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

PARALLEL NETWORKS, LLC	§	
	§	
Plaintiff,	§	Case No. 6:10-cv-111-LED
	§	
v.	§	JURY TRIAL DEMANDED
	§	
ABERCROMBIE & FITCH, et al.	§	
	§	
Defendants.	§	

PARALLEL NETWORKS, LLC	§	
	§	
Plaintiff,	§	Case No. 6:10-cv-112-LED
	§	
v.	§	JURY TRIAL DEMANDED
	§	
BENTLEY MOTORS, et al.	§	
	§	
Defendants.	§	

PARALLEL NETWORKS, LLC	§	
	§	
Plaintiff,	§	Case No. 6:10-cv-275-LED
	§	
v.	§	JURY TRIAL DEMANDED
	§	
AEO, INC., et al.	§	
	§	
Defendants.	§	

PARALLEL NETWORKS, LLC	§	
	§	
Plaintiff,	§	Case No. 6:10-cv-491-LED
	§	
v.	§	JURY TRIAL DEMANDED
	§	
ADIDAS AMERICA, INC., et al.	§	
	§	
Defendants.	§	

PARALLEL NETWORKS, LLC'S MOTION TO BIFURCATE DAMAGES ISSUES

Parallel Networks, LLC ("Parallel Networks") hereby submits the instant brief in response to the Court's order of January 5, 2011. (6:10-cv-111 ("-111"), D.I. 308, Order; 6:10-cv-112 ("-112"), D.I. 47; 6:10-cv-275 ("-275"), D.I. 392; 6:10-cv-491 ("-491"), D.I. 438). For the reasons discussed below, Parallel Networks asks the Court to bifurcate liability and damages issues; this will likely conserve limited judicial resources and also the resources of the parties, and will promote the early resolution of this now coordinated action and will help avoid the possibility of jury confusion. Certainly, no defendant will be prejudiced by the grant of this motion.

I. NATURE AND STAGE OF THE PROCEEDINGS

Parallel Networks brought four actions charging the defendants with infringement of United States Patent No. 6,446,111 (the "'111 patent"). These four actions were coordinated by this Court by order dated January 5, 2011 (6:10-cv-111, D.I. 308, Order; 6:10-cv-112, D.I. 47; 6:10-cv-275, D.I. 392; 6:10-cv-491, D.I. 438) and now include 124 defendants engaged in a wide variety of business activities having different business models, including retail sales, banking services, airline services, automobile sales, travel agencies and online services. All defendants are companies conducting a large volume of business that Parallel Networks contends is related to the infringing activity.

The parties are presently preparing and intend to submit a docket control and discovery order for the Court's consideration on or about February 8, 2011. Parallel Networks previously brought a pending Joint Motion to Bifurcate Damages Issues in Civil Action No. 6:10-cv-111, asking the Court to bifurcate damages issues for discovery and trial. (*See* 6:10-cv-111 at D.I. 307). All of the defendants in Civil Action No. 6:10-cv-111 joined in the motion to bifurcate.

II. INTRODUCTION AND BACKGROUND OF THE INVENTION

The '111 patent was filed on June 18, 1999, and issued on September 3, 2002. It is entitled "Method and Apparatus for Client-Server Communication Using a Limited Capability Client Over a Low-Speed Communications Link." (D.I. 1, Complaint at p.3, ¶3 [-112], p.9, ¶3 [-275], ¶64 [-491], Exh. A). Parallel Networks owns all right, title and interest in the '111 patent. (*Id.* at p. 3, ¶4 [-112], p.9, ¶4 [-275], ¶65 [-491]). Parallel Networks is a Texas limited liability company which has its place of business in Plano, Texas. (*Id.* at ¶1). The research and development activities that resulted in the '111 patent were conducted by infoSpinner, Inc., a Texas corporation that was founded by Keith A. Lowery (the sole inventor of the '111 patent) and which is a predecessor-in-interest to Parallel Networks (through reorganization and recapitalization). Mr. Lowery, who conceived of and reduced the invention in the '111 patent to practice, is a consultant and Chief Scientist for Parallel Networks. There have not been and are not any pending USPTO reexaminations or reissue proceedings with respect to the '111 patent.

The invention of the '111 patent is directed in part to systems and methods for more efficiently operating websites in response to requests by clients. The pioneering invention disclosed and claimed in the '111 patent may be best understood by beginning with the state of the art prior to the invention. At that time, persons (or "clients") using personal computers or other computers (*e.g.*, handheld devices) attempting to contact and acquire information from websites incurred increasingly frequent difficulties. For example, communication links have limited resources that can be overloaded with numerous requests and transmissions, thereby resulting in an increased time to respond to client requests. (*Id.* at Ex. A at col. 7:37 – col. 8:4; col. 8:34-50). In addition, as smaller client computers such as handheld devices became more widely used, these devices inherently had difficulties (given their limited memory and computational capability) quickly and efficiently accessing websites. (*Id.*). In sum, the

increasing load on websites coupled with the concomitant transmission of large amounts of information to increasingly smaller client computers was becoming slow and inefficient.

The pioneering invention of the '111 patent solved these problems, and it is the pioneering nature of the invention that explains why it is being so widely used and infringed. One advantage of the patented invention is that it allows for the decrease of the total amount of data transferred between the server and the client, thus allowing for increased speed and efficiency in accessing information from websites. (*Id.* at col. 3, ll. 11-17). Another advantage of the invention of the '111 patent is that it allows a client using a computer that has limited storage and memory capacity to more efficiently access websites. (*Id.* at col. 2, ll. 67 – col. 3, ll. 5). The patented invention also allows for the faster access to websites by clients by efficiently transmitting requested data and reducing or eliminating the transmission of duplicate and unnecessary data. (*Id.* at col. 3, ll. 17-23). Because of these powerful advantages that can be achieved with the use of the claimed inventions of the '111 patent, its technology is being widely infringed—the patented technology has wide applicability to a variety of businesses, including retailers, banks, airlines and others that provide goods, services and advertising.

III. ARGUMENT

The facts of this coordinated action show that it can more efficiently be resolved by bifurcating liability from damages issues. As this Court recognized at the recent status conference, this is a unique case that calls out for special treatment in case management, and the Court has already taken a key step in doing so by coordinating the cases and consolidating *Markman* and trial dates. Taking the additional step of bifurcating here will help conserve the resources of the Court and the parties, and will likely aid the parties in their attempts to seek an amicable resolution of the issues. Certainly in the event of this Court's resolution of liability issues, the parties will be in a much more informed position to discuss settlement.

The liability issues in this action are as follows. Parallel Networks will assert at trial that the defendants infringe the asserted claims of the '111 patent. The defendants in turn are expected to contend at trial that the asserted claims are not infringed, are invalid, and are not enforceable. On the one hand, these liability issues will be common for all defendants; their noninfringement contentions are expected to be similar; and so too are the invalidity and unenforceability contentions. Indeed, the defendants in Civil Action No. 6:10-cv-111 submitted one joint set of invalidity contentions applicable to all defendants in that action. Moreover, several law firms represent multiple defendants having common defenses.

On the other hand, the damages issues require the consideration of legal and factual factors not relevant to the determination of liability, are expected to be separate from liability issues and at least to some degree are defendant dependent. *See, e.g., Cherdak v. Stride Rite,* 396 F.Supp.2d 602, 604 (D.Md. 2005). Parallel Networks expects to seek no less than a reasonable royalty for the infringing activities of each defendant. Under a *Georgia Pacific* analysis, some of the relevant factors in determining a reasonable royalty are defendant-specific and may vary across different defendants or groups of defendants. *Georgia-Pacific Corp. v. United States Plywood Corp.*, 318 F. Supp. 1116, 1120 (S.D.N.Y. 1970); *see also Cherdak,* 396 F.Supp.2d at 604. These factors relate only to damages, not liability.

Parallel Networks's entitlement to damages is directed to each defendant that operates different websites that have varying commercial purposes, and according to the defendants, have different uses and values. For example, the accused websites have a varying volume of usage; some accused websites offer goods or services for sale, goods or services that are defendant-dependent and vary with respect to their relevant markets. Other accused websites do not offer any goods or services for sale at all, but rather have value as advertising websites. As a

consequence, there is no real dispute here that a damages analysis would be separate from a liability analysis, and is also likely to be website and defendant specific with respect to classes of defendants.

In addition, the natural groupings of defendants' arguments are likely to be different between liability and damages. For instance, to the extent various defendants' non-infringement arguments differ, they are likely to be based on the ways that the various defendants' websites operate; whereas, potential groupings for case management purposes based on damages would likely turn on the distinctions described above, such as whether the website is used for retailing versus advertising, or based on the level of usage of the website.

Because damages issues for each defendant are expected to present individualized issues and defenses, separate and apart from liability issues, bifurcation of liability and damages issues (for both discovery and trial) in this action will likely result in the conservation of scarce judicial resources and thus promote judicial efficiency; bifurcation will also conserve the parties' resources. *Intel Corp. v. Commonwealth Scientific & Indus. Research Org. ("CSIRO")*, 2008 WL 5378037, at *5 (E.D.Tex., Dec. 23, 2008) (Exh. A). Additionally, the resolution of liability issues will likely promote settlement and may therefore result in the elimination of the need for much damages discovery and trial with respect to some or all of the defendants.

In any complex litigation, one of this Court's tools for maximizing efficiency is bifurcation. *CSIRO*, 2008 WL 5378037, at *2. A court's power to bifurcate trial and discovery has long been established and is reflected in Fed. R. Civ. P. 42(a) that authorizes bifurcation "in furtherance of convenience or to avoid prejudice, or to expedite and economize." Bifurcation of course may be a useful tool in some actions but not in others. Certainly, proceeding to trial on liability issues and damages simultaneously in patent cases involving "many parties" may in

some circumstances promote inefficiency. *Id.* at *5. The complexity of issues in this patent case having many parties makes it a good candidate for special trial management, including bifurcation. *See Id.* In addition, bifurcation is particularly appropriate here since a finding on the issue of liability is an appealable interlocutory order to the Federal Circuit under 28 U.S.C. §1292(c)(2), allowing for a final liability determination before proceeding to the damages phase of the case.

In addition, bifurcation will also aid the Court through the avoidance of jury confusion and likely pre-trial and trial damages issues that the Court may need to resolve, such as discovery disputes, *Daubert* challenges, challenges to the sufficiency of damages theories and defenses, the consideration of the admissibility of exhibits, and the like. And, bifurcation will also benefit the parties by enhancing efficiency through the possible avoidance of damages discovery and trial.

Finally, the mediations required by the Court pre-*Markman* and pre-liability trial will facilitate settlement. Parallel Networks looks forward to participating in these mediations and, as discussed at the recent status conference, Parallel Networks has been able to negotiate pre-*Markman* settlements with a number of defendants. And, to the extent that settlements are not achieved through the mediation process prior to trial on liability issues, Parallel Networks believes that decisions on the liability issues will have a strong likelihood of promoting the possibility of settlement after the liability trial, thus potentially avoiding the need to address damages issues altogether.

CONCLUSION

For the foregoing reasons, Parallel Networks asks the Court to bifurcate the issue of damages for purposes of trial and discovery. An appropriate form of order is submitted herewith.

Dated: January 24, 2011

Respectfully submitted,

By: */s/ Charles Craig Tadlock*

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CERTIFICATE OF CONFERENCE

Counsel for Plaintiff Parallel Networks hereby certifies as follows:

On January 5, 2011, the Court entered an Order stating that "Any party seeking to bifurcate [damages in] its cases may file briefing on this issue not later than Monday, January 24, 2011 with responsive briefing due Friday, February 4, 2011." (6:10-cv-111 ("-111"), D.I. 308, Order; 6:10-cv-112 ("-112"), D.I. 47; 6:10-cv-275 ("-275"), D.I. 392; 6:10-cv-491 ("-491"), D.I. 438). This Motion to Bifurcate Damages Issues is filed in response to this Order.

In the -111 case, the parties had previously jointly agreed to a bifurcation motion which was filed with the Court. (-111 at D.I. 307). In a conference call with participating defendants in the -111, -112, -275, and -491 cases during the week of January 17, 2011, defendants indicated that they were still considering the issue of whether to agree to bifurcation. Subsequently, counsel for Plaintiff Parallel Networks sent an e-mail to counsel for defendants in the -112 case, the -275 case, and the -491 case on January 21, 2011, attaching the joint motion that had previously been filed in the -111 case and asking whether the defendants would agree to a similar joint motion to bifurcate in their respective cases. In accordance with the Court's Order, defendants were allowed until January 24, 2011, to decide on this issue and to so indicate to the Court. Many defendants in all of the cases have agreed to bifurcation, and have so indicated to the Court by filing joinders in the motion to bifurcate.

/s/ David R. Bennett
David R. Bennett

/s/ Charles Craig Tadlock
Charles Craig Tadlock

CERTIFICATE OF SERVICE

I hereby certify that counsel of record who are deemed to have consented to electronic service are being served this 25th day of January, 2011, with a copy of this document via the Court's CM/ECF system per Local Rule CV-5(a)(3). Any other counsel of record will be served by electronic mail, facsimile transmission and/or first class mail on this same date.

/s/ Charles Craig Tadlock
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