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Hon. Marsha J. Pechman

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

INTERVAL LICENSING LLC,

Plaintiff,

v.

AOL, INC.; APPLE, INC.; eBAY, INC.;
FACEBOOK, INC.; GOOGLE INC.;
NETFLIX, INC.; OFFICE DEPOT, INC.;
OFFICEMAX INC.; STAPLES, INC.;
YAHOO! INC.; AND YOUTUBE, LLC,

Defendants.

Case No. 2:10-cv-01385-MJP

**INTERVAL LICENSING LLC
OPPOSITION TO RENEWED
MOTION TO DISMISS OR SEVER
FOR MISJOINDER PURSUANT
TO FED. R. CIV. P. 20 AND 21 OF
DEFENDANTS EBAY INC.,
NETFLIX, INC., OFFICE DEPOT,
INC., STAPLES, INC., AND
YAHOO! INC.**

JURY DEMAND

Plaintiff Interval Licensing LLC (“Interval”) responds to the renewed motions to dismiss for misjoinder filed by defendants eBay, Inc.; Netflix, Inc.; Office Depot, Inc.; Staples, Inc.; and Yahoo!, Inc. (collectively “Moving Defendants.”)

INTRODUCTION

The Moving Defendants renew this motion to sever or dismiss but have as yet failed to provide—in this filing as well as in their original motion—any practical justification for splitting this case into eleven separate cases. The Moving Defendants argue that strict

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1 interpretations of the applicable rules require severance but they disregard the Ninth
2 Circuit's mandate that these rules should be interpreted flexibly to promote efficiency and
3 fairness. They have even crafted an apparently novel argument adding a third requirement
4 for joinder under Fed. R. Civ. P. 20(a) to the two requirements that were the basis of the
5 original motion. No precedent supports this reinterpretation of the rule and none of the other
6 authorities relied upon by the Moving Defendants compel severance. Although they argue
7 vehemently that severance is mandated by the rules, the Moving Defendants simply ignore
8 the contrary cases that have found joinder of multiple defendants infringing the same patents
9 proper.
10

11
12 The Moving Defendants also fail to provide any credible justification for believing
13 that severance would be efficient or fair, or why it is important at this point in the case.
14 Office Depot, Staples, Netflix, and eBay ignore these issues entirely. Yahoo! complains
15 about restrictions on its ability to seek construction of a sufficient number of claim terms or
16 to file a summary judgment brief exceeding the joint page limits set by the Court. But these
17 complaints are not only premature, they are a back-door attempt to have the Court
18 reconsider its scheduling order.¹ And there is no reason to believe that severance would
19 impact these case management issues in any event, given the Court's ability to consolidate
20 these unquestionably related cases. Yahoo! also argues that the jury will be confused, but
21 even if that were true, it would not justify severance at this stage, when months of joint
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25 ¹ Indeed, both of these issues were raised in recent motions to reconsider the scheduling
26 order filed by a number of defendants. Yahoo! joined the motion by Google to reconsider
27 and increase the maximum number of terms to be construed in the *Markman* process (Dkt
28 #189, #187), which was granted in part (Dkt #195.) The other Moving Defendants here also

1 discovery and claim construction must be completed before a jury hears from the first
2 witness at trial.

3 **BACKGROUND**

4 As Interval explained in its opposition to the initial motion to sever, Interval's
5 Complaint properly joins multiple defendants who infringe the same claims of the same
6 patents by operating websites that display information in very similar ways. This argument
7 has only gained strength from Interval's First Amended Complaint, which set out more
8 details of Interval's infringement theory, and Interval's Preliminary Infringement Charts
9 both of which were served after briefing was completed for the previous motion to sever.
10

11 Interval's claim charts for the '507 patent demonstrate the nature of the similarities
12 between the infringement case against different defendants. All of the defendants operate
13 websites that display related products or related content in response to a user choosing to
14 view a webpage associated with a particular product or content item. Excerpts of Interval's
15 claim charts for claim 63 of the '507 patent for each of the Moving Defendants are attached
16 to the Declaration of Edgar Sargent filed in conjunction with this opposition. These excerpts
17 show that each of the Moving Defendants' websites display a primary item being viewed by
18 the user and also a number of secondary items that the Defendant has determined to be
19 related to the primary item based on one or more criteria, e.g. "Customers Who Viewed This
20 Item Purchased," "Customers Who Viewed This Camera Ultimately Bought," etc. The
21 charts map the claim elements to portions of the websites displaying this functionality. It is
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27 sought reconsideration of the page limitations on briefing (Dkt #184), which was denied
(Dkt #195.)

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1 Interval's contention that the functionality demonstrated by these accused products is so
2 similar that the infringement case against each defendant is likely to be very similar as well.

3 Nothing provided by the Moving Defendants undermines Interval's contention about
4 the similarity of the infringement cases. Document discovery is underway but to date not
5 one of the Moving Defendants (or any other defendant, for that matter) has come forward
6 with any concrete evidence disproving Interval's contention that many of the defendants'
7 accused products operate similarly and therefore raise similar or identical infringement
8 issues.
9

10 Because the operation of the defendants' infringing websites are apparently similar,
11 there is every reason to believe that not only will there be common issues in this case related
12 to invalidity and claim construction, but also with respect to infringement. Certainly, the
13 Moving Defendants cite nothing concrete to justify an argument for eleven different
14 Markman hearings and eleven different phases of invalidity-related discovery. Judicial
15 efficiency unquestionably favors joint resolution of these common issues. The Moving
16 Defendants attempt to sever these cases and potentially require repetitious and possibly
17 inconsistent judicial proceedings addressing the same issues would be wasteful and is not
18 mandated by the Federal Rules or controlling precedent.
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22 ARGUMENT

23 **A. Yahoo! Does Not Dispute That Interval's Claims Against Different** 24 **Defendants Satisfy The First Requirement Of Rule 20(a) Because They** 25 **Involve Common Questions Of Law Or Fact.**

26 Yahoo!'s brief largely repeats the substance of the legal argument made by Google
27 in the initial motion to sever or dismiss. To the degree that Yahoo!'s renewed motion

1 formally incorporates Google’s brief, Interval incorporates its response to Google here. For
2 the convenience of the Court, Interval repeats the relevant portions of that argument below,
3 modified to respond to the argument as it is presented in Yahoo!’s brief.

4 Federal Courts recognize that permissive joinder promotes fairness and judicial
5 efficiency. In an early case interpreting the modern Federal Rules, the Supreme Court made
6 the policy clear:
7

8 Under the rules, the impulse is toward entertaining the broadest possible
9 scope of action consistent with fairness to the parties; joinder of claims,
parties, and remedies is strongly encouraged.

10 *United Mine Workers of America v. Gibbs*, 383 U.S. 715, 724 (1966). Consistent with this
11 mandate, the Ninth Circuit holds that “Rule 20 regarding permissive joinder is to be
12 construed liberally in order to promote trial convenience and to expedite the final
13 determination of disputes, thereby preventing multiple lawsuits.” *League to Save Lake*
14 *Tahoe v. Tahoe Regional Planning Agency*, 558 F.2d 914, 917 (9th Cir. 1977).
15

16 Under the Federal Rules, a plaintiff may join multiple defendants if the claims
17 against both satisfy two elements: (1) “any question of law or fact common to all
18 defendants will arise in the action;” and (2) “any right to relief is asserted against them
19 jointly, severally, or in the alternative with respect to or arising out of the same transaction,
20 occurrence, or series of transactions or occurrences.” Fed. R. Civ. P. 20. Yahoo! does not
21 contest that the first prong is met because Interval’s claims for infringement of the same
22 claims of the same patents plainly involve common issues.
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25 **B. Interval Satisfies the “Common Series of Transactions” Requirement**
26 **Because of the Logical Relationship Between the Claims.**

1 Yahoo mischaracterizes the second prong of the permissive joinder rule by
2 suggesting that it requires allegations that all defendants conspired or cooperated in
3 producing the same infringing product. (Yahoo Br. at 6.) Consistent with the general
4 mandate favoring joinder, courts have not interpreted the phrase “same transaction or series
5 of transactions” so strictly, but instead require allegations showing a logical relationship
6 between the claims against different defendants. *See, e.g., Alexander v. Fulton County, Ga.*,
7 207 F.3d 1303, 1323 (11th Cir. 2000); *Fisher v. CIBA Specialty Chemicals Corp.*, 245
8 F.R.D. 539, 542 (S.D. Ala. 2007); *Cf.* 4 James Wm. Moore et al., *Moore’s Federal Practice*
9 § 20.05[3] (3d ed. 2010) (“same transaction” test met if “claims involve enough related
10 operative facts to make joinder in a single case fair.”)
11

12
13 The Ninth Circuit has not addressed joinder of multiple defendants under Rule 20 in
14 a patent case. Opinions discussing joinder in other contexts indicate that “same transaction
15 or series of transactions” should be given a flexible meaning to promote judicial economy
16 and fairness. *See League to Save Lake Tahoe*, 588 F.2d at 917 (finding that claims against
17 Lake Tahoe authority and several developers for allegedly improper approvals of different
18 projects initiated by the different developers satisfied the “same transaction or occurrence”
19 prong of Rule 20 and could be joined in a single action); *Coughlin v. Rogers*, 130 F.3d 1348,
20 1350 (9th Cir. 1997) (“the ‘same transaction’ requirement refers to similarity in the factual
21 background of a claim.”) (internal punctuation omitted).
22

23
24 Particularly given the paucity of decisions interpreting Rule 20, courts have
25 frequently sought guidance in the interpretation of the “same transaction” requirement of
26 Rule 13 concerning mandatory counterclaims. *See, e.g., Alexander*, 207 F.3d at 1323;
27

1 *Mosley v. General Motors Corp.*, 497 F.2d 1330, 1333 (8th Cir. 1974); *see also* 4 James
2 Wm. Moore et al., *Moore's Federal Practice* § 20.05[2] (3d ed. 2010). In this context, the
3 Ninth Circuit has unequivocally endorsed a very broad and liberal interpretation of "same
4 transaction."

5 We apply the "logical relationship" test to determine whether two claims
6 arise out of the same transaction or occurrence." *Pochiro v. Prudential Ins.*
7 *Co. of America*, 827 F.2d 1246, 1249 (9th Cir.1987) " 'This flexible approach
8 to Rule 13 problems attempts to analyze whether the essential facts of the
9 various claims are so logically connected that considerations of judicial
10 economy and fairness dictate that all the issues be resolved in one lawsuit.' " *Id.* (quoting *Harris v. Steinem*, 571 F.2d 119, 123 (2d Cir.1978)); *see also*
11 *Albright v. Gates*, 362 F.2d 928, 929 (9th Cir.1966) (noting that we have
12 given Rule 13 an "increasingly liberal construction").

13 *Johnson v. Swinney*, 1993 WL 230192 *3 (9th Cir. 1993).

14 Other District Courts have relied upon this interpretation of "same transaction" to
15 support joinder of multiple defendants allegedly infringing the same patent with different
16 accused devices. *See, e.g., Manatech, Inc. v. Country Life LLC*, 2010 WL 2944574 at *1-2
17 (N.D. Tex.) (finding that claims against different defendants for infringing the same patent
18 by manufacturing similar products satisfied the same transaction prong of Rule 20); *My*
19 *Mail Ltd. v. America Online, Inc., et al.*, 223 F.R.D. 455, 457 (E.D. Tex. 2004) (upholding
20 joinder against multiple defendants based on its finding "that there is a nucleus of operative
21 facts or law in the claims against all the defendants and, therefore, the claims against [the
22 defendants moving to sever] do arise out of the same series of transactions or occurrences as
23 the claims against the other defendants.") The *My Mail* Court emphasized the importance of
24 flexibility and criticized a "per se" rule that different defendants manufacturing different
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1 products did not satisfy Rule 20 as “a hypertechnical [interpretation of the rule] that perhaps
2 fails to recognize the realities of complex, and particularly patent, litigation.” *Id.*

3 Yahoo! relies on a series of district court cases that apply a *per se* rule against
4 joinder of multiple defendants in a patent case for infringing the same patent by
5 manufacturing different products. *Philips Electronics North Amer. Corp. v. Contec Corp.*,
6 220 F.R.D. 415, 417 (D. Del. 2004) (severing claims against different defendants after
7 discovery and before trial because “[a]llegations of infringement against two unrelated
8 parties based on different acts do not arise from the same transaction”); *Reid v. General*
9 *Motors Corp.*, 240 F.R.D. 260, 263 (E.D. Tex. 2007) (finding patents claims against
10 multiple defendants do not satisfy Rule 20 and relying on *Philips*); *Spread Spectrum v.*
11 *Eastman Kodak Co.*, 2010 WL 3516106 *2 (N.D. Ill.) (applying a *per se* rule against joinder
12 of claims against multiple defendants who infringed the same patent with different products
13 as “clearly” not satisfying Rule 20); *Pergo, Inc. v. Alloc, Inc.*, 262 F.Supp.2d 122, 128
14 (S.D.N.Y. 2003) (same); *Multi-Tech Systems, Inc. v. Net2Phone, Inc.*, 2000 U.S. Dist.
15 LEXIS 22683 at *23 (Minn. 2000) (same).

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19 None of these cases are binding on this Court and none of them apply the sort of
20 flexible, case-by-case analysis of “same transaction” set out in Ninth Circuit case law. The
21 one patent infringement case cited by Yahoo! from this Circuit is a recent Northern District
22 of California decision in which the plaintiff sued *sixty-eight* different defendants for
23 infringing two patents.² *WIAV Networks, Inc. v. 3COM Corp.*, 2010 WL 3895047 *1 (N.D.

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² Yahoo! also relies on district court decisions from this Circuit that do not involve
patent infringement or any equivalent to the overlapping claim construction, invalidity, and
infringement issues presented here and are therefore readily distinguishable. These include
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1 Cal). After the plaintiff agreed to drop all but twelve of the defendants which were to be
2 divided into seven groups, Judge Alsop analyzed the issues that would arise in the case and
3 determined that the common issues were “overwhelmed” by individual issues, in the areas
4 of claim construction and validity as well as infringement. *Id.* at *3. Here, by contrast, the
5 similarity between different defendants’ infringing products, as well as common issues in
6 claim construction and invalidity support continued consolidation rather than severance.
7

8 Interval’s claims against multiple defendants satisfy the “logical relationship” test
9 endorsed by the Ninth Circuit’s interpretation of “same transaction” in the context of Rule
10 13. Interval has sued multiple defendants, each of whom operates a website that infringes
11 Interval’s patents in closely related ways. These claims will raise a series of identical or
12 very closely related issues against each of the defendants. Severance of these claims into
13 different cases would be inefficient and contrary to the policies embodied in the Federal
14 Rules.
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17 **C. Interval’s Complaint Satisfies The Moving Defendants’ Claimed “Third
18 Factor” Under Fed. R. Civ. P. 20(a)(2).**

19 The Moving Defendants argue that Fed. R. civ. P. 20(a)(2) includes a requirement
20 that the Complaint assert a claim for a “single injury” for which all defendants must be
21 liable jointly, severally, or in the alternative. The Moving Defendants argue that Interval
22 cannot satisfy this requirement because it asserts claims for separate torts causing separate
23

24 one trademark infringement suit in which the owner of the mark sued a number of unrelated
25 businesses using different variations of the mark from across the country, *Golden Scorpio
26 Corp. v. Steel Horse Bar & Grill*, 596 F. Supp.2d 1282 (Ariz. 2009), and two cases brought
27 by the same plaintiff against multiple defendants for allegedly marking products with the
numbers of expired patents, *San Francisco Technology, Inc. v. The Glad Products Co. et al.*,

1 injuries.³ The Moving Defendants are unable to cite a single example of a Court severing a
2 claim for improper joinder based on their interpretation of the rule or on this purported
3 requirement, and the very authorities on which the Moving Defendants rely contradict their
4 theory. Properly construed, the rule requires only that claims be asserted against the
5 defendants “jointly, severally, or in the alternative,” a requirement that is readily satisfied
6 by Interval’s Complaint because Interval alleges that the defendants are severally liable for
7 their own acts of infringement.
8

9 The Moving Defendants argue that Fed. R. Civ. P. 20(a)(2)’s clause permitting
10 joinder of “any right to relief . . . asserted against [the defendants] jointly, severally, or in
11 the alternative” restricts claims to those asserted against multiple defendants all responsible
12 or potentially responsible for the same injury. (eBay Br. at 2.)
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14 The Moving Defendants authority for this interpretation of the rule is not on point.
15 They rely on a case involving fifty different plaintiffs asserting job discrimination claims
16 against fifty different defendants. However, in that case, the Court dismissed the complaint
17 because the plaintiffs could not satisfy either the “common transaction or occurrence”
18 requirement or the “common question of law or fact” requirement, not because of any
19 “common injury” requirement. *Wynn v. Nat’l Broad. Co., Inc.*, 234 F.Supp.2d 1067, 1079
20 (C.D. Cal. 2002). In a separate section of the opinion, the Court also rejected the fifty
21 plaintiffs’ attempt to allege a single, indivisible injury (based on their discouragement from
22 entering the job market) as a basis for asserting joint *and* several liability, but that holding
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26 2010 US Dist. LEXIS 83681 (N.D. Ca. 2010); and *San Francisco Technology, Inc. v. Adobe*
27 *Systems, Inc.*, 2010 WL 1640397 (N.D. Cal. 2010).

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1 has no relevance here because Interval is not seeking to hold the defendants jointly *and*
2 severally liable, but only severally liable for their own infringement. *See Id.* at 1096. (cited
3 in eBay’s Br. at 3.) Similarly, the *Bravado* case, also cited by the Moving Defendants,
4 involved claims for copyright infringement against seventy six different defendants and the
5 Court dismissed for failure to meet the “common transaction or occurrence” requirement.
6 *Bravado Intern. Group Merchandising Services v. Cha*, 2010 WL 2650432 at *4 (C.D.
7 Cal. June 30, 2010) (cited in eBay’s Br. at 4-5.)

9 Moving Defendants reliance on Wright & Miller to support their “single
10 injury/single tort” theory also fails. Rather than treating the “jointly, severally, or in the
11 alternative” requirement as a further *restriction* on joinder, Wright & Miller recognizes it
12 only as a welcome liberalization of the too strict standard for joinder under the former rule.
13
14 7 Charles A. Wright, Arthur R. Miller & Mary K. Kane, *Federal Practice and Procedure* §
15 1654 (2010). Indeed the previous section setting out the requirements of the rule contains
16 no mention of the purported “single injury/single tort” requirement:
17

18 The rule imposes two specific requisites to the joinder of
19 parties: (1) a right to relief must be asserted by, or against,
20 each plaintiff or defendant relating to or arising out of the
21 same transaction or occurrence; and (2) some question of law
22 or fact common to all the parties will arise in the action.

23 *Id.* § 1653.

24 The plain language of the rule requires nothing more than that the Plaintiff assert
25 claims under which the joined defendants are “severally” liable (“ . . . jointly, severally, *or* in
26 the alternative . . .”). Interval has satisfied this requirement. “Several liability” is defined in

27 ³ This argument is set out in the brief filed by eBay, Netflix, Office Depot, and Staples
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1 Black's as "Liability that is separate and distinct from another's liability. . ." *Black's Law*
2 *Dictionary* 926 (7th Ed. 1999). This is consistent with Black's definition of "several":
3 "separate, distinct, but not necessarily independent." *Id.* at 1378. The Moving Defendants
4 argue that "several" carries with it an implicit requirement that multiple defendants' liability
5 be for the same injury, and must be distinguished from "separate" liability, but not only is
6 this inconsistent with Black's, nothing in the case law interpreting Rule 20, Wright & Miller,
7 or any authority cited by the Moving Defendants supports this distinction. Indeed, the one
8 case the Moving Defendants cite for this proposition holds nothing of the kind. The *Aetna*
9 *Casualty* case is plainly discussing joint *and* several liability among multiple defendants,
10 contrary to the misleading excerpt quoted by the Moving Defendants. *Aetna Cas. And Sur.*
11 *Co. v. Leheay Const. Co.*, 219 F.3d 519, 546 (6th Cir. 2000) (cited in eBay's Br. at 2).
12 Because Interval has alleged that the defendants are severally liable for damages flowing
13 from their own individual acts of infringement, it has satisfied this component of Fed. R.
14 Civ. P. 20(a)(2).
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18 **D. Yahoo!'s Claims Of Prejudice Are Premature And Unpersuasive.**

19 Yahoo! argues that it should be severed from the other defendants because its ability
20 to defend itself will be unfairly hampered by a joint proceeding. Yahoo! claims that its right
21 to present an "individualized assault on questions of non-infringement, invalidity, and claim
22 construction" is being impaired by the Court's approach to this case. (Yahoo! Br. at 9.) In
23 particular, Yahoo! argues that the Court's scheduling order unfairly requires Yahoo! to
24 "share limited space and time with the other Defendants," including limitations on the
25
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27 ("eBay Br.") at pp. 1-6, and it is joined by Yahoo! in its brief at p. 5 n.1.

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1 number of terms to be construed in the *Markman* process and the number of pages permitted
2 for briefing. (*Id.* at 10). This is a blatant attempt to re-argue issues that have already been
3 briefed and that the Court has already decided in issuing its scheduling order and Yahoo!
4 provides no justification for revisiting these issues so soon after they have been decided.
5 Moreover, the Court recently granted defendants' motion to reconsider one of the elements
6 about which Yahoo! complains and doubled the number of claim terms to be construed from
7 ten to twenty. As this modification demonstrates, if Yahoo! is genuinely prejudiced by the
8 limitations in the scheduling order it will have the opportunity to seek appropriate relief at
9 the appropriate time. Nothing Yahoo! sets out in this motion demonstrates any pressing
10 need to change any of those limitations now.
11

12
13 Yahoo!'s complaints about jury confusion and complexity at trial are similarly
14 premature and unsupported. (Yahoo! Br. at 10.) Yahoo! hypothesizes that Interval will
15 attempt to prove infringement by showing that only one defendant infringes and then
16 arguing that all of the other defendants are sufficiently similar that they should be held liable
17 too. (*Id.*) The basis for Yahoo!'s specific concern is not clear; Interval has never indicated
18 any plan to limit its infringement case to only a subset of the defendants. More importantly,
19 Yahoo!'s fears can be fully and fairly addressed when they become ripe, in the pre-trial
20 process and during the trial itself. The possibility that Interval might attempt to prove its
21 case against Yahoo! with insufficient evidence hardly justifies severance into separate
22 proceedings now.
23
24

25 At the end of its brief, Yahoo! appears to acknowledge the inefficiency that would
26 undoubtedly result from separating this litigation into multiple parallel cases. As Yahoo!
27

1 points out, the Federal Rules authorize consolidation of any matters involving common
2 issues to promote efficiency. Fed. R. Civ. P. 42(a)(3). The Court correctly concluded in its
3 scheduling order that joint management of the claims against the eleven defendants here will
4 be the fastest and most efficient means to resolve this case. Given Yahoo!'s
5 acknowledgement of the Court's authority to proceed with the case on a consolidated basis
6 no matter what the outcome of this motion, it is difficult to see the point of severance.
7 Whether proceeding under a single case number or severed into multiple cases, there is no
8 doubt that the claims against the eleven defendants should be consolidated so that common
9 issues can be resolved together, avoiding wasteful duplication and the risk of inconsistent
10 findings. The prospect of eleven different claim construction hearings addressing identical
11 terms, for example, or of multiple, un-coordinated discovery investigations into invalidity
12 issues for the same patent, plainly justify the consolidation of these cases under Rule 42.
13
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15 Given that the claims against the different defendants will be proceeding jointly at
16 least through claim construction, severance into multiple cases at this early stage would be
17 premature. If the Court is inclined to consider severance into different matters for purposes
18 of addressing issues unique to the individual defendants, it should do so when those unique
19 issues have been more clearly identified and can be balanced against the benefits from
20 proceeding jointly.
21
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23 CONCLUSION

24 For the reasons stated above, Interval respectfully requests that the Moving
25 Defendants' renewed motion to sever or dismiss for misjoinder be denied.
26

27 Dated: March 21, 2011

/s/ Edgar Sargent

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CERTIFICATE OF SERVICE

I hereby certify that on March 21, 2011, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following counsel of record:

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