

<i>Defendants.</i>)	
)	
WIRELESS RECOGNITION TECHNOLOGIES LLC,)	
)	
<i>Plaintiff,</i>)	
)	
v.)	C.A. No. 2:10-cv-00578-TJW-CE
)	
NOKIA CORPORATION, and RICOH COMPANY, LTD)	
)	JURY TRIAL DEMANDED
)	
<i>Defendants.</i>)	
)	

**PLAINTIFF WIRELESS RECOGNITION TECHNOLOGIES LLC'S
OPPOSITION TO DEFENDANTS' CROSS-MOTION TO SEVER PURSUANT TO
RULES 20, 21 OF THE FEDERAL RULES OF CIVIL PROCEDURE**

I. Defendants' Cross-Motion to Have the Cases Severed and Tried Separately Should be Denied

Defendants state that if the Court decides the trial consolidation issue now, then they cross-move to sever the cases pursuant to Fed. R. Civ. Proc. 20 and 21.¹ While the former Rule determines when different defendants may be joined, the latter permits the Court to sever claims as well as parties.

In this proposition, Defendants state that Rule 20 permits multiple defendants to be joined in a single action only if plaintiff's allegations arise out of the same transaction or occurrence, and a question of common law or fact arises in the action. Defendants further recite Fifth Circuit precedent regarding Rule 20, as having a two-part conjunctive test, holding that the claims arise out of the same transaction or occurrence, and that there is at least one common question of law or fact linking claims. *Citing, Acevedo v. Allsup's Convenience Stores, Inc.*, 600 F.3d 516, 521 (5th Cir. 2010).

Contrary to the Defendants' position, however, their acts indeed arise out of the same transaction and occurrence, and common questions of law and fact do arise. Each Defendant offers software that is downloadable to a mobile device, and that performs recognition of objects in an allegedly infringing manner, under patents related by specification, inventorship, priority date and assignee.² In fact, "[c]ourts in this District have consistently held that as long as the Defendants' allegedly infringing products are not dramatically different, then determining

¹ 287PDA ("364 Case") Dkt. No. 104; 287PIA ("365 Case") Dkt. No. 33; 474PDA ("577 Case") Dkt. No. 48; 474PIA ("578 Case") Dkt. No. 35.

² For A9, *compare* 287PDA ("364 Case") Dkt. No. 1, ¶ 14 to 474PDA ("577 Case") Dkt. No 1, ¶ 14. For Amazon, *compare* 287PDA ("364 Case") Dkt. No. 1, ¶ 20 to 474PDA ("577 Case") Dkt. No 1, ¶ 20. For Google, *compare* 287PDA ("364 Case") Dkt. No. 1, ¶ 26 to 474PDA ("577 Case") Dkt. No 1, ¶ 26. For Nokia, *compare* 287PDA ("364 Case") Dkt. No. 1, ¶ 32 to 474PDA ("577 Case") Dkt. No 1, ¶ 32. For RII, *compare* 287PDA ("364 Case") Dkt. No. 1, ¶ 38 to 474PDA ("577 Case") Dkt. No 1, ¶ 38.

Defendants' liability will involve substantially overlapping questions of law and fact." *Oasis Research v. ADrive, et al.*, Report and Recommendation of United States Magistrate Judge, No. 4:10-cv-435 (E. D. Tex. May 23, 2011).³

This District has provided multiple sources of support for this position entirely consistent with Fifth Circuit precedent. *Id.* ("See, e.g., *Eolas Tech., Inc. v. Adobe Systems, Inc.*, No. 6:09-CV-446, 2010 WL 3835762, at *2 (E.D. Tex. Sept. 28, 2010) (holding 'adjudicating infringement will require construing the claims and evaluating the patents' innovation over the prior art...will involve substantially overlapping questions of law and fact'); *Adrain v. Genetec, Inc.*, No. 2:08-CV-423, 2009 WL 30633414, at *2 (E.D. Tex. Sept. 22, 2009) ('license plate recognition system[s]' sold by unrelated defendants were sufficiently similar to be of the same transaction or occurrence); *MyMail, Ltd. v. America Online, Inc.*, 223 F.R.D. 455, 457 (E.D. Tex. 2004) ('severance could be appropriate if the defendants' methods or products were dramatically different').")

Furthermore, the Federal Circuit has already decided this very issue in an unpublished order on a writ of mandamus, in full support of WRT's present position. *Oasis Research, supra*, at 5, citing *Eolas Tech., Inc. v. Adobe Systems, Inc.*, No. 6:09-cv-446, 2010 WL 3835762, at *2 (E.D. Tex. Sep. 28, 2010). There, the facts were more favorable to defendants than at present, as the plaintiff accused twenty-three unrelated defendants of infringing two different patents. In holding that liability will involve substantially overlapping questions of law and fact and that joinder was therefore proper, the Court noted that all of the defendants were accused of infringing the patents, and that determining infringement will require claim construction and

³ Exhibit A at 4.

prior art evaluation.⁴ The bases for the decision are no different than for Plaintiff WRT and Defendants at present.

The Federal Circuit also highlighted the significant role of judicial economy as it upheld the lower court's decision not to sever the claims, stating: "judicial economy plays a paramount role in trying to maintain an orderly, effective, administration of justice and having one trial court decide all of these claims clearly furthers that objective." *Oasis Research, supra, quoting In re Google, Inc.*, Misc. No. 968, 2011 WL 772875 at *2 (Fed. Cir. Mar. 4, 2011). For WRT and Defendants in the present circumstance, it can hardly be argued the questions of law and fact are any less substantial, or that such principles of judicial economy would less readily apply. *Id.* ("Further, the district court noted that, in this case, 'adjudicating infringement...will involve substantially overlapping question of law or fact.'")

To promote their position, Defendants also cite the legislative intent behind the newly enacted Leahy-Smith America Invents Act, which was enacted into law on September 16, 2011. H.R. 1249, 112th Cong. (2011).

However, Defendants' position is completely meritless, for the very language of the new law makes it abundantly clear that the amendments made to the joinder section apply exclusively to civil actions "*commenced on or after* the date of the enactment of [the] Act." *Id.*, Sec. 19(e) (emphasis added). Accordingly, to follow Defendants' counsel would be to violate the very Act they use to propound their position. No better evidence of the legislative intent exists than the very language of the Act, itself.

⁴ "In *Eolas Tech*, the plaintiff accused twenty-three unrelated defendants of infringing two different patents, and the Court held joinder was proper, stating '[a]ll defendants are accused of infringing the patents in suit, and adjudicating infringement will require construing the claims and evaluating the patents' innovation over the prior art. Thus, determining defendants' liability will involve substantially overlapping questions of law and fact.'" *Oasis Research, supra, quoting Eolas Tech*, 2010 WL 3835762 at *2.

Finally, Defendants would have the Court decide their pending motions to transfer venue⁵ before the issue of consolidation so that the Court hearing the cases can structure them for discovery, claim construction dispositive motions and trial. However, as noted in WRT's replies concerning consolidation,⁶ and contrary to Defendants' assertion, were the Court to transfer to the Northern District of California, it would be easier for the latter court's administration of justice to attend to a single, consolidated case rather than four, and the new court would have the benefit of this Court's knowledge and ruling after having reviewed the issues respecting consolidation. Furthermore, were the cases to be transferred as one, the new court would have opportunity, if it so chose, to sever the cases pursuant to the arguments Defendants present in their cross-motions under Fed. R. Civ. Proc. 20 and 21.⁷

II. Conclusion

WRT requests that the Court deny Defendants' cross-motion to sever the cases for trial. WRT also respectfully reiterates the position of its pending motions⁸ that the Court consolidate the cases pursuant to Fed. R. Civ. P. 42(a) and L. R. CV-42(b). Defendants' additional proposals, namely that (i) the parties be ordered to submit a revised consolidated case schedule, and (ii) the Court should set a case management conference or a briefing schedule to address the division and order of the issues to be tried, shall be unnecessary once the cases are consolidated and Defendants' proposed cross-motion to sever is denied.

⁵ 287PDA ("364 Case") Dkt. Nos. 62, 68, 73 and 78; 287PIA ("365 Case") Dkt. No. 21, 22; 474PDA ("577 Case") Dkt. No. 36, 37; 474PIA ("578 Case") Dkt. No. 22, 24.

⁶ 287PDA ("364 Case") Dkt. Nos. 108; 287PIA ("365 Case") Dkt. No. 37; 474PDA ("577 Case") Dkt. No. 52; 474PIA ("578 Case") Dkt. No. 39.

⁷ 287PDA ("364 Case") Dkt. No. 104; 287PIA ("365 Case") Dkt. No. 33; 474PDA ("577 Case") Dkt. No. 48; 474PIA ("578 Case") Dkt. No. 35.

⁸ 287PDA ("364 Case") Dkt. Nos. 108; 287PIA ("365 Case") Dkt. No. 37; 474PDA ("577 Case") Dkt. No. 52; 474PIA ("578 Case") Dkt. No. 39.

Dated: October 11, 2011

Respectfully Submitted,

/s/ Cameron H. Tousi

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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 the 11th day of October, 2011.

/s/ Cameron H. Tousi
Cameron H. Tousi

CERTIFICATE OF CONFERENCE

Pursuant to Local Rule CV-7(h), and on behalf of the Plaintiff filing this motion, Plaintiff's counsel, Cameron Tousi held a teleconference with Michael Smith and Daniel Shvodian, counsel for Defendants A9.com, Inc., Amazon.com, Inc., Google Inc., Michael Smith and Allison Altersohn, counsel for Nokia Inc., and Mark Rowland, counsel for Ricoh Innovations, Inc., regarding Defendants' Cross-Motion to Sever Pursuant to Rules 20 and 21 of the Federal Rules of Civil Procedure on several dates, including most recently on July 14, 2011. Plaintiff had proposed consolidating four cases filed by Plaintiff (the '364, '365, '577, and '578 cases) into a single action. Defendants rejected the proposed consolidation, and proposed that the issue be addressed, if at all, later in the case. Defendants also proposed in the alternative, that the cases be severed and consolidated into four separate cases against: (1) Google Inc; (2) Amazon.com, Inc. and A9.com, Inc.; (3) Nokia Inc. and Nokia Corporation; and (4) Ricoh Innovations, Inc. and Ricoh Company, Ltd. Not able to achieve consensus, Plaintiff's counsel proceeded with filing a motion to consolidate the four cases. Therefore, there was a conclusive impasse between the parties regarding Defendants' proposed severance, leaving an open issue for the Court to resolve.

Dated: October 11, 2011

/s/ Cameron H. Tousi
Cameron H. Tousi