

# EXHIBIT H



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VIA ECF

8 April 2019

Honorable Paul G. Gardephe  
United States District Judge  
United States District Court - Southern District of New York  
40 Foley Square, Room 2204  
New York, New York 10007

Re: *Mediated Ambiance LLC v. TouchTunes Music Corp.*, No. 1:18-cv-02624-PGG  
**Letter Motion for Infringement and Invalidity Contentions**  
***Response to TouchTunes' Letter in Opposition [Dkt. 30]***

Your Honor:

Mediated Ambiance writes to briefly respond to TouchTunes' letter opposing our request for fulsome invalidity contentions.<sup>1</sup>

TouchTunes' letter highlights that the parties previously agreed to the schedule, and that the parties are in compliance with the local rules concerning

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<sup>1</sup> TouchTunes styled its letter in opposition as pursuant to §IV(A) of Your Honor's Individual Rules, which concerns "Pre-Motion Conferences." While Mediated Ambiance has no objection to a conference, we believe that the parties' positions, and the relief requested, have been sufficiently and clearly stated in the letters (Dkt. 29, 30, and 31) and do not believe that either a conference or additional motion briefing is necessary unless the Court would find it helpful.

infringement and invalidity contentions. And, Mediated Ambiance agrees—the parties have met the minimum requirements of the rules. But TouchTunes misses the point. The purpose of the Local Patent Rules is to provide notice of the other side’s claims and defenses, streamlining the discovery process and providing the parties a clear path to narrowing issues for trial. The problem in this instance is not that TouchTunes has broken the rules, rather the problem is that Touchtunes has provided so many prior art references without *any* substantive explanation as to their reads on the asserted patents that the purposes of notice and streamlining are completely thwarted by sheer numbers.

TouchTunes’ letter does not dispute that, without more detailed invalidity contentions, TouchTunes’ actual invalidity contentions<sup>2</sup> are effectively shielded from the fact discovery process (a majority of the timeline of this case) because the subject matter is not encompassed by document requests, and the numbers of references involved prevent effective deposition. This is exactly the situation that Local Civil Rule 33.3(b) remedies. It provides that “interrogatories . . . may only be served if they are a more practical method of obtaining the information sought than a request for production or deposition.”

TouchTunes’ letter shifts the discussion away from Local Civil Rule 33.3(b) to expert discovery, the parties’ agreement on a schedule, and downplays the problem of the inability to take effective, complete discovery. These arguments are red

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<sup>2</sup> E.g. which of the hundreds of references that TouchTunes asserted it will actually present at trial, and how those references purportedly map onto the patent claims at issue.

herrings. Mediated Ambiance has no issue with the agreed upon expert discovery schedule. The issue is that, without relief, a large portion of TouchTunes' case is effectively shielded from discovery for the majority of this schedule, *until* the expert discovery phase.

TouchTunes downplays the fact that Mediated Ambiance will be unable to depose fact or 30(b)(6) witnesses on TouchTunes invalidity case, baldly asserting that "such a deposition would be inappropriate." This argument by TouchTunes effectively concedes the standard for serving interrogatories under L. Rule 33.3(b) – if depositions are "inappropriate" then written discovery is the only "more practical" way to obtain the information.

Likewise, TouchTunes downplays the fact that Mediated Ambiance will be unable to pursue fact discovery into TouchTunes' invalidity contentions, calling it "speculative, premature, and hypothetical." This is an incredible statement, coming the very next paragraph after TouchTunes concedes that it will be effectively undeposable and rejecting TouchTunes' proposal for more detailed contentions. In other words, TouchTunes argues that Mediated Ambiance is effectively not allowed to obtain fact discovery about what is likely to be TouchTunes' primary (and perhaps, only) defenses to Mediated Ambiance's claims.

Without more detailed invalidity contentions, which will narrow the issues and allow meaningful fact discovery into TouchTunes' actual claims, the effective immunity of TouchTunes' invalidity case from fact discovery is anything but hypothetical. Mediated Ambiance respectfully requests that its motion be granted.

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8 April 2019

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Date

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