UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION

I/P ENGINE, INC.,	)	
Plaintiff,	)	
v.	)	Civ. Action No. 2:11-cv-512
AOL, INC. et al.,	)	
Defendants.	)	

OPPOSITION TO DEFENDANTS' MOTION TO DISMISS ALL CLAIMS AGAINST AOL INC., GANNETT CO., INC., IAC SEARCH & MEDIA, INC., AND TARGET CORPORATION

The central premise of Defendants' motion is that "I/P Engine claims damages only from Google, and not from any of the other Defendants." D.I. 294, p. 1. This allegation, however, is utterly false. Because Defendants have misrepresented the facts to the Court, and because I/P Engine has made specific damage claims against each Defendant, the motion to dismiss must be denied.

In its complaint, I/P Engine has alleged that there are compensable damages in this case with respect to each and every Defendant. D.I. 1 (Complaint). During discovery, I/P Engine identified and quantified specific damage amounts against each defendant. Defendants know this. Dr. Becker's report, which Defendants cite at length, totals the amount of damages attributable to Google in Exhibit SLB-1 and the damages attributable to AOL, IAC, Gannett, and Target in Exhibit SLB-2a. *See* Ex. 1 (Becker Report excerpts). Thus, there is both an allegation

of, and admissible evidence to support, an injury in fact with respect to each and every Defendant.

Even if Defendants somehow misapprehended Dr. Becker's report, Dr. Becker explicitly testified that he had calculated damages from Defendants AOL, IAC, Gannett, and Target during his deposition:

> Q. **Have you offered an opinion of an appropriate level of damages against any party other than Google in this case**?
>
> A. (By Dr. Becker) **I have** -- the opinion that I offered is….
>
> Q. Well, if, let's say, the jury only found that Gannett was infringing, **is there a number that you could find -- that you could point to in your report that would say this is the appropriate amount of the damages against Gannett?**
>
> A. I believe that number is in there, **yes**.
>
> Q. That's in one of the charts or something?
>
> A. It's in one of the exhibits to the report.

Ex. 2 (Becker Dep.), Page 7, Lines 13-Page 8, line 7 (emphasis added). Defendants thus were told on at multiple occasions that I/P Engine sought damages against all Defendants. I/P Engine's damages contentions are not limited to Google. I/P Engine seeks a monetary judgment against each of the defendants in the amounts specified by Dr. Becker.

Standing requires the allegation of an injury in fact, which is "an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). In the context of declaratory judgment actions, the Federal Circuit has held that merely alleging an affirmative act by the patentee that relates to enforcement of patent rights satisfies the injury in fact requirement. *3M Co. v. Avery Dennison Corp.*, 673 F.3d 1372 (Fed. Cir. 2012). This

standard is surely met here, where the patentee has filed this lawsuit to enforce its patents by seeking damages for their infringement.

Defendants rely on the District Court's dismissal in *Apple, Inc. v. Motorola, Inc.*, but that case is not relevant to this one. In that case, and unlike here, both parties moved for summary judgment on all remedy issues, including damages. 2012 WL 2376664 at *1 (N.D. Ill. June 22, 2012). The court granted the summary judgment motions, disposing of the case by finding that no remedy is available. *Id.* at *1-*11; Ex. 3 (Order indicating *Apple v. Motorola* was decided on motions for summary judgment). The court found that it would not have standing to address the issue of infringement when there is no remedy available for that infringement. *Id.* at *22. It reasoned that the parties' failure to prove entitlement to a remedy is analogous to an absence of an injury in fact. *Id.* at *6.[1]

Unlike in *Apple v. Motorola,* Defendants have not filed a summary judgment motion alleging that no remedy is available. Thus, unlike in *Apple v. Motorola,* a remedy (damages capable of being allocated among each of the Defendants) is available to redress I/P Engine's injury. Defendants mischaracterize I/P Engine's damages positions in their motion to dismiss, falsely claiming that no remedy has been requested against the non-Google defendants. But unilaterally mischaracterizing I/P Engine's contentions does not create a failure of proof on the remedy issue. Consistent with Dr. Becker's opinions, the jury may award damages to I/P Engine for each and every defendant's infringement, not just Google's infringement. This Court therefore has standing, even under the logic of *Apple v. Motorola,* at least because it can provide a remedy (damages) for each and every Defendant's infringement.

[1] The Federal Circuit has held that patent infringement itself constitutes an injury in fact. *Morrow v. Microsoft Corp.*, 499 F.3d 1332 (Fed. Cir. 2007) ("Constitutional injury in fact occurs when a party performs at least one prohibited action with respect to the patented invention that violates these exclusionary rights").

In their motion, Defendants expound at length on Dr. Becker's damages analysis, ignoring his allocation of damages to each defendant and instead alleging that he allocated damages only to Google. All of the information Defendants cite is attributable to the fact that Google is involved in, and collects the revenue from, each infringing transaction. *See* Ex. 1 (Becker report) at ¶ 191 and n. 245. But Google is not the sole infringer in this case. The non-Google defendants use the accused AdWords system and share the resulting advertising revenue with Google. Ex. 4 (Frieder report explaining that non-Google defendants infringe by using AdWords), p. 10-11. Because Google runs the AdWords system, Google collects the revenue associated with the ads and distributes that revenue to the non-Google defendants. Regardless of how the revenue is collected and distributed, Google and the non-Google defendants are jointly and severally liable for their infringe use. Ex. 1 ¶ 11, 26-40, 191 & Exhibit SLB-2a (Becker report explaining why non-Google damages are included and how non-Google damages are calculated). I/P Engine's allegations and evidence are more than sufficient to show that the non-Google defendants are jointly and severally liable.

In footnote two, Defendants again mislead the Court regarding I/P Engine's position. There, Defendants claim that "I/P Engine does not contend that any other Defendant is jointly and severally liable…." As shown above, this is not and never has been true. Tellingly, in the very next paragraph, Defendants admit that the damages sought from AOL, Gannett, IAC, and Target are <u>not additive</u> with the damages attributable to Google. This is the definition of joint liability. If there is any doubt that the liability is also several, Defendants need only reference the complaint to see that I/P engine seeks a judgment against each Defendant.

Defendants also misstate the law by claiming that I/P Engine has no factual or legal basis for asserting joint and several liability. Joint and several liability is the default rule for related

acts of infringement. As *Chisum on Patents,* explains "a patent owner may obtain judgments against unauthorized makers users, sellers, [etc.] as joint tort-feasors." [7-20 Chisum on Patents § 20.03[7][b]]. The Federal Circuit rejected an infringer's argument that a distributor and seller could not be jointly liable in *Shockley v. Arcan, Inc.*, holding "other courts, including the Supreme Court, have held that parties that make and sell an infringing device are joint tort-feasors with parties that purchase an infringing device for use or resale…. This court agrees with and adopts this rule." 248 F.3d 1349, 1364 (Fed. Cir. 2001).

I/P Engine is aware of no authority to support Defendants' assumption that subject matter jurisdiction exists for only one infringer per lawsuit. The law is precisely the opposite. *See, e.g., Shockley*, 248 F.3d at 1364 ("Each joint tort-feasor is liable for the full amount of damages (up to a full single, recovery) suffered by the patentee."); *Cooper Industries, Inc. v. Juno Lighting Inc.*, 1 USPQ2d 1313, 1315 (N.D. Ill. 1986) ("it is elementary that a plaintiff who possesses a valid cause of action against two defendants may pursue both of them at once, even though one defendant is capable of providing full relief"); *Robbins Music Corp. v. Alamo Music, Inc.*, 119 F. Supp. 29, 31 (S.D. N.Y. 1954) ("the acts of infringement…--sale, distribution, and publication--are charged against the three defendants; each is an alleged tort-feasor. It is hornbook law that an aggrieved party is not compelled to sue all tort-feasors. He may sue one or more or all of them, at his discretion.").

Defendants' motion must be rejected because it is built on the false premise that there are no compensable damages for several of the parties. I/P Engine can and does seek a monetary judgment against each of the defendants in the amounts specified in Dr. Becker's expert report.

Dated: October 5, 2012

By: /s/ Jeffrey K. Sherwood
Donald C. Schultz (Virginia Bar No. 30531)
W. Ryan Snow (Virginia Bar No. 47423)
CRENSHAW, WARE & MARTIN PLC
150 West Main Street
Norfolk, VA 23510
Telephone: (757) 623-3000
Facsimile: (757) 623-5735

Jeffrey K. Sherwood (Virginia Bar No. 19222)
Frank C. Cimino, Jr.
Kenneth W. Brothers
Dawn Rudenko Albert
Charles J. Monterio, Jr.
DICKSTEIN SHAPIRO LLP
1825 Eye Street, NW
Washington, DC 20006
Telephone: (202) 420-2200
Facsimile: (202) 420-2201

Counsel for Plaintiff I/P Engine, Inc.

CERTIFICATE OF SERVICE

I hereby certify that on this 5th day of October, 2012, the foregoing

OPPOSITION TO DEFENDANTS' MOTION TO DISMISS ALL CLAIMS AGAINST AOL INC., GANNETT CO., INC., IAC SEARCH & MEDIA, INC., AND TARGET CORPORATION, was served via the Court's CM/ECF system, on the following:

Stephen Edward Noona
Kaufman & Canoles, P.C.
150 W Main St
Suite 2100
Norfolk, VA 23510
senoona@kaufcan.com

David Bilsker
David Perlson
Quinn Emanuel Urquhart & Sullivan LLP
50 California Street, 22nd Floor
San Francisco, CA 94111
davidbilsker@quinnemanuel.com
davidperlson@quinnemanuel.com

Robert L. Burns
Finnegan, Henderson, Farabow, Garrett & Dunner, LLP
Two Freedom Square
11955 Freedom Drive
Reston, VA 20190
robert.burns@finnegan.com

Cortney S. Alexander
Finnegan, Henderson, Farabow, Garrett & Dunner, LLP
3500 SunTrust Plaza
303 Peachtree Street, NE
Atlanta, GA 94111
cortney.alexander@finnegan.com

/s/ Jeffrey K. Sherwood