the agreement was to resolve the matter without incurring litigation costs. The agreement also included two form letters which MPHJ proposed sending to infringers in New York, in which the New York Attorney General agreed that based upon the provisions and representations in the agreement and side letters, that the New York Attorney General did not intend to assert that such conduct violates any of the guidelines set forth within the agreement. A copy of that agreement is attached hereto as Exhibit C.

61. On November 6, 2014, MPHJ reached an agreement with the Federal Trade Commission regarding its patent enforcement efforts. Again, MPHJ admitted to no wrongdoing and paid no money pursuant to the agreement. The agreement in general requires only that MPHJ be accurate in any representations, and to bring suit for infringement if it indicates it will be doing so, absent a reasonable intervening event. Both conditions were satisfied by MPHJ's prior letters, and are certainly satisfied, or not applicable to, the proposed post-IPR letter of Exhibit F. A copy of the FTC agreement is attached hereto as Exhibit D.

Actions Of Defendant Sorrell

62. On or about January 2013, Defendant Sorrell, or persons under his authority and control, served a Civil Investigative Demand on MPHJ.

63. The Civil Investigative Demand requested certain information regarding the sending of First, Second and Third Letters, as identified above, to businesses in Vermont whom MPHJ believed were Reasonably Suspected Private Infringers.

64. Representatives of MPHJ met telephonically on several occasions with Defendant Sorrell or persons under his authority and control.

65. As part of those telephonic meetings, representatives of MPHJ explained that patent owners, including MPHJ, are entitled to protection under the First Amendment “Right to Petition” clause in connection with the sending of patent inquiry or enforcement correspondence.

66. As part of that explanation, representatives of MPHJ explained to Defendant Sorrell or persons operating under his authority or control, that state law, such as unfair competition, deceptive trade practices and consumer protection laws, were barred from assertion against patent enforcement activity in the absence of proof that such conduct was both objectively baseless as well as subjectively baseless.

67. Further, as part of that explanation, representatives of MPHJ explained to Defendant Sorrell or persons operating under his authority or control that MPHJ’s patent enforcement activity was not objectively baseless.

68. Further, as part of that explanation, representatives of MPHJ explained to Defendant Sorrell or persons operating under his authority or control that MPHJ’s patent enforcement activity was not subjectively baseless.

69. MPHJ reasonably complied with the Civil Investigative Demand by providing documents and written responses to Defendant Sorrell or persons operating under his authority or control on or about February 2013.

70. On or about May 8, 2013, Defendant Sorrell, including persons operating under his authority and control, filed a Complaint (the “Original Complaint”) under the Vermont Consumer Protection Act against MPHJ in Vermont Superior Court. The Original Complaint was served on MPHJ on or about May 22, 2013.

71. MPHJ removed the Original Complaint to this Court on or about June 7, 2013.

72. On or about April 14, 2014, this Court remanded the Original Complaint back to the Vermont Superior Court.

73. In this Court's Order remanding the case, the Court expressly found that MPHJ's patent enforcement activity, which is the subject of the threats, allegations, and suit by Defendant Sorrell, is constitutionally protected under the First Amendment, and the Vermont Consumer Protection Act is preempted, unless Defendant Sorrell pleads and proves "bad faith" as that term is used in *Globetrotter Software, Inc. v. Elan Computer Group, Inc.*, 362 F.3d 1367 (Fed. Cir. 2004). This Court's decision that *Globetrotter* applies is now considered the law of the case, and Defendant Sorrell is estopped and precluded from asserting the *Globetrotter* standard does not apply.

74. Under *Globetrotter*, the term "bad faith" has a special and unique meaning, which requires proof that the conduct alleged to be in "bad faith" must first be proven to be "objectively baseless" and then also be proven to be "subjectively baseless." *Globetrotter*, 362 F.3d at 1376.

75. On or about August 11, 2014, the U.S. Court of Appeals for the Federal Circuit denied MPHJ's appeal of this Court's April 2014 remand order, and certain collateral matters.

76. On August 28, 2014, the Vermont Superior Court granted Defendant Sorrell leave to file an amended complaint (the "First Amended Complaint") (Exhibit E).

77. The First Amended Complaint filed by Defendant Sorrell asserts that MPHJ's sending of the First, Second and Third Letters violated the VCPA. The basis for the allegations is set forth in the First Amended Complaint (Exh. E).

78. The First Amended Complaint does not allege that MPHJ's accused conduct was "objectively baseless."

79. Defendant Sorrell intends to pursue the claims set forth in the First Amended Complaint related to alleged violation of the VCPA without pleading or proving objective baselessness. Doing so disregards entirely this Court's holding in this matter related to *Globetrotter*.

80. Defendant Sorrell has made it clear that to prove a violation of Vermont state law based upon the allegations in the First Amended Complaint, he does not believe that he needs to either plead, or prove, that MPHJ's accused conduct was objectively baseless, and that he will not do so.

81. Defendant Sorrell has made his belief set forth in the preceding paragraph clear in previous representations to this Court, and to the U.S. Court of Appeals for the Federal Circuit.

82. None of the allegations made in the First Amended Complaint related to acts alleged to constitute violations of the VCPA are legally relevant or have any legal bearing on the question of whether MPHJ's conduct was objectively baseless.

83. On September 2, 2014, the U.S. District Court for the District of Nebraska issued a summary judgment in favor of MPHJ, which in part included the finding and judgment that none of the allegations made by Defendant Sorrell in this case, as set forth in the Original Complaint, are legally sufficient to plead or prove "objective baselessness." *See Activision TV, Inc. and MPHJ Technology Investments, LLC v. Bruning*, No. 13-cv-00215, slip op. at 4-7 (D. Neb. Sept. 2, 2014).

84. On September 16, 2014, the U.S. District Court for the Western District of Texas issued a procedural decision dismissing MPHJ's declaratory judgment case against the Federal Trade Commission, but included a finding that the objective baselessness standard set forth in

Globetrotter applied to MPHJ's patent enforcement activities. *See MPHJ Technology Investments, LLC v. FTC*, No. 14-cv-011, Dkt. No. 83 at 11 (W.D. Tex. Sept. 16, 2014).

85. The actions of MPHJ in sending communications related to enforcing its patents were not objectively baseless.

86. The actions of MPHJ in sending communications related to enforcing its patents were not objectively baseless to the extent that a reasonable person would have believed at the time of the accused communications that there was a reasonable chance of prevailing on the issue of validity.

87. The actions of MPHJ in sending communications related to enforcing its patents were not objectively baseless to the extent that a reasonable person would have believed at the time of the accused communications that there was a reasonable chance of prevailing on the issue of infringement.

88. The First Amended Complaint did not allege that any claim of the Klein Patents was invalid.

89. The First Amended Complaint did not allege that, objectively, a reasonable person could not believe that the patents were not invalid.

90. The First Amended Complaint did not allege that, subjectively, MPHJ could not believe that the patents were not invalid.

91. At the time of the patent enforcement communications by MPHJ that are the subject of the First Amended Complaint were sent, it was not objectively baseless for a reasonable person to believe that at least one claim of the '426 Patent, '410 Patent, '381 Patent, '590 Patent, or the '173 Patent was not invalid under Title 35 of the U.S. Code.

92. At least one claim of the '426 Patent, '410 Patent, '381 Patent, '590 Patent, or the '173 Patent is not invalid under Title 35 of the U.S. Code.

93. The First Amended Complaint did not allege that, objectively, a reasonable person could not believe that the patents were infringed by a Vermont Reasonably Suspected Private Infringer.

94. The First Amended Complaint did not allege that, subjectively, MPHJ could not believe that the patents were infringed by a Vermont Reasonably Suspected Private Infringer.

95. The First Amended Complaint did not allege that, objectively, a reasonable person could not reasonably suspect infringement by a Vermont Reasonably Suspected Private Infringer.

96. The First Amended Complaint did not allege that, subjectively, MPHJ could not reasonably suspect infringement by a Vermont Reasonably Suspected Private Infringer.

97. On information and belief, at least one of the claims of the '426 Patent, '410 Patent, '381 Patent, '590 Patent, or the '173 Patent, is infringed by at least one or more of the businesses in Vermont who received patent enforcement correspondence from MPHJ that is the subject of the First Amended Complaint.

98. On information and belief, at least one of the claims of the '426 Patent, '410 Patent, '381 Patent, '590 Patent, or the '173 Patent, is infringed by at least one or more of the businesses in Vermont who received patent enforcement correspondence from MPHJ that is the subject of the First Amended Complaint.

99. Defendant Sorrell, prior to filing the First Amended Complaint, and now, has not obtained any information that would support a conclusion that MPHJ's patent enforcement activity was "objectively baseless."

100. Defendant Sorrell, prior to filing the First Amended Complaint, and now, has not obtained any information that would support a conclusion that MPHJ's patent enforcement activity was "subjectively baseless."

101. On information and belief, Defendant Sorrell, prior to filing the First Amended Complaint, had neither obtained nor reviewed the prosecution history file of any of the Klein Patents.

102. On information and belief, Defendant Sorrell, prior to filing the First Amended Complaint, had neither obtained nor reviewed any prior art relevant to the Klein Patents.

103. On information and belief, Defendant Sorrell, prior to filing the First Amended Complaint, had not conducted a review or investigation necessary under the law to properly construe any claims of the Klein Patents.

104. On information and belief, prior to filing the First Amended Complaint, Defendant Sorrell conducted no reasonable investigation to determine whether, and has no lawful basis to contend, the Klein Patents are invalid, or whether it was objectively baseless or subjectively baseless to presume them to be valid.

105. On information and belief, Defendant Sorrell conducted no reasonable investigation to determine whether, and has no lawful basis to contend, at least some claims of the Klein Patents may be infringed by at least some companies to whom MPHJ's exclusive licensees or their counsel sent letters, or that any such belief that such companies are reasonably suspected to infringe was objectively baseless or subjectively baseless.

106. The VCPA, as applied by Defendant Sorrell in the First Amended Complaint, is unconstitutional, and barred or preempted under the First and Fourteenth Amendments, and Title

35 of the U.S. Code and the Supremacy Clause of the U.S. Constitution and the Dormant Commerce Clause.

107. As part of its requested relief, the First Amended Complaint seeks: “A permanent injunction prohibiting Defendant from engaging in any business activity in, into or from Vermont that violated Vermont law.”

108. Between the time of the filing of the Original Complaint, and the grant by the Vermont Superior Court for leave to file the First Amended Complaint, the State of Vermont enacted the Vermont Bad Faith Assertions of Patent Infringement Act, 9 V.S.A. §§ 4195-4199.

109. Among the Vermont laws for which the First Amended Complaint seeks an injunction requiring MPHJ’s compliance is the Vermont Patent Assertions Act.

110. The Vermont Patent Assertions Act (Title 9, Chap. 120 of the V.S.A.) is invalid or preempted on its face under the First and Fourteenth Amendments, Title 35 of the U.S. Code, the Supremacy Clause of the U.S. Constitution and the Dormant Commerce Clause, for reasons, *including but not limited to* the following:

- (a) the Act (§ 4195) admits on its face that it is intended to regulate the content of patent infringement assertions, stating “it is necessary that [Vermont companies] receive specific information regarding how [they] may have infringed the patent at issue”;
- (b) the Act (§ 4196) admits on its face that it is intended “to facilitate the efficient and prompt resolution of patent infringement claims” and is intended to have the State, by virtue of this Act, distinguish between “legitimate” and “illegitimate” patent enforcement actions;

- (c) the Act (§§ 4196-4197) provides benefits to Vermont citizens who are “targets” of patent assertions differently than citizens of other States;
- (d) the Act (§ 4197) requires inclusion of information, such as analysis of a target’s products, that may not be possible, such as in the situation of Reasonably Suspected Private Infringers, and thereby impairs the ability to enforce at least some types of U.S. patents, and the rights of the owners of such U.S. patents, in a manner that interferes with the U.S. patent law;
- (e) the Act (§ 4197) refers to “bad faith” but permits a violation of the Act to be found, and penalties and injunctive relief imposed, without requiring proof of objective and subjective baselessness;
- (f) the Act (§ 4197) specifically cites being “meritless” as to infringement as only one factor to consider in finding a violation of the Act, and thus by its terms permits finding a violation of the Act without a finding of baselessness as to infringement, or validity;
- (g) the Act (§ 4197) expressly permits a sender of a patent assertion communication to be found liable for sending the communication after litigation on the merits of the infringement claim, thereby expressly chilling the exercise of the right to petition in the First and Fourteenth Amendments;
- (h) the Act (§ 4197) puts a defendant at greater risk of being found in violation of the Act if the defendant does not provide defendants “analysis” of an infringement assertion, and thereby puts a defendant at risk of choosing between protecting material protected under attorney-

client privilege or the work product doctrine, and instead enhanced liability, or risk of liability, under the Act;

- (i) the Act (§ 4197) expressly discriminates among different classes of patent owners in a manner not recognized or permitted under Title 35 of the U.S. Code, inclusive of 35 U.S.C. § 261, and under the First and Fourteenth Amendments of the U.S. Constitution, including, for example, by expressly favoring patent owners who have made investment in use of the patent or who are the inventor, or a university (§ 4197(c)(4 & 5));
- (j) the Act (§ 4198) subjects the patent owner to the risk of posting a bond at the beginning of litigation under the Act, thereby substantially chilling the exercise of the First Amendment right to send patent assertion communications;
- (k) the Act (§ 4199) subjects the patent owners to substantial damages, penalties and injunctive relief, thereby substantially chilling the exercise of the First Amendment right to send patent assertion communications;
- (l) the Act (§§ 4195-4199) is unconstitutionally vague, and affords too much discretion to the state court, such that it fails to reasonably put a patent owner on notice of what conduct might be considered to violate the Act.

111. The allegations and actions taken by Defendant Sorrell, including filing the First Amended Complaint, alleging violations of the VCPA and seeking a court order requiring MPHJ's compliance with the Vermont Patent Assertions Act, has served to chill MPHJ's exercise of its First Amendment Rights, particularly under the "Right to Petition" clause, and to deprive MPHJ of rights, privileges and immunities under the U.S. Constitution and laws of the

United States, including Title 35 of the U.S. Code. This chilling effect and deprivation of rights includes, but it not limited to, impairment of MPHJ's rights to:

- (a) send patent-related letters to actual or potential infringers operating in the state of Vermont without fear of suit by Defendant Sorrell or liability under the VCPA or the Vermont Patent Assertions Act;
- (b) enter into licensing discussions with parties infringing the Klein Patents without having such parties discount the value of the Klein Patents by virtue of allegations that the assertion of the patent rights may be limited by alleged violations of Vermont state law;
- (c) send patent-related letters to actual or potential infringers operating in the state of Vermont without fear of being subjected to the penalties requested by Defendant Sorrell in the First Amended Complaint under the VCPA, which is up to \$10,000 per occurrence;
- (d) send patent-related letters to actual or potential infringers operating in the state of Vermont without fear of being subjected to an injunction ordering compliance with the Vermont Patent Assertions Act, which treats MPHJ differently than other patent owners, subjects MPHJ to potential fines of and penalties as set forth in 9 V.S.A. §4199, and potential bond to the plaintiff asserting the action to cover the plaintiff's legal fees under 9 V.S.A. § 4198.

112. A patent is a time-limited asset.

113. The filing by Defendant Sorrell of the Original Complaint and the First Amended

Complaint impairs the enforcement of the Klein Patents for at least some time and to some

degree, and thus represents an unlawful and unconstitutional taking under the Fifth and Fourteenth Amendments.

114. On information and belief, there is no remedy under Vermont law for the unlawful and unconstitutional taking by Defendant Sorrell.

115. A justiciable and immediate controversy exists with respect to whether MPHJ's sending of the patent enforcement letters identified herein to companies in Vermont violates Vermont state law inclusive of the limitations on those laws by virtue of the U.S. Constitution and the U.S. Code.

116. The filing of the First Amended Complaint comprises an unlawful act which impermissibly chills MPHJ's exercise of its First Amendment rights, and constitutes unlawful deprivations of MPHJ's rights under the U.S. Constitution and the laws of the United States.

117. Defendant Sorrell has confirmed publicly that he intends to assert Vermont law against patent owners in similar circumstances to MPHJ, where he does not intend to assert such claims against similarly situated patent owners of other types, such as universities, inventors, or companies engaged in practicing the patents.

118. On information and belief, the First Amendment Complaint was filed, at least in part, as an unlawful and unconstitutional retaliation for MPHJ having exercised its First Amendment rights.

MPHJ's Present Intended Patent Enforcement Efforts

119. Having had the validity of claim 6 of the '426 patent reconfirmed by the U.S. Patent Office on November 19, 2014, MPHJ sensibly desires now to address the widespread infringement it reasonably suspects is occurring in Vermont.

120. To do so, MPHJ is required by federal law to send patent infringement inquiry letters. It wishes now to send such letters, such as the post-IPR letter of Exhibit F, to Vermont

businesses who are reasonably suspected of infringing at least claim 6 of the '426 patent. As an example, and in particular, MPHJ wishes to send the attached post-IPR letter (Exhibit F), to at least six Vermont businesses who are reasonably suspected to have systems that may infringe claim 6 of the '426 Patent.

121. The letter described in Exhibit F would comply with MPHJ's Agreements with New York and the Federal Trade Commission.

122. Defendant Sorrell, or persons acting under his authority or control, have refused to reach agreement with MPHJ that would confirm a lack of intent to assert Vermont law against MPHJ for the sending of letters that would satisfy the New York agreement.

123. While the letter (Exhibit F) that MPHJ intends to send complies with its Agreements with New York and the Federal Trade Commission, as described above, the same letter would violate the Vermont Consumer Protection Act, 9 V.S.A. § 2453(a) as it has been applied by Defendant Sorrell, for a number of reasons, including at least the following:

- a. MPHJ's letters would be sent to small Vermont businesses that are infringing certain claims of MPHJ's Patents, but who are unlikely to have the resources to fight patent-litigation, or to pay patent counsel; and
- b. MPHJ's letters would be sent to Vermont businesses that are reasonably suspected to be infringing MPHJ's patents, of which information of such infringement is not publicly available and cannot be confirmed prior to sending the inquiry letter.

124. While the letter (Exhibit F) that MPHJ intends to send complies with its Agreements with New York and the Federal Trade Commission, as described above, the same

letter would violate the Vermont Patent Assertions Act, for a number of reasons, including at least the following:

- a. MPHJ's letters would be sent to Vermont businesses that are reasonably suspected of infringing MPHJ's patents exclusive of information required under the Vermont Patent Assertions Act, such as an analysis of the infringing businesses' products and infringement, since such information is not publicly available to MPHJ; and
- b. MPHJ's letters would be sent to Vermont businesses that are reasonably suspected of infringing MPHJ's patents exclusive of factual allegations concerning the specific areas in which the businesses' products, services, and technology infringe the patents or are covered by claims in the patents, since such information is not publicly available to MPHJ.

125. Because MPHJ cannot initiate sending the letters described in the previous paragraph without a reasonable fear that Defendant Sorrell will assert that doing so violates the Vermont Consumer Protection Act and/or the Vermont Patent Assertions Act, and will make such an assertion without regard to any need to plead and prove baselessness, a justiciable and immediate controversy exists with respect to whether MPHJ's sending of the patent enforcement letters identified in Exhibit F to companies in Vermont violates Vermont state law inclusive of the limitations on those laws by virtue of the U.S. Constitution and the U.S. Code.

126. Defendant Sorrell likely will also assert that the sending of any post-IPR letters will subject MPHJ to personal jurisdiction in Vermont under the Vermont long-arm statute, which Vermont courts have interpreted to exceed the bounds of due process permitted by the Fourteenth Amendment.

COUNTS

COUNT I: Counts Related to MPHJ's Desire And Intent To Send Patent Enforcement Letters, Including The Post-IPR Letters

COUNT I-A

Declaratory Judgment That the Vermont Bad Faith Assertions of Patent Infringement Act (9 V.S.A. §§ 4195-4199) is Invalid or Preempted

127. Plaintiff MPHJ repeats and realleges the allegations of all of the preceding paragraphs as though fully set forth herein.

128. The Vermont Patent Assertions Act permits liability to attach to patent owners, including injunctive and monetary liability, without a requirement that the plaintiff prove that the conduct at issue was both objectively baseless and subjectively baseless pursuant to the standard outlined in *Globetrotter Software, Inc. v. Elan Computer Group, Inc.*, 362 F.3d 1367 (Fed. Cir. 2004).

129. As a result, the Vermont Patent Assertions Act is invalid or preempted on its face, and as applied, at least under the First and Fourteenth Amendments.

130. Further, the Vermont Patent Assertions Act is invalid or preempted on its face, and as applied, by virtue of Title 35 U.S. Code.

131. The Vermont Patent Assertions Act expressly provides that owners of U.S. patents are to be treated differently under the statute with respect to the rights to enforce their patents on the basis of whether they are a university, an inventor, a non-practicing entity or other considerations, all distinctions in patent ownership that are not recognized by, and are inconsistent with, the provisions of Title 35 of the U.S. Code, including but not limited to 35 U.S.C. § 261.

132. The Vermont Patent Assertions Act impermissibly grants patent infringers in Vermont certain rights and immunities not available to the citizens of other States.

133. The Vermont Patent Assertions Act was passed, at least in part, because of the previous patent enforcement efforts undertaken by MPHJ in Vermont.

134. It is reasonable to believe that Defendant Sorrell will attempt to assert the Vermont Patent Assertions Act against MPHJ's future patent enforcement activity, including the sending of the letters described in Exhibit F.

135. The Vermont Patent Assertions Act violates the Equal Protection clause of the Fourteenth Amendment.

136. The Vermont Patent Assertions Act is invalid or preempted on its face under the First, Fifth and Fourteenth Amendments, and the Supremacy and Patent Clauses of the U.S. Constitution, and Title 35 of the U.S. Code.

137. The Vermont Patent Assertions Act is invalid or preempted as applied under the First, Fifth and Fourteenth Amendments, and the Supremacy and Patent Clauses of the U.S. Constitution, and Title 35 of the U.S. Code.

138. The Vermont Patent Assertions Act violates the Dormant Commerce Clause of the U.S. Constitution, at least in part because it provides benefits to Vermont businesses with respect to use of U.S. patents not available to businesses in other states, and in that it causes Vermont businesses to be treated differently than those similarly situated outside of Vermont.

139. At present, MPHJ cannot send the letters attached hereto as Exhibit F without bearing the likely risk of suit by Defendant Sorrell under the Vermont Patent Assertions Act.

140. A justiciable and immediate controversy exists in order to protect MPHJ's First Amendment rights to send the letters attached hereto as Exhibit F to suspected infringers in Vermont and to lift the present chill on MPHJ's First Amendment rights to send the letters.

141. If MPHJ were to send such letters without a declaratory judgment by this Court, MPHJ could be required to post a bond of up to \$250,000 under the Vermont Patent Assertions Act, 9 V.S.A. § 4198, and could be subject to damages, costs, fees and exemplary damages in an amount equal to \$ 50,000.00 or three times the total of damages, costs, and fees, whichever is greater.

COUNT I-B

Declaratory Judgment That the Vermont Consumer Protection Act is Invalid or Preempted as Applied

142. Plaintiff MPHJ repeats and realleges the allegations of all of the preceding paragraphs as though fully set forth herein.

143. Defendant Sorrell has and currently asserts that the Vermont Consumer Protection Act may be applied against correspondence related to patent enforcement without pleading or proof that such conduct is objectively baseless and subjectively baseless.

144. As a result, as applied, the Vermont Consumer Protection Act is invalid or preempted under the First, Fifth and Fourteenth Amendments, and the Supremacy and Patent Clauses of the U.S. Constitution, and Title 35 of the U.S. Code.

145. At present, MPHJ has a reasonable fear that Defendant Sorrell will bring suit against MPHJ for sending future patent enforcement letters, including letters such as the one in Exhibit F, asserting claims under the Vermont Consumer Protection Act.

146. A justiciable and immediate controversy exists in order to protect MPHJ's First Amendment rights to send the letters attached hereto as Exhibit F to infringers in Vermont and to lift the present chill on MPHJ's First Amendment rights to send the letters.

147. If MPHJ were to send such letters without a declaratory judgment by this Court, MPHJ could be subject to at least the following penalties under the Vermont Consumer Protection Act, 9 V.S.A. § 2458: a civil penalty of up to \$10,000 per violation, restitution, reimbursement to the State of Vermont for the reasonable value of its services and its expenses in investigating and prosecuting the action.

COUNT I-C

Declaratory Judgment That The Vermont Long Arm Statute Is Invalid As Applied To Subject MPHJ to Personal Jurisdiction In Vermont For The Sending Of Letters Described In Exhibit F

148. Plaintiff MPHJ repeats and realleges the allegations of all of the preceding paragraphs as though fully set forth herein.

149. MPHJ does not have any contacts with the State of Vermont. It does not conduct business in Vermont, it does not have a mailing address in Vermont, it does not have a residence in Vermont, it does not sell or distribute products in Vermont and it has not purchased any Vermont products.

150. The only contact with Vermont that MPHJ has had is the sending of the patent licensing inquiry letters described in the preceding paragraphs.

151. Federal constitutional law is well-settled that the sending of such patent infringement inquiry letters, without other contacts, is insufficient to subject a patentee to personal jurisdiction in a foreign forum, such as Vermont.

152. MPHJ has a reasonable basis to believe that if it sends patent enforcement letters such as those in Exhibit F to suspected infringers in Vermont, that Defendant Sorrell will bring

suit against MPHJ in Vermont, and assert that the Vermont Long-Arm Statute extends to MPHJ's activity. Indeed, Vermont courts have construed the Vermont Long-Arm Statute in this manner. As so applied, the Vermont Long-Arm Statute is invalid and preempted as applied, as it violates MPHJ's rights under the First and Fourteenth Amendments to the U.S. Constitution.

COUNT I-D

Declaratory Judgment That the Vermont Patent Assertions Act, And The Vermont Consumer Protection Act As Applied, Are Invalid Under The Dormant Commerce Clause

153. Plaintiff MPHJ repeats and realleges the allegations of all of the preceding paragraphs as though fully set forth herein.

154. Article 1, Section 8, Clause 3 of the United States Constitution vests exclusive authority in the United States Congress to regulate "Commerce with foreign Nations, and among the several States."

155. Although the Commerce Clause contains an explicit grant of authority to Congress, the United States Supreme Court has long recognized that the Commerce Clause prevents states, including Vermont, from enacting laws and regulations that impose excessive burdens on interstate commerce in relation to local interests or benefits. This prohibition of state and local governments from burdening interstate commerce is referred to as the "dormant Commerce Clause."

156. The Vermont Patent Assertions Act is invalid as applied and enforced by Vermont, under the Dormant Commerce Clause, as it is designed to shield Vermont businesses from patent infringement claims more favorably than out of state businesses, and unlawfully discriminates against patent owners seeking to enforce their patents against Vermont infringing businesses.

157. The Vermont Consumer Protection Act is invalid as applied to patent enforcement activity and enforced by Vermont, as it shields Vermont businesses from patent infringement claims more favorably than out of state businesses, and it unlawfully discriminates against patent owners to the benefit of Vermont businesses more favorably than businesses in other states in violation of the Dormant Commerce Clause.

COUNT I-E

Declaratory Judgment That MPHJ's Sending Of The Letter Of Exhibit F
Would Not Be Objectively Baseless And Subjectively Baseless

158. Plaintiff MPHJ repeats and realleges the allegations of all of the preceding paragraphs as though fully set forth herein.

159. Claim 6 of the '426 patent is not invalid under Title 35 of the U.S. Code.

160. Claim 6 of the '426 patent can be reasonably suspected of infringement by at least some businesses in Vermont.

161. Sending the letter of Exhibit F to a Vermont business reasonably suspected of infringement, even without having proof of that infringement in hand prior to sending the letter, is neither objectively baseless nor subjectively baseless.

COUNT I-F

Claim For Relief Under 42 U.S.C. § 1983 & 1988

162. Plaintiff MPHJ repeats and realleges the allegations of all of the preceding paragraphs as though fully set forth herein.

163. At least prior to filing the First Amended Complaint, Defendant Sorrell knew that the suit, and the allegations it contains, was barred or preempted under the U.S. Constitution and/or Title 35 of the U.S. Code in the absence of pleading and proof that the accused conduct was both objectively baseless and subjectively baseless.

164. Federal law defines objectively baseless as the assertion of patents which no reasonable person could believe were valid and infringed.

165. Defendant Sorrell filed the Original Complaint, and the First Amended Complaint, in retaliation for MPHJ's exercise of its First Amendment rights.

166. The patent enforcement communications in which MPHJ engaged are disfavored by Defendant Sorrell.

167. MPHJ is a type of patent owner, one who does not manufacture or sell products covered by its patents, that is disfavored by Defendant Sorrell and the State of Vermont.

168. The filing by Defendant Sorrell of at least the First Amended Complaint was blatantly unconstitutional, as it was filed after this Court had made it the law of the case that *Globetrotter* applied, which required Defendant Sorrell to not bring suit against MPHJ without pleading and proof of objective and subjective baselessness.

169. The filing by Defendant Sorrell of at least the First Amended Complaint was harassment, as it was filed after this Court had made it the law of the case that *Globetrotter* applied, which required Defendant Sorrell to not bring suit against MPHJ without pleading and proof of objective and subjective baselessness.

170. The filing by Defendant Sorrell of at least the First Amended Complaint was unlawful selective prosecution, as it was filed after this Court had made it the law of the case that *Globetrotter* applied, which required Defendant Sorrell to not bring suit against MPHJ without pleading and proof of objective and subjective baselessness, and was filed because MPHJ is a type of patent owner that does not practice its patents.

171. The filing of Defendant Sorrell's Original Complaint, and the First Amended Complaint, reasonably served to "chill" MPHJ's exercise of its First Amendment rights.

172. The filing of the Original Complaint by Defendant Sorrell was done under the color of one or more Vermont statutes.

173. The filing by Defendant Sorrell of the Original Complaint subjected MPHJ to the deprivation of rights or privileges secured by the U.S. Constitution and laws of the United States, including those in Title 35 of the U.S. Code and the Equal Protection Clause of the Fourteenth Amendment.

174. The filing of the First Amended Complaint by Defendant Sorrell was done under the color of one or more Vermont statutes.

175. The filing by Defendant Sorrell of the First Amended Complaint subjected MPHJ to the deprivation of rights or privileges secured by the U.S. Constitution and laws of the United States, including those in Title 35 of the U.S. Code and the Equal Protection Clause of the Fourteenth Amendment.

176. A patent owner who does not manufacture or sell products covered by its patents is entitled to equal treatment as all other types of patent owners, including those who manufacture or sell products covered by their patents.

177. Defendant Sorrell has purposely and unconstitutionally targeted his enforcement efforts towards MPHJ, and has selectively prosecuted MPHJ solely because MPHJ is a type of patent owner who does not manufacture or sell products covered by its patents.

178. Defendant Sorrell, acting under the color of state authority, has caused MPHJ, a patent owner who does not manufacture or sell products covered by its patents, to be treated differently than other patent owners who are similarly situated that manufacture and sell products covered by their patents.

179. Defendant Sorrell has intentionally sought to harass and discriminate against MPHJ, a patent owner who does not manufacture or sell products, at least in favor of patent owners who are similarly situated that do manufacture and sell products covered by their patents.

180. Defendant Sorrell has no rational basis to afford different types of patent owners different rights under the First Amendment than other types of patent owners.

181. As a result of Defendant Sorrell's intentional discrimination against MPHJ, a patent owner who does not manufacture or sell products covered by its patents, MPHJ has been deprived of its constitutional rights under the Equal Protection Clause.

182. Defendant Sorrell's conduct, or persons operating under his authority or control, in connection with MPHJ's sending of its previous letters, in suing MPHJ under the VCPA and also seeking an injunction compelling compliance with the Vermont Patent Assertions Act, and in refusing to enter into any agreement, such as the New York agreement, that would identify any form of license MPHJ could send into Vermont to a suspected infringer without being subject to suit, has reasonably chilled MPHJ's exercise of its First Amendment rights, created a case or controversy that is ripe, afforded MPHJ standing, and caused MPHJ to be deprived of its rights under the U.S. Constitution and the U.S. Code.

183. The conduct of Defendant Sorrell, inclusive of the filing of the Original Complaint, and the First Amended Complaint, has caused MPHJ to necessarily incur attorneys' fees and costs.

184. The attorneys' fees and costs incurred by MPHJ are recompensable to MPHJ under the law.

COUNT II: Counts Related to Unconstitutionality of Enforcing The VCPA Against MPHJ's Prior Letters and Seeking Enforced Compliance with the Vermont Patent Assertions Act as a Remedy

COUNT II-A

Declaratory Judgment That the Vermont Bad Faith Assertions of Patent Infringement Act (9 V.S.A. §§ 4195-4199) is Invalid or Preempted And That Suit To Enforce MPHJ's Compliance With That Act Is Unlawful

185. Plaintiff MPHJ repeats and realleges the allegations of all of the preceding paragraphs as though fully set forth herein.

186. The Vermont Patent Assertions Act is invalid or preempted on its face under the First, Fifth and Fourteenth Amendments, and the Supremacy and Patent Clauses of the U.S. Constitution, and Title 35 of the U.S. Code.

187. The Vermont Patent Assertions Act is invalid or preempted as applied under the First, Fifth and Fourteenth Amendments, and the Supremacy and Patent Clauses of the U.S. Constitution, and Title 35 of the U.S. Code.

188. The Vermont Patent Assertions Act violates the Dormant Commerce Clause of the U.S. Constitution, at least in part because it provides benefits to Vermont businesses with respect to use of U.S. patents not available to businesses in other states, and in that it causes Vermont businesses to be treated differently than those similarly situated outside of Vermont.

189. Defendant Sorrell's efforts in his suit regarding MPHJ's prior letters forcing MPHJ to comply with the Vermont Patent Assertions Act violates MPHJ's rights under the U.S. Constitution and the U.S. Code.

COUNT II-B

Declaratory Judgment That the Vermont
Consumer Protection Act is Invalid or Preempted as Applied

190. Plaintiff MPHJ repeats and realleges the allegations of all of the preceding paragraphs as though fully set forth herein.

191. Defendant Sorrell currently asserts that the VCPA may be applied against MPHJ's previous patent enforcement letters without pleading or proof that such conduct is objectively baseless and subjectively baseless.

192. The First Amended Complaint filed by Defendant Sorrell contains a number of allegations of violations of the Vermont Consumer Protection Act that all are based upon the sending of letters related to patent enforcement by MPHJ or the MPHJ Subsidiaries to certain businesses in Vermont.

193. No allegation contained in the First Amended Complaint relates to, pleads, or if proven, would demonstrate objective baselessness.

194. As so applied, the VCPA is invalid or preempted as applied under the First, Fifth and Fourteenth Amendments, and the Supremacy and Patent Clauses of the U.S. Constitution, and Title 35 of the U.S. Code.

195. Defendant Sorrell's efforts in his suit regarding MPHJ's prior letters to have MPHJ held liable for violation of the VCPA without proof of objective baselessness and subjective baselessness violate MPHJ's rights under the U.S. Constitution and the U.S. Code.

COUNT II-C

Declaratory Judgment That MPHJ Did Not
Violate the Vermont Consumer Protection Act

196. Plaintiff MPHJ repeats and realleges the allegations of all of the preceding paragraphs as though fully set forth herein.

197. The First Amended Complaint filed by Defendant Sorrell contains a number of allegations of violations of the Vermont Consumer Protection Act that all are based upon the sending of letters related to patent enforcement by MPHJ or the MPHJ Subsidiaries to certain businesses in Vermont.

198. No state law may be asserted against a patent owner for the sending of patent enforcement correspondence unless it is first pled and proven that the conduct is objectively baseless as well as subjectively baseless.

199. No allegation contained in the First Amended Complaint relates to, pleads, or if proven, would demonstrate objective baselessness.

200. It was not objectively baseless for MPHJ, in sending its patent enforcement correspondence to companies in Vermont, to believe at least one claim of MPHJ's patents were not invalid.

201. It was not objectively baseless for MPHJ, in sending its patent enforcement correspondence to companies in Vermont, to suspect such companies of infringing at least one claim of MPHJ's patents.

202. As a result, MPHJ, in the sending of its patent enforcement correspondence as described herein, cannot be found to have violated the Vermont Consumer Protection Act, on grounds established by the First, Fifth and Fourteenth Amendments, and the Supremacy and Patent Clauses of the U.S. Constitution, and Title 35 of the U.S. Code.

COUNT II-D

Declaratory Judgment That MPHJ's Sending Of Its Prior Letters
Was Neither Objectively Baseless Nor Subjectively Baseless

203. Plaintiff MPHJ repeats and realleges the allegations of all of the preceding paragraphs as though fully set forth herein.

204. The actions of MPHJ in sending the prior communications related to enforcing its patents were not objectively baseless to the extent that a reasonable person would have believed at the time of the accused communications that there was a reasonable chance of prevailing on the issue of infringement.

205. The actions of MPHJ in sending the prior communications related to enforcing its patents were not subjectively baseless, as MPHJ believed at the time of the accused communications that there was a reasonable chance of prevailing on the issue of infringement.

206. At the time of the patent enforcement communications by MPHJ that are the subject of the First Amended Complaint, it was not objectively baseless for a reasonable person to believe that at least one claim of the '426 Patent, '410 Patent, '381 Patent, '590 Patent, or the '173 Patent was not invalid under Title 35 of the U.S. Code.

207. At least one claim of the '426 Patent, '410 Patent, '381 Patent, '590 Patent, or the '173 Patent is not invalid under Title 35 of the U.S. Code.

208. On information and belief, at least one of the claims of the '426 Patent, '410 Patent, '381 Patent, '590 Patent, or the '173 Patent, is infringed by at least one or more of the businesses in Vermont who received patent enforcement correspondence from MPHJ that is the subject of the First Amended Complaint.

209. On information and belief, a reasonable person could have believed there was at least a chance of prevailing on infringement of at least one of the claims of the '426 Patent, '410 Patent, '381 Patent, '590 Patent, or the '173 Patent, with respect to at least one or more of the businesses in Vermont who received patent enforcement correspondence from MPHJ that is the subject of the First Amended Complaint.

210. MPHJ believes that at least one of the claims of the '426 Patent, '410 Patent, '381 Patent, '590 Patent, or the '173 Patent, is infringed by at least one or more of the businesses in Vermont who received patent enforcement correspondence from MPHJ that is the subject of the First Amended Complaint.

211. MPHJ's sending of the prior letters was neither objectively baseless, nor subjectively baseless, and as a result, under *Globetrotter*, the First Amendment bars assertion of state law against that activity.

COUNT II-E

Claim For Relief Under 42 U.S.C. § 1983 & 1988

212. Plaintiff MPHJ repeats and realleges the allegations of all of the preceding paragraphs as though fully set forth herein.

213. At least prior to filing the First Amended Complaint, Defendant Sorrell knew that the suit, and the allegations it contains, was barred or preempted under the U.S. Constitution and/or Title 35 of the U.S. Code in the absence of pleading and proof that the accused conduct was both objectively baseless and subjectively baseless.

214. Federal law defines objectively baseless as the assertion of patents which no reasonable person could believe were valid and infringed.

215. Defendant Sorrell filed the Original Complaint, and the First Amended Complaint, in retaliation for MPHJ's exercise of its First Amendment rights.

216. The patent enforcement communications in which MPHJ engaged are disfavored by Defendant Sorrell.

217. MPHJ is a type of patent owner, one who does not manufacture or sell products covered by its patents, that is disfavored by Defendant Sorrell and the State of Vermont.

218. The filing of Defendant Sorrell's Original Complaint, and the First Amended Complaint, reasonably served to "chill" MPHJ's exercise of its First Amendment rights.

219. The filing by Defendant Sorrell of at least the First Amended Complaint was blatantly unconstitutional, as it was filed after this Court had made it the law of the case that *Globetrotter* applied, which required Defendant Sorrell to not bring suit against MPHJ without pleading and proof of objective and subjective baselessness.

220. The filing by Defendant Sorrell of at least the First Amended Complaint was harassment, as it was filed after this Court had made it the law of the case that *Globetrotter* applied, which required Defendant Sorrell to not bring suit against MPHJ without pleading and proof of objective and subjective baselessness.

221. The filing by Defendant Sorrell of at least the First Amended Complaint was unlawful selective prosecution, as it was filed after this Court had made it the law of the case that *Globetrotter* applied, which required Defendant Sorrell to not bring suit against MPHJ without pleading and proof of objective and subjective baselessness, and was filed because MPHJ is a type of patent owner that does not practice its patents.

222. The filing of the Original Complaint by Defendant Sorrell was done under the color of one or more Vermont statutes.

223. The filing by Defendant Sorrell of the Original Complaint subjected MPHJ to the deprivation of rights or privileges secured by the U.S. Constitution and laws of the United States, including those in Title 35 of the U.S. Code and the Equal Protection Clause of the Fourteenth Amendment.

224. The filing of the First Amended Complaint by Defendant Sorrell was done under the color of one or more Vermont statutes.

225. The filing by Defendant Sorrell of the First Amended Complaint subjected MPHJ to the deprivation of rights or privileges secured by the U.S. Constitution and laws of the United States, including those in Title 35 of the U.S. Code and the Equal Protection Clause of the Fourteenth Amendment.

226. A patent owner who does not manufacture or sell products covered by its patents is entitled to equal treatment as all other types of patent owners, including those who manufacture or sell products covered by their patents.

227. Defendant Sorrell has purposely and unconstitutionally targeted his enforcement efforts towards MPHJ, and has selectively prosecuted MPHJ solely because MPHJ is a type of patent owner who does not manufacture or sell products covered by its patents.

228. Defendant Sorrell, acting under the color of state authority, has caused MPHJ, a patent owner who does not manufacture or sell products covered by its patents, to be treated differently than other patent owners who are similarly situated that manufacture and sell products covered by their patents.

229. Defendant Sorrell has intentionally sought to harass and discriminate against MPHJ, a patent owner who does not manufacture or sell products, at least in favor of patent owners who are similarly situated that do manufacture and sell products covered by their patents.

230. Defendant Sorrell has no rational basis to afford different types of patent owners different rights under the First Amendment than other types of patent owners.

231. As a result of Defendant Sorrell's intentional discrimination against MPHJ, a patent owner who does not manufacture or sell products covered by its patents, MPHJ has been deprived of its constitutional rights under the Equal Protection Clause.

232. The conduct of Defendant Sorrell, inclusive of the filing of the Original Complaint, and the First Amended Complaint, has caused MPHJ to necessarily incur attorneys' fees and costs.

233. The attorneys' fees and costs incurred by MPHJ are recompensable to MPHJ under the law.

COUNT III

Takings Claim Under The Fifth Amendment

234. Plaintiff MPHJ repeats and realleges the allegations of all of the preceding paragraphs as though fully set forth herein.

235. The Takings Clause of the 5th Amendment of the United States Constitution as applied to the States under the 14th Amendment, prohibits the government from taking private property for public use without just compensation and guarantees the right of just compensation for property taken by a public entity for public use.

236. U.S. Patent rights are considered private property rights under the U.S. Patent laws and Title 35 of the U.S. Code.

237. Defendant Sorrell, under color of law of Vermont, filed suit against MPHJ, seeking an injunction that unlawfully interferes with MPHJ's patent property rights and MPHJ's enforcement of those rights, which are a time-limited asset.

238. The Defendant Sorrell, under color of law of Vermont, through the Vermont Consumer Protection Act and the Vermont Patent Assertions Act, and the affirmative Amended Complaint against MPHJ filed in Vermont state court, and causing MPHJ to delay or limit its enforcement of its patents in Vermont, have taken and/or interfered with MPHJ's private patent rights without providing MPHJ just compensation for such taking.

CLAIMS FOR RELIEF

WHEREFORE, Plaintiff MPHJ respectfully demands judgment for itself and against Defendant Sorrell as follows:

Claims for Relief – COUNT I-A

A. A declaration that the Vermont Bad Faith Patent Infringement Assertions Act is invalid or preempted on its face and as applied under the First, Fifth, and Fourteenth Amendments, and Article VI, Clause 2 (“the Supremacy Clause”), and Article I, Section 8, Clause 8 (“the Patent Clause”) of the U.S. Constitution, and Title 35, U.S. Code, and the Dormant Commerce Clause.

B. Such preliminary and permanent injunctive relief as Plaintiff may show itself to be entitled.

C. Such other and further relief at law or in equity as the Court deems just and proper.

Claims for Relief – COUNT I-B

A. A declaration that the Vermont Consumer Protection Act, as applied by Defendant Sorrell, and as it would relate to future letters such as Exhibit F sent by MPHJ, is invalid or preempted under the First, Fifth, and Fourteenth Amendments, and Article VI, Clause

2 (“the Supremacy Clause”), and Article I, Section 8, Clause 8 (“the Patent Clause”) of the U.S. Constitution, and Title 35, U.S. Code, and the Dormant Commerce Clause.

B. Such preliminary and permanent injunctive relief to which Plaintiff may show itself to be entitled.

C. Such other and further relief at law or in equity as the Court deems just and proper.

Claims for Relief – COUNT I-C

A. A declaration that the Vermont Long Arm Statute is invalid as applied to subject MPHJ to personal jurisdiction in Vermont for the future sending of patent licensing inquiry letters, such as those described in Exhibit F.

B. Such preliminary and permanent injunctive relief as Plaintiff may show itself to be entitled.

C. Such other and further relief at law or in equity as the Court deems just and proper.

Claims for Relief – COUNT I-D

A. A declaration that the Vermont Consumer Protection Act as applied, and the Vermont Patent Assertions Act, as asserted against MPHJ’s sending of future patent enforcement letters such as Exhibit F, are invalid or preempted under the Dormant Commerce Clause.

B. Such preliminary and permanent injunctive relief as Plaintiff may show itself to be entitled.

C. Such other and further relief at law or in equity as the Court deems just and proper.

Claims for Relief – COUNT I-E

- A. A declaration that claim 6 of the '426 patent is not invalid under Title 35 of the U.S. Code.
- B. A declaration that claim 6 of the '426 patent may reasonably suspected of being infringed by at least some Vermont businesses.
- C. A declaration that sending the letter of Exhibit F, or a substantially similar letter, would not be objectively baseless as to merits of the validity or infringement of claim 6 of the '426 patent.
- D. A declaration that sending the letter of Exhibit F, or a substantially similar letter, would not be subjectively objectively baseless as to merits of the validity or infringement of claim 6 of the '426 patent.
- E. Such preliminary and permanent injunctive relief as Plaintiff may show itself to be entitled.
- F. Such other and further relief at law or in equity as the Court deems just and proper.

Claims for Relief – COUNT I-F

- A. An order enjoining Defendant Sorrell, and any of his authorized agents or representatives in their official capacity, from further threatening to bring suit against MPHJ under the VCPA or the Vermont Patent Assertions Act for the sending of future letters such as Exhibit F without having a reasonable basis to plead and prove that MPHJ's sending of such letter would be objectively baseless and subjectively baseless.
- B. An order enjoining Defendant Sorrell, and any of his authorized agents or representatives in their official capacity, from further discriminating against MPHJ because it

does not manufacture or sell products covered by its patents, and affording patent owners like MPHJ less rights under the First Amendment to enforce their patents in Vermont.

C. An award of fees and costs, and such other monetary relief, as MPHJ may show itself to be entitled under 42 U.S.C. §§ 1983 & 1988, and other relevant statutes.

D. Such preliminary and permanent injunctive relief as Plaintiff may show itself to be entitled.

E. Such other and further relief at law or in equity as the Court deems just and proper.

Claims for Relief – COUNT II-A

A. A declaration that it would be unlawful and violate MPHJ's rights to require MPHJ to comply with the Vermont Patent Assertions Act, as that Act is invalid or preempted on its face and as applied under the First, Fifth, and Fourteenth Amendments, and Article VI, Clause 2 ("the Supremacy Clause"), and Article I, Section 8, Clause 8 ("the Patent Clause") of the U.S. Constitution, and Title 35, U.S. Code, and the Dormant Commerce Clause.

B. Such preliminary and permanent injunctive relief to which Plaintiff may show itself to be entitled.

C. Such other and further relief at law or in equity as the Court deems just and proper.

Claims for Relief – COUNT II-B

A. A declaration that it would be unlawful and violate MPHJ's constitutional rights to assert that MPHJ's previous letters violated the Vermont Consumer Protection Act as applied without accompanying pleading and proof of objective and subjective baselessness, as that Act is invalid or preempted as applied under the First, Fifth, and Fourteenth Amendments, and Article

VI, Clause 2 (“the Supremacy Clause”), and Article I, Section 8, Clause 8 (“the Patent Clause”) of the U.S. Constitution, and Title 35, U.S. Code, and the Dormant Commerce Clause.

B. Such preliminary and permanent injunctive relief to which Plaintiff may show itself to be entitled.

C. Such other and further relief at law or in equity as the Court deems just and proper.

Claims for Relief – COUNT II-C

A. A declaration that in the absence of pleading or proof of objective baselessness and subjective baselessness in connection with MPHJ’s sending of its prior letters, that MPHJ cannot be found to have violated the Vermont Consumer Protection Act pursuant to the First, Fifth, and Fourteenth Amendments, and Article VI, Clause 2 (“the Supremacy Clause”), and Article I, Section 8, Clause 8 (“the Patent Clause”) of the U.S. Constitution, and Title 35, U.S. Code, and the Dormant Commerce Clause.

B. An order enjoining Defendant Sorrell, and any of his authorized agents or representatives in their official capacity, from further discriminating against MPHJ because it does not manufacture or sell products covered by its patents, and affording patent owners like MPHJ less rights under the First Amendment to enforce their patents in Vermont.

C. An award of fees and costs, and such other monetary relief, as MPHJ may show itself to be entitled under 42 U.S.C. § 1988, and other relevant statutes.

D. Such preliminary and permanent injunctive relief as Plaintiff may show itself to be entitled.

E. Such other and further relief at law or in equity as the Court deems just and proper.

Claims for Relief – COUNT II-D

A. A declaration that it would be unlawful and violate MPHJ's rights to assert that MPHJ's previous letters violated the Vermont Consumer Protection Act because the sending of those letters was not objectively baseless.

B. A declaration that it would be unlawful and violate MPHJ's rights to assert that MPHJ's previous letters violated the Vermont Consumer Protection Act because the sending of those letters was not subjectively baseless.

C. An award of fees and costs, and such other monetary relief, as MPHJ may show itself to be entitled under 42 U.S.C. §§ 1983 & 1988, and other relevant statutes.

D. Such preliminary and permanent injunctive relief as Plaintiff may show itself to be entitled.

E. Such other and further relief at law or in equity as the Court deems just and proper.

Claims for Relief – COUNT II-E

A. An order enjoining Defendant Sorrell, and any of his authorized agents or representatives in their official capacity, from asserting the VCPA or the Vermont Patent Assertions Act against MPHJ for the sending of the prior letters, absent pleading or proof of objective baselessness.

B. An award of fees and costs, and such other monetary relief, as MPHJ may show itself to be entitled under 42 U.S.C. §§ 1983 & 1988, and other relevant statutes.

C. Such preliminary and permanent injunctive relief as Plaintiff may show itself to be entitled.

D. Such other and further relief at law or in equity as the Court deems just and proper.

Claims for Relief – COUNT III

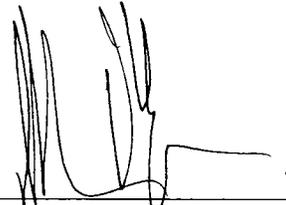
A. Just compensation for the unlawful taking of MPHJ’s patent property rights by the Defendant Sorrell.

B. An award of fees and costs, and such other monetary relief, as MPHJ may show itself to be entitled.

C. Such preliminary and permanent injunctive relief as Plaintiff may show itself to be entitled.

D. Such other and further relief at law or in equity as the Court deems just and proper.

Dated: Burlington, Vermont
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