EXHIBIT C

Not Reported in F.Supp.2d, 2004 WL 1737835 (S.D.N.Y.)
(Cite as: 2004 WL 1737835 (S.D.N.Y.))

United States District Court,
S.D. New York.
Tony **COLIDA**, a citizen of Canada, Plaintiff,
v.
SONY CORPORATION OF AMERICA and **Sony** Ericsson Communication (USA) Inc., Defendants.
No. 04 Civ.2093(RJH).

Aug. 2, 2004.

MEMORANDUM OPINION AND ORDER

HOLWELL, J.

***1** *Pro se* plaintiff Tony Colida ("Colida" or "plaintiff") filed the above-captioned complaint seeking damages and injunctive relief against defendant corporations, who he alleges infringed two United States design patents for cellular telephones by manufacturing, selling, or offering to sell the "Sony Ericsson Z-600 cellular phone." Defendant Sony Corporation of America ("SCA") has moved to dismiss all claims against it pursuant to Rules 12(b)(1) and 12(b)(6) on the grounds that it is not a proper party because it does not manufacture, sell, or offer to sell the allegedly infringing product. Based on the submissions of both parties, the Court concludes that SCA has made a sufficient showing that it is not a proper party to justify dismissal of all claims against this defendant.

In support of its motion to dismiss, SCA has submitted the sworn declaration of the Jaime A. Siegel, Senior Director of Licensing and Intellectual Property of SCA ("Siegel Decl."). That declaration states that the allegedly infringing phone is sold by Sony Ericsson Mobile Communications (USA) Inc. ("Sony Ericsson"), not SCA, and that SCA is a separate corporate entity that has only an attenuated, indirect relationship to Sony Ericsson in that "SCA's ultimate corporate parent, Sony Corporation, a Japanese corporation, and Ericsson AB, a Swiss corporation, are partners in a joint venture, Sony Ericsson Mobile Communications AB, a Swedish corporation, which is the parent company of Sony Ericsson." Siegel Decl. ¶ 2. The declaration further states that "SCA does not manufacture, market, sell, offer for sale, repair or support" the allegedly infringing product. *Id.* Siegel further declares that prior to the commencement of this action, Colida contacted SCA to warn them of his intention to file suit, whereupon Siegel informed Colida in writing of SCA's lack of involvement in manufacturing or selling the allegedly infringing phone and provided Colida with contact information for the intellectual property general counsel at Sony Ericsson. *Id.* at ¶ 4 & Ex. A. In response, Colida wrote to inform SCA that he had commenced an action against SCA. *Id.* at ¶ 5 & Ex. B. SCA contacted Colida, offering to provide him with a sworn affidavit stating that SCA was in no way involved with the allegedly infringing product. In that conversation, Colida adverted to a newspaper article he had seen that had characterized Sony Ericsson as a joint venture between "Sony" and Ericsson and cited it as the basis for his naming SCA as a party in this action. *Id.* at ¶ 6 & Ex. C. Colida stated that he would not drop SCA as a party unless SCA paid him a settlement. *Id.*

In opposition to this motion, Colida has submitted a copy of an order issued by the Hon. William A. Webb, Magistrate Judge for the Eastern District of North Carolina, Western Division, in an unrelated matter entitled *Tony Colida v. Ericsson, Inc.* In that order, apropos of a potential recusal issue arising from Judge Webb's social acquaintanceship with the Vice President for Human Relations at Sony Ericsson, Inc., the court wrote: "Addressing the Court's inquiry regarding the corporate relationship between Defendant and Sony-Ericsson, Mr. Bennett [counsel for defendant] explained that Sony-Ericsson was a joint venture between Sony Corp. and Ericsson, Inc., that manufactured the mobile phones which are sold by Sony and for which Ericsson develops the microchip technology." Enclosure to letter from Colida to the Court dated June 24, 2004, at 2. Colida argues in effect that this statement memorializes an admission that "Sony" sells cell phones, and therefore that SCA is the proper party. In reply, SCA submitted a declaration from David E. Bennett, counsel for defendant in the North Carolina case, stating that he had told the judge during a telephone conference that "Sony was a seller of cellular phones," but that he had been referring to Sony's business activities prior to the joint venture between Sony Corporation and Ericsson, Inc.

that had formed Sony Ericsson. Sur-Reply [*sic*] Mem. of Law in Further Support of Mot. to Dismiss Claims Against Def. SCA, Bennett Decl. ¶ 3. Bennett declared that he did not represent to the court that SCA sells mobile phones made by Sony Ericsson, and that the North Carolina court misconstrued his statements during the telephone conference. *Id.* Attached to Bennett's declaration is a transcript of the telephone conference, which bears out the representations contained in the declaration. Bennett Decl. Ex. A.

***2** The evidence submitted by plaintiff fails to demonstrate that SCA is involved in cellular phone manufacture, marketing, or sale. The ambiguous statement in the North Carolina court's Order appears to be an imprecise or inaccurate interpretation of a statement made by counsel before that court, and does not constitute an admission or evidence that SCA is a proper party to this action. SCA's submissions amply demonstrate that SCA is not involved in the manufacture or sale of the allegedly infringing cellular phone. As defendant points out, Mem. of Law in Support of Mot. to Dismiss Claims Against Def. SCA at 7-8, liability for infringing pursuant to 35 U.S.C. § 271 requires a showing that the defendant makes, uses, offers to sell, sells, or imports without authority any patented invention, or actively induces or contributes to the infringement of a patented invention. 35 U.S.C. § 271. Because it does not appear that plaintiff can make such a showing as to SCA, defendant SCA's motion [5-1] is granted, and all claims against SCA are hereby dismissed for failure to state a claim upon which relief may be granted.

Plaintiff shall have sixty (60) days to serve summons and complaint upon the other defendant named in the action. If plaintiff amends his complaint, service of the amended complaint must be made upon all defendants named in the action within this period. If proper service is not effected within this period, this action shall be dismissed in its entirety.

A pretrial conference shall be held in this matter on Tuesday, September 28, 2004, at 11:00 a.m. in Room 17B, 500 Pearl Street.

SO ORDERED.

S.D.N.Y.,2004.
Colida v. Sony Corp. of America

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