NORTH ANNEX

Granville

IN THE SUPERIOR COURT OF GEORGIA
FULTON COUNTY

FILED IN OFFICE
MAY 28 2015
DEPUTY CLERK SUPERIOR COURT
FULTON COUNTY, GA

SCOTT A. HORSTEMEYER,

Plaintiff,

vs.

ELECTRONIC FRONTIER FOUNDATION, INC., and

DANIEL NAZER,

Defendants.

Case No.: 2015CV261243

COMPLAINT

(Tort – Defamation)

COMPLAINT

COMES NOW, Plaintiff Scott A. Horstemeyer ("Horstemeyer") and files this Complaint, showing this Honorable Court as follows.

Parties

1. Plaintiff Horstemeyer is an individual residing in Fulton County, Georgia.

2. Defendant Electronic Frontier Foundation, Inc. ("EFF") is a Massachusetts corporation having a business address of 815 Eddy Street, San Francisco, CA 94109.

3. On information and belief Defendant Daniel Nazer ("Nazer") is an individual, and an attorney admitted to practice in California, having a business address of 815 Eddy Street, San Francisco, CA 94109. According to the EFF website, located at http://www.eff.org, Nazer is employed by EFF with the title, " Staff Attorney and Mark Cuban Chair to Eliminate Stupid Patents".

Jurisdiction and Venue

4. Venue is properly laid in this court, in that, on information and belief, Defendants transact business within this judicial district, and Defendants committed the torts complained of herein within this judicial district.

5. This Court has personal jurisdiction over Defendants pursuant to O.C.G.A. § 9-10-91 in that Defendants have transacted, and continue to transact, business within the State of Georgia; Defendants have committed tortious acts or omissions within this state; Defendants have committed tortious injuries in this state; and Defendants regularly do and/or solicit business, and engage in other persistent courses of conduct, and derive substantial revenue from goods used or consumed or services rendered in this state.

Background

6. Horstemeyer is an attorney-at-law and member in good standing of the Bars of Georgia, Ohio, and the District of Columbia. In addition, Mr. Horstemeyer is a Registered Patent Attorney, duly licensed for almost twenty-five years to practice before the United States Patent and Trademark Office ("the PTO").

7. As an attorney-at-law and Registered Patent Attorney, Horstemeyer has enjoyed an exemplary reputation, and he has been a named partner in an Atlanta law firm for almost twenty years.

8. Horstemeyer is also a prolific inventor who has been awarded twenty-eight U.S. Patents.

9. Horstemeyer's U.S. Patents have been licensed to almost 400 separate licensees.

10. On or about April 30, 2015 an online "article" entitled "*Stupid Patent of the Month: Eclipse IP Casts A Shadow Over Innovation*", a true copy of which is annexed as Exhibit 1, was published by EFF on its website located at http://www.eff.org ("the Article").

11. The Article (Exhibit 1) was published under the byline of Nazer.

12. The content of the Article set out both opinions and alleged facts.

13. Horstemeyer recognizes that both Nazer and EFF were entitled to express their opinions

in the Article (*e.g.*, that a particular patent is a "stupid patent").

14. The Article went on, however, to publish as alleged facts, several statements that were false, malicious, and defamatory.

15. The defamatory statements were set out as facts under the pretext of "reporting", and those statements specifically named, and maliciously defamed, Horstemeyer in several ways.

16. In particular, the false, malicious, and defamatory remarks in the article include, at least, the following statements (set out in bold and surrounded by quotation marks, each of which is followed by explanations as to why those statements were false when published):

A. "Patent applicants and their attorneys have an ethical obligation to disclose any information material to patentability."

In fact, patent attorneys and applicants are obligated by Title 37, Code of Federal Regulations, Section 1.56 (rather than by an "ethical obligation", as incorrectly stated in the article) to disclose information that is relevant to the patentability of claims pending in an existing application. 37 CFR §1.56 expressly states, "***There is no duty to submit information which is not material to the patentability of any existing claim.***" While the EFF article (incorrectly) states and implies that Mr. Horstemeyer had an ethical duty to disclose Judge Wu's order to the Patent Examiner, Mr. Horstemeyer was under neither an ethical nor a legal duty to do so, as Judge Wu's decision (a) did not relate to the claims then under consideration; (b) related to claims to different subject matter than that claimed in the patents invalidated by Judge Wu and referenced in the article; and (c) was already made of record in the PTO (as set forth below with respect to the filing of Forms AO 120). Specifically, the legal duty to disclose information relates to prior art, so that the Examiner is able to make a determination as to the relevance of such prior art to the patentability of the claims based on 35 U.S.C. §102 and 35 U.S.C. §103. The specific issue addressed by District Judge Wu related to the issue of whether the claims in the patents before him were directed to patentable subject matter pursuant to 35 U.S.C. §101, rather than prior art of the type that would be considered by a Patent Examiner based on 35 U.S.C. §102 or 35 U.S.C. §103. Further, subsequent to the U.S. Supreme Court's decision in *Alice Corp. v. CLS Bank*, 134 S.Ct. 2347 (2014), the PTO issued specific guidelines to its Examiners relating to the manner in which the Examiners were to determine subject matter eligibility (*See, http://www.uspto.gov/patent/laws-and-regulations/examination-policy/2014-interim-guidance-subject-matter-eligibility-0*).

B. "While Horstemeyer has not made any genuine contribution to notification 'technology,' he has shown advanced skill at gaming the patent system."

The foregoing statement impugns and defames Mr. Horstemeyer in his professions, both as an inventor (who has been awarded 28 U.S. Patents) and as an attorney, whereby it constitutes libel, *per se*.

C. "It appears Horstemeyer hoped the Office would not notice [the *Alice*] decision and would simply rubber-stamp his application."

As set out above, the PTO not only "noticed" the *Alice* decision, but it put into place specific guidelines to address the issues raised therein. Further, it is the obligation of the Clerk of every U.S. District Court to file a Form AO 120 with the PTO upon the filing of any civil action relating to any patent (or trademark), whereby that form is made of record within the PTO. In the case cited within the article, two such Form AO 120's were, in fact, filed with the PTO, thereby giving notice of the pendency of the action involving the patents held by Judge Wu to include claims that were not directed to patentable subject matter. As the Clerks are aware, the Form AO 120's must be filed both (a) when a patent (or trademark) is the subject of an action; and (b) when the action is concluded with a statement as to the outcome of the case, whereby two AO 120's were filed with respect to *each* of the three patents that included claims invalidated by Judge Wu as relating to ineligible subject matter, and the Forms AO 120 that were filed at the conclusion of the matter ***included a full copy of Judge Wu's opinion***, wherefore everything about which the article stated as to the failure to disclose information to the PTO was demonstrably both factually and legally false.

14. The foregoing false, malicious, and defamatory statements constitute libel as set forth in O.C.G.A. 51-5-1(a).

15. The publication of the foregoing false statements in the Article constituted "newspaper libel" as defined in O.C.G.A. § 51-5-2.

16. The Article was published as set out in O.C.G.A. § 51-5-3, the publication having taken place over the Internet whereby it included a worldwide audience, including peers, current and potential clients, and/or current and potential licensees of Horstemeyer.

17. The foregoing statements were neither true nor privileged.

18. The malice of Defendants EFF and Nazer can be inferred from the foregoing false statements, O.C.G.A. § 51-5-5.

19. In view of the foregoing, Horstemeyer, through his undersigned attorney emailed and mailed a letter dated May 14, 2015, a true copy of which is annexed hereto as Exhibit 2, to Defendants EFF and Nazer requesting that they publish retractions and that EFF publish an editorial denouncing the foregoing libelous statements.

20. Notwithstanding Horstemeyer's reasonable requests for publication of retractions and an

editorial, neither Nazer nor EFF published either the requested retractions or editorial.

21. On information and belief, Mark Cuban and Markus Persson donated $500,000 to create the "Mark Cuban Chair to Eliminate Stupid Patents". *See,* Exhibit 3.

22. As set forth in Exhibit 3 the purpose of the Mark Cuban Chair was to allow the EFF to hire an attorney who was to seek the elimination of patents that were improperly granted by the PTO.

23. Rather than pursue the purposes of the Mark Cuban Chair, Defendant Nazer took it upon himself to determine the "stupidity" of patents based on hindsight, rather than the prior art that existed as of the filing date of the patents that he chose to deprecate.

23. As set forth above, EFF received a grant of $500,000 to pursue the elimination of improperly granted patents.

24. Notwithstanding the foregoing purpose of the Mark Cuban Chair, EFF and Nazer subverted those goals to, instead, fund Nazer who chose to defame Horstemeyer in both his legal profession and in his profession as an inventor and entrepreneur.

25. The defamatory statements published by Nazer and EFF damaged Horstemeyer personally, and in his professions as an attorney-at-law, a Registered Patent Attorney, and an inventor.

26. As a result of the defamatory statements published by Nazer and EFF Horstemeyer's reputation as an attorney and as an inventor has been damaged, and he has been held up to ridicule.

27. As the defamatory statements damaged Horstemeyer in his professions, *i.e.*, by stating that Horstemeyer acted unethically, such statements constituted libel, *per se*.

28. Notwithstanding that Horstemeyer's patents currently have close to 400 licensees, the publication of the Article is likely to negatively impact Horstemeyer's ability to garner additional licensees as the Article is likely to cause prospective licensees to question the validity

of all of Horstemeyer's patents.

29. Notwithstanding Horstemeyer's unblemished career and reputation as an attorney-at-law and as a Registered Patent Attorney, the Article maliciously, and improperly called into question Horstemeyer's legal ethics.

30. As both Nazer and EFF profited financially through the funding of the Mark Cuban Chair, their defamation of Horstemeyer in the Article was especially heinous, as it was done not only with malice, but also for their own selfish financial benefit and profit.

WHEREFORE, plaintiff Horstemeyer prays that this honorable Court:

(a) enter a judgment against defendants Nazer and EFF and in favor of Horstemeyer in an amount to be determined at trial;

(b) enter a permanent injunction against any such future conduct;

(c) assess actual and punitive damages against defendants Nazer and EFF;

(c) award Horstemeyer's reasonable attorney's fees and litigation expenses; and

(d) award such other relief to Horstemeyer as this Honorable Court may deem to be just and proper.

PLAINTIFF REQUESTS THAT THE PRESENT CAUSE BE TRIED BY JURY.

Respectfully submitted,

This 26th day of May, 2015

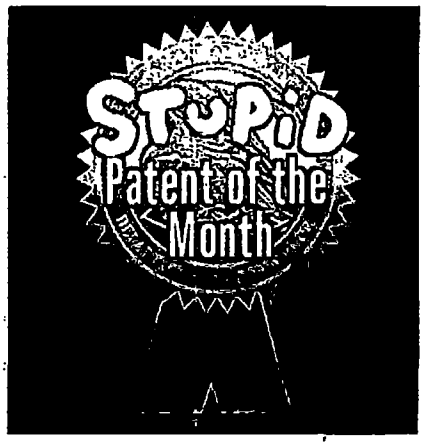
By: _____
Sanford J. Asman
Georgia Bar No. 026118
Attorney for Plaintiff

Law Office of Sanford J. Asman
570 Vinington Court
Atlanta, GA 30350
Phone : 770-391-0215
Email : sandy@asman.com

EXHIBIT 1

APRIL 30, 2015 | BY DANIEL NAZER

Stupid Patent of the Month: Eclipse IP Casts A Shadow Over Innovation



Imagine you're on your way to deliver a case of beer to a party. Before you get there, your boss sends you a text: *They want 2 cases now*. You read the text while driving (don't do that), so you deliver an extra case when you arrive. Having successfully completed that task, you leave for your next delivery.

Congratulations! You might get sued by the owner of April's stupid patent of the month.

This month's winner, US Patent No. 9,013,334 (the '334 patent), has the prosaic title: Notification systems and methods that permit change of quantity for delivery and/or pickup of goods and/or services. It issued just last week, on April 21, 2015. As its title suggests, the patent claims a "method" of updating delivery information. It belongs to Eclipse IP LLC, one of the most litigious patent trolls in the country. Eclipse belongs to an elite group of trolls (such as Arrivalstar and Geotag) that have filed over 100 lawsuits.

Eclipse owns a patent family of more than 20 patents, all of which claim priority back to a single 2003 provisional application. These patents claim various closely related "notification systems." Eclipse interprets its patents very broadly and has asserted them against a wide range of mundane business practices. For example, in January it sent a letter claiming that Tiger Fitness infringes one of these patents by sending emails to customers updating them about the status of orders. This letter explains that "Eclipse IP aggressively litigates patent infringement lawsuits" and that "litigation is expensive and time consuming." The letter demands a $45,000 payment.

We think that all of Eclipse's patents deserve a stupid patent of the month award. But the '334 patent is especially deserving. This is because the Patent Office issued this patent *after* a federal court invalidated similar claims from other patents in the same family. On September 4, 2014, Judge Wu of the Central District of California issued an order invalidating claims from three of Eclipse's patents. The court explained that these patents claim abstract ideas like checking to see if a task has been completed. Judge Wu applied the Supreme Court's recent decision in *Alice v CLS Bank* and held the claims invalid under Section 101 of the Patent Act.

All of Eclipse's patents were both "invented" and prosecuted by a patent attorney named Scott Horstemeyer (who just so happens to have prosecuted Arrivalstar's patents too). Patent applicants and their attorneys have an ethical obligation to disclose any information material to patentability. Despite this, from what we can tell from the Patent Office's public access system PAIR, Horstemeyer did not disclose Judge Wu's decision to the examiner during the prosecution of the '334 patent, even though the decision invalidated claims in the patent family. While Horstemeyer has not made any genuine contribution to notification "technology," he has shown advanced skill at gaming the patent system.

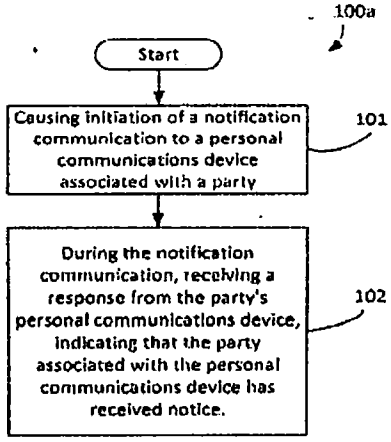


FIG. 7A

Judge Wu's reasoning applies directly to the '334 patent. While one claim in the '334 patent expressly requires "computer program code" executed to carry out the method, this does not make a difference. Indeed, Judge Wu explained that, under *Alice*, it is not enough that the claimed methods must be performed by a "specially programmed" computer. It appears Horstemeyer hoped the Office would not notice this decision and would simply rubber-stamp his application. Sadly, that is exactly what happened. The Patent Office issued the Patent No. 9,013,334 without raising *Alice* or Section 101 at all. We believe this is part of a disturbing trend of Patent Office decisions that ignore *Alice* where courts have struck down almost identical claims.

Trolls like Eclipse will continue to thrive as long as the Patent Office gives them stupid patents and courts allow them to use the cost of litigation to extort settlements. Reform such as the Innovation Act will make abusive patent litigation less attractive. But we need broader reform to stop the Patent Office from being a rubber stamp for vague and overbroad software patents.

Late breaking addition: As if to drive home just how much of a rubber stamp it is, the Patent Office issued yet another patent to Eclipse yesterday. Patent No. 9,019,130 is almost identical to the '334 patent, except it deals with updating "time" information instead of "quantity" information.

Patents | Patent Trolls | Innovation

Free Speech Weak Links

Global Chokepoints

HTTPS Everywhere

Manila Principles

Medical Privacy Project

Open Wireless Movement

Patent Busting

Student Activism

Surveillance Self-Defense

Takedown Hall of Shame

Teaching Copyright

Transparency Project

Trolling Effects

Ways To Help

MORE DEEPLINKS PO

DECEMBER 2012
30+ Examples of Prior Art to Help Combat ArrivalStar's Patent

MARCH 2015
Patent Troll ArrivalStar is Back, Extorting Money by Hiding Facts and Operating in the Shadows

JUNE 2013
ArrivalStar: How to NOT Make Friends and Influence People

NOVEMBER 2014
Victory! Court Finally Throws Out Ultramercial's Infamous Patent on Advertising on the Internet

AUGUST 2014
EFF to Patent Office: End the Flood of Stupid Software Patents

RECENT DEEPLINKS

MAY 22, 2015
Oversight Report on FBI's Use of Patriot Act Highlights Need for Intelligence Reform at Crucial Moment

MAY 22, 2015
Why Mitch McConnell Cannot Be Allowed to Decide the Fate of the Patriot Act

MAY 22, 2015
The Unexpected Policy Laundering Implications of the Garcia v. Google Dissent

MAY 22, 2015
California Attorney General Locks Down Wiretap and Other Criminal Justice Data

MAY 22, 2015
La Regulación de Inteligencia en Colombia Se Raja en los Derechos Humanos

DEEPLINKS TOPICS

Fair Use and Intellectual Property: Defending the Balance
Free Speech
Innovation
International
Know Your Rights
Privacy
Trade Agreements and Digital
DMCA Rulemaking
Do Not Track
DRM
E-Voting Rights
EFF Europe
Encrypting the Web
Export Controls
FAQs for Lodsys Targets
Patent Trolls
Patents
PATRIOT Act
Pen Trap
Policy Analysis
Printers
Public Health Reporting and Hospital Discharge Data

EXHIBIT 2

SANFORD J. ASMAN
ATTORNEY AT LAW
570 VININGTON COURT
ATLANTA, GEORGIA 30350 - U.S.A.

Telephone: (770) 391-0215 E-mail: sandy@asman.com Facsimile: (770) 668-9144

May 14, 2015

Via U.S. Mail and Email to Daniel@eff.org

Daniel Nazer and Electronic Frontier Foundation ("EFF")
815 Eddy Street
San Francisco CA 94109

Re: Scott A. Horstemeyer, Esq.
Our File : 170809-7010

Dear Mr. Nazer and EFF:

I represent Scott A. Horstemeyer, Esq. an attorney-at-law and member in good standing of the Bars of Georgia, Ohio, and the District of Columbia. In addition, Mr. Horstemeyer is a Registered Patent Attorney, duly licensed to practice before the United States Patent and Trademark Office ("the PTO").

It has come to our attention that on or about April 30, 2015 an online "article" entitled "*Stupid Patent of the Month: Eclipse IP Casts A Shadow Over Innovation*" was published by the Electronic Frontier Foundation ("EFF") under the byline of Mr. Nazer. While both Mr. Nazer and the EFF are entitled to express their opinions, such entitlement does not extend to the publication of false, malicious, and defamatory remarks made under the pretext of "reporting". The article specifically names, and maliciously defames, Mr. Horstemeyer in several ways. In particular, the false, malicious, and defamatory remarks in the article include, at least, the following statements:

A. **"Patent applicants and their attorneys have an ethical obligation to disclose any information material to patentability."**

In fact, patent attorneys and applicants are obligated by Title 37, Code of Federal Regulations, Section 1.56 (rather than by an "ethical obligation", as incorrectly stated in the article) to disclose information that is relevant to the patentability of claims pending in an existing application. 37 CFR §1.56 expressly states, "***There is no duty to submit information which is not material to the patentability of any existing claim.***" While the EFF article (incorrectly) states and implies that Mr. Horstemeyer had an ethical duty to disclose Judge Wu's order to the Patent Examiner, Mr. Horstemeyer was under neither an ethical nor a legal duty to do so, as Judge Wu's decision (a) did not relate to the claims then under consideration; (b) related to claims to different subject matter than that claimed in the patents invalidated by Judge Wu and referenced in the article; and (c) was already made of record in the PTO (as set forth below with respect to the filing of Forms AO 120). Specifically, the legal duty to disclose information relates to prior art, so that the Examiner is able to make a determination as to the relevance of such prior art to the patentability of the claims based on 35 U.S.C. §102 and 35 U.S.C. §103. The specific issue addressed by District Judge Wu related to the issue of whether

the claims in the patents before him were directed to patentable subject matter pursuant to 35 U.S.C. §101, rather than prior art of the type that would be considered by a Patent Examiner based on 35 U.S.C. §102 or 35 U.S.C. §103. Further, subsequent to the U.S. Supreme Court's decision in *Alice Corp. v. CLS Bank*, 134 S.Ct. 2347 (2014), the PTO issued specific guidelines to its Examiners relating to the manner in which the Examiners were to determine subject matter eligibility (*See*, *http://www.uspto.gov/patent/laws-and-regulations/examination-policy/2014-interim-guidance-subject-matter-eligibility-0*).

B. "While Horstemeyer has not made any genuine contribution to notification 'technology,' he has shown advanced skill at gaming the patent system."

The foregoing statement impugns and defames Mr. Horstemeyer in his professions, both as an inventor (who has been awarded 28 U.S. Patents) and as an attorney, whereby it constitutes libel, *per se*.

C. "It appears Horstemeyer hoped the Office would not notice [the *Alice*] decision and would simply rubber-stamp his application."

As set out above, the PTO not only "noticed" the *Alice* decision, but it put into place specific guidelines to address the issues raised therein. Further, it is the obligation of the Clerk of every U.S. District Court to file a Form AO 120 with the PTO upon the filing of any civil action relating to any patent (or trademark), whereby that form is made of record within the PTO. In the case cited within the article, two such Form AO 120's were, in fact, filed with the PTO, thereby giving notice of the pendency of the action involving the patents held by Judge Wu to include claims that were not directed to patentable subject matter. As the Clerks are aware, the Form AO 120's must be filed both (a) when a patent (or trademark) is the subject of an action; and (b) when the action is concluded with a statement as to the outcome of the case, whereby two AO 120's were filed with respect to *each* of the three patents that included claims invalidated by Judge Wu as relating to ineligible subject matter, and the Forms AO 120 that were filed at the conclusion of the matter ***included a full copy of Judge Wu's opinion***, wherefore everything about which the article stated as to the failure to disclose information to the PTO was demonstrably both factually and legally false.

In view of the foregoing false, defamatory, and malicious statements made in the cited article I am hereby demanding (a) that both Daniel Nazer and the EFF immediately publish retractions; (b) that the EFF publish an editorial expressly repudiating the false, defamatory, and malicious statements set forth in the article; and (c) that both Daniel Nazer and the EFF provide me with copies of both the retractions and editorials upon their publication. Absent immediate compliance with the foregoing demands, and notification of the same by the close of business on **May 22, 2015**, I shall take such action as is appropriate without further notice.

Very truly yours,

Sanford J. Asman

EXHIBIT 3

Related Issues

Patents

EFF creates the "Mark Cuban Chair to Eliminate Stupid Patents"

Broadcast.com founder Mark Cuban and Minecraft creator Markus Persson have donated $500,000 to the Electronic Frontier Foundation to endow the "Mark Cuban Chair to Eliminate Stupid Patents," which will be occupied by an attorney tasked with hunting down and destroying crappy patents that have been recklessly granted by the US Patent and Trademark Office to unscrupulous "inventors" who claim to have invented things that were obvious and/or already extant; and to pay for activists to fight for substantive patent reform.

By Cory Doctorow
Thursday, December 20, 2012
Article Link
Boing Boing
Related Issues:
Patents

GLADVILLE

NORTH ANNEX

IN THE SUPERIOR COURT OF FULTON COUNTY, GEORGIA

136 PRYOR STREET, ROOM C-103, ATLANTA, GEORGIA 30303

SUMMONS

Scott A. Horstemeyer,	)	
	)	
Plaintiff,	)	Case No. 2015CV261243
	)	
vs.	)	
	)	
Electronic Frontier Foundation, Inc., and	)	
	)	
Daniel Nazer,	)	
	)	
Defendants	)	
	)	
	)	

TO THE ABOVE NAMED DEFENDANT(S):

You are hereby summoned and required to file with the Clerk of said Court and serve upon plaintiff's attorney, whose name and address is:

Sanford J. Asman, Esq.
Law Office of Sanford J. Asman
570 Vinington Court
Atlanta, GA 30350
Phone: (770) 391-0215
Email: sandy@asman.com

An answer to the complaint which is herewith served upon you, within 30 days after service of this summons upon you, exclusive of the day of service; unless proof of service of this complaint is not filed within five (5) business days of such service. Then time to answer shall not commence until such proof of service has been filed. **IF YOU FAIL TO DO SO, JUDGMENT BY DEFAULT WILL BE TAKEN AGAINST YOU FOR THE RELIEF DEMANDED IN THE COMPLAINT.**

This 26TH day of MAY, 2015

Honorable Cathelene "Tina" Robinson
Clerk of Superior Court
By _____
Deputy Clerk

To defendant upon whom this petition is served:
This copy of complaint and summons was served upon you _____, 20 _____

_____
Deputy Sheriff

Instructions: Attach addendum sheet for additional parties if needed, make notation on this sheet if addendum is used