

August 9, 2024

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VIA E-MAIL

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Re: WellcomeMat, LLC v. Aylo Holdings S.à r.l. et al., Case No. 2:23-cv-483- JRG-RSP.
Deficiencies in WellcomeMat's Responses and Objections to Defendants' First Set of
Interrogatories (Nos. 1-17)

Counsel,

We write regarding WellcomeMat's Responses and Objections to Defendants' First Set of Interrogatories (Nos. 1-17). WellcomeMat's responses are deficient in several respects, and we request that WellcomeMat supplement its responses to address these deficiencies by no later than **August 23, 2024**. Although we identify specific deficiencies below, our investigation of WellcomeMat's responses is still ongoing, and we reserve the right to identify additional deficiencies.

Interrogatory No. 1

Interrogatory No. 1 asks WellcomeMat to, *inter alia*, "identify the date of conception, the dates of any subsequent diligence until reduction to practice, and the date of actual reduction to practice and/or the date of constructive reduction to practice" for each asserted claim of the Asserted Patent. Interrogatory No. 1 further asks WellcomeMat to "state in detail all facts supporting each such date, including a description of the supporting events that occurred on each such date and the individuals involved (whether Named Inventors or other Persons), and identify any corroborating Documents, Things, and witnesses."

In response, WellcomeMat cites to its Local Patent Rule 3-1(e) and 3-2 Disclosures and its corresponding production of over a thousand pages of documents under Federal Rule of Civil Procedure 33(d), bates stamped WMAYLO_00000001-1072. This is improper. Rule 33(d) allows a party to specify records to be reviewed only if "the burden of deriving or ascertaining the answer will be substantially the same for either party." In addition, Rule 33(d) requires the party to "specify[] the records that must be reviewed, in sufficient detail to enable the interrogating party to locate and identify them as readily as the responding party could."

Aylo Exhibit 1022
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Here, it is extremely burdensome, if not impossible, for Aylo to derive or ascertain from the 1000+ pages of cited documents the facts and events supporting each of WellcomeMat's alleged conception dates and alleged diligence toward reduction to practice. Moreover, the interrogatory is requesting **WellcomeMat's** understanding of which facts support each alleged date, which Aylo cannot ascertain on its own in any event. Providing a blanket citation, with no accompanying explanation, to 1000+ pages is nonresponsive because it does not inform Aylo of which facts WellcomeMat believes support its alleged conception, diligence, or reduction to practice. This is especially so where WellcomeMat has provided a number of "alternative" conception dates, some of which appear to have been arbitrarily chosen. For example, WellcomeMat states that the asserted claims "are entitled to a priority date of no later than January 3, 2006" or "[i]n the alternative . . . no later than May 25, 2006." Neither the Asserted Patent nor its provisional application was filed on these dates, and no explanation is provided for how these dates are relevant to the asserted claims.

Please supplement your response by providing us the Bates ranges of documents that are relevant to each of WellcomeMat's alleged conception dates as well as Bates ranges of documents that support any corresponding diligence toward reduction to practice. Please also provide us the salient facts supporting each of WellcomeMat's alleged dates. This information is presumably already in WellcomeMat's possession assuming WellcomeMat conducted a proper investigation prior to making its Local Patent Rule 3-1(e) disclosures. In any event, deriving and ascertaining the requested information from WellcomeMat's own document production is far less burdensome for WellcomeMat than it is for Aylo.

Finally, the interrogatory requests that this information be provided "[s]eparately, for each Asserted Claim," which WellcomeMat has not done. If WellcomeMat alleges that the dates of conception, diligence, and reduction to practice are the same for all asserted claims, please state so explicitly. Otherwise, please provide separate dates for each asserted claim as requested.

Interrogatory No. 2

Interrogatory No. 2 asks WellcomeMat to, *inter alia*, "identify and describe all bases for Your contention that Frederick Albrecht is not an inventor of [each claim of the Asserted Patent]."

WellcomeMat begins its response by asserting that "Frederick Albrecht worked as an independent contractor for WellcomeMat beginning on or about March 15 to April 25, 2006." However, it is our understanding based on documents produced by Mr. Albrecht that he worked for WellcomeMat as early as January 2005. *See, e.g.*, Albrecht0000206; Albrecht0000011; Albrecht0000204. Notably, WellcomeMat does not cite any documents to support its assertion that Mr. Albrecht began working for WellcomeMat as an independent contractor starting on or about March 15, 2006, and WellcomeMat is entirely silent regarding Mr. Albrecht's apparent

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relationship with WellcomeMat from before that date. Please supplement your response to explain and include all support for your assertion that Mr. Albrecht did not begin work for WellcomeMat until on or about March 15, 2006, despite the evidence to the contrary produced by Mr. Albrecht.

Interrogatory No. 3

Interrogatory No. 3 asks WellcomeMat to, *inter alia*, provide whether each “prior art reference that WellcomeMat or the Named Inventors were aware of prior to or during prosecution of the Asserted Patent . . . was provided to those involved in prosecution of the Asserted Patent.” Interrogatory No. 3 further asks WellcomeMat to provide “a complete explanation for each claim of the Asserted Patent of why You contend the reference was not material to patentability of the claim, why You contend the reference was cumulative of the art that was already before the USPTO, and why You contend the USPTO would have allowed the claim had it been aware of the reference.”

First, WellcomeMat’s response ignores the interrogatory’s request to state “whether the reference was provided to those involved in prosecution of the Asserted Patent.” Please supplement your response to include this information.

Second, we disagree with your assertion that this interrogatory “require[s] WellcomeMat to marshal all of its evidence before discovery is complete,” “prematurely seek[s] expert opinions or disclosures,” or “seeks to shift the burden of proving invalidity from Aylo to WellcomeMat.” This interrogatory is relevant to whether the applicants engaged in inequitable conduct *at the time of filing and during prosecution* of the Asserted Patent and seeks information known to WellcomeMat and the Named Inventors at that time. By deciding to not disclose relevant prior art to the USPTO, WellcomeMat and the Named Inventors must have determined for each withheld reference that it was not material to patentability, was cumulative of other prior art, and that the USPTO would have allowed the claims even had it been aware of the reference. Otherwise, they were under an obligation to disclose the reference. Any issue regarding the current state of discovery or the need for expert opinion in 2024 is completely irrelevant and an improper basis for not responding. Thus, please provide a fulsome response to this interrogatory that provides, for each reference, “why You contend the reference was not material to patentability of the claim, why You contend the reference was cumulative of the art that was already before the USPTO, and why You contend the USPTO would have allowed the claim had it been aware of the reference.”

Interrogatory No. 5

Interrogatory No. 5 asks WellcomeMat to, *inter alia*, “[i]dentify each [WellcomeMat] Product that at any time embodied or practiced any Asserted Claim of the Asserted Patent” and provide for

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each such product “on a limitation-by-limitation basis, all facts demonstrating that the Product embodied or practiced the Asserted Claim.”

WellcomeMat’s response identifies the following WellcomeMat products and/or systems as practicing each of the Asserted Claims of the ’286 Patent: WellcomeMat Enterprise; WellcomeMat Pro; WellcomeMat Professional; WellcomeMat Pro-Classic; and WellcomeMat Filmmaker. WellcomeMat’s response then provides “representative exemplary screenshots” purportedly demonstrating that WellcomeMat’s products perform each step of the Asserted Claims. However, WellcomeMat’s response fails to identify *which* WellcomeMat product the representative screenshots belong to. Please supplement your response to include this information. Further, if this product is representative of the other WellcomeMat products, please state so explicitly, and include in your response that there is no material difference in how the WellcomeMat products practice the asserted claims of the patent.

In addition, the representative screenshots do not describe *how* each limitation of each asserted claim is met. Instead, including only screenshots with no explanation leaves Aylo guessing as to what about each screenshot WellcomeMat believes is relevant to each claim limitation and how that screenshot allegedly demonstrates that the limitation has been met. This is exacerbated by the fact that some screenshots are reused multiple times for different claim limitations. Please supplement your response to include a narrative description for each screenshot explaining how the screenshot shows that the representative WellcomeMat product practices the corresponding claim limitation. WellcomeMat clearly already has this information as it must have gone through this analysis in determining that the products practice the asserted claims.

Interrogatory No. 7

Interrogatory No. 7 asks WellcomeMat: “For each Asserted Claim that You accuse Defendants of indirectly infringing, describe in detail the facts that support such accusation, including the identity of any third party that You contend has directly infringed the Asserted Claim; on a limitation-by-limitation basis, the acts of the third party that You contend constitute direct infringement of each Asserted Claims; and each of Defendants’ actions that You contend have induced or contributed to the third party’s direct infringement, and identify any corroborating Documents, Things, and witnesses.”

In its response, WellcomeMat objects to this interrogatory as “premature and improper to the extent it purports to require WellcomeMat to marshal all of its evidence before discovery is complete.” However, WellcomeMat’s allegations that Aylo indirectly infringes the Asserted Patent were included as part of its Complaint. Dkt. No. 1 ¶ 31. (“Aylo S.à r.l., including through Aylo Freesites, Aylo Premium, 9219-1568 Quebec, and the other Aylo entities, directly or indirectly have induced Texan content partners to upload video content to Pornhub and categorize

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such content with ‘Action Tags’ using one or more platforms, described below, in a manner that infringes the ’286 Patent (<https://help.pornhub.com/hc/en-us/articles/4419860542483-Video-Tags>).” Thus, WellcomeMat should supplement its response to at least include the facts that support its indirect infringement accusations as stated in the Complaint, which should all already be in WellcomeMat’s possession and not subject to the need for any discovery from Aylo (unless WellcomeMat made these allegations without any factual bases). At a minimum, please identify who the direct infringer is, what acts constitute direct infringement, and the actions taken by Aylo that allegedly induced that direct infringement.

In addition, to the extent WellcomeMat is seeking to add new allegations of indirect infringement that are not included in its Amended Complaint (e.g., “WellcomeMat alleges that Aylo has indirectly infringed, and continues to indirectly infringe, the Asserted Claims of the ’286 Patent by taking active steps to induce, encourage, facilitate, direct, and/or control the direct infringement of one or more of its co-defendants and/or subsidiaries, including Aylo Global Entertainment, Inc., Aylo USA Incorporated, Aylo Billing US Corp., and Aylo Holdings USA Corp. ... and/or companies such as Brazzers, MOFOS, Babes.com, Twistys, Men.com, RealityKings.com, and DigitalPlayground.com; and the users and/or visitors of the Accused Websites”), WellcomeMat must seek to amend its Complaint to include these allegations and cannot merely rely on an interrogatory response to raise such claims.

Interrogatory No. 10

Interrogatory No. 10 asks WellcomeMat to, *inter alia*, “[s]eparately for each Asserted Claim, state all factual and legal bases for Your contention that the Asserted Claim is not anticipated and/or rendered obvious by each Invalidity Reference.”

WellcomeMat refers to its responses to other interrogatories and its Patent Owner Preliminary Response to Aylo’s IPR petition, but otherwise claims this interrogatory is premature and refuses to provide a substantive response at this time. We note, however, that WellcomeMat does not need any additional information or discovery from Aylo to provide a substantive response to this interrogatory. Everything WellcomeMat needs is in its possession or control. Thus, we ask that WellcomeMat please substantively respond to this interrogatory.

Interrogatory No. 11

Interrogatory No. 11 asks WellcomeMat to: “Separately for each Accused Website, on a limitation-by-limitation basis for each Asserted Claim, identify and describe each and every Document, Thing, and/or witness that You contend supports Your allegations of infringement (as, for example, found in Your Infringement Contentions).”

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WellcomeMat's response is deficient because it merely lists volumes of documents pursuant to Federal Rule of Civil Procedure 33(d) without any explanation or identification of which documents are relevant to which asserted claim, let alone claim limitations. As explained above, Rule 33(d) allows a party to specify records to be reviewed if "the burden of deriving or ascertaining the answer will be substantially the same for either party." Rule 33(d) also requires the party to "specify[] the records that must be reviewed, in sufficient detail to enable the interrogating party to locate and identify them as readily as the responding party could." Here, it is extremely burdensome, if not impossible, for Aylo to derive or ascertain the requested information from the voluminous documents cited by WellcomeMat. Moreover, the interrogatory requests that WellcomeMat identify what *it* believes is relevant to each limitation, something Aylo cannot do regardless as Aylo cannot know this information unless WellcomeMat tells it. Thus, please supplement your response to at least identify by Bates ranges the documents that you contend supports your allegations of infringement for each Accused Website on a limitation-by-limitation basis for each Asserted Claim.

Interrogatory No. 14

Interrogatory No. 14 asks WellcomeMat to, *inter alia*, "[i]dentify and describe each and every Document, Thing, and witness that You contend supports the allegations You made in the Amended Complaint that WellcomeMat had, prior to filing the Litigation, put Defendants on notice of infringement of the Asserted Patent."

WellcomeMat's response makes the following claim without citing any support: "During the call, Mr. Sterner pointed out that Aylo was also violating WellcomeMat's intellectual property, including the '286 Patent. Mr. Sterner asked Ms. Cricco-Lizza whether Aylo would negotiate for a license to WellcomeMat's intellectual property, including the '286 Patent." Please confirm that WellcomeMat's failure to include a citation for this statement was intentional. To the extent that WellcomeMat has any documents or other information within its possession, custody, or control that support this allegation, it must produce such document(s) and information and timely supplement its response.

Interrogatory No. 15

Interrogatory No. 15 asks WellcomeMat: "For each Accused Website, identify when WellcomeMat obtained a membership or login credential to the Accused Website, and identify all corroborating Documents, Things, and witnesses."

WellcomeMat's response states it "is available to meet and confer to discuss what relevant, properly discoverable information Aylo seeks via this interrogatory." But we do not think a meet and confer is necessary, as the requested information is clearly not privileged or otherwise

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protected from discovery and is relevant to at least WellcomeMat's allegation that it was aware of Aylo's infringement at least as of April 2021 and purportedly offered to negotiate a patent license at that time on that basis. See Response at 65 ("During the April 9, 2021 call . . . Mr. Sterner pointed out that Aylo was also violating WellcomeMat's intellectual property, including the '286 Patent. Mr. Sterner asked Ms. Cricco-Lizza whether Aylo would negotiate for a license to WellcomeMat's intellectual property, including the '286 Patent."). As such, this interrogatory must be answered.

Interrogatory No. 17

Interrogatory No. 17 asks WellcomeMat to: "Describe in detail Your monthly sales, revenue, expenses, costs, and profit data relating to each of the WellcomeMat Products from October 13, 2017, to the present."

In response, WellcomeMat cites certain documents under Federal Rule of Civil Procedure 33(d). However, none of the cited documents appear to provide the requested financial information specific to any WellcomeMat products, including the products identified in WellcomeMat's response to Interrogatory No. 5: WellcomeMat Enterprise; WellcomeMat Pro; WellcomeMat Professional; WellcomeMat Pro-Classic; and WellcomeMat Filmmaker. For example, from the WellcomeMat Profit and Loss summary report produced at WM-AYLO_00008072, Aylo cannot ascertain how much revenue was generated for any particular WellcomeMat Product. Income categories such as "Enterprise Subscriptions" may not relate to WellcomeMat products at all and could simply be a subscription fee charged to customers. Similarly, other income categories like "Customization and Integration" or "Site Subscriptions" are unclear and could have no relevance to any WellcomeMat products.

Please supplement your response to provide a narrative explanation of the information requested in this interrogatory. Specifically, please describe in detail WellcomeMat's monthly sales, revenue, expenses, costs, and profit data relating to each of the WellcomeMat Products from October 13, 2017, to the present. Alternatively, please produce documents where this information can be readily derived or ascertained.

* * *

Thank you for your prompt attention to these matters. As noted at the outset, please supplement your responses with the requested information no later than **August 23, 2024**.

Best regards,

/s/ Ralph A. Dengler

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cc: Counsel of Record