

1 Clayton C. James (Cal. Bar No. 287800)
2 clay.james@hoganlovells.com
3 Srecko Vidmar (Cal. Bar No. 241120)
4 lucky.vidmar@hoganlovells.com
5 HOGAN LOVELLS US LLP
6 Three Embarcadero Center, Suite 1500
7 San Francisco, California 94111
8 Telephone: (415) 374-2300
9 Facsimile: (415) 374-2499
10
11 Attorneys for UNITED HEALTHCARE
12 SERVICES, INC.

13
14 **IN THE UNITED STATES DISTRICT COURT**
15 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**
16 **SAN JOSE DIVISION**

17 XIMPLEWARE CORP.,

18 Plaintiff,

19 v.

20 VERSATA SOFTWARE, INC. *ET AL.*,

21 Defendants.

Case No.: 5:13-cv-05161-PSG

**UNITED HEALTHCARE
SERVICES, INC.'S REPLY IN
SUPPORT OF ITS MOTION TO
DISMISS PLAINTIFF'S SECOND
AMENDED COMPLAINT**

Hearing Schedule:

Before: Hon. Paul S. Grewal
Date: Tuesday, August 12, 2014
Time: 10:00 a.m.
Location: U.S. Courthouse, San Jose,
Courtroom 5

1 Nothing in the Plaintiff's Opposition to the Motion to Dismiss by United HealthCare
2 Services, Inc. ("UHC") changes the following facts flowing directly from Plaintiff's Second
3 Amended Complaint (Dkt. 88, "SAC"):

4 1. Plaintiff chose to make its software available to the world, including UHC, under
5 the terms of version 2 of the General Public License ("GPL").

6 2. Under the GPL, UHC has an unrestricted right to use the covered software.

7 3. Plaintiff has not stated any plausible facts supporting the allegation that UHC has
8 modified or distributed the covered software, such that other conditions of the GPL might be
9 implicated.

10 As such, Plaintiff is barred under the terms of the GPL from seeking to restrict UHC's use
11 of the covered software. As a result, Plaintiff's SAC cannot, as a matter of law, support a claim
12 for patent infringement against UHC.

13 **I. Plaintiff Has Not Alleged Any Distribution of GPL-Covered Software by UHC.**

14 In the course of dismissing Plaintiff's previous inadequately pleaded complaint, this Court
15 was clear regarding the only real issue to be resolved and even identified the deficiency that
16 Plaintiff must fix if it chose to amend. Specifically, the Court stated that

17 the only real issue to resolve is whether XimpleWare has sufficiently alleged
18 that its software was "distributed" by the customers when they shared the
19 software with their independent contractors, franchisees, and producers.

20 (Dkt. 85 at 10). Yet, Plaintiff devotes less than one page of its twenty-two page Opposition to the
21 subject of distribution of the covered software by UHC. (Dkt. 97, "Opposition", at 13-14).

22 There, Plaintiff merely regurgitates paragraph 76 of the SAC, which states only the following:

23 Among the risk factors discussed in United Health's recent 10-Q quarterly report,
24 filed with the U.S. Securities Exchange Commission on May 6, 2014, United
25 Health stated that "our ability to attract, retain and provide support to a network of
26 independent producers (i.e., brokers and agents) and consultants" could materially
27 impact the company's financial performance. On information and belief, these
28 "independent producers" (i.e., non-employees of United Health) are the
beneficiaries of the DCM software, which calculates their compensation.

(Dkt. 88 ¶ 76).

1 This assertion does not mention any software much less distribution of any software by
2 UHC, let alone UHC's distribution of Plaintiff's software, or anything else that might support
3 Plaintiff's allegations that UHC violated any obligations under the GPL, which was the sole issue
4 that this Court specifically directed Plaintiff to address in its amended complaint. Nor does
5 Plaintiff's Opposition illuminate how an allegation that a contractor is a "beneficiary" of software
6 equates to breach of a license restricting distribution and modification. In fact, neither Plaintiff's
7 SAC nor its Opposition do anything to resolve, or even address, the concern that caused this
8 Court to dismiss Plaintiff's previous attempt to state a patent infringement claim against UHC.
9 As with its first attempt, Plaintiff's latest allegations are, in the Court's entirely appropriate
10 formulation, "classic *Iqbal* and *Twombly* territory." (Dkt. 85 at 11.)

11 On this basis alone, the Court should dismiss Plaintiff's SAC with prejudice.

12 **II. The GPL Contains No Conditions On Mere Use of Covered Software.**

13 Unable to muster any facts to support an allegation that UHC distributed its software,
14 Plaintiff spends the remaining twenty-one pages of its Opposition trying to make a patent
15 infringement claim out of mere use of the software that Plaintiff chose to make available to the
16 world under the GPL. The GPL, however, could not be any clearer that "[t]he act of running the
17 Program is not restricted." (Dkt. 18, Exhibit 1, Section 0). This provision is not in the Preamble
18 of the GPL (which Plaintiff repeatedly disclaims);¹ it is in Section 0, which sets out the overall
19 rights and obligations granted under the license.

20 Plaintiff cites GPL Sections 1 and 2 as ostensibly restricting UHC's mere use of the
21 covered software. By their own terms, however, these sections do not deal with use of software

22
23 ¹ The GPL Preamble aptly demonstrates the extent to which Plaintiff seeks the benefits of the
24 GPL while disclaiming its obligations and restrictions. For example, the Preamble clarifies two
25 important points: (1) "if you distribute copies of such a program, whether gratis or for a fee, you
26 must give the recipients all the rights that you have"; and (2) "we have made it clear that any
27 patent must be licensed for everyone's free use or not licensed at all." Given that these provisions
28 eviscerate Plaintiff's case, it is self-evident why Plaintiff insists that these provisions are not
binding on it. (Dkt. 97 at 11). But, Plaintiff's case lacks legal or factual foundation even without
the damning provisions of the GPL Preamble.

1 at all. Section 1 spells out the conditions that apply if the covered software is copied or
2 distributed: “[y]ou may copy and distribute verbatim copies of the Program’s source code as you
3 receive it, in any medium, provided that” (*Id.*, Section 1 (emphasis added)). Section 2
4 specifies the obligations that apply if the covered software is modified before distribution: “[y]ou
5 may modify ... the Program ... and copy and distribute such modifications ... provided that”
6 (*Id.*, Section 2 (emphasis added)). The GPL places no obligations on UHC in exchange for mere
7 use of the covered software. As the license itself says, such use is “not restricted.” (Dkt. 18,
8 Exhibit 1, Section 0).

9
10 **III. In Order to Dismiss Plaintiff’s Claims against UHC, this Court Need Not Decide
Whether the GPL Contains a Full Patent License.**

11 There is no reason for the Court to decide a purely advisory question of whether the GPL
12 contains a full patent license. Instead, the issue is whether, by opting to release its software under
13 the GPL, Plaintiff gave up its right to seek compensation for the mere use of that software,
14 including compensation for any patent royalties that Plaintiff may otherwise be entitled to. That
15 result is the same whether couched as a license, waiver, or estoppel. In fact, in its Opposition,
16 Plaintiff notes that licenses may arise not only expressly, but also by acquiescence, conduct and
17 estoppel. (Dkt. 97 at 12.) Plaintiff chose to distribute its software to the public under the GPL for
18 its own commercial reasons. In so doing, Plaintiff represented to the consuming public that mere
19 use of its software was “not restricted.” (Dkt. 18, Exhibit 1, Section 0). Plaintiff cannot wish that
20 representation away now that it inconveniences its litigation strategy. Plaintiff’s arguments
21 amount to a “bait and switch,” seeking to recover payment for mere use that Plaintiff, through its
22 adoption of the GPL, told the world would be unrestricted.²

23
24 ² Plaintiff cites a series of cases for the proposition that the absence of an express patent license in
25 the GPL makes it improper for the Court to dismiss the patent infringement claim against UHC.
26 (Dkt. 97 at 13). None of the cited cases support this conclusion. In fact, none of the cases has
27 anything to do with implied licenses specifically. They stand for the uncontroversial proposition
28 that a court cannot insert terms into an otherwise unambiguous contract or instrument. As
discussed in UHC’s Motion and in this Reply, the GPL expressly and unambiguously authorizes
UHC to perform the act that constitutes the patent infringement alleged by the Plaintiff, *viz.* to use
Plaintiff’s software. As such, the cited cases squarely support UHC’s position.

1 In addition to wishing away the past, Plaintiff seeks to pick and choose the parts of the
2 GPL it likes, while disregarding the rest. First, Plaintiff argues that UHC’s right to use the
3 software is not supported by adequate consideration because the software at issue was not sold.
4 (Dkt. 97 at 12). This is contrary to black letter law of contracts that monetary consideration is not
5 required. *Steiner v. Thexton*, 226 P.3d 359, 366 (Cal. 2010) (“We emphasize either [benefit or
6 prejudice] alone is sufficient to constitute consideration; it is not necessary to the existence of a
7 good consideration that a benefit should be conferred upon the promisor. It is enough that a
8 prejudice be suffered or agreed to be suffered by the promisee.”) (citations omitted); *Harris v.*
9 *Time, Inc.*, 237 Cal. Rptr. 584, 587 (Ct. App. 1987) (“Courts will not require equivalence in the
10 values exchanged or otherwise question the adequacy of the consideration. If a performance is
11 bargained for, there is no further requirement of benefit to the promisor or detriment to the
12 promisee.”) (citations omitted). Thus, extracting any form of prejudice from the promisee in a
13 bargained for exchange is adequate consideration.

14 This is not only black letter law of contracts generally; it is also settled law as applied to
15 open-source licenses. *Jacobsen v. Katzer*, 535 F.3d 1373, 1379 (Fed. Cir. 2008) (“The lack of
16 money changing hands in open source licensing should not be presumed to mean that there is no
17 economic consideration, however. There are substantial benefits, including economic benefits, to
18 the creation and distribution of copyrighted works under public licenses that range far beyond
19 traditional license royalties.”). Adequate consideration in the GPL is found not only in the
20 obligations governing copying, modification, and distribution of software that it imposes, but also
21 in increased market share, enhanced reputation, and the potential for free and rapid improvements
22 by the public, all benefits that accrue to Plaintiff in exchange for each user’s acceptance of the
23 software under the GPL. *Id.* Thus, the commitments that Plaintiff made in the GPL are
24 supported by consideration and binding upon it.

25 Second, in its Opposition, Plaintiff states that, notwithstanding the provisions of the GPL,
26 UHC “would still require an explicit license” to Plaintiff’s patents in order to use the covered
27 software. (Dkt. 97 at 18, ll. 17-20). In other words, Plaintiff argues that the GPL itself is never a
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1 sufficient instrument to convey a right to use the software. Instead, in the world according to
2 Plaintiff, potential users of open-source software would have to investigate each GPL-covered
3 piece of software to determine whether it is potentially covered by a patent. Then, the end user
4 would have to seek a separate explicit patent license in order to freely use the software – a right
5 which the GPL already explicitly grants. Thankfully, this is not the world we live in.

6 Finally, a word about Section 7 of the GPL, an apparent favorite of Plaintiff's. While that
7 section does mention patents, it has nothing to do with the issues at hand. By its very terms,
8 Section 7 only applies where the licensee distributes the software in a way that may subject it to
9 patent-related obligations.³ As mentioned, there is no facially plausible allegation that UHC ever
10 distributed Plaintiff's software. As such, Section 7 has no direct bearing on the resolution of
11 UHC's Motion. More importantly, however, Plaintiff should have carefully examined Section 7
12 of the GPL before distributing its software under the GPL. That section clearly cautions anyone
13 about to distribute software under the GPL of the consequences related to patent rights. If there
14 will be patent issues, Section 7 says, don't distribute under the GPL. Yet, Plaintiff did so
15 anyway. If Plaintiff wanted to maintain its right to enforce its patents, it had a choice not to use
16 the GPL. Having made a different choice, Plaintiff has to live with the entirely foreseeable
17 consequences.

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21 ³ Section 7 provides, in pertinent part:

22 If, as a consequence of a court judgment or allegation of patent infringement or for
23 any other reason (not limited to patent issues), conditions are imposed on you
24 (whether by court order, agreement or otherwise) that contradict the conditions of
25 this License, they do not excuse you from the conditions of this License. If you
26 cannot distribute so as to satisfy simultaneously your obligations under this
27 License and any other pertinent obligations, then as a consequence you may not
28 distribute the Program at all. For example, if a patent license would not permit
royalty-free redistribution of the Program by all those who receive copies directly
or indirectly through you, then the only way you could satisfy both it and this
License would be to refrain entirely from distribution of the Program.

(emphasis added).

1 **IV. Plaintiff's Appeal to Principles of Equity and Good Faith Does Not Salvage Its**
2 **Improperly Pleaded Patent Infringement Claim.**

3 Plaintiff's Opposition opens with a plea to equity because, according to Plaintiff, UHC
4 broke a commitment made to this Court under oath (Dkt. 97 at 1), because UHC supposedly
5 failed to "install a non-infringing patch" after promising the Court that it would do so. (*Id.* at 6).
6 The only support Plaintiff offers for this proposition is a sworn declaration by the CEO of
7 co-defendant Versata. *Id.* Plaintiff has not pointed to anything (nor could it) showing that
8 Versata's CEO made his statements on UHC's behalf or with UHC's approval. Nor does Plaintiff
9 explain how UHC has control over its vendor's patch process. If anything, Plaintiff's reliance on
10 these statements makes clear that this entire case is about a dispute between Plaintiff and Versata,
11 and Plaintiff's harassment of UHC and other customers of Versata is a mere side-show for the
12 improper purpose of using the customer claims to pressure Versata.⁴

13 This remains a case of patent infringement in which there is no dispute that Plaintiff gave
14 UHC the right to use Plaintiff's software without further interference. Irrespective of Versata's
15 plans to patch the software, UHC continues to enjoy the benefits of the GPL, which Plaintiff, of
16 its own free will, chose to use. One of those benefits, as discussed above, is the right of
17 unrestricted use of the covered software.

18 **V. Plaintiff Has Not Alleged a Plausible Claim of Willful Infringement.**

19 While the issue of willfulness is likely to be moot because Plaintiff has not effectively
20 alleged a claim for infringement in the first place, Plaintiff's Opposition again skates very close to
21 Rule 11 territory on this topic. Plaintiff tacitly admits that UHC had no actual pre-suit knowledge
22 of the asserted patents. Instead, Plaintiff relies on the marking of its software with patent
23 numbers as "constructive notice" to UHC. Even assuming for the purposes of this motion that
24 Plaintiff's marking was proper, the law is clear that "the issue of willfulness turns on the actual
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26 _____
27 ⁴ UHC served Plaintiff with a motion for Rule 11 sanctions on June 12, 2014. Assuming that
28 Plaintiff does not voluntarily withdraw its baseless claims, UHC will file its motion on July 7,
2014, seeking to recover in full the fees and costs incurred in this case.

1 knowledge of the infringer, and is unrelated to the adequacy of constructive notice by the
2 patentee.” *Nike, Inc. v. Wal-Mart Stores, Inc.*, 138 F.3d 1437, 1446 (Fed. Cir. 1998). As the
3 Federal Circuit has made clear, “[a]ctual notice of another’s patent rights triggers an affirmative
4 duty of due care. Constructive notice, as by marking a product with a patent number, is
5 insufficient to trigger this duty.” *Imonex Servs., Inc. v. W.H. Munzprufer Dietmar Trenner*
6 *GMBH*, 408 F.3d 1374, 1377 (Fed. Cir. 2005) (citations omitted).

7 Plaintiff relies on 35 U.S.C. § 287 and cases interpreting it for the proposition that
8 constructive notice by marking can trigger a duty of care necessary for an allegation of
9 willfulness. (Dkt. 97 at 14-15). However, Section 287 says nothing about willful infringement.
10 In fact, Section 287 is about “[l]imitation on damages” rather than their enhancement as a result
11 of willfulness. Moreover, the cases cited by Plaintiff are directly contrary to its arguments to the
12 Court. Plaintiff cites a section of *Loops, LLC v. Amercare Products, Inc.*, 636 F. Supp. 2d 1128,
13 1133 (W.D. Wash. 2008), which discusses limitation on damages under Section 287. Plaintiff
14 does not cite a later portion of the case dealing with willful infringement, where the *Loops*
15 decision makes it clear that constructive notice does not play into the issue of willfulness. *Id.* at
16 1334 (“The Court acknowledges, however, that the *State Industries* case was determining whether
17 the infringing party’s conduct was willful, and not specifically discussing constructive notice for
18 purposes of 35 U.S.C. § 287(a).”).

19 The same is true of *American Medical Systems, Inc. v. Medical Engineering Corp.*, 6 F.3d
20 1523, 1537 n.18 (Fed. Cir. 1993). Plaintiff quotes from the portion of the decision dealing with
21 whether Plaintiff’s damages should be limited under Section 287 because of a failure to mark.
22 However, in an earlier section of the opinion dealing with willfulness, the Court never mentioned
23 marking because the accused infringer’s actual knowledge of the patent was not in dispute. *Id.* at
24 1528, 1530-31. Thus, neither case cited by Plaintiff stands for the proposition for which Plaintiff
25 cited it, and it is clear that Plaintiff has not alleged sufficient facts to support a claim for pre-suit
26 willfulness by UHC.

27 Plaintiff’s allegation of willfulness is also defective with respect to UHC’s post-suit
28

1 conduct. Under either the objective or subjective prongs of the willfulness test, *see In re Seagate*
2 *Tech., LLC*, 497 F.3d 1360, 1371 (Fed. Cir. 2007), UHC's use of Plaintiff's software is covered
3 by the provisions of the GPL in which Plaintiff promised not to restrict such use, as discussed
4 above. As such, even if infringement by UHC were to be found, UHC's good-faith subjective
5 reliance on the provisions of the GPL negates the "bad faith" that is required to support a finding
6 of willfulness. *Id.* at 1368.

7 Therefore, Plaintiff's assertion of willful infringement against UHC should be dismissed.

8 **VI. Plaintiff's Declaratory Judgment Claims Are Fatally Defective.**

9 Plaintiff's Opposition addresses its declaratory judgment claims against UHC in a grand
10 total of ten lines. (Dkt. 97 at 21). Rather than dealing with the relevant arguments in UHC's
11 Motion, Plaintiff cavalierly offers to resolve the matter if UHC "concedes on the record and
12 stipulates to a declaratory judgment on each point." *Id.* On the contrary, the way to resolve
13 Plaintiff's declaratory judgment claims, which lack statutory jurisdictional basis, as well as legal
14 and factual support, is to dismiss them.

15 **VII. Another Opportunity to Amend the Complaint Will Not Help.**

16 Each successive amendment of Plaintiff's complaint and each of Plaintiff's successive
17 attempts to support its claims have served only to make it abundantly clear that Plaintiff has no
18 patent infringement claim against UHC. Having had multiple opportunities to allege a plausible
19 claim of distribution by UHC, Plaintiff has offered only speculation and conclusory assertions.
20 Therefore, for the reasons set out in UHC's Motion and the grounds discussed above, UHC
21 respectfully requests that each of the claims against UHC in Plaintiff's SAC be dismissed with
22 prejudice.
23

24 Respectfully submitted on July 3, 2014.

HOGAN LOVELLS US LLP

By: s/ Clayton C. James

Clayton C. James

Attorneys for Defendant

UNITED HEALTHCARE SERVICES, INC.