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 10 EIT Holdings LLC

11  
 12 UNITED STATES DISTRICT COURT  
 13 NORTHERN DISTRICT OF CALIFORNIA  
 14 SAN JOSE DIVISION

15  
 16 EIT HOLDINGS LLC, a Delaware company,  
 17 Plaintiffs,  
 18 vs.  
 19 LINKEDIN CORPORATION, a Delaware  
 Corporation,  
 20 Defendants.

Case No. CV 11-02465 PSG

**MOTION TO CONSIDER WHETHER  
 CASES SHOULD BE RELATED  
 PURSUANT TO CIVIL L.R. 3-12**

21  
 22 Pursuant to Civil L.R. 3-12, EIT Holdings LLC ("EIT") files this Motion to Consider  
 23 Whether Cases Should be Related Pursuant to Civil L.R. 3-12. This brief will show that a  
 24 ruling has already been made that the case against LinkedIn Corporation ("LinkedIn") is not  
 25 related to any pending civil action.

26 **I. BACKGROUND OF THE PROCEEDINGS**

27 EIT filed suit against LinkedIn and eight additional Defendants (No. C-10-05623 WHA)  
 28 alleging infringement of United States Patent No. 5,828,837 ("the '837 patent") entitled

1 “Computer Network System and Method for Efficient Information Transfer.” Though each  
2 Defendant was alleged to violate the same two claims of the same patent, there were no  
3 allegations that any of the Defendants acted in concert.

4 On May 12, 2011, in what has become the law of this case, Judge Alsup dismissed all  
5 Defendants but for the first-named defendant Yelp!, Inc., holding that the additional Defendants  
6 had been misjoined.

7 In his Order, Judge Alsup said that even under rule 3-12, the cases would not be related.

8 Given the disparity in defendants, websites, and other disparate  
9 issues discussed herein like damages, willfulness, and  
10 discovery supervision, it is worth adding that the allegations  
11 against each defendant would not be related under our civil  
12 local rules even if brought here as separate actions. See Civil  
13 L.R. 3-12(a)(2).

14 (Order Dismissing All Defendants Except Yelp! p. 4, Ins. 7-10, attached hereto as Exhibit A.  
15 hereinafter “Order” or “Ex. A”.)

16 As suggested, EIT now initiates this action against LinkedIn as a separate action. The  
17 allegations against LinkedIn and the relief claimed remain identical to the action first filed in  
18 Judge Alsup’s Court.

## 19 **II. FACTS**

20 In its Points and Authorities on Misjoinder, EIT argued that each Defendant infringed  
21 claims 40 and 41 of the ‘837 patent. Furthermore, EIT alleged that each of Defendants’  
22 infringing websites worked in a similar manner.

23 Notwithstanding those arguments, Judge Alsup held that the Defendants were not so  
24 closely related as to merit joinder. “They are unrelated companies operating unrelated  
25 websites,” Judge Alsup states, holding that the case does not meet the “same transaction or  
26 occurrence test” necessary for joinder. (Ex. A, p. 1, Ins. 19-21)

27 Judge Alsup stressed that the accused Defendants were likely to have “competing  
28 interests and strategies” (Ex. A p. 2, Ins. 21-22) and says that “[e]ach defendant has been  
thrown into a mass pit to suit plaintiff’s convenience. (Ex. A, p. 2, ln. 20) Judge Alsup adds,  
“the damages issues, willfulness issues, time frames, accused conduct, and discovery issues will

1 obviously vary from company to company.” (Ex. A, p. 3, Ins. 17-19.) Judge Alsup concludes  
2 that “Plaintiff cannot escape the fact that it is suing unrelated defendants for their own  
3 independent acts of patent infringement.” (Ex. A, p. 3, Ins. 3-4). He further states that even  
4 under local rule 3-12(a), these cases would fail to be related. “It is worth adding that the  
5 allegations against each defendant would not be related under our civil local rules even if  
6 brought here as separate actions. See Civil L.R. 3-12(a)(2).” (Ex. A, p. 4, Ins. 7-9)

### 7 **III. ARGUMENT**

#### 8 **A. Law of the Case**

9 “Under the law of the case doctrine, when a court decides upon a rule of law, the decision  
10 continues to govern the same issue in subsequent stages of the same case.” *Christianson v. Colt*  
11 *Industries Operating Corp.*, 486 U.S. 800, 816, (1988). “For the doctrine to apply, the issue in  
12 question must have been decided explicitly or by necessary implication in [the] previous  
13 disposition.” *Milgard Tempering Inc. v. Selas Corp. of America*, 902 F2d 703, 715 (9th Cir. 1990).

14 In the previous case, Judge Alsup looked at the issue of whether or not these cases were  
15 related and concluded they were not. And while Judge Alsup needed only to determine if they  
16 were related for purposes of joinder, he took his analysis one step forward and declared them to  
17 also fail the test under local rule 3-12(a). Under the law of the case doctrine, this Court should  
18 not revisit the issue, but should stand behind Judge Alsup’s Order, which declares these cases  
19 unrelated.

#### 20 **B. Civil Local Rule 3-12(a)**

21 Even if this Court were to disagree that this issue has already been determined due to  
22 the law of the case doctrine, it would still fail the test established by Civil Local Rule 3-12. L.R.  
23 3-12 defines a “related case” as one that concerns “substantially the same parties, property,  
24 transaction or event” and “[i]t appears likely that there will be an unduly burdensome  
25 duplication of labor and expense or conflicting results if the cases are conducted before  
26 different Judges.” *Hynix Semiconductor, Inc. v. Rambus, Inc.*, 2008 U.S. Dist. LEXIS 68625,  
27 12-15 (N.D. Cal. Aug. 24, 2008). In *Hynix Semiconductor*, the Court was asked to determine if  
28 a newly filed case was related to a series of other cases in the same Court which involved some,

1 but not all of the same patents. Because the Court had not had many opportunities to look at  
2 the related case rule in the context of patent litigation, it looked to the precedent set in *Target*  
3 *Therapeutics, Inc. v. Scimed Life Systems, Inc.*, 1996 WL 241692 (N.D. Cal. May 2, 1996), in  
4 which the court denied a motion to relate in litigation involving catheter technology.

5 In *Target Therapeutics*, the court identified three reasons for denying the motion to  
6 relate. First, the court noted a minor difference in the identity of the entities in the two cases in  
7 that the second case involved the subsidiary of one of the parties in the first case, but not the  
8 parent corporation itself. *Id.*, at ¶13. More importantly, the court noted that the catheters at  
9 issue in the first case were "significantly different" from the catheters at issue in the second  
10 case. *Id.* Finally, the parties failed to explain how relating the two cases would preserve judicial  
11 economy or prevent conflicting rulings.

12 In the present case, there's an argument that the first prong may be met since the same  
13 patent (property) is at issue. However, there are different parties and this Court has already  
14 held that the transactions and events are not related. The second part of the test dealing with  
15 the undue burden of appearing before different judges is not met. According to Judge Alsup,  
16 "the infringement issues will vary from defendant to defendant because, as explained at the case  
17 management conference, their websites implement different functionalities, through different  
18 software, that works in different ways. Additionally, the damages issues, willfulness issues,  
19 time frames, accused conduct, and discovery issues will obviously vary from company to  
20 company." (Ex. A. Ins. 15-19.) Judge Alsup adds:

21 It is true that plaintiff asserts the same two patent claims  
22 against all defendants. At most, this means that some claim  
23 construction issues will overlap. While it would be nice to have  
24 an identical set of elaborations on the asserted claims for each  
25 accused infringer, even that may not practical, for the  
26 differences in the websites themselves will provoke differences  
27 in which words and slants in the claim language really  
28 matter.... In short, whatever common issues may exist from  
website to website will be overwhelmed by the individual  
issues of claim construction, damages, willfulness, and  
discovery supervision. Given the disparity in defendants,  
websites, and other disparate issues discussed herein like  
damages, willfulness, and discovery supervision, it is worth  
adding that the allegations against each defendant would not be  
related under our civil local rules even if brought here as  
separate actions. See Civil L.R. 3-12(a)(2).

1 (Ex. A, p. 3, ln. 23-p. 4, ln. 10) Judge Alsup also offered to coordinate claim construction in  
2 any newly-filed cases if the parties and judges believe the exercise will be worthwhile in  
3 promoting judicial efficiency. (Ex. A, lns. 10-13)

4 **IV. CONCLUSION**

5 The question of whether or not these cases are related has already been studied and  
6 ruled upon by Judge Alsup. Because there are no new facts or laws that were not considered by  
7 Judge Alsup at the time, his ruling that the cases are unrelated must stand under the law of the  
8 case doctrine. This Court should therefore hold that the above-captioned case is unrelated to  
9 Civil Case No. C-10-05623 WHA.

10 Dated: May 24, 2011

Respectfully submitted,

11  
12 By: /s/ Benedict O'Mahoney

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28 **ATTORNEYS FOR PLAINTIFF**

# **EXHIBIT A**

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IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

EIT HOLDINGS LLC, a Delaware company,  
Plaintiff,

No. C 10-05623 WHA

v.

YELP!, INC., a Delaware corporation, *et al.*,  
Defendants.

**ORDER DISMISSING  
ALL DEFENDANTS  
EXCEPT YELP!, INC.  
FOR MISJOINDER  
UNDER FRCP 21**

Plaintiff EIT Holdings LLC named nine defendants in this patent-infringement action, accusing each defendant of infringing the same two patent claims. Following the voluntary dismissal of Memory Lane, Inc., eight defendants remain. They are unrelated companies that operate unrelated websites. Significantly, they are not alleged to have acted in concert to infringe plaintiff's asserted patent. They share no common transaction or occurrence.

As set forth in FRCP 20(a)(2), multiple defendants may be joined together in one action if "(A) any right to relief is asserted against them jointly, severally, or in the alternative with respect to or arising out of the same transaction, occurrence, or series of transactions or occurrences; and (B) any question of law or fact common to all defendants will arise in the action." In situations of misjoinder and nonjoinder of parties, FRCP 21 provides that "[o]n motion or on its own, the court may at any time, on just terms, add or drop a party."

1           “The Ninth Circuit has interpreted the phrase ‘same transaction, occurrence, or series of  
2 transactions or occurrences’ to require a degree of factual commonality underlying the claims.”  
3 *Bravado Int’l Group Merchandising Servs. v. Cha*, 2010 WL 2650432, at \*4 (C.D. Cal.  
4 June 30, 2010) (citing *Coughlin v. Rogers*, 130 F.3d 1348, 1350 (9th Cir. 1997)). Typically, this  
5 means that a party “must assert rights . . . that arise from *related activities* — a transaction or an  
6 occurrence or a series thereof.” *Ibid*. Plaintiff argues that the issuance of its asserted patent could  
7 qualify as a common transaction, but this argument is not supported by any binding authority  
8 (Dkt. No. 84 at 3).

9           As stated, plaintiff has not alleged that the named defendants in this action have engaged  
10 in related activities or have otherwise acted in concert. As such, proof of infringement  
11 necessarily would require proof of facts specific to each individual defendant and to each accused  
12 website. The mere fact that the nine defendants all operate websites that allow targeted  
13 advertising does nothing to obviate the bone-crushing burden of individualized methods of proof  
14 unique to each website. Similarly, the fact that seven of the defendants “are represented by the  
15 same counsel, who filed a single Answer and Counterclaims for all seven” is not availing  
16 (*id.* at 2). Factual differences among the accused websites will require separate discovery,  
17 evidence, and proof regardless whether the same or different lawyers are involved. Plaintiff has  
18 not proposed — and defendants have not consented to — a common method of proof. Again,  
19 there is no conspiracy claim. There is no claim that any defendant induced another to infringe.  
20 Each defendant has simply been thrown into a mass pit with others to suit plaintiff’s convenience.

21           In this connection, the accused defendants — who will surely have competing interests  
22 and strategies — also are entitled to present individualized assaults on questions of non-  
23 infringement, invalidity, and claim construction. *Cf. Nasalok Coating Corp. v. Nylok Corp.*,  
24 522 F.3d 1320, 1326 (Fed. Cir. 2008) (“[W]e have explicitly held that a determination of patent  
25 infringement in an infringement suit, or even an explicit determination of patent validity, does not  
26 preclude the assertion of an invalidity defense in a second action involving different products.”);  
27 *Texas Instruments, Inc. v. Linear Techs. Corp.*, 182 F. Supp. 2d 580, 586 (E.D. Tex. 2002)  
28 (recognizing that “defendants in a later proceeding involving previously construed patents should



1 have the opportunity to brief and argue the issue of claim construction, notwithstanding any  
2 policy in favor of judicial uniformity”).

3 Plaintiff cannot escape the fact that it is suing unrelated defendants for their own  
4 independent acts of patent infringement. In such situations, numerous courts have found that  
5 joinder is improper. *See, e.g., Philips El ecs. N. Am. Corp. v. Contec Corp.*, 220 F.R.D. 415, 417  
6 (D. Del. 2004) (“Allegations of infringement against two unrelated parties based on different acts  
7 do not arise from the same transaction.”); *Androphy v. Smith & Nephew, Inc.*,  
8 31 F. Supp. 2d 620, 623 (N.D. Ill. 1998) (holding that the joinder of three manufacturers in a  
9 patent infringement suit was improper because the claims did not arise from a common  
10 transaction or occurrence when the manufacturers were separate companies that independently  
11 designed, manufactured, and sold different products); *New Jersey Mach. Inc. v. Alford Indus.,*  
12 *Inc.*, 1991 WL 340196, at \*2 (D.N.J. Oct. 7, 1991) (holding in a patent infringement suit that  
13 “claims of infringement against unrelated defendants, involving different machines, should be  
14 tried separately against each defendant”).

15 The infringement issues will vary from defendant to defendant because, as explained at  
16 the case management conference, their websites implement different functionalities, through  
17 different software, that works in different ways. Additionally, the damages issues, wilfulness  
18 issues, time frames, accused conduct, and discovery issues will obviously vary from company to  
19 company. Finally, while a common defense such as inequitable conduct may arise,  
20 FRCP 20(a)(2)(A) does not encompass defenses asserted against a plaintiff. Only a “right to  
21 relief” asserted *by the plaintiff* can satisfy the requirements for joining defendants under  
22 FRCP 20(a)(2)(A).

23 It is true that plaintiff asserts the same two patent claims against all defendants. At most,  
24 this means that *some* claim construction issues will overlap. While it would be nice to have an  
25 identical set of elaborations on the asserted claims for each accused infringer, even that may not  
26 be practical, for the differences in the websites themselves will provoke differences in which  
27 words and slants in the claim language really matter. These differences will lead one defendant to  
28 focus entirely upon the meaning of certain words or phrases in a claim and another defendant to

1 focus entirely on different words or phrases even though they are in the same claim. In other  
2 words, the claim-construction work likely will not be the same for all defendants, even though  
3 they are facing trial on the same two patent claims. The claim-construction work must be adapted  
4 to the actual issues being litigated over the varying accused acts. In short, whatever common  
5 issues may exist from website to website will be overwhelmed by the individual issues of claim  
6 construction, damages, wilfulness, and discovery supervision.

7 Given the disparity in defendants, websites, and other disparate issues discussed herein  
8 like damages, wilfulness, and discovery supervision, it is worth adding that the allegations against  
9 each defendant would *not* be related under our civil local rules even if brought here as separate  
10 actions. See Civil L.R. 3-12(a)(2). If, however, the actions are re-filed in this district, the  
11 undersigned judge would be willing to coordinate certain claim construction issues (and those  
12 issues only) if the parties so stipulate, the assigned judge(s) consent, and the parties make a  
13 showing that the same phrases in the same claims require interpretation.

14 For the foregoing reasons, pursuant to a finding of misjoinder under FRCP 21, all  
15 remaining defendants except Yelp!, Inc. are **DISMISSED**. This dismissal is without prejudice to  
16 the claims being re-filed as separate actions against the different defendants. Judgment will be  
17 entered accordingly.

18  
19 **IT IS SO ORDERED.**

20  
21 Dated: May 12, 2011.

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24 WILLIAM ALSUP  
25 UNITED STATES DISTRICT JUDGE  
26  
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28