**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION**

COLLEGENET, INC.	Case No. 1:09-CV-00544-SS
Plaintiff,	
v.	
MARKETLINX, INC., and RAPATTONI CORPORATION	
Defendants.	

DEFENDANTS' STATEMENT OF NON-INFRINGEMENT

Pursuant to the Court's Scheduling Order dated November 5, 2009 (Dkt. No. 45),

Defendants MarketLinx, Inc. ("MarketLinx") and Rapattoni Corporation ("Rapattoni")

(collectively, the "Defendants") file this short, concise statement as to why the accused products

do not infringe United States Patent No. 6,910,045 (the "CollegeNET Patent").

I.   THE PATENT-IN-SUIT

The CollegeNET Patent generally relates to a very simple automatic notification system

using the internet. In this system, when someone posts information on a form that matches

criteria specified by an institution, a message specified by the institution will be sent to recipients

specified by the institution. The system can be used by a college to respond to a match between

the college's selected criteria for prospective college applicants and information posted by high

school students about themselves.[1] Although CollegeNET correctly notes that the patent

survived an *ex parte* reexamination, that reexamination was based on a prior art system that, the

Patent Examiner found, did not specify a message or recipients for the message. These

features—along with every other feature of the asserted claims—were well known and disclosed

in prior art systems that were not reviewed by the Patent Office.

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[1]   *See e.g.,* CollegeNET Patent , col. 1, lines 10-16. (Ex. A.)

II.   COLLEGENET'S INFRINGEMENT ALLEGATIONS

CollegeNET's Statement on Infringement (Dkt. No. 47) did not explain "how the accused

product(s) infringe[]," including by identifying features of the accused products that allegedly

meet the limitation of the asserted claims. As one example, CollegeNET did not identify what it

considers a specified "message" in each system, a significant issue in the case based on

CollegeNET's contention that prior art multiple listing service ("MLS") auto-notification

systems did not disclose a specified "message." With respect to almost all of the dependent

claims, CollegeNET merely quoted the claim language and then paraphrased that same language

to contend that the accused products infringe. Defendants have asked CollegeNET for a further

explanation but have, thus far, received none. Defendants therefore reserve the right to revise or

supplement their positions in response to CollegeNET's allegations as discovery and claim

construction proceeds in this case to shed more light on CollegeNET's allegations.

III.   THE ACCUSED PRODUCTS DO NOT INFRINGE THE ASSERTED CLAIMS

As indicated above, CollegeNET has suggested that it will distinguish prior art MLS

systems by relying on claim constructions for terms such as "specify a message." The parties

have not yet exchanged claim constructions, but Defendants believe that in distinguishing the

prior art, CollegeNET will necessarily have to distinguish the technology in the accused

products, leading to a conclusion of non-infringement.

Claims 1 and 10 (and all asserted claims): The accused products do not meet the

limitations of any of the asserted patent claims for at least the following additional reasons.

CollegeNET referred in its specification to different types of notifications—including

those used by individuals using "a dating service."[2] But CollegeNET drafted its claims more

narrowly to cover a method for improving responsiveness for an institution by allowing the

institution to specify a message, recipients for the message, and criteria for matching with

information submitted by a form user. Although the MLS "institution" to whom Defendants

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[2] CollegeNET Patent, col. 8, ll. 15-28.

provide their MLS software is a real estate organization (Dkt. No. 47 at 2), this software is used by individuals who are real estate agents to conduct automatic searches and notifications. Thus, with respect to the independent claims (and all of the dependent claims), the accused products do not perform the limitations of the preamble because they do not provide "[a] method of simplifying workflow and improving responsiveness *for an institution* by conditionally messaging one or more parties based upon data entered by a user into a web form."

The accused products also do not perform the step of "presenting to the *institution* a web-based template through which *the institution* can specify [1] a message, [2] one or more recipients for that message, and [3] a combination of one or more fields and the corresponding field value or values which if matched by data submitted from a form user will automatically cause delivery of that message to the one or more recipients."

In addition, based on CollegeNET's apparent interpretation of "specify a message," at least some of the accused products do not infringe claims 1 and 10 when, for example, they do not provide the ability to write a text message to a sales prospect. The accused products therefore do not meet the above limitations of independent claims 1 and 10.

The asserted dependent claims incorporate all of the limitations of the independent claims and additionally cannot be infringed at least for the following reasons:

Claim 3: In some installations of the accused products, the steps set forth by claims 1 and 3 are not "performed by a third party that is neither the institution nor the form user." Instead, the systems are hosted by the real estate organization.

Claims 4 and 12: CollegeNET contends that "with the Accused Products a message can be specified by the institution through the template so as to incorporate some data entered by the form user." (Dkt. No. 47 at 2). In the accused products, an e-mail notification does not include data entered by a listing agent, at least as CollegeNET is apparently construing the claims to distinguish prior art.

Claims 5 and 13: Defendants do not perform the step of "delivering the specified message to one or more recipients determined by the content of the submitted data."

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CollegeNET has not explained the basis for its contention that recipients of a notification are determined by the content of the submitted data, and Defendants are not aware of any such basis. Emails are delivered by the accused products to recipients whose email addresses have been provided.

Claim 22: The accused products do not perform the step of "delivering the specified message to the form user." In these products, the express addresses for the recipients of the e-mail notification are submitted in advance of the search. The address for the matched form user (*i.e.,* the listing agent of a matched property) is not known before the search is conducted.

Claim 24: Defendants do not perform the step of **"**delivering different messages to different recipients as specified by the institution." In the CollegeNET patent, one notification customized with notification templates may read "Student John Smith meets your criteria for a student that plays the saxophone and has a B or better average grade," while another customized notification may read, "Dear John, we are excited to receive your application because our band needs experienced saxophone players." [3] In the accused products, however, different messages are not customized for different recipients by the institution.

Claim 27: Defendants do not perform the step of "delivering a message that includes plain language text bringing at least a portion of the matched data to the attention of the recipient." CollegeNET has not explained the basis for this contention. The claims refer to the ability of the system disclosed in the CollegeNET patent to, for example, inform a recruiter that a student with a "B or better average grade" meets the recruiter's criteria or tell a student the institution is excited about the student's application because it needs "experienced saxophone players."[4] Unlike this feature of asserted claim 27, the accused products do not bring matched data to the attention of the recipients in plain language text.

Claim 28: CollegeNET contends that the accused products "can deliver a message

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[3] *See id.* at col. 7, lines 27-36.

[4] *See id.*

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specified through the template that includes nothing from the form and when they do, claim 28 is

infringed." (Dkt. No. 47 at 4). Based on CollegeNET's infringement position, Defendants'

accused products do not infringe because they do not deliver a message that includes nothing

from the form used by listing agents.

Dated: December 18, 2009   Respectfully submitted,

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<u>CERTIFICATE OF SERVICE</u>

The undersigned hereby certifies that the above and foregoing document was filed with the Court and has been served on December 18, 2009, on all counsel of record who are deemed to have consented to electronic service via the Court's CM/ECF system.

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/s/Heather H. Fan

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