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IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF CALIFORNIA

ESET, LLC,

Plaintiff,

vs.

LODSYS, LLC,

Defendant.

CASE NO. 11cv1285 WQH RBB

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS

Date: August 8, 2011
Time: 11:00 a.m.
Crtm: 4

NO ORAL ARGUMENTS UNLESS REQUESTED BY THE COURT

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1 ## I. INTRODUCTION

2 In its haste to "win" the race to the courthouse, Plaintiff ESET, LLC ("Plaintiff") apparently failed to
3 conduct a diligent pre-filing investigation to determine that the requisite jurisdiction and venue requirements
4 are satisfied for bringing its Complaint For Declaratory Judgment [dkt. No. 1] (the "Complaint") in this
5 Judicial District. Indeed, Plaintiff bases its jurisdiction and venue allegations on an infringement letter and
6 e-mail it received from Defendant Lodsys, LLC ("Defendant"), and the conclusory assertion that Defendant
7 is allegedly "pursuing licensing and enforcement activities regarding the Asserted Patents throughout
8 California." Complaint, ¶ 10. But the Federal Circuit and the District Courts of California have repeatedly
9 rejected infringement letters and licensing activity as a basis for personal jurisdiction. And, as discussed in
10 detail below, Defendant has *no* contacts with the State of California or this Judicial District that could
11 possibly constitute a basis for personal jurisdiction or venue. Accordingly, Plaintiff's Complaint should be
12 dismissed pursuant Federal Rule of Civil Procedure 12(b)(2) and (3).

13 ## II. RELEVANT BACKGROUND

14 This lawsuit (and the litigation already pending in the Eastern District of Texas) was triggered by a
15 series of wrongful acts by Plaintiff. Defendant, however, will not burden the Court with an exhaustive
16 recitation of Plaintiff's misconduct. Instead, Defendant recites here only the following few facts and
17 procedural history relevant to this motion.

18 ### A. Plaintiff's Inaccurate Allegations of Personal Jurisdiction.

19 Plaintiff alleges, "[u]pon information and belief, [that] this Court has personal jurisdiction over
20 Lodsys because Lodsys has purposefully availed itself of the benefits and protections of the laws of this
21 State, including this Judicial District, in connection with its conduct in wrongfully asserting the Asserting
22 Patents against ESET, and in pursuing licensing and enforcement activities regarding the Asserted Patents
23 throughout California." Complaint, ¶ 11.

24 Plaintiff's reference to "asserting the Asserted Patents against ESET," however, concerns only the
25 infringement letter and "e-mail message enclosing an 'Infringement Claim Chart'" that Defendant sent to
26 ESET. *See* Complaint, ¶¶ 14-15. ESET does not provide any further explanation for its allegation that
27 Defendant is allegedly "pursuing licensing and enforcement activities regarding the Asserted Patents
28

throughout California." Complaint, ¶ 10. But, in fact, Defendant has not entered into any exclusive licenses (in California or elsewhere). *See* Declaration of Mark Small (the "Small Decl."), ¶ 4. Nor has Defendant filed any lawsuits for patent infringement in California. *See id.*

B. <u>The Litigation Pending in the Eastern District of Texas</u>.

On February 11, 2011, nearly four months before Plaintiff filed this action, Defendant filed a patent infringement lawsuit against twelve companies in the Eastern District of Texas. *See id.* at Ex. A. On May 31, 2011, Defendant filed a patent infringement lawsuit against seven additional persons and/or companies in the Eastern District of Texas. *See id.* at Ex. B. On June 10, 2011, Defendant filed a patent infringement lawsuit against ten additional companies in the Eastern District of Texas. *See id.* at Ex. C. Finally, on July 5, 2011, Defendant filed a patent infringement lawsuit against five additional companies (including Plaintiff) in the Eastern District of Texas. *See id.* at Ex. D.

III. ARGUMENT

"[I]t is well established that, in cases concerning patent rights, the law of the Federal Circuit controls the district court's inquiry whether it has personal jurisdiction over a defendant." *Injen Tech. Co., Ltd. v. Advanced Engine Mgmt., Inc.*, 270 F. Supp. 2d 1189, 1193 (S.D. Cal. 2003). "This choice of governing law applies as well to personal jurisdiction in declaratory judgment actions that involve patentees as defendants." *Red Wing Shoe Co., Inc. v. Hockerson-Halberstadt, Inc.*, 148 F.3d 1355, 1358 (Fed. Cir. 1998). Whether a defendant "'resides' in the Southern District of California for purposes of [venue] is [also] controlled by Federal Circuit precedent pertaining to personal jurisdiction." *Injen Tech. Co.*, 270 F. Supp. 2d at 1194

"When a defendant moves to dismiss for lack of personal jurisdiction pursuant to Federal Rule of Civil Procedure 12(b)(2), the plaintiff has the burden of making a prima facie showing of jurisdictional facts." *Advantage Lift Sys. Inc. v. O.M.E.R. S.p.A.*, No. CIV 96-0951, 1997 WL 398033, *3 (S.D. Cal. Mar. 19, 1997). And "once the defendant has challenged the propriety of venue in a given court, the plaintiff bears the burden of showing that venue is proper." *Omnicell, Inc. v. Medacist Solutions Group, LLC*, 272 F.R.D. 469, 472 (N.D. Cal. 2011).

"In ruling on the motion, the 'court may consider evidence presented in affidavits to assist in its determination and may order discovery on the jurisdictional issues.'" *Pac. Rollforming, LLC v. Trakloc Int'l,*

1 *LLC*, No. 07CV1897LJMA, 2008 WL 4183916, *1 (S.D. Cal. Sept. 8, 2008).[1] "To establish a prima facie
2 showing of personal jurisdiction, plaintiff must set forth some evidentiary basis to support the allegations
3 offered in the complaint." *BJI Energy Solutions, LLC v. Artemis Technologies d/b/a Alpha-Lite*, CV 04-
4 1521-RGK(JTLX), 2004 WL 1498164, *1 (C.D. Cal. June 17, 2004). Accordingly, while "a district court
5 must accept the ***uncontroverted allegations*** in the plaintiff's complaint as true and resolve any factual
6 conflicts in the affidavits in the plaintiff's favor" (*Electronics For Imaging, Inc. v. Coyle*, 340 F.3d 1344,
7 1348 (Fed. Cir. 2003)) (emphasis added)), "the court may not assume the truth of such allegations if they are
8 contradicted by affidavit." *SDS Korea Co., Ltd. v. SDS USA, Inc.*, 732 F. Supp. 2d 1062, 1069 (S.D. Cal.
9 2010).

10 As discussed below, Plaintiff's Complaint should be dismissed because (a) this Court lacks personal
11 jurisdiction over Defendant; (b) venue is improper in this Judicial District; and (c) the Court should exercise
12 its discretion to decline to hear this declaratory judgment action, particularly given that the same issues are
13 already pending before the Eastern District of Texas.

14 **A. Plaintiff's Complaint Should Be Dismissed for Lack of Personal Jurisdiction.**

15 "Determining whether personal jurisdiction exists over an out-of-state defendant involves two
16 inquiries: whether a forum state's long-arm statute permits service of process, and whether the assertion of
17 personal jurisdiction would violate due process." *Avocent Huntsville Corp. v. Aten Int'l Co., Ltd.*, 552 F.3d
18 1324, 1329 (Fed. Cir. 2008). "California's jurisdictional statute is co-extensive with federal due process
19 requirements; therefore, jurisdictional inquiries under state law and federal due process standards merge into
20 one analysis-'whether jurisdiction comports with due process.'" *Juniper Networks, Inc. v. SSL Services,*
21 *LLC*, No. C 08-5758 SBA, 2009 WL 3837266, *2 (N.D. Cal. Nov. 16, 2009). "Due process requires a
22 nonresident defendant to have certain 'minimum contacts' with the forum state so that the maintenance of a
23 suit does not offend 'traditional notions of fair play and substantial justice.'" *Crane v. Battelle*, 127 F.R.D.
24 174, 176 (S.D. Cal. 1989) (quoting *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945)).

25 "Consistent with these principles, the Supreme Court has drawn a distinction between 'specific'
26 jurisdiction and 'general' jurisdiction." *Avocent*, 552 F.3d at 1330. To establish specific jurisdiction in a
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28 [1] The Court may also take judicial notice of matters of public record, including proceedings in other courts. *See, e.g., Bennett v. Meditronic*, 285 F.3d 801, 803 n.2 (9th Cir. 2002).

declaratory judgment action for non-infringement and/or invalidity of a patent, a plaintiff must demonstrate that "(1) the defendant purposefully directed its activities at residents of the forum, (2) the claim arises out of or relates to those activities, and (3) assertion of personal jurisdiction is reasonable and fair." *Juniper Networks*, 2009 WL 3837266 at *3.

"To establish the minimum contacts necessary to establish general personal jurisdiction, plaintiffs bear a higher burden." *Avocent*, 552 F.3d at 1330. Specifically, the defendant must have "'substantial' or 'continuous and systematic' contacts with the forum state." *Perry v. Lyons*, No. 09CV0794 JM(CAB), 2009 WL 3062409, *2 (S.D. Cal. Sept. 22, 2009) (citing *Fields v. Sedgwick Associated Risks, Ltd.*, 796 F.2d 299 (9th Cir. 1986)).

"While the application of this description of due process has evolved along with the increasing national and international scope of business transactions affecting citizens of this country, the Supreme Court has repeatedly cautioned that 'it is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws.'" *Avocent.*, 552 F.3d at 1329 (quoting *Hanson v. Denckla*, 357 U.S. 235, 253 (1958)). "Each Defendant's contacts with the forum State must be assessed individually" (*Calder v. Jones*, 465 U.S. 783, 790 (1984)), and the "indirect or attenuated contacts or the unilateral activity of a third party will not support the exercise of specific jurisdiction since it cannot be said that defendant purposely availed himself of the benefits of the forum." *VCS Samoa Packing Co. v. Blue Continent Products (PTY) Ltd.*, 83 F. Supp. 2d 1151, 1154 (S.D. Cal. 1998) (citing *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 775 (1984)).

1. The Federal Circuit and the District Courts of California Have Repeatedly Held that Infringement Letters and Licensing Activity Do *Not* Create Personal Jurisdiction.

Plaintiff has alleged that this Court has personal jurisdiction over Defendant based entirely on Plaintiff's "information and belief" that infringement letters and other unspecified "licensing and enforcement activities" gives rise to personal jurisdiction. *See* Complaint, ¶ 10. But the Federal Circuit has repeatedly rejected similar allegations:

> In many patent declaratory judgment actions, the alleged injury arises out of the threat of infringement as communicated in an infringement letter, and the patentee may have little contact with the forum beyond this letter. While such letters themselves might be expected

> to support an assertion of specific jurisdiction over the patentee because the letters are purposefully directed at the forum and the declaratory judgment action arises out of the letters, ***we have held that, based on policy considerations unique to the patent context, letters threatening suit for patent infringement sent to the alleged infringer by themselves do not suffice to create personal jurisdiction***. This is because to exercise jurisdiction in such a situation would not comport with fair play and substantial justice. Principles of fair play and substantial justice afford a patentee sufficient latitude to inform others of its patent rights without subjecting itself to jurisdiction in a foreign forum. ***A patentee should not subject itself to personal jurisdiction in a forum solely by informing a party who happens to be located there of suspected infringement***. Grounding personal jurisdiction on such contacts alone would not comport with principles of fairness. Thus, [f]or the exercise of personal jurisdiction to comport with fair play and substantial justice, there must be other activities directed at the forum and related to the cause of action besides the letters threatening an infringement suit.

Avocent, 552 F.3d at 1333 (internal citations and quotation marks omitted; emphasis added); *see also Autogenomics, Inc. v. Oxford Gene Tech. Ltd.*, 566 F.3d 1012, 1014 (Fed. Cir. 2009) ("Because the district court possessed neither general nor specific personal jurisdiction over Oxford, and because the court did not abuse its discretion by denying jurisdictional discovery, we affirm."); *Silent Drive, Inc. v. Strong Industries, Inc.*, 326 F.3d 1194, 1202 (Fed. Cir. 2003) ("We have decided that under the third of these tests the sending of letters threatening infringement litigation is not sufficient to confer personal jurisdiction."); *Hildebrand v. Steck Mfg. Co., Inc.*, 279 F.3d 1351, 1356 (Fed. Cir. 2002) ("All of his documented contacts were for the purpose of warning against infringement or negotiating license agreements, and he lacked a binding obligation in the forum."); *Red Wing Shoe*, 148 F.3d at 1360 ("Thus, even though cease-and-desist letters alone are often substantially related to the cause of action (thus providing minimum contacts), the 'minimum requirements inherent in the concept of 'fair play and substantial justice' ... defeat the reasonableness of jurisdiction.'").

The Federal Circuit has also developed a non-exhaustive list of "other activities" that do *not* confer personal jurisdiction, including engaging in licensing negotiations in conjunction with infringement letters (*see Hildebrand*, 279 F.3d 1356); successfully licensing patents, even to multiple non-exclusive licensees, with receipt of royalty income (*see Red Wing Shoe*, 148 F.3d at 1357-58); the defendant's own "commercialization activity" in the forum (*see Autogenomics*, 566 F.3d at 1019-1020); and initiating litigation in the defendant's home forum. *See Avocent*, 552 F.3d at 1334 (distinguishing "initiating judicial or extra-judicial activities in the forum").

Similarly, applying binding Federal Circuit law, the District Courts of California have repeatedly

dismissed declaratory judgment actions that allege infringement letters and licensing activity as grounds for personal jurisdiction. *See, e.g., Autonomy, Inc. v. Adiscov, LLC*, No. C 11-00420 SBA, 2011 WL 2175551, *3 (N.D. Cal. June 3, 2011) ("Though Autonomy does not allege that the Court has general jurisdiction over Adiscov, it avers that the Court has specific jurisdiction based on Adiscov's conduct in directing its patent enforcement activities at Autonomy in California, as well as other companies which are based in or that do business in California. However, the actions cited by Automony are far too attenuated to support a showing of personal jurisdiction."); *Juniper Networks*, 2009 WL 3837266 at *4 ("Here, the enforcement activity involving Citrix entities transpired in Texas, not California."); *Picturewall Co., Inc. v. Rice*, No. C 09-5442 PJH, 2010 WL 1753209, *2 (N.D. Cal. Apr. 29, 2010) ("Federal Circuit precedent is clear on this issue… For 'policy considerations ... letters threatening suit for patent infringement sent to the alleged infringer by themselves do not suffice to create personal jurisdiction.'"); *Dex Products, Inc. v. Houghteling*, No. C 05-05126 SI, 2006 WL 1751903, *3 (N.D. Cal. June 23, 2006) ("The Federal Circuit has long held that a letter threatening litigation is an insufficient basis for asserting personal jurisdiction over a patent holder.").

Because the Federal Circuit and the District Courts of California have repeatedly rejected infringement letters and licensing activity as a basis for personal jurisdiction, Plaintiff's Complaint should be dismissed.

2. Defendant Has *No* Contacts with California that Could Give Rise to Specific Jurisdiction, Let Alone General Jurisdiction.

In addition to the one infringement letter and one e-mail directed to Plaintiff, Plaintiff alleges that Defendant has purportedly engaged in licensing and enforcement activities "throughout California." Complaint, ¶ 10. "As stated above, [however], the Federal Circuit has established that sending infringement letters and offering non-exclusive licenses is not enough to establish personal jurisdiction." *Oacis Health Care Sys., Inc. v. Allcare Health Mgmt. Sys., Inc.*, No. C-99-5112-VRW, 2000 WL 550040, *2 (N.D. Cal. Apr. 25, 2000). And, although Defendant has initiated litigation against entities registered or headquartered in California, those lawsuits (*i.e.*, the so-called "enforcement activities") have been filed in the Eastern District of Texas, not California. *See Juniper Networks, Inc. v. SSL Services, LLC*, No. C 08-5758 SBA, 2009 WL 3837266, *4 (N.D. Cal. Nov. 16, 2009) (rejecting "***novel*** argument that the act of filing a lawsuit against an alleged California resident-in a Texas district court-is sufficient to make a prima facie showing

that it has purposefully availed 'itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws'") (emphasis added).

Moreover, Defendant does not have (nor has it ever had) any employees, offices, or facilities in California. *See* Small Decl., ¶ 3. It does not maintain any bank accounts or other assets in California. *See id.* Nor does it lease or own any real or other property in California. *See id.* Indeed, as Plaintiff correctly alleges, Defendant "is a Texas limited liability company." Complaint, ¶ 7. The letter attached to Plaintiff's Complaint also reveals that Defendant's principal place of business is in Marshall, Texas. *See* Complaint, Ex. E. And Defendant maintains an office in its Texas headquarters. *See* Small Decl., ¶ 2. Accordingly, Defendant has no contacts with California that could give rise to personal jurisdiction. *See, e.g.*, *Oacis Health Care*, 2000 WL 550040, at *3 ("The court concludes that defendant's actions, though they go slightly beyond merely notifying potential infringers, do not rise to the level necessary to establish general or specific jurisdiction.").

Because this Court lacks personal jurisdiction over Defendant, Plaintiff's Complaint should be dismissed.

B. <u>Plaintiff's Complaint Should Also Be Dismissed for Improper Venue.</u>

Plaintiff alleges that "[v]enue is proper in this district pursuant to 28 U.S.C. §§ 1391 and/or 1400." Complaint, ¶ 11. But "[v]enue in a declaratory judgment action for patent non-infringement and invalidity is governed by the general venue statute, 28 U.S.C. § 1391(b) and (c), and not the special patent infringement venue statute, 28 U.S.C. § 1400(b)." *Diamond-Chase Co. v. Stretch Devices Inc.*, CV 90-1808 DT (TX), 1990 WL 10072475, *1 (C.D. Cal. May 29, 1990) (citing *United States Aluminum Corp. v. Kawneer Co., Inc.*, 694 F.2d 193, 195 (9th Cir.1982)). Accordingly, because section 1400 is not applicable, venue could only be proper in this Judicial District if the statutory bases in section 1391(b) are satisfied.[2]

Specifically, section 1391(b) provides that, an "action wherein jurisdiction is not founded solely on diversity of citizenship may" be brought *only* in:

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[2] Section 1391(a) is also inapplicable because it applies "wherein jurisdiction is founded only on diversity of citizenship;" section 1391(c) merely defines the residency of "a corporation;" section 1391(d) provides that "[a]n alien may be sued in any district;" section 1391(e) concerns civil actions "in which a defendant is an officer or employee of the United States or any agency thereof;" section 1391(f) concerns civil actions "against a foreign state;" and section 1391(g) applies only when the "jurisdiction of the district court is based upon section 1369." *See* 28 U.S.C. § 1391(a)-(g).

1 (1) a judicial district where any defendant resides, if all defendants reside in the same State,

2 (2) a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated, or

3 (3) a judicial district in which any defendant may be found, if there is no district in which the action may otherwise be brought.

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28 U.S.C. § 1391(b). As discussed below, the uncontroverted facts here demonstrate that venue is improper
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in this Judicial District.
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1. Defendant Resides in Texas, Not California.
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Defendant "is a Texas limited liability company." Complaint, ¶ 7. And its principal place of
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business is in Marshall, Texas. *See id.*; *see also* Small Decl., ¶ 2. Although Section 1391(c) provides that "a
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defendant that is a corporation shall be deemed to reside in any judicial district in which it is subject to
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personal jurisdiction at the time the action is commenced" (28 U.S.C. § 1391(c)), as discussed above,
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Defendant is not subject to personal jurisdiction in California. Thus, venue would be proper under section
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1391(b)(1) in Texas, not California.
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2. The Relevant Events Occurred in Texas (or D.C.), Not California.
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Plaintiff has alleged no specific "events" other than the sending of an infringement letter and e-mail
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to Plaintiff and other unspecified "licensing and enforcement activities." *See* Complaint, ¶¶ 10, 14-15. But
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any "enforcement activity" is occurring in the Eastern District of Texas, and infringement letters and
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licensing activities are not a "substantial part of the events" giving rise to a declaratory judgment action.
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See, e.g., *Modern Computer Corp. v. Ma*, 862 F. Supp. 938, 947 (E.D.N.Y. 1994) ("It is well-established that
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in a declaratory judgment action for non-infringement and invalidation of a patent, a cease and desist letter
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cannot form the basis for venue under section 1391 on the grounds that the sending of the letter constitutes
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"'a substantial part of the events giving rise to the claim.'").
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Moreover, the property at issue here (*i.e.*, the patents) are owned by Defendant, a Texas limited
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liability company. And like all patents, the property rights were granted by the USPTO in Washington, D.C.
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Thus, venue would be proper under section 1391(b)(2) in Texas (or D.C.), not California. *See, e.g.*, *Unistrut*
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Corp. v. Baldwin, 815 F. Supp. 1025, 1027 (E.D. Mich. 1993) ("The case at hand seeks declaratory judgment
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as to certain patent rights. While it is true that institution of the action was sparked by defendant's letters
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requesting compensation for plaintiffs' alleged infringement on defendant's patent, these letters did not
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cause the alleged patent infringement that is ultimately the subject of this suit. The transaction at issue here is essentially the granting, in Washington, D.C., of a patent which plaintiffs are alleging is invalid.").

3. This Action May Be Brought in Texas, Not California.

There is no dispute that venue is proper in the Eastern District of Texas, and both Plaintiff and Defendant are subject to personal jurisdiction in that Judicial District. In fact, Defendant has already initiated litigation against Plaintiff in the Eastern District of Texas. *See* Small Decl., Ex. D. Thus, venue would be proper under section 1391(b)(3) in Texas, not California.

Because venue is improper in this Judicial District, Plaintiff's Complaint should be dismissed.

C. Plaintiff's Complaint Should Be Dismissed Based on the Court's Discretion.

Federal courts are not required to hear cases requesting declaratory judgments; rather, the Declaratory Judgment Act provides that courts "***may*** declare the rights and other legal relations of any interested party seeking such declaration" (28 U.S.C. § 2201) (emphasis added)), and courts may decline such actions in their broad discretion. *See Wilton v. Seven Falls Co.*, 515 U.S. 277, 288 (1995) ("By the Declaratory Judgment Act, Congress sought to place a remedial arrow in the district court's quiver; it created an opportunity, rather than a duty, to grant a new form of relief to qualifying litigants. Consistent with the nonobligatory nature of the remedy, a district court is authorized, in the sound exercise of its discretion, to stay or to dismiss an action seeking a declaratory judgment before trial or after all arguments have drawn to a close. In the declaratory judgment context, the normal principle that federal courts should adjudicate claims within their jurisdiction yields to considerations of practicality and wise judicial administration.") (internal footnote omitted).

"The 'touchstone' factors are that a district court should ... discourage litigants from filing declaratory actions as a means of forum shopping; and it should avoid duplicative litigation." *Supermicro Computer, Inc. v. Digitechnic*, S.A., 145 F. Supp. 2d 1147, 1150 (N.D. Cal. 2001). In particular, courts disfavor declaratory judgment actions based only on a recent infringement letter, because hearing such actions "would create a strong disincentive for patentees to communicate with potential infringers before filing suit, for fear of being sued first and thus forced to litigate in the defendant's forum of choice." *Fresenius USA, Inc. v. Transonic Sys., Inc.*, 207 F. Supp. 2d 1009, 1013 (N.D. Cal. 2001).

Courts have also dismissed declaratory judgment actions where it appears that there is an intent, or the resulting effect is, to gain a tactical or unfair advantage in negotiations. *See, e.g.*, *EMC Corp. v. Norand Corp.*, 89 F.3d 807, 815 (Fed. Cir. 1996) ("Under these circumstances, the district court could properly view the declaratory judgment complaint as a tactical measure filed in order to improve EMC's posture in the ongoing negotiations-not a purpose that the Declaratory Judgment Act was designed to serve.").

Here, the purposes of the Declaratory Judgment Act are plainly *not* furthered by hearing this action. Litigation is already pending in the Eastern District of Texas, which involves legal and factual questions common to this action (as well as the same parties). For obvious reasons of judicial economy, and in consideration of the "natural plaintiff's" right to choose the forum, the logical (and more efficient) forum for this action is the Eastern District of Texas. Plaintiff apparently filed this action in California only to gain a tactical advantage. *See Davox Corp. v. Digital Sys. Int'l, Inc.*, 846 F. Supp. 144, 148 (D. Mass. 1993) ("This court will not exercise its discretionary jurisdiction over this action because it would be inappropriate to reward-and indeed abet-conduct which is inconsistent with the sound policy of promoting extrajudicial dispute resolution, and conservation of judicial resources.").

Plaintiff will not be harmed if the Court exercises its broad discretion to decline to hear this action, because a forum exists in which Plaintiff's declaratory judgment action may be properly heard, in which Defendant is subject to personal jurisdiction, and in which litigation is already pending. Because the Court may exercise its broad discretion to decline to hear this declaratory judgment action, Plaintiff's Complaint should be dismissed.

IV. CONCLUSION

This Court lacks personal jurisdiction over Defendant. Venue is improper in this Judicial District. And given that the same issues are already pending before the Eastern District of Texas, the Court should decline to hear this declaratory judgment action. For all of the above reasons, Plaintiff's Complaint should be dismissed.

Respectfully Submitted,

Dated: July 5, 2011

LAW OFFICE OF KENT M. WALKER, A.P.C.
By:

s/ Kent M. Walker

KENT M. WALKER

Attorney for Defendant
LODSYS, LLC

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CERTIFICATE OF SERVICE

I hereby certify the following: I am over the age of 18 years and am not a party to the above-captioned action. I am a registered user of the CM/ECF system for the United States District Court for the Southern District of California.

On July 5, 2011, I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system. To the best of my knowledge, all counsel to be served in this action are registered CM/ECF users and will be served by the CM/ECF system.

I declare under penalties of perjury under the laws of the United States that the foregoing is true and correct.

Dated: July 5, 2011

LAW OFFICE OF KENT M. WALKER, A.P.C.

By: s/ Kent M. Walker

KENT M. WALKER

Attorney for Defendant
LODSYS, LLC