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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

COLLEGENET, INC., a Delaware corporation,

Plaintiff,

v.

XAP CORPORATION, a Delaware corporation,

Defendant.

No. CV-04-793-HU

ORDER/FINDINGS &
RECOMMENDATION

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5 HUBEL, Magistrate Judge:

6 Plaintiff CollegenET, Inc. filed this action against defendant
7 XAP Corporation bringing claims of unfair competition under the
8 Lanham Act and common law. Prior to filing this action, plaintiff
9 had filed claims of patent infringement against defendant in a
10 separate case. The other case has been assigned case number CV-03-
11 1229-HU.

12 Plaintiff moves to consolidate the two cases. Plaintiff has
13 filed separate motions to consolidate in each case. In the motion
14 filed in the older patent case, 03-1229, plaintiff alternatively
15 moves to amend its Complaint in that case to add the unfair
16 competition claims plaintiff brought in this case.

17 In an Order issued in the older patent case, 03-1229, issued
18 simultaneously with this Order, I denied plaintiff's motion to
19 consolidate in the 03-1229 case, and granted plaintiff's
20 alternative motion to amend. Accordingly, I deny plaintiff's
21 motion to consolidate filed in the instant new unfair competition
22 case, 04-793. I deny plaintiff's request for oral argument on the
23 motion to consolidate and strike the previously scheduled July 19,
24 2004 oral argument on that motion.

25 On July 6, 2004, defendant moved to dismiss the Complaint in
26 this case. I deny that motion as moot. Defendant may refile the
27 motion in the older patent case, 03-1229, after plaintiff formally
28 files its amended pleading.

1 Finally, inasmuch as plaintiff is now allowed to bring the
2 claims raised in this case as new claims in the older patent case,
3 03-1229, I recommend that this new unfair competition case, 04-793,
4 be dismissed¹, without prejudice.

5 CONCLUSION

6 Plaintiff's motion to consolidate (#5) and defendant's motion
7 to dismiss (#9) are denied as moot. Oral argument on the motion to
8 consolidate is denied and stricken from the Court's July 19, 2004
9 calendar. Because the claims in this case will now become part of
10 the pending patent case, 03-1229, I recommend that this case be
11 dismissed without prejudice and that a judgment of dismissal be
12 entered.

13 SCHEDULING ORDER

14 The above Findings and Recommendation regarding the dismissal
15 of this case, will be referred to a United States District Judge
16 for review. Objections, if any, are due July 29, 2004. If no
17 objections are filed, review of the Findings and Recommendation
18 will go under advisement on that date.

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25 ¹ Given that there is not full consent to Magistrate Judge
26 jurisdiction in this case, and given that the Complaint's
27 dismissal is a dispositive action (in contrast to the rulings on
28 plaintiff's consolidation motion and defendant's dismissal
rather than as an Order.

