

**IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF OHIO  
EASTERN DIVISION**

**TRIUMVIRATE SYSTEMS LLC,**

Plaintiff,

v.

**ZULILY, LLC,**

Defendant.

Civil Action No.: 2:22-cv-02203

**TRIAL BY JURY DEMANDED**

**COMPLAINT FOR INFRINGEMENT OF PATENT**

Now comes Plaintiff, Triumvirate Systems LLC (“Plaintiff” or “Triumvirate”), by and through undersigned counsel, and respectfully alleges, states, and prays as follows:

**NATURE OF THE ACTION**

1. This is an action for patent infringement under the Patent Laws of the United States, Title 35 United States Code (“U.S.C.”) to prevent and enjoin Zulily, LLC. (hereinafter “Zulily” or “Defendant”), from infringing and profiting, in an illegal and unauthorized manner, and without authorization and/or consent from Plaintiff from U.S. Patent No. 8,005,747 (“the ‘747 Patent” or the “Patent-in-Suit”), which is attached hereto as Exhibit A and incorporated herein by reference, and pursuant to 35 U.S.C. §271, and to recover damages, attorneys’ fees, and costs.

**THE PARTIES**

2. Plaintiff is a Delaware Corporation with its principal place of business at 261 West 35<sup>th</sup> Street, Suite 1003, New York, NY 10001.

3. Upon information and belief, Defendant is a limited liability company organized under the laws of Delaware, having a mailing address located at 2601 Elliot Ave, Suite 200, Seattle, WA 98121. Defendant may be served with process through its registered agent, Corporation Service Company, 3366 Riverside Drive – Suite 103, Upper Arlington, OH 43221.

4. Upon information and belief, Defendant maintains a physical presence in this judicial district through its location at 800 Tech Center Drive, Gahanna, Ohio 43230.

**JURISDICTION AND VENUE**

5. This is an action for patent infringement in violation of the Patent Act of the United States, 35 U.S.C. §§1 *et seq.*

6. The Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. §§1331 and 1338(a).

7. This Court has personal jurisdiction over Defendant by virtue of its systematic and continuous contacts with this jurisdiction including multiple stores in this District, as well as because of the injury to Plaintiff, and the cause of action Plaintiff has risen in this District, as alleged herein.

8. Defendant has established minimum contacts with this forum such that exercise of jurisdiction over the Defendant would not offend traditional notions of fair play and substantial justice.

9. Defendant is subject to this Court's specific and general personal jurisdiction pursuant to its substantial business in this forum, including: (i) at least a portion of the infringements alleged herein; (ii) regularly doing or soliciting business, engaging in other persistent courses of conduct, and/or deriving substantial revenue from goods and services provided to individuals in this forum state and in this judicial District; and (iii) being physically located in this District.

10. Venue is proper in this judicial district pursuant to 28 U.S.C. §1400(b) because Defendant resides in this District under the Supreme Court's opinion in *TC Heartland v. Kraft*

*Foods Group Brands LLC*, 137 S. Ct. 1514 (2017) through its physically located, and regular and established place of business in this District.

### **FACTUAL ALLEGATIONS**

11. On August 23, 2011, the United States Patent and Trademark Office (“USPTO”) duly and legally issued the ‘747 Patent, entitled “METHOD AND APPARATUS FOR GENERATING A SALE OFFER OVER AN ELETRONIC NETWORK SYSTEM” after a full and fair examination. The ‘747 Patent is attached hereto as Exhibit A and incorporated herein as if fully rewritten.

12. Plaintiff is presently the owner of the ‘747 Patent, having received all right, title and interest in and to the ‘747 Patent. Plaintiff possesses all rights of recovery under the ‘747 Patent, including the exclusive right to recover for past infringement.

13. To the extent required, Plaintiff has complied with all marking requirements under 35 U.S.C. § 287.

14. One exemplary invention claimed in the ‘747 Patent comprises a system and method for efficiently and intelligently communicating and withdrawing sale offers through an electronic network system for purposes of customer retention and reducing seller risk when it comes to offering products or services for sale a significantly reduced prices.

15. Claim 31 of the ‘747 Patent states:

“31. A method of making a sale offer from a seller to at least one buyer visiting an Internet website, comprising the steps of:

displaying, on the web site, a sale offer of a product or service to the at least one buyer at a random point in time unknown to the buyer, the sale offer having an offer price substantially less than a current value of the offered product or service in a competitive marketplace;  
displaying on the website, based on a predetermined period of time, an amount of time remaining for the buyer to

indicate acceptance of the sale offer, and withdrawing the displayed sale offer from the Internet web site when the at least one buyer does not indicate acceptance of the sale offer within the predetermined period of time. Ex. A at Col.24:43-57

16. Claim 32 of the '747 Patent states: "The method of Claim 31, wherein displaying the sale offer includes generating a sale offer based on at least one parameter defined by the seller." Ex. A at Col.24:58-60.

17. Claim 33 of '747 Patent States: "The method of Claim 32, wherein the at least one parameter comprises a period of time for displaying the sale offer to the at least one buyer visiting the Internet web site." Ex. A at Col.24:61-63.

18. Claim 34 of the '747 Patent States: "The method of Claim 32, wherein the at least one parameter comprises a number of sale offers to be made to the at least one consumer visiting the electronic network during a selected period of time." Ex. A at Col.24:64-67.

19. Claim 35 of the '747 Patent States: "The method of Claim 32, wherein the at least one parameter comprises at least one location on the Internet web site for displaying the sale offer to the at least one consumer visiting the electronic network." Ex. A at Col.25:1-4.

20. Claim 36 of the '747 Patent states: "The method of Claim 32, wherein the at least one parameter comprises at least one type of good or service associated with the sale offer to be displayed to the at least one buyer visiting the web site." Ex. A at Col.25:5-8.

21. Claim 37 of '747 Patent States: "The method of Claim 32, wherein the at least one parameter comprises a number of sale offers to be displayed during a predetermined period of time based on a number of buyers visiting the Internet web site." Ex. A at Col.25:9-12.

22. Claim 39 of the '747 Patent States: "The method of Claim 32, wherein the at least one parameter comprises at least one term associated with the sale offer to be displayed to the at least one buyer visiting the Internet web site." Ex. A at Col.25:15-18.

23. Claim 41 of the '747 Patent States: "The method of Claim 39, wherein the at least one term comprises an offer price equal to a discounted value less than a market value of the product or service plus a delivery price associated with delivery of the product or service." Ex. A at Col.25:22-25.

24. Claim 43 of the '747 Patent states:

"43. A system for making a sale offer from a seller to at least one buyer visiting an Internet website, the system comprising: a generating device for generating an electronic sale offer of a product or service based on at least one parameter defined by the seller, the at least one parameter including an offer price substantially less than a current value of the offered product or service in a competitive market place; a display device for displaying the electronic sale offer of the product or service to the at least one buyer visiting the Internet web site at a point in time unknown to the buyer, the electronic sale offer including an indication of based on a predetermined period of time, an amount of time remaining for the buyer to indicate acceptance of the offer; and a timing device in communication with the generating device and the display device for withdrawing the displayed sale offer from the Internet web site if the at least one buyer does not indicate acceptance of the offer within the predetermined period of time.  
Ex. A at Col.25:30-Col.26:2

25. As identified in the '747 Patent, prior art systems had technological faults. Ex. A at Col.1:47-Col.2:18.

26. Namely, the '747 Patent identifies that the prior art provided: "Electronic sales systems, however, suffer from the same drawbacks of conventional sales methods in that the seller

normally absorbs the risk and cost of advertising. That is, the advertising cost associated with the transaction and the attendant risk that such advertising will be unsuccessful fall directly upon the seller. As a result, the offered cost of a product will normally include not only the cost of manufacturing the product and the sellers anticipated profit, but also the cost of advertising the product. Similar problems and associated risk exist when a seller offers services.” Ex. A at Col.1:55-64.

27. Moreover, with regard to discounted products or services, the ‘747 Patent identifies the “need for an improved method and apparatus for offering goods and services, including within electronic sales systems, to reduce the risk placed on a seller.” Ex. A at Col.1: 65-67

28. Further, “[t]here is also a need for an improved method and apparatus for advertising goods and services, and reaching more buyers in a fast and economical fashion. Still further, there is a need to provide an improved method and apparatus for automatically and intelligently directing sale offers to particular types of buyers in order to increase the likelihood of acceptance of the sale offer.” Ex. A at Col.2:1-8.

29. To address this specific technical problem, Claims 31 and 43 (and their dependent claims) in the ‘747 Patent comprises a non-abstract system and method for intelligently making substantially discounted sales offers to buyers while maintaining web site traffic and generating more completed sales in an economical fashion. Ex. A at Col.24:43-Col.26:2

30. To further address the issues identified in the prior art, Claims 31, 32, 33, 34, 35, 36, 37, 39, 41, and 43 of the ‘747 Patent comprise a non-abstract system and method for automatically and intelligently directing sale offers to particular buyers in a manner that increases the likelihood of acceptance of the sale offer and reduces the risk to the seller as a result of offering products price substantially less than a current value.

31. Claim 31 and 43 of the '747 Patent are a practical application and inventive step of technology that address the specific computer-centric problem of communicating reduced cost products and related sale offers to buyers through an electronic network system.

32. The '747 Patent indicates that one advantage of its invention is a method for reducing sellers risk when it comes to offering products or services through a website or electronic network. Ex. A at Col.2:17-18.

33. Moreover, “the invention itself creates an ever increasing buyer traffic to the website which is highly marketable” and can reduce the costs associated with selling a product or service at a substantial discount.

34. Specifically, to overcome the computer-centric problems identified by the '747 Patent, Claim 31 in the '747 patent requires a) displaying, on the web site, a sale offer of a product or service to the at least one buyer at a random point in time unknown to the buyer, the sale offer having an offer price substantially less than a current value of the offered product or service in a competitive marketplace; b) displaying on the website, based on a predetermined period of time, an amount of time remaining for the buyer to indicate acceptance of the sale offer, and c) withdrawing the displayed sale offer from the Internet web site when the at least one buyer does not indicate acceptance of the sale offer within the predetermined period of time. Ex. A at Col.24:43-57.

35. Specifically, to overcome the computer-centric problems identified by the '747 Patent, Claim 43 in the '747 patent requires: a) a generating device for generating an electronic sale offer of a product or service based on at least one parameter defined by the seller, the at least one parameter including an offer price substantially less than a current value of the offered product or service in a competitive market place; b) a display device for displaying the electronic sale offer

of the product or service to the at least one buyer visiting the Internet web site at a point in time unknown to the buyer, the electronic sale offer including an indication of based on a predetermined period of time, an amount of time remaining for the buyer to indicate acceptance of the offer; and c) a timing device in communication with the generating device and the display device for withdrawing the displayed sale offer from the Internet web site if the at least one buyer does not indicate acceptance of the offer within the predetermined period of time. Ex. A at Col.25:30-Col.26:2

36. These specific elements, as combined, accomplish the desired result of reducing the risk a seller carries when offering discounted products to buyers in a competitive marketplace.

37. Further, the specific elements of 31, 32, 33, 34, 35, 36, 37, 39, 41, and 43 accomplish the desired results to overcome the then existing problems in the relevant field of selling discounted products or services via electronic network systems or websites. *Ancora Technologies, Inc. v. HTC America, Inc.*, 908 F.3d 1343, 1348 (Fed. Cir. 2018) (holding that improving computer security can be a non-abstract computer-functionality improvement if done by a specific technique that departs from earlier approaches to solve a specific computer problem). See also *Data Engine Techs. LLC v. Google LLC*, 906 F.3d 999 (Fed. Cir. 2018); *Core Wireless Licensing v. LG Elecs., Inc.*, 880 F.3d 1356 (Fed. Cir. 2018); *Finjan, Inc. v. Blue Coat Sys., Inc.*, 879 F.3d 1299 (Fed. Cir. 2018); *Uniloc USA, Inc. v. LG Electronics USA, Inc.*, 957 F.3d 1303 (Fed. Cir. April 30, 2020).

38. Claims need not articulate the advantages of the claimed combinations to be eligible. *Uniloc USA, Inc. v. LG Elecs. USA, Inc.*, 957 F.3d 1303, 1309 (Fed. Cir. 2020).

39. The specific elements of Claims 31, 32, 33, 34, 35, 36, 37, 39, 41, and 43 of the ‘747 Patent were an unconventional arrangement of elements. By adding the specific elements, the



‘747 Patent was able to unconventionally reduce seller risk when it comes to making sale offers that are substantially less than a current value of the offered product or service in a competitive marketplace *Cellspin Soft, Inc. v. FitBit, Inc.*, 927 F.3d 1306 (Fed. Cir. 2019).

40. Further, regarding the specific non-conventional and non-generic arrangements of known, conventional pieces to overcome an existing problem rooted in software and technology, the claims of the ‘747 Patent provide a method for intelligently making substantially discounted sales offers to buyers while maintaining web site traffic and generating more completed sales in an economical fashion, that would not preempt all ways of making discounted offers to potential buyers on an electronic network or website because of the use of the combined elements are accomplished in a particular manner, any of which could be removed or performed differently to permit a method for communicating sale offers through an electronic network system. *Bascom Global Internet Servs., Inc. v. AT&T Mobility LLC*, 827 F.3d 1341 (Fed. Cir. 2016); See also *DDR Holdings, LLC v. Hotels.com, L.P.*, 773 F.3d 1245, 1257-1258 (Fed. Cir. 2014) (noting that the problems associated with internet retailers and customer retention is not analogous to “brick and mortar” context and holding that creating a composite webpage on the fly to prevent users from leaving a site when they click a website link was a patentable idea and that it is the challenge of retaining control over customer in the context of the internet that makes the claims patent-eligible).

41. Based on the allegations, it must be accepted as true at this stage, that the Claims of the ‘747 Patent recite a specific, plausibly inventive way of communicating and withdrawing sale offers through an electronic network system while allowing a seller to reduce the risk of a customer leaving the website without completing a transaction. See *DDR Holdings*, 773 F.3d 1245 (Fed. Cir. 2014); *Cellspin Soft, Inc. v. Fitbit, Inc.*, 927 F.3d 1306, 1319 (Fed. Cir. 2019), *cert. denied sub nom. Garmin USA, Inc. v. Cellspin Soft, Inc.*, 140 S. Ct. 907, 205 L. Ed. 2d 459 (2020).

42. Alternatively, there is at least a question of fact that must survive the pleading stage as to whether these specific elements of Claims 31 of the ‘747 Patent were an unconventional arrangement of elements. *Aatrix Software, Inc. v. Green Shades Software, Inc.*, 882 F.3d 1121 (Fed. Cir. 2018) See also *Berkheimer v. HP Inc.*, 881 F.3d 1360 (Fed. Cir. 2018), *cert. denied*, 140 S. Ct. 911, 205 L. Ed. 2d 454 (2020).

43. Claims 31, 32, 33, 34, 35, 36, 37, 39, 41, and 43 of the ‘747 Patent recite a non-abstract device that performs method steps for communicating sale offers through an electronic network system.

44. Claims 31, 32, 33, 34, 35, 36, 37, 39, 41, and 43 of the ‘747 Patent provides the practical application of a device that performs method steps for communicating sale offers through an electronic network system.

45. Defendant commercializes, inter alia, methods that perform all the steps recited in at least one claim of the ‘747 Patent. More particularly, Defendant commercializes, inter alia, methods that perform all the steps recited in Claims 31, 32, 33, 34, 35, 36, 37, 39, 41, and 43 of the ‘747 Patent. Specifically, Defendant makes, uses, sells, offers for sale, or imports a method that encompasses that which is covered by at least Claims 31, 32, 33, 34, 35, 36, 37, 39, 41, and 43 of the ‘747 Patent.

### **DEFENDANT’S PRODUCTS**

46. Defendant (“seller”) operates an online electronic commerce site “Zulily.com” (the “Accused Product”)<sup>1</sup>, and offers products, utilizing a method of making a sale offer from a seller to at least one buyer visiting a website comprising the steps of displaying, on the web site, a sale

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<sup>1</sup> The Accused Product is just one of the products provided by Defendant, and Plaintiff’s investigation is on-going to additional products to be included as an Accused Product that may be added at a later date.

offer of a product or service to at least one buyer at a random point in time unknown to the buyer, the sale offer having an offer price substantially less than a current value of the offered product or service in a competitive marketplace; displaying on the website, based on a predetermined period of time, an amount of time remaining for the buyer to indicate acceptance of the sale offer; and withdrawing the displayed sale offer from the Internet web site when the at least one buyer does not indicate acceptance of the sale offer within the predetermined period of time.

47. A non-limiting and exemplary claim chart comparing the Accused Product to Claims 31, 32, 33, 34, 35, 36, 37, 39, 41, and 43 of the '747 Patent is attached hereto as Exhibit B and is incorporated herein as if fully rewritten.

48. For example, as recited in one step of Claim 31, the Accused Product practices a method displaying, on the web site, a sale offer of a product or service to at least one buyer at a random point in time unknown to the buyer, the sale offer having an offer price substantially less than a current value of the offered product or service in a competitive market place. The Accused Product presents a pop up sales banner that is not previously known to the buyer. See Ex. B.

49. Further, as recited in another step of Claim 31, the Accused Product displaying on the website, based on a predetermined period of time, an amount of time remaining for the buyer to indicate acceptance of the sale offer. The Accused Product displays when the sale ends (“amount of time remaining”) for the buyer to indicate acceptance of the sale offer. See Ex. B.

50. Additionally, as recited in another step of Claim 31, the Accused Product practices withdrawing the sales offer from the internet website when at least one buyer does not indicate acceptance of the same offer within the predetermined period of time. See Ex. B.

51. As recited in Claim 32, the displaying of the sale offer includes generating a sale offer based on at least one parameter defined by the seller. See Ex. B.

52. As recited in Claim 33, the Accused Product practices the method of claim 32, wherein at least one parameter comprises a period of time for displaying a sale offer to the at least one buyer visiting the internet web site. See Ex. B.

53. As recited in Claim 34, the Accused Product practices the method of claim 32, wherein the at least one parameter comprises a number of sale offers to be made to the at least one consumer visiting the electronic network during a selected period of time. See Ex. B.

54. As recited in Claim 35, the Accused Product practices the method of claim 32, wherein the at least one parameter comprises at least one location on the Internet web site for displaying the sale offer to the at least one consumer visiting the electronic network. See Ex. B.

55. As recited in Claim 36, the Accused Product practices the method of claim 32, wherein the at least one parameter comprises at least one type of good or service associated with the sale offer to be displayed to the at least one buyer visiting the web site. See Ex. B.

56. As recited in Claim 37, the Accused Product practices the method of claim 32, wherein the at least one parameter comprises a number of sale offers to be displayed during a predetermined period of time based on a number of buyers visiting the Internet web site. See Ex. B.

57. As recited in Claim 39, the Accused Product practices the method of claim 32, wherein the at least one parameter comprises at least one term associated with the sale offer to be displayed to the at least one buyer visiting the Internet web site. See Ex. B.

58. As recited in Claim 41, the Accused Product practices the method of claim 39, wherein the at least one term comprises an offer price equal to a discounted value less than a market value of the product or service plus a delivery price associated with delivery of the product or service. See Ex. B.

59. As recited in Claim 43, the Accused Product includes a system for making a sale offer from a seller to at least one buyer visiting an internet website, the system comprising: (a) a generating device for generating an electronic sale offer of a product or service based on at least one parameter defined by the seller, the at least one parameter including an offer price substantially less than a current value of the offered product or service in a competitive marketplace; (b) a display device for displaying the electronic sale offer of the product or service to the at least one buyer visiting the Internet web site at a point in time unknown to the buyer, the electronic sale offer including an indication of, based on a predetermined period of time, an amount of time remaining for the buyer to indicate acceptance of the offer; and (c) timing device in communication with the generating device and the display device for withdrawing the displayed sale offer from the Internet web site if the at least one buyer does not indicate acceptance of the offer within the predetermined period of time. See Ex. B.

60. The elements described in the preceding paragraphs are covered by at least Claims 31, 32, 33, 34, 35, 36, 37, 39, 41, and 43 of the '747 Patent. Thus, Defendant's use of the Accused Product is enabled by the methods described in the '747 Patent.

#### **INFRINGEMENT OF THE PATENT-IN-SUIT**

61. Plaintiff realleges and incorporates by reference all the allegations set forth in the preceding paragraphs.

62. In violation of 35 U.S.C. § 271, Defendant is now, and has been directly infringing the '747 Patent.

63. Defendant has had knowledge of infringement of the '747 Patent at least as of the service of the present Complaint.

64. Defendant has directly infringed and continues to directly infringe at least one claim of the '747 Patent by using, at least through internal testing or otherwise, the Accused Product without authority in the United States, and will continue to do so unless enjoined by this Court. As a direct and proximate result of Defendant's direct infringement of the '747 Patent, Plaintiff has been and continues to be damaged.

65. Defendant has induced others to infringe the '747 Patent, by encouraging infringement, knowing that the acts Defendant induced constituted patent infringement, and its encouraging acts actually resulted in direct patent infringement.

66. By engaging in the conduct described herein, Defendant has injured Plaintiff and is thus liable for infringement of the '747 Patent, pursuant to 35 U.S.C. § 271.

67. Defendant has committed these acts of infringement without license or authorization.

68. As a result of Defendant's infringement of the '747 Patent, Plaintiff has suffered monetary damages and is entitled to a monetary judgment in an amount adequate to compensate for Defendant's past infringement, together with interests and costs.

69. Plaintiff will continue to suffer damages in the future unless Defendant's infringing activities are enjoined by this Court. As such, Plaintiff is entitled to compensation for any continuing and/or future infringement up until the date that Defendant is finally and permanently enjoined from further infringement.

70. Plaintiff reserves the right to modify its infringement theories as discovery progresses in this case; it shall not be estopped for infringement contention or claim construction purposes by the claim charts that it provides with this Complaint. The claim chart depicted in Exhibits B is intended to satisfy the notice requirements of Rule 8(a)(2) of the Federal Rule of

Civil Procedure and do not represent Plaintiff's preliminary or final infringement contentions or preliminary or final claim construction positions.

**DEMAND FOR JURY TRIAL**

71. Plaintiff demands a trial by jury of any and all causes of action.

**PRAYER FOR RELIEF**

WHEREFORE, Plaintiff prays for the following relief:

a. That Defendant be adjudged to have directly infringed the '747 Patent either literally or under the doctrine of equivalents;

b. An accounting of all infringing sales and damages including, but not limited to, those sales and damages not presented at trial;

c. That Defendant, its officers, directors, agents, servants, employees, attorneys, affiliates, divisions, branches, parents, and those persons in active concert or participation with any of them, be permanently restrained and enjoined from directly infringing the '747 Patent;

d. An award of damages pursuant to 35 U.S.C. §284, sufficient to compensate Plaintiff for the Defendant's past infringement and any continuing or future infringement up until the date that Defendant is finally and permanently enjoined from further infringement, including compensatory damages;

e. An assessment of pre- and post-judgment interest and costs against Defendant, together with an award of such interest and costs, in accordance with 35 U.S.C. §284;

f. That Defendant be directed to pay enhanced damages, including Plaintiff's attorneys' fees incurred in connection with this lawsuit pursuant to 35 U.S.C. §285; and

g. That Plaintiff be granted such other and further relief as this Court may deem just and proper.

Dated: May 18, 2022

Respectfully submitted,

SAND, SEBOLT & WERNOW CO., LPA

/s/ Howard L. Wernow

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