

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
MARSHALL DIVISION**

LODSYS GROUP, LLC,)	
)	
Plaintiff,)	
)	CIVIL ACTION NO. 2:12-CV-286
v.)	
)	JURY TRIAL DEMANDED
BECKER PROFESSIONAL)	
DEVELOPMENT CORPORATION, <i>et. al.</i> ,)	
)	
Defendants.)	

**HSN, INC.’S COMBINED MOTIONS TO (A) DISMISS, OR ALTERNATELY SEVER,
FOR IMPROPER JOINDER, AND(B) DISMISS FOR IMPROPER VENUE**

Pursuant to Fed. R. Civ. P. 20 and 21 and 35 U.S.C. §299, Defendant HSN, Inc. (“HSN”) moves to dismiss the Complaint (Dkt. No. #1) against HSN, or alternately sever HSN into a new action, because joinder of the defendants in a single lawsuit is improper. Also, pursuant to Fed. R. Civ. P. 12(b)(3) and 28 U.S.C. § 1400(b), HSN moves to dismiss the Complaint, as against HSN, because venue is improper in this District.¹

I. Joinder is Improper

On May 10, 2012, Lodslys Group, LLC (“Lodslys”) initiated this lawsuit against seven unrelated defendants, contending that each infringes claim 1 of U.S. Patent No. 7,222,078 (“the ‘078 Patent”). Compl. ¶¶13-19. By initiating a single lawsuit against these seven unrelated defendants, Lodslys willfully ignored the America Invents Act’s (“AIA”) amendments to 35 U.S.C. § 299 and recent Federal Circuit precedent, which strictly forbid Lodslys’s attempt at

¹ To the extent that the Court severs HSN into a new action, instead of dismissing HSN, for improper joinder, HSN submits that HSN’s Motion to Dismiss for Improper Venue remains ripe.

joinder here. The only similarity between any of these seven unrelated defendants is that they apparently conduct some type of e-commerce activity over the Internet and are alleged to infringe the same '078 Patent. Other than that, the similarity ends - neither the defendants nor the defendants' respective accused products are related in any way, shape, or form.

Rule 20(a)(2) requires the following two conditions to be met for joining defendants in a single action:

(A) any right or relief is asserted against them jointly, severally, or in the alternative with respect to or arising out of the same transaction, occurrence, or series of occurrences; and

(B) any question of law or fact common to all defendants will arise in the action.

Fed. R. Civ. P. 20(a)(2).

For joinder in patent infringement lawsuits, the plaintiff must also meet the requirements of 35 U.S.C. § 299, which states:

(a) With respect to any civil action arising under any Act of Congress relating to patents... parties that are accused infringers may be joined in one action as defendants... **only if**

(1) any right to relief is asserted against the parties jointly, severally, or in the alternative with respect to or arising out of the same transaction, occurrence, or series of transactions or occurrences relating to the making, using, importing into the United States, offering for sale, or selling of **the same accused product or process**; and

(2) questions of fact common to all defendants or counterclaim defendants will arise in the action.

(b) ...accused infringers **may not be joined in one action** as defendants... based solely on allegations that they each have infringed the patent or patents in suit.

35 U.S.C. § 299 (emphasis added).

Apparent similarity of accused products is not enough to establish that the accused products are the "same accused product or process," as required by 35 U.S.C. § 299. See Body

Science LLC v. Boston Scientific Corp., 2012 WL 718495 at *10-11 (N.D. Ill. Mar. 6, 2012) (“[T]he fact that two parties may manufacture or sell similar products, and that these sales or production may have infringed the identical patent owned by the plaintiffs is not sufficient to join unrelated parties as defendants in the same lawsuit pursuant to Rule 20(a)” (quoting Pergo, Inc. v. Alloc, Inc., 262 F.Supp.2d 122, 128 (S.D.N.Y. 2003))). Simply put, multiple unrelated defendants cannot be joined simply because the accused products or processes appear to be similar to one another, or because the accused products or processes allegedly infringe claims of the same patent. Id. The accused products or processes must be “**the same accused product or process.**” 35 U.S.C. §299(a).

Lodsys attempts to circumvent Section 299 based on the sole allegation that the “defendants make or utilize infringing websites with live interactive chat technology and/or the same infringing process.” Compl. ¶ 11. Lodsys has not, and cannot, allege that each defendant infringes the ‘078 Patent on the basis of “making, using, importing into the United States, offering for sale, or selling of **the same accused product or process,**” as required by 35 U.S.C. §299.² Lodsys summarily identifies the accused product of each defendant as “live interactive chat and feedback soliciting FAQs, including but not limited to live interactive chat and feedback soliciting FAQs on [defendant’s website].” Compl. ¶13-19. However, Lodsys’s allegations are nothing more than the accused products may be coincidentally similar to one another. Lodsys’s vague allegations are the exact gamesmanship the AIA intended to eliminate.

² Significantly, Lodsys contends that the defendants infringe claim 1 of the ‘078 Patent, an apparatus (system) claim. Compl. ¶13-19. Lodsys does not allege that any process claims of the ‘078 Patent (claims 69-74) are infringed by the defendants, so any contention by Lodsys that the defendants use a similar “process” (while still not meeting Section 299’s requirements), is irrelevant.

The legislative history of the AIA makes clear that, prior to the AIA, district courts inconsistently interpreted Fed. R. Civ. P. 20 to allow joinder of completely unrelated defendants. For example, the House Report explains that Section 299 “addresses problems occasioned by the joinder of defendants (sometimes numbering in the dozens) who have tenuous connections to the underlying disputes in patent infringement suits.” H.R. Rep. No. 112-98, pt. 1, at 54 (2011). Although Congress believed “the majority of jurisdictions” interpreted Rule 20 correctly, amended Section 299

legislatively abrogates the construction of Rule 20(a) adopted in MyMail, Ltd. v. America Online, Inc., 223 F.R.D. 455 (E.D. Tex. 2004); ... Adrain v. Genetec Inc., 2009 WL 3063414 (E.D. Tex. September 22, 2009); ... and Eolas Technologies, Inc. v. Adobe Systems, Inc., 2010 WL 3835762 (E.D. Tex. September 28, 2010)... and effectively conform[s] these courts’ jurisprudence to that followed by a majority of jurisdictions.

Id. at 55, n.61 (citing Rudd v. Lux, 2011 WL 148052 at *3 (N.D. Ill. Jan. 12, 2011)). Indeed, Section 299 “effectively codifies current law as it has been applied everywhere outside of the Eastern District of Texas.” 157 Cong. Rec. S5429 (Daily Ed. Sept. 8, 2011); see e.g. Golden Scorpio v. Steel Horse Bar & Grill, 596 F.Supp.2d 1282 (D.Ariz. 2009) (joinder improper where unrelated defendants committing independent acts allegedly infringed same trademarks); Pergo, Inc. v. Alloc, Inc., 262 F.Supp.2d 122, 128 (S.D.N.Y. 2003) (“that [allegedly infringing acts] may have infringed the identical patent owned by the plaintiffs is not sufficient to join unrelated parties as defendants...”); New Jersey Machine Inc. v. Alford Indus. Inc., 1991 WL 340196 (D.N.J. Oct. 7, 1991) (holding joinder improper because “[i]nfringement of the same patent by different machines and parties does not constitute the same transaction or occurrence”); Paine, et. al. v. Merrill Lynch, et. al. v. Dean Witter Reynolds, Inc., 564 F.Supp. 1358 (D.Del. 1983) (joinder improper where “no allegation that the acts of infringement are connected in any manner” and parties are unrelated).

The legislative history of the AIA further explains that the purpose of enacting Section 299(b) was to “limit a NPE’s [Non-Practicing Entity’s] ability to haul dozens of unrelated defendants into an inappropriate jurisdiction.” Review of Recent Judicial Decisions on Patent Law: Hearing Before the Subcommittee on Intellectual Property, Competition, and the Internet of the House Committee on the Judiciary, 112th Cong. 68-69 (2011) (statement of John Boswell, Senior Vice President and General Counsel, SAS Institute). Yet Lodsys, a NPE, attempts to do just that - join several unrelated defendants in a single lawsuit in the Eastern District of Texas, whose sole similarity is the operation of separate, unrelated and independent “live interactive chat technology.”

Significantly, Lodsys’s Complaint would have failed even before enactment of the AIA in September 2011. For example, the Federal Circuit recently confirmed that, for pre-AIA complaints:

[u]nless there is an actual link between the facts underlying each claim of infringement, independently developed products using differently sourced parts are not part of the same transaction [for purposes of joinder], even if they are otherwise coincidentally identical.

In re EMC Corp., 2012 WL 1563920 at *7 (Fed. Cir. May 4, 2012).

In EMC Corp., the Federal Circuit confirmed that joinder was improper in the Eastern District of Texas when unrelated defendants have no similarity other than the allegation that they each allegedly infringe the same patent through the use or sale of similar products. Id. Lodsys’s allegation is almost identical to EMC Corp. – the defendants have “independently developed products” that may “otherwise [be] coincidentally identical.” Id.

Accordingly, the Defendants are not properly joined in this lawsuit. “On motion or on its own, the court may at any time, on just terms...drop a party” that is misjoined in a lawsuit. Fed. R. Civ. P. 21; see Acevedo v. Allsup's Convenience Stores, Inc., 600 F.3d 516 (5th Cir. 2010)

("[a] court will remedy misjoinder of one thousand plaintiffs in single lawsuit by 'drop[ping] all but the first named plaintiff from the case;'" (quoting Aaberg v. ACandS Inc., 152 F.R.D. 498, 501 (D. Md. 1994)). HSN should therefore be dismissed from the Complaint.

Alternately, if the Court does not dismiss HSN for improper joinder, the Court should sever HSN into a new case. "The court may also sever any claim against a party" that has been misjoined. Fed. R. Civ. P. 21; see also Body Science, 2012 WL 718495 at *1 (granting a motion to sever for improper joinder).

II. Venue is Improper as against HSN

Rule 12(b)(3) requires dismissal when venue is improper. Fed. R. Civ. P. § 12(b)(3); see e.g. Telford v. United States, 2011 WL 6942303 (E.D. Tex. Nov. 30, 2011) (granting motion to dismiss for improper venue); Serco Servs. Co., L.P. v. Kelley Co., 1994 WL 715913 (N.D. Tex. May 24, 1994) (dismissing complaint due to improper venue); see also Langton v. Cbeyond Commc'n, LLC., 282 F.Supp.2d 504, 508 (E.D. Tex. 2003) ("Federal Rule 12(b)(3) allows defendants to move for dismissal based on improper venue"). Once a defendant raises the issue of venue by motion, it is the plaintiff's burden to establish that venue is proper. Norsworthy v. Mystik Transp., Inc., 430 F.Supp.2d 631 (E.D. Tex. 2006); Langton, 282 F.Supp.2d at 508.

In patent infringement suits, venue is governed by 28 U.S.C. § 1400(b), which provides:

Any civil action for patent infringement may be brought in the judicial district:

[1] where the defendant resides, or

[2] where the defendant has committed acts of infringement **and** has a regular and established place of business."

28 U.S.C. § 1400(b)(emphasis added).

Accordingly, venue would be proper in this District only if Lodslys can properly allege:

(1) HSN "resides" in this District, or

(2) HSN “has committed acts of infringement” in this District **and** “has a regular and established place of business” in this District.

Neither criterion has been met here.

In a weak attempt to establish venue for all seven unrelated defendants, Lodslys blindly alleges that:

defendants reside in this district, a substantial part of the events giving rise to the claims occurred in this district, and/or the defendants have a regular and established practice of business in this district and have committed acts of infringement in this district.” Compl. ¶9.

As a preliminary matter, Lodslys’s allegation that “a substantial part of the events giving rise to the claims occurred in this district” is irrelevant, because that allegation has nothing to do with the requirements for venue under 28 U.S.C. § 1400. See Fourco Glass Co. v. Transmirra Products Corp., 353 U.S. 222, 229 (1957) (“28 U.S.C. §1400(b) ... is the sole and exclusive provision controlling venue in patent infringement actions ...”). As for the remainder of Lodslys’s venue allegation, Lodslys has done little more than regurgitate the requirements of §1400(b), without providing any basis that the requirements are actually met.

Regarding part (1) of § 1400(b), Lodslys correctly acknowledged that HSN does not reside in this District, because, as Lodslys states: “HSN, Inc. (‘HSN’) is a Delaware corporation with its principal place of business in St. Petersburg, Florida.” Compl. ¶5. Therefore, Lodslys cannot meet part (1) of 28 U.S.C. § 1400(b).

Regarding part (2) of § 1400(b), Lodslys failed to allege that HSN “has committed acts of infringement” in this District, **and** “has a regular and established place of business” in this District. Rather than alleging that HSN maintains “a regular and established place of business” in the Eastern District of Texas, Lodslys readily admits that HSN does not, as HSN’s “regular and established place of business” is in Florida. Compl. ¶5. Moreover, Lodslys failed to allege that HSN actually committed any alleged acts of infringement through the use of the allegedly

infringing “live interactive chat technology” in this District. Therefore, Lodsys has not met part (2) of 28 U.S.C. § 1400(b).

Accordingly, Lodsys failed to establish that venue is proper in this District as against HSN, and, pursuant to Fed. R. Civ. P. 12(b)(3), the Complaint against HSN should be dismissed. See e.g. Telford, 2011 WL 6942303 (dismissing complaint for improper venue).

* * *

For the reasons set forth above, HSN respectfully requests that the Court (1) dismiss Lodsys’s Complaint against HSN, or alternately (2) sever HSN from this lawsuit, for improper joinder. Also, HSN requests the Court to dismiss Lodsys’s complaint, as against HSN, for improper venue.

Dated June 6, 2012

Respectfully submitted,

s/ Joseph R. Lanser

Joseph R. Lanser
SEYFARTH SHAW LLP
131 S. Dearborn Street, Suite 2400
Chicago, Illinois 60603-5577
Telephone: (312) 460-5000
Email: jlanser@seyfarth.com

ATTORNEY FOR DEFENDANT
HSN, INC.

CERTIFICATE OF SERVICE

I, Joseph R. Lanser, an attorney, certify that I caused the foregoing to be filed electronically with the Clerk of the Court for the Eastern District of Texas using the Court's Electronic Case Filing System, which will send notification to the registered participants of the ECF System as listed in the Court's Notice of Electronic Filing, on June 6, 2012.

s/ Joseph R. Lanser
Joseph R. Lanser
131 South Dearborn Street
Suite 2400
Chicago, Illinois 60603
(312) 469-5000 – Telephone
(312) 460-7000 – Facsimile
e-mail: jlanser@seyfarth.com