

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
MARSHALL DIVISION

WIRELESS RECOGNITION
TECHNOLOGIES LLC,

Plaintiff,

vs.

A9.COM, INC., AMAZON.COM, INC.,
GOOGLE INC., NOKIA, INC., and
RICOH INNOVATIONS, INC.,

Defendants.

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Civil No. 2:10-CV-00364-TJW-CE

WIRELESS RECOGNITION
TECHNOLOGIES LLC,

Plaintiff,

vs.

NOKIA CORPORATION and RICOH
COMPANY, LTD.,

Defendants.

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Civil No. 2:10-CV-00365-TJW

WIRELESS RECOGNITION
TECHNOLOGIES LLC,

Plaintiff,

vs.

A9.COM, INC., AMAZON.COM, INC.,
GOOGLE INC., NOKIA, INC., and
RICOH INNOVATIONS, INC.,

Defendants.

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Civil No. 2:10-CV-00577-TJW

**WIRELESS RECOGNITION
TECHNOLOGIES LLC,**

Plaintiff,

vs.

**NOKIA CORPORATION and RICOH
COMPANY, LTD.,**

Defendants.

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Civil No. 2:10-CV-00578-TJW

**DEFENDANTS' OPPOSITION TO PLAINTIFF WIRELESS RECOGNITION
TECHNOLOGIES LLC'S MOTION TO CONSOLIDATE PURSUANT TO
FEDERAL RULE OF CIVIL PROCEDURE 42(a) AND LOCAL RULE CV-42(b)
AND DEFENDANTS' CROSS-MOTION TO SEVER PURSUANT TO
RULES 20 AND 21 OF THE FEDERAL RULES OF CIVIL PROCEDURE**

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I. INTRODUCTION

Plaintiff Wireless Recognition Technologies LLC (“WRT”) moves the Court to consolidate four cases for all purposes, including trial. Although the defendants in the four cases (collectively “Defendants”) are amenable to sensible consolidation of discovery and claim construction proceedings, Defendants oppose full consolidation.

In the first two actions, WRT asserts U.S. Patent 7,392,287 (“the ‘287 patent”) against different and unrelated products from multiple defendants. The products are used for different applications and were developed independently by different defendants. In the third and fourth actions, WRT asserts U.S. Patent 7,856,474 (“the ‘474 patent”) against the same disjointed set of defendants and accused products.

Preliminarily, Defendants note that motions to transfer the actions to the Northern District of California are pending. Defendants believe that the motions to transfer should be decided before this motion is considered to assure that the Court that will actually hear the cases can structure them for discovery, claim construction, dispositive motions, and trial.

Substantively, WRT’s motion mixes two sets of issues: (1) whether all of the cases against all of the parties and all of the products should be consolidated now for trial, and (2) whether all of the cases should be consolidated for all pretrial proceedings according to the schedule in place in the first case. Defendants address these issues separately.

Regarding the issue of how to structure the cases for trial, Defendants believe the issue is premature and should be deferred. It makes no sense to consolidate any cases for trial now because the earliest trial date in any of the actions is not until December 2, 2013, and the issues to be tried have not yet been sufficiently developed to determine how best to structure the trials. There is ample time to let the issues develop before contemplating how the trials should be structured, and doing so will not jeopardize the first trial date.

Only the first case, which involves only the ‘287 patent, is currently proceeding. Although the parties are exchanging infringement and invalidity contentions in that action, no discovery has been taken, and the parties have not yet begun claim construction proceedings.

Nothing has happened in the cases involving the '474 patent, and WRT has yet to serve infringement contentions for that patent. Moreover, the '474 patent is the subject of an *inter partes* reexamination brought by a non-party to any of the four cases. The '474 patent claims have been rejected in the reexamination, and original and amended claims are being considered.

Accordingly, the parties do not yet know what patent claims, defenses, or products will ultimately be tried in any of the cases. Rather than spend resources briefing and deciding how to structure any trials now, Defendants recommend that the Court set a deadline by which the parties should bring motions regarding how best to structure any trials. That deadline should be closer to the first trial date and sufficiently far from today to allow the issues to develop. Once the Court sees what issues and parties remain in the cases, it can then decide how best to package the issues for trial.

If the Court is inclined to reach the issue of how to structure the cases for trial at this point, Defendants have no choice but to cross-move pursuant to Rules 20 and 21 of the Federal Rules of Civil Procedure to sever the cases against each group of defendants and accused products. The accused products are unrelated and were independently developed by different defendants. WRT has not alleged and could not establish that the Defendants all engaged in “the same transaction or occurrence” in developing or selling the accused products. Even if the cases are severed, however, Defendants are still amenable to consolidating discovery and claim construction proceedings. Below, Defendants propose a more sensible and fair way to divide the trials than the complete consolidation that WRT proposes.

Regarding the issue of whether the cases should be consolidated and placed on the schedule entered in the first action, Defendants are not opposed to consolidating and coordinating discovery and claim construction, and have previously made proposals to WRT that would have accomplished such consolidation.¹ Given the status of the various cases, however, WRT's request to consolidate the cases according to the schedule for the first case has now

¹ WRT refused the offer because WRT also wanted Defendants to agree to have everything tried in one action.

become unworkable. WRT did not serve infringement contentions on the '474 patent when it served them for the '287 patent, and the first case is now far ahead of the others. Moreover, in order to overcome the PTO's rejection of all of the claims of the '474 patent in the ongoing *inter partes* reexamination, WRT is amending some of the claims. The parties do not know what, if any, claims of the '474 patent will survive the reexamination and, to the extent that any do, it is almost certain that some of them will contain amended limitations. Thus, the reexamination engenders uncertainty that makes it difficult for the parties to develop their infringement and invalidity cases for the '474 patent. Nevertheless, Defendants are willing to negotiate a joint schedule with the goal of consolidating most discovery and having only a single claim construction proceeding on both patents. That consolidation will, however, require some adjustments to the schedule that is operative in the first case.

II. FACTS

A. The Four Cases

On September 14, 2010, WRT filed an action captioned *Wireless Recognition Technologies LLC v. A9, et al.*, No. 2:10-cv-00364-TJW-CE (the "364 Action"), against A9.com, Inc. ("A9"), Amazon.com, Inc. ("Amazon"), Google Inc. ("Google"), Nokia, Inc. ("Nokia"), and Ricoh Innovations, Inc. ("Ricoh"). (Dkt. No. 1.)² The complaint and WRT's infringement contentions assert that the following products infringe one or more claims of the '287 patent: A9's Snaptell product, Amazon's Remembers and Price Check features, Google's Goggles and Shopper mobile applications, Nokia's Point and Find Mobile application, and applications that Ricoh allegedly makes for the iPhone, including French Rev. and DriveTube.

On the same day that it filed the 364 Action, WRT filed an action captioned *Wireless Recognition Technologies LLC v. Nokia Corporation, et al.*, No 2:10-cv-00365-TJW (the "365 Action"). In the 365 Action, WRT alleges that Nokia Corporation and Ricoh Company Ltd. ("Ricoh Company") also infringe the '287 patent. The products accused of infringement are

² Unless otherwise indicated, all docket citations are to the docket in the 364 Action.

Nokia's Point and Find Mobile application, and applications that Ricoh allegedly makes for the iPhone, including French Rev. and DriveTube. Nokia Corporation and Ricoh Company are foreign entities and affiliates of Nokia and Ricoh, respectively.

On December 21, 2010, WRT filed an action captioned *Wireless Recognition Technologies LLC v. A9, et al.*, No. 2:10-cv-00577-TJW-CE (the "577 Action"), against A9, Amazon, Google, Nokia, and Ricoh. The complaint asserts that the following products infringe one or more claims of the '474 patent: A9's Saptell product, Amazon's Remembers and Price Check features, Google's Goggles and Shopper mobile applications, Nokia's Point and Find Mobile application, and applications that Ricoh allegedly makes for the iPhone, including French Rev. and DriveTube.

On the same day that it filed the 577 Action, WRT filed an action captioned *Wireless Recognition Technologies LLC v. Nokia Corporation, et al.*, No 2:10-cv-00578-TJW (the "578 Action"). In the 578 Action, WRT alleges that Nokia Corporation and Ricoh Company infringe the '474 patent. The products accused of infringement are Nokia's Point and Find Mobile application, and applications that Ricoh allegedly makes for the iPhone, including French Rev. and DriveTube.

Only the first-filed 364 Action has been progressing. A status conference was held on February 16, 2011, and the parties submitted a Joint Discovery Order and Docket Control Order on March 23, 2011. Pursuant to the Docket Control Order, WRT served its infringement contentions on May 5, 2011. Those contentions covered only the '287 patent and only with respect to the Defendants in the 364 Action. Defendants' invalidity contentions are due on September 23, 2011.

There has been no status conference in the 365 Action, the 577 Action, or the 578 Action, but by orders issued on September 16, 2011, these cases were assigned trial dates of February 3, 2014, May 2, 2014, and June 2, 2014, respectively. No Docket Control Order has been entered in any of those cases. WRT has not served infringement contentions in any of those actions, but according to the recent orders, WRT's infringement contentions are due on October 21, 2011.

B. The '474 Patent Reexamination

A petition for an *inter partes* reexamination of the '474 patent was filed on February 25, 2011 by a third party that is not a defendant in any of the four actions. (Ex. A at ¶ 2.) The Patent and Trademark Office ordered a reexamination on March 25, 2011. (*Id.*) All of the claims of the '474 patent have been rejected in the reexamination. (*Id.* at ¶ 3.) On or about May 31, 2011, WRT responded by, among other things, amending certain claims of the '474 patent. (*Id.* at ¶ 4.) On information and belief, the *inter partes* reexamination of the '474 patent is still ongoing. (*Id.* at ¶ 5.)

C. The Pending Motion To Transfer

The Defendants in the 364 Action filed a motion to transfer that action to the Northern District of California on March 23, 2011. (Dkt. No. 62.) Briefing on that motion has been closed since May 16, 2011. (Dkt. No. 78.) The same motion to transfer incorporating the same briefs has essentially been filed in each of the other three cases. (*See* 365 Action Dkt. Nos. 21, 22; 577 Action Dkt. Nos. 36, 37; 578 Action Dkt. Nos. 22, 24.) Briefing on all of the transfer motions is closed. (*See* 365 Action Dkt. Nos. 21, 22; 577 Action Dkt. Nos. 36, 37; 578 Action Dkt. Nos. 22, 24.)

III. ARGUMENT

WRT's motion mixes two issues under Rule 42(a): (1) whether all four cases against all parties and all accused products should be tried in one trial; and (2) whether all four cases should be consolidated for pretrial proceedings under the schedule entered in the first-filed 364 Action. Defendants will address these issues separately below. Preliminarily, however, Defendants believe that the pending motions to transfer should be decided before WRT's motion to consolidate is considered.

A. The Court Should Decide Defendants' Pending Motion To Transfer Before Considering Plaintiff's Motion To Consolidate

In the first-filed 364 Action, Defendants moved to transfer the action to the Northern District of California on March 23, 2011. (Dkt. No. 62.) Briefing on that motion has been closed since May 16, 2011. (Dkt. No. 78.)³ The Court should decide the pending motions to transfer before considering any consolidation issues because the decision on the transfer motions will determine which Court will handle claim construction, discovery, and trial. It makes sense for the Court that will handle the claim construction, discovery, and trials to decide how it wants to structure the cases and proceedings.

B. The Issue Of How The Cases Should Be Structured For Trial Is Premature And Should Be Deferred

Defendants believe that the issue of how the four cases should be structured for trial is premature and should be deferred. There is no reason to address the structure of any trials now because the earliest trial date is for the 364 Action, and that date is not until December 2, 2013. Moreover, the issues that may ultimately be tried have not yet been fully developed and may vary widely, depending on future events. For example, only the first-filed 364 Action has been proceeding. Although WRT served infringement contentions for the '287 patent against the Defendants in that case, WRT has not served any infringement contentions on the foreign defendants in the 365 Action. Defendants will be serving invalidity contentions contemporaneously with the filing of this brief, but the parties have not begun claim construction negotiations or briefing. No party has served written discovery, and no depositions have been taken.

The situation is even murkier with respect to the later cases asserting the '474 patent. WRT has not served any infringement contentions whatsoever on the '474 patent. The '474 patent is also the subject of an ongoing *inter partes* reexamination. All of the claims of the '474 patent stand rejected in the reexamination, and WRT is attempting to amend at least some of the

³ As Defendants indicated they would do in the first motion (*see* Dkt. No. 62 at 15 n.5), the same motion incorporating the same briefs was filed in each of the other three cases.

claims to preserve their validity. Thus, at this point, the parties cannot know what claims of the '474 patent, if any, will survive the reexamination or what limitations those claims will contain.

For the most part, the accused products of the different Defendants are unrelated to one another and have widely varying characteristics and applications, which may lead to widely varying noninfringement theories.⁴ In addition, WRT's infringement theories against the foreign defendants and their U.S. subsidiaries may be subject to different defenses, and WRT's infringement theories for the '474 patent may differ substantially from those for the '287 patent. The '474 patent reexamination proceedings may amplify the differences and may also give rise to an intervening rights defense unique to the '474 patent. Invalidity defenses against the two patents may also vary widely, and may change based in part on the reexamination. Moreover, WRT's damages theories have not been presented, and are likely to vary widely from one defendant to another and from one accused product to another, in view of the differences among the products and their applications. Finally, claims and defenses in each of the actions may be added, dropped, or revised as the 364 Action proceeds and as the other actions begin, and some of the parties may settle as the cases progress.

Accordingly, the matters to be tried in the four cases have not been developed sufficiently to determine how the trials should be structured. Ultimately, it may turn out that the matters at issue differ so widely as between patents, products, or parties that the complete trial consolidation proposed by WRT would not make sense to a jury and would unfairly prejudice one defendant or another. Rather than engage in motion practice regarding how any trials should be structured at this juncture, Defendants propose that the Court set a date by which parties should bring motions as to how best to structure the trials. That date should be close to the first trial date, December 2, 2013, and sufficiently far from the present to allow the claims and

⁴ The sole exception concerns the Amazon and A9 accused products, which are related products from related entities. Thus, as discussed in more detail below, Defendants propose that if the cases are restructured, Amazon and A9 should be kept together in the same action.

defenses to develop. Once the Court sees what issues and parties remain in the cases, it can then decide how best to package the issues for trial.

C. If The Court Is Inclined To Decide The Trial Consolidation Issue Now, Defendants Cross-Move To Have The Cases Against Each Set Of Accused Products Severed And Tried Separately

If the Court is inclined to determine now how the cases will be structured for trial, Defendants have no choice but to cross-move pursuant to Rules 20 and 21 to have the cases against each set of accused products severed and tried separately. Rule 20 governs when different defendants may be joined in an action, and Rule 21 permits a court at any time to sever claims and parties.

Rule 20 permits two or more defendants to be joined in a single action only if the plaintiff's allegations "*arise out of the same transaction, occurrence, or series of transactions or occurrences*" and a question of law or fact common to all defendants will arise in the action. Fed. R. Civ. P. 20(a)(2) (emphasis added). Recognizing that Rule 20 has a two-part *conjunctive* test, the Fifth Circuit has held that the two conditions are separate requirements: "Courts have described Rule 20 as creating a two-prong test, allowing joinder of plaintiffs when (1) their claims arise out of the 'same transaction, occurrence, or series of transactions or occurrences' and when (2) there is at least one common question of law or fact linking all claims." *Acevedo v. Allsup's Convenience Stores, Inc.*, 600 F.3d 516, 521 (5th Cir. 2010).

Respecting the two separate requirements for permissive joinder under Rule 20 preserves a defendant's due process rights. Specifically, the two-prong test of Rule 20 is designed to protect defendants from the prejudice and potential confusion of being forced to defend claims alongside unrelated parties with different products or services and possibly different strategies. The Advisory Committee on the Federal Rules of Civil Procedure settled on Rule 20 after extensive debate about allowing joinder to promote judicial economy *only* if it preserves the ability of defendants to protect their individual interests. In commenting on the importance of protecting defendants, one committee member stated:

I cannot possibly see any justification in compelling a single defendant to come into a lawsuit, with, perhaps, 20 others, and with as many different lawyers, and **saddle him [sic] the additional expense and trouble of having his attorney watch all of those others to be sure that something is not done in the suit by which he would be injuriously affected.**

See Proceedings of Meeting of Advisory Committee on Rules for Civil Procedure of the Supreme Court of the United States at 490-91 (Friday, November 15, 1935), available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Minutes/CV11-1935-min-Vol2.pdf> (emphasis added).

Joining numerous unrelated defendants in a single patent infringement case exceeds the limits of due process. As the Supreme Court explained over 50 years ago, the Due Process Clause guarantees an “opportunity for hearing appropriate to the nature of the case.” *Jones v. Flowers*, 547 U.S. 220, 223 (2006) (quoting *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950)). That means that a party must be able to “present his case and have its merits fairly judged.” *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 433 (1982). In evaluating what is necessary “to make a civil proceeding fundamentally fair,” a court must consider, among other factors, the “risk of an erroneous deprivation” of a party’s property. *Turner v. Rogers*, 131 S. Ct. 2507, 2517-19 (2011) (internal quotation marks omitted).

The circumstances of the four cases at issue in this motion make clear that WRT’s proposal to have all four cases combined for trial would violate Rule 20 and the Due Process Clause. WRT has not alleged and could not establish that the Defendants all engaged in “the same transaction or occurrence” in developing or selling the accused products. The products were independently developed separately by the Defendants. (*See, e.g.*, Dkt. No. 62 Ex. B at ¶¶ 4-5, Ex. C at ¶¶ 4-5, Ex. D at ¶¶ 4-8, Ex. E at ¶ 6, Ex. F at ¶ 5.) If unrelated defendants with different accused products are joined in one trial, the Defendants will not have a meaningful opportunity to present individualized defenses on issues such as infringement, willfulness, and damages. In reality, each Defendant will have only a few hours to present a defense to the jury, which means that “the risk of an erroneous deprivation” of each Defendant’s property is very high. The threat is particularly acute in the context of patent infringement, where the issues are

often extraordinarily complex and may vary widely from accused product to accused product. It is asking a great deal of a jury of laypeople to decide whether *one* defendant infringed a valid patent claim and what damages resulted. Adding additional defendants and accused products eliminates any realistic possibility of a “fundamentally fair” hearing.⁵

To crystallize the prohibition against joining multiple unrelated defendants with different accused products in the same patent infringement case, Congress recently passed the Leahy-Smith America Invents Act, and President Obama signed that bill into law on September 16, 2011. *See* H.R. 1249, 112th Cong. (2011). Section 19(d) of the Act adds a new Section 299 to Title 35 of the U.S. Code governing joinder of parties in patent infringement litigation. New Section 299 clarifies how Rule 20 should be applied in patent cases involving multiple defendants and provides that the “same transaction or occurrence” requirement of Rule 20(a)(2) must “relat[e] to the making, using, importing into the United States, offering for sale, or selling of *the same accused product or process.*” 35 U.S.C. § 299(a)(1) (emphasis added). Further, it changes the second prong of Rule 20(a)(2) to require that there be “questions of fact common to all defendants” – a common question of law will not suffice. *Id.* § 299(a)(2).⁶ Finally, it states

⁵ The cases cited by WRT in support of consolidation are inapposite. In *TBC Consoles, Inc. v. Forrest Consoles, Inc.*, No. 05-2756, 2008 U.S. Dist. LEXIS 64659 (S.D.N.Y Aug. 21, 2008), the parties *jointly requested that liability issues be consolidated for trial* but wanted only to bifurcate damages from liability. *Id.* at *1, *3.

In *Kowalski v. Mommy Gina Tuna Resources*, No. 05-00679, 2008 U.S. Dist. LEXIS 87853 (D. Haw. Oct. 24, 2008), the parties agreed to consolidate two of the three cases at issue. *Id.* at *3. With respect to the third case, the court initially denied a motion to consolidate, but then granted a motion to consolidate the cases for trial *because the plaintiff dismissed all but one of the remaining unique claims* against the defendants in the third case. *Id.* at *4, *8-*9. Significantly, there were no unique issues of infringement remaining to be tried in *Kowalski* because the court had earlier granted summary judgment of infringement. *Id.* at *9. The court found that the only unique issue that remained to be tried was a charge of willfulness against certain defendants and that the court could adequately prevent prejudice from having that issue consolidated. *Id.* at *10. Thus, the considerations in *Kowalski* were vastly different than those involved in the four cases brought by WRT, where a multitude of unique issues, including infringement and damages, remain.

⁶ Issues such as claim construction are questions of law. *Markman v. Westview Instruments, Inc.*, 52 F.3d 967, 979 (Fed. Cir. 1995) (*en banc*), *aff'd*, 517 U.S. 370 (1996).

that “accused infringers may not be joined in one action as defendants or counterclaim defendants, or have their actions *consolidated for trial, based solely on allegations that they each have infringed the patent or patents in suit.*” *Id.* § 299(b) (emphasis added).

The legislative history of the new statute makes clear that Congress believed that certain district court decisions had misinterpreted Rule 20(a)(2) to permit the joinder of unrelated defendants accused of infringing the same patent. The House Report explained that the section “addresses problems occasioned by the joinder of defendants (sometimes numbering in the dozens) who have tenuous connections to the underlying disputes in patent infringement suits.” H.R. Rep. No. 112-98, pt. 1, at 54 (June 1, 2011). “Section 299,” the report stated, “legislatively abrogates the construction of Rule 20(a) adopted in *MyMail, Ltd. v. America Online, Inc.*, 223 F.R.D. 455 (E.D. Tex. 2004); . . . *Adrain v. Genetec Inc.*, 2009 WL3063414 (E.D. Tex. September 22, 2009); . . . and *Eolas Technologies, Inc. v. Adobe Systems, Inc.*, 2010 WL 3835762 (E.D. Tex. September 28, 2010).” *Id.* at 55 n.61. The section “effectively conform[s] these courts’ jurisprudence to that followed by a majority of jurisdictions.” *Id.* (citing *Rudd v. Lux Prods. Corp.*, No. 09-cv-6957, 2011 WL 148052 (N.D. Ill. Jan. 12, 2011)).⁷

Thus, as is clear from the legislative history underlying Rule 20 from its inception until its most recent clarification, Rule 20 does not permit the consolidation for trial that WRT urges. Nevertheless, in the interests of judicial economy, Defendants are willing to suggest some consolidation and reconstruction of the four cases for trial. Defendants propose that, to the extent that the Court makes any decision regarding restructuring the cases at this time, the cases be divided between Defendants and accused products as follows (in no particular order): A9 (which is now an Amazon subsidiary) and Amazon and their accused products should be tried in one trial; Google and its two accused products should be the subject of a second trial; the Nokia

⁷ On its face, new Section 299 applies only to cases filed on or after its date of enactment, September 16, 2011. *See* H.R. 1249, § 19(e). Nevertheless, the new statute and its legislative history indicate that the statute clarifies rather than modifies Rule 20 in the context of patent infringement actions.

entities and Nokia accused products should be in a third trial; and the Ricoh entities and their accused products should be in a fourth trial.⁸ Because the Court has already set four trial dates in the four actions, Defendants' proposal will not unduly delay the case schedules already in place.⁹

D. Although Defendants Are Amenable To Consolidating Discovery And Claim Construction, WRT's Proposal That All Four Cases Be Consolidated On The First Case Schedule Is Unworkable

Defendants are not opposed to consolidating and coordinating discovery and claim construction and have previously proposed options for such consolidation to WRT. (*See, e.g., Ex. B.*)¹⁰ WRT, however, rejected those proposals and insisted on moving to consolidate all of the cases for all purposes, including trial. WRT's request to consolidate the cases now according to the schedule agreed-upon for the first case is unworkable because the first case is already progressing far ahead of the other three cases. WRT has only served infringement contentions in the first action, and WRT has yet to serve any infringement contentions on the '474 patent that is at issue in the later two actions. Additionally, for the first case only, Defendants are serving their invalidity contentions contemporaneously with the filing of this brief. Defendants' invalidity contentions for the other three cases will not be due until some date after WRT has served its infringement contentions. Moreover, the ongoing *inter partes* reexamination of the '474 patent makes it difficult for the parties to develop infringement and invalidity contentions for that patent. Consequently, the cases involving the '474 patent are somewhat in limbo and are trailing the first case to a significant degree.

⁸ Because WRT chose to file four separate cases, it should not be heard to claim that proceeding with four trials is unfairly burdensome, especially if the cases are consolidated for claim construction and discovery.

⁹ Defendants' offer to consolidate trials in this manner is without prejudice to their right to move to dismiss or otherwise revisit the issue as the cases proceed. Also, Defendants do not at this point have a specific proposal as to the order of the respective trials but suggest a status conference closer to the first trial date to address the ordering of the trials.

¹⁰ It is Defendants' understanding that WRT refused the offer because WRT also wanted Defendants to agree to have everything tried in one action.

Immediately consolidating the latter three cases on the schedule in the first case would unfairly squeeze Defendants' case preparation time. For example, Defendants' invalidity contentions for the '287 patent are due on September 23, 2011. It would be unfair to require Defendants hurriedly to prepare invalidity contentions for the '474 patent because Defendants have not received WRT's infringement contentions for the '474 patent and the parties do not yet know what '474 patent claims, if any, will emerge from the reexamination.

Moreover, there is no reason to prejudice Defendants in such a manner given that the earliest trial date in any of the actions is not until December 2013. The parties should be able to negotiate a revised case schedule that will allow the latter three cases to progress along a more reasonable schedule that would still allow for a single, consolidated claim construction hearing. Although the date currently set for the claim construction hearing, August 22, 2012, may need to be adjusted, the adjustment should not jeopardize the earliest trial date of December 2, 2013.

Defendants believe that the above proposal is fair and reasonable and that WRT should not be heard to complain about a situation that is entirely its own making. WRT purposely brought the 364 Action separately from the other actions for timing reasons. WRT admits that it brought a separate action against the foreign defendants to avoid having a schedule based on the involvement of foreign defendants. WRT could have sought to, but chose not to, amend its pleadings in the 364 Action to add the second patent and the foreign defendants. This too, however, would likely have led to a longer schedule. Instead, WRT attempted to manipulate the system by filing separate actions, and upon getting a schedule in one action, seeking through consolidation to have that schedule apply to the other actions, all to the prejudice of Defendants. By doing so, WRT seeks to bind Defendants to a pretrial and trial schedule for the other cases with which WRT has not complied. Defendants invited WRT to serve infringement contentions for the latter three cases and the second patent when its infringement contentions were due to be served in the first action. But WRT declined Defendants' invitation to accelerate the latter three cases. WRT should not now profit by its actions by forcing Defendants to adhere to a case schedule that has now become unworkable.

IV. CONCLUSION

For all of the above reasons, the Court should first decide the pending motions to transfer. If those motions are denied, the Court should deny WRT's consolidation motion and grant Defendants' cross-motion to sever the cases for trial.

If the Court wishes to address consolidation for purposes of discovery and claim construction, the Court should order the parties to submit a revised consolidated case schedule that will provide for only a single claim construction hearing on both patents on a date sufficient to preserve the first trial date of December 2, 2013. The Court should also set a case management conference or a briefing schedule for some time after the claim construction hearing but prior to the first trial date to address the division and order of the issues to be tried.

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Respectfully submitted,

/s/ James F. Valentine

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CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing document was filed electronically in compliance with Local Rule CV-5(a). As such, this document was served on all counsel who are deemed to have consented to electronic service. Local Rule CV-5(a)(3)(A). Pursuant to Fed. R. Civ. P. 5(d) and Local Rule CV-5(d) and (e), all other counsel of record not deemed to have consented to electronic service were served with a true and correct copy of the foregoing by email, on this 23rd day of September, 2011.

/s/ James F. Valentine

James F. Valentine