

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WISCONSIN

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RIGHTNOW TECHNOLOGIES, INC.,                         )  
   )  
Plaintiff   )  
   )  
v.   ) Civil Action No. 2:11-cv00737-CNC  
   )  
LODSYS, LLC,   )  
   )  
Defendant   )

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**DEFENDANT LODSYS, LLC'S MEMORANDUM IN SUPPORT OF  
MOTION TO DISMISS OR, IN THE ALTERNATIVE, TRANSFER OR STAY**

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Pursuant to the first-to-file rule, defendant Lodsyst, LLC ("Lodsyst") hereby moves, to dismiss or, in the alternative, transfer or stay this action in favor of the first-filed action in the Eastern District of Texas. In addition, and also in the alternative, pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure, Lodsyst moves to dismiss the Second Claim for Relief and Sixth Claim for Relief of plaintiff RightNow Technologies, Inc.'s ("RightNow") Second Amended Complaint for Declaratory Judgment (the "Second Amended Complaint") for lack of subject matter jurisdiction. As permitted by Rule 12(b), Lodsyst files this motion in lieu of an answer and without waiving its right to answer the allegations in RightNow's Second Amended Complaint and assert any applicable defenses, affirmative defenses, and counterclaims.

**I.      INTRODUCTION**

Nearly two months *before* RightNow filed this declaratory judgment action, Lodsyst filed a patent infringement action in the Eastern District of Texas against a customer of RightNow (*i.e.*, Sam's West, Inc., which is commonly known as "Sam's Club"). The issues on which RightNow seeks declaratory relief in this *second*-filed action are the same issues that Lodsyst

raised in the *first*-filed action against Sam's Club. In fact, RightNow admits in its Second Amended Complaint that its allegations are based entirely on Lodsys' "threatened assertion of the ... patents against RightNow's CRM Products as hosted online by RightNow for its customers." *See* Second Amended Complaint at ¶14. Accordingly, because "duplicative" and/or "substantially overlapping" issues were first presented to the Eastern District of Texas, this Court should dismiss or, in the alternative, transfer or stay RightNow's *second*-filed declaratory judgment action based on the first-to-file rule.

Moreover, the Second Claim for Relief and Sixth Claim for Relief of RightNow's Second Amended Complaint seek a declaration of non-infringement and invalidity of U.S. Patent No. 7,133,834 (the "'834 patent"). But those claims fail to present a case or controversy among the parties regarding the '834 patent. At the very least, therefore, those claims must be dismissed under Rule 12(b)(1) for lack of declaratory judgment subject matter jurisdiction.

## **II. STATEMENT OF FACTS**

### **A. Lodsys' First-Filed Action**

Lodsys is a Texas limited liability company. *See* Second Amended Complaint at ¶7. Lodsys maintains an office at its headquarters located at 505 East Travis Street, Suite 207, Marshall, Texas. *See id.*

On June 10, 2011 — nearly two months before RightNow filed its *second*-filed declaratory judgment action — Lodsys filed a patent infringement action in the Eastern District of Texas against several defendants, including Sam's Club. *See* First Declaration of Aaron T. Olejniczak in Support of Defendant Lodsys, LLC's Motion to Dismiss Or, in the Alternative, Transfer or Stay (the "Olejniczak Decl.") at Ex. A. In that *first*-filed action, Lodsys alleges that "Sam's Club makes, sells, offers to sell, and/or uses infringing feedback soliciting FAQs,

including but not limited to feedback soliciting FAQs on [www.samsclub.com](http://www.samsclub.com), which infringes at least claim 1 of the '078 patent under 35 U.S.C. § 271." *See id.* at ¶15.

**B. Lodsys' Related Actions**

In addition to the action against Sam's Club, Lodsys also filed three related patent infringement actions in the Eastern District of Texas. Specifically, on February 11, 2011 — six months before RightNow filed its declaratory judgment action — Lodsys filed a patent infringement lawsuit against twelve companies in the Eastern District of Texas. *See Olejniczak Decl.* at Ex. B. On May 31, 2011 — more than two months before RightNow filed its declaratory judgment action — Lodsys filed a patent infringement lawsuit against seven additional persons and/or companies in the Eastern District of Texas. *See id.* at Ex. C.<sup>1</sup> On July 5, 2011 — a month before RightNow filed its declaratory judgment action — Lodsys filed a patent infringement lawsuit against five additional companies in the Eastern District of Texas. *See id.* at Ex. E. All four actions in the Eastern District of Texas are pending before the Honorable James Rodney Gilstrap.<sup>2</sup>

**C. RightNow's Second-Filed Action**

RightNow is a Delaware corporation. *See* Second Amended Complaint at ¶6. RightNow maintains an office at its headquarters located at 136 Enterprise Boulevard, Bozeman, Montana. *See id.*

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<sup>1</sup> Lodsys filed an amended complaint adding five companies as defendants on July 21, 2011. *See Olejniczak Decl.* at Ex. D.

<sup>2</sup> On February 2, 2012, Lodsys Group, LLC was substituted for Lodsys, LLC for all purposes in the first-filed action against Sam's Club (*see Olejniczak Decl.* at Ex. F), based on an assignment of the patents. *See Olejniczak Decl.* at Ex. G. Lodsys Group, LLC was also substituted for, or joined with, Lodsys, LLC in all of the other related actions pending in the Eastern District of Texas. Accordingly, Lodsys Group, LLC and Lodsys, LLC are collectively referred to as "Lodsys" in the remainder of this reply memorandum.

On August 4, 2011 — nearly two months after Lodsus filed its *first*-filed action against RightNow's customer in the Eastern District of Texas — RightNow filed a declaratory judgment action against Lodsus. *See* Complaint for Declaratory Judgment [Dkt. No. 1]. RightNow filed an amended declaratory judgment action against Lodsus on August 5, 2011. *See* Amended Complaint for Declaratory Judgment [Dkt. No. 4]. In that *second*-filed action, RightNow alleged that "RightNow develops and licenses a suite of customer experience software, which RightNow provides through servers that RightNow owns or controls ('CRM Products')." *Id.* at ¶6. RightNow also alleged that "[t]hrough communications and conduct, Defendant has repeatedly threatened assertion of the '908, the '834, the '708 and/or the '565 patents against RightNow's CRM Products as hosted online by RightNow for its customers." *Id.* at ¶14.

**D. RightNow's Second Amended Complaint**

On May 2, 2012, RightNow filed its Second Amended Complaint in this Court. As alleged in its amended complaint, RightNow again alleges that "RightNow develops and licenses a suite of customer experience software, which RightNow provides through servers that RightNow owns or controls ('CRM Products')." *Second Amended Complaint at ¶6.* RightNow also again alleges that "[t]hrough communications and conduct, Defendant has repeatedly threatened assertion of the '908, the '834, the '708 and/or the '565 patents against RightNow's CRM Products as hosted online by RightNow for its customers." *Id.* at ¶14.

In its Second Amended Complaint, RightNow seeks a declaratory judgment regarding four patents — the '834 patent, U.S. Patent No. 5,999,908 (the "'908 patent"), U.S. Patent No. 7,222,078 (the "'078 patent"), and U.S. Patent No. 7,620,565 (the "'565 patent"). *See id.* at ¶¶23-87. In particular, RightNow's First Claim for Relief, Second Claim for Relief, Third Claim for Relief, and Fourth Claim for Relief of the Second Amended Complaint seek a declaratory judgment that RightNow does not infringe the '908 patent, the '834 patent, the '078 patent, and

the '565 patent, respectively. *See id.* at ¶¶23-32, 33-38, 39-47, and 48-57. And RightNow's Fifth Claim for Relief, Sixth Claim for Relief, Seventh Claim for Relief, and Eighth Claim for Relief of the Second Amended Complaint seek a declaratory judgment of invalidity of the '908 patent, the '834 patent, the '078 patent, and the '565 patent, respectively. *See id.* at ¶¶58-64, 65-71, 72-79, 80-87.

In contending there is an actual controversy between the parties sufficient to furnish this Court with declaratory judgment subject matter jurisdiction, RightNow alleges generally that Lodsys has lodged accusations of infringement of the patents against a number of RightNow's customers. *See id.* at ¶¶14-17. But RightNow has not alleged that Lodsys has made specific allegations of infringement of the '834 patent against a RightNow customer based on that customer's use of a RightNow product. For example, RightNow alleges that Lodsys' communications with RightNow customer Bass Pro Online, Inc. ("Bass Pro") offered a license to all of the patents in the portfolio and described that "[b]ased on Lodsys' review, this letter constitutes our notice that Bass Pro Online, Inc. is infringing at least claim 1 of US 7,620,565 and claim 1 of US 7,222,078." *Id.* at Ex. E. RightNow also alleges that Lodsys provided Bass Pro with a claim chart describing Bass Pro's infringement of only the '078 patent. *See id.* at ¶16 and Ex. F. RightNow does not make, however, any similar allegations regarding the '834 patent. *See id.*

#### **E. Lodsys' Additional Related Actions**

In addition to the action against Sam's Club and the three related patent infringement actions in the Eastern District of Texas, Lodsys filed seven additional related patent infringement actions in the Eastern District of Texas. Specifically, on May 10, 2012, Lodsys filed seven, separate patent infringement lawsuits against a total of thirty-two additional companies. *See* Olejniczak Decl. at Exs. H-N.

### **III. ARGUMENT**

Under the first-to-file rule, "[w]hen a federal suit is duplicative of a parallel action already pending in another federal court, the suit may be stayed, transferred or dismissed in the interest of wise judicial administration." *Eragen Biosciences, Inc. v. Nucleic Acids Licensing, LLC*, 447 F. Supp. 2d 930, 940 (W.D. Wis. 2006). "The first-to-file rule at once eliminates duplicative litigation and adheres to 'the inherently fair concept that the party who commenced the first suit should generally be the party to attain its choice of venue.'" *Barrington Group, Ltd. v. Genesys Software Sys., Inc.*, 239 F. Supp. 2d 870, 873 (E.D. Wis. 2003).

"In patent infringement actions the Federal Circuit has strongly endorsed the first-to-file doctrine." *Trading Technologies Int'l, Inc. v. CQG, Inc.*, No. 05 C 4811, 2005 WL 3601936, \*2 (N.D. Ill. Oct. 31, 2005) (citing *Genentech, Inc. v. Eli Lilly & Co.*, 998 F.2d 931 (Fed. Cir. 1993)). While courts may grant exceptions to the first-to-file rule in special situations, "[r]estraint of the first-filed suit is made only to prevent wrong or injustice." *Kahn v. General Motors Corp.*, 889 F.2d 1078, 1081 (Fed. Cir. 1989).

As discussed below, this action should be dismissed or, in the alternative, transferred or stayed because Lodsys filed the first action in the Eastern District of Texas. Allowing this action to proceed in this Court, therefore, would unnecessarily fragment related cases, waste judicial resources and risk inconsistent claim constructions. In the alternative, at the very least the Second Claim for Relief and Sixth Claim for Relief of RightNow's Second Amended Complaint should be dismissed for lack of subject matter jurisdiction.

#### **A. This Action Should be Dismissed Or, in the Alternative, Transferred or Stayed Because Lodsys Filed the First Action in the Eastern District of Texas.**

"When two or more patent infringement suits are commenced and each suit involves the same or similar parties and issues, courts will normally grant priority to the first-filed suit and enjoin or stay subsequent suits in order to avoid duplicative litigation and inefficient use of

judicial resources." *Alloc, Inc. v. Unilin Decor N.V.*, No. 02-C-1266, 2005 WL 3448060, \*2 (E.D. Wis. Dec. 15, 2005). "To properly apply the first-to-file rule, the district court need only find that substantial overlap is likely between its case and a pending case in another federal court that was filed previously." *Luckett v. Peco Foods, Inc.*, No. 3:07-CV-85-KS-MTP, 2008 WL 534760, \*3 (S.D. Miss. Feb. 22, 2008).

"District courts are accorded 'a great deal of latitude and discretion' in determining whether one action is duplicative of another, but generally, a suit is duplicative if the "claims, parties, and available relief do not significantly differ between the two actions." *Serlin v. Arthur Andersen & Co.*, 3 F.3d 221, 233 (7th Cir.1993). "Acting within its discretion, a court may stay an action in deference to an earlier lawsuit even if the parties and issues are not identical." *Hill v. Chase Bank, NA*, No. 2:07-CV-82-RLM, 2008 WL 1882735 (N.D. Ind. Apr. 24, 2008). And claims are considered "duplicative" or "substantially overlap" if they "arise out of essentially the same core of operative facts." *Doyle v. Fairman*, No. 96 C 2574, 1996 WL 312096, at \*2 (N.D. Ill. June 7, 1996).

Here, there can be no serious dispute that the issues in Lodsys' *first*-filed action against Sam's Club and RightNow's *second*-filed declaratory judgment action are "duplicative" or "substantially overlap." Both actions involve the validity of Lodsys' patents and whether Sam's Club's feedback soliciting FAQs infringe Lodsys' patents. There is no dispute that Sam's Club is a RightNow Customer. Nor is there any dispute that feedback soliciting FAQs are among the "suite" of "RightNow's CRM Products." See Olejniczak Decl. at Ex. O. In fact, RightNow admits in its Second Amended Complaint that its allegations are based on Lodsys' assertion of the patents "against RightNow's CRM Products as hosted online by RightNow for its customers." See Second Amended Complaint at ¶14. Accordingly, this action should be dismissed or, in the alternative, transferred or stayed, because Lodsys filed the first action in the Eastern District of

Texas. *See Eragen Biosciences, Inc.*, 447 F. Supp. 2d at 940 ("Under the rule, when related cases are pending before two federal courts, the court in which the case was last filed may refuse to hear it if the issues raised by the cases substantially overlap").

Moreover, the fact that Lodsys' *first*-filed action was against Sam's Club (rather than RightNow) does not preclude application of the first-to-file rule. In fact, courts have "found no requirement that the parties in the concurrent actions be the same in order for the first-to-file rule to apply;" rather, the "'subject matter' requirement of the first-to-file rule is satisfied in patent infringement matters where the actions in question involve the same patent and the same allegedly infringing product, though not necessarily the same parties." *Shire U.S., Inc. v. Johnson Matthey, Inc.*, 543 F. Supp. 2d 404, 408 (E.D. Pa. 2008); *see also Save Power Ltd. v. Syntek Fin. Corp.*, 121 F.3d 947, 950 (5th Cir. 1997) (rejecting argument that the two actions must involve "identical" parties).

In fact, courts have repeatedly applied the first-to-file rule in relationships analogous to Sam's Club and RightNow's relationship. *See e.g., Microchip Tech., Inc. v. United Module Corp.*, No. CV-10-04241-LHK, 2011 WL 2669627, at \*3 (N.D. Cal. July 7, 2011) (transferring manufacturer's declaratory judgment action to forum of pre-existing suit against related entities and customers); *Horton Archery, LLC v. Am. Hunting Innovations, LLC*, No. 5:09CV1604, 2010 WL 395572, \*2 (N.D. Ohio Jan. 27, 2010) ("The first-to-file rule does not require that the issues and parties in the two actions be identical."); *Interactive Fitness Holdings, LLC, v. Icon Health & Fitness, Inc.*, No. 10-CV-04628-LHK, 2011 WL 1302633, \*3 (N.D. Cal. Apr. 5, 2011) ("If the Utah action and the instant case were to proceed in both courts, duplicative and potentially inconsistent claim construction and infringement analyses would inevitably result. The first-to-file rule exists to prevent this situation, and the Court finds that it is properly applicable here.").

*Shire* is particularly instructive. There, Johnson Matthey (the holder of a pharmaceutical patent) filed an infringement action in the Eastern District of Texas against Noven, a manufacturer. A month later, Shire (the distributor of Noven's product) filed a declaratory judgment action for non-infringement in the Eastern District of Pennsylvania. Johnson Matthey then amended its complaint in Texas to add Shire as a defendant, and moved to dismiss the Pennsylvania declaratory judgment action. 543 F. Supp. 2d at 406. The court held that the first-to-file rule should apply against Shire, even though it was not originally a party to the Texas action, because the Texas action was the first to raise the relevant issues:

However, the timing of the addition of Shire as a party to the Texas suit is not material to the determination of which action was first-filed. ***Rather, as previously noted, the substantive touchstone of the first-to-file inquiry is subject matter.*** As such, because the Texas court obtained possession of the subject of this dispute on June 19, 2007, nearly a month before this Court obtained possession of the same, the first-to-file rule compels dismissal of the instant declaratory judgment action in favor of the Texas Action, unless some exception to the rule applies.

*Id.* at 409-10 (emphasis added).

Similarly here, RightNow was not named as a party in Lodsyst first-filed action against Sam's Club, however, Sam's Club is a customer of RightNow and feedback soliciting FAQs are among the "suite" of "RightNow's CRM Products." See Olejniczak Decl. at Ex. O. Accordingly, this action should be dismissed or, in the alternative, stayed or transferred, because the issue of whether RightNow's customers infringe Lodsyst patents was first raised in the Eastern District of Texas. See *Pierce Mfg. Inc. v. First In Inc.*, 10-C-393, 2010 WL 2854258, \*3 (E.D. Wis. July 19, 2010) ("Under the 'first to file' rule, questions about the propriety of a claim or defense, or about proper venue, are left to the court who has received the case first.").

**B. Allowing This Action to Proceed Would Unnecessarily Fragment Related Actions, Waste Judicial Resources, and Risk Inconsistent Claim Constructions.**

"As between federal district courts ... the general principle is to avoid duplicative litigation." *Colorado River Water Conservation Dist. v. U. S.*, 424 U.S. 800, 817 (1976). Indeed, the Federal Circuit has found that in patent cases "judicial economy plays a paramount role in trying to maintain an orderly, effective, administration of justice and having one trial court decide all of these claims clearly furthers that objective." *In re Google Inc.*, 412 F. App'x. 295, 296, 2011 WL 772875 (Fed. Cir. Mar. 4, 2011). To that end, the first-to-file rule seeks "to maximize judicial economy and minimize embarrassing inconsistencies by prophylactically refusing to hear a case raising issues that might substantially duplicate those raised by a case pending in another court." *Cadle Co. v. Whataburger of Alice, Inc.*, 174 F.3d 599, 604 (5th Cir. 1999).

Here, if this action is allowed to proceed, the Eastern District of Texas will simultaneously adjudicate nearly identical issues in Lodsys' *first*-filed action against Sam's Club. The Eastern District of Texas will also adjudicate nearly identical issues in Lodsys' other three related actions (which were also filed before RightNow's declaratory judgment action) and the seven additional related actions. But dismissing or, in the alternative, staying or transferring this action eliminates the evils that the first-to-file rule seeks to avoid: unnecessarily fragmented related actions, wasted judicial resources, and the risk of inconsistent claim constructions. *See Askin v. Quaker Oats Co.*, No. 11 CV 111, 2011 WL 5008524, \*4 (N.D. Ill. Oct. 20, 2011) ("the first-to-file rule exists to prevent duplicative litigation and to minimize waste"); *Trafficcast, Inc. v. Pritchard*, No. 05-C-557-S, 2005 WL 3002267, \*3 (W.D. Wis. Nov. 7, 2005) ("There is no question the possibility of inconsistent judgments is present here."); *see also In re Volkswagen of Am., Inc.*, 566 F.3d 1349, 1351 (Fed. Cir. 2009) ("In this case, the existence of multiple lawsuits involving the same issues is a paramount consideration when determining whether a transfer is in the interest of justice.... Although these cases may not involve precisely the same issues, there will be significant overlap and a familiarity with the patents could preserve time and resources.").

C. **At the Very Least, the Court Should Dismiss the Second Claim for Relief and Sixth Claim for Relief of RightNow's Second Amended Complaint For Lack of Subject Matter Jurisdiction.**

As discussed above, this entire action should be dismissed or, in the alternative, transferred or stayed because Lodsys filed the first action in the Eastern District of Texas. In the alternative, the Court should dismiss the Second Claim for Relief and Sixth Claim for Relief of RightNow's Second Amended Complaint, because RightNow has failed to present the requisite case or controversy between the parties with respect to the '834 patent.

For the Court to have subject matter jurisdiction to award declaratory relief, there must be "a case of actual controversy" among the parties. *See, e.g.,* 28 U.S.C. § 2201(a); *MedImmune, Inc. v. Genentech, Inc.*, 127 S. Ct. 764, 770-71 (2007). In particular, "the question in each case is whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." *Id.* at 771 (quoting *Md. Cas. Co. v. Pac. Coal & Oil Co.*, 61 S. Ct. 510, 512 (1941)). A party seeking a declaratory judgment bears the burden of showing there is an actual case or controversy adequate to support jurisdiction. *See Benitec Australia, Ltd. v. Nucleonics, Inc.*, 495 F.3d 1340, 1344 (Fed. Cir. 2007) ("The burden is on the party claiming declaratory judgment jurisdiction to establish that such jurisdiction existed at the time the claim for declaratory relief was filed and that it has continued since."); *see also Applera Corp. v. Michigan Diagnostics, LLC*, 594 F. Supp. 2d 150, 158 (D. Mass. 2009); *Furminator, Inc. v. Ontel Prods. Corp.*, 246 F.R.D. 579, 584-85 (E.D. Mo. 2007).

Here, the Second Claim for Relief and Sixth Claim for Relief of RightNow's Second Amended Complaint seek a declaratory judgment regarding non-infringement and invalidity of the '834 patent. *See* Second Amended Complaint at ¶¶33-38, 65-71. But RightNow has not met its burden of showing there is an actual case or controversy between RightNow and Lodsys

regarding that particular patent. Instead, RightNow has merely alleged generally and imprecisely that Lodsys has lodged accusations of infringement of the patents against a number of RightNow's customers, including a letter and claim chart concerning the '078 patent to Bass Pro:

On or about March 22, 2011, [Lodsys] sent a letter to RightNow customer Bass Pro Online, Inc., ("Bass Pro") alleging that Bass Pro, "is infringing at least Claim 1 of [the '565 patent] and Claim 1 of [the '078 patent] as it relates to your product's provision of online help, customer, or technical support for online chat help and similar products." The March 22, 2011 letter also offered a license to Bass Pro under "the Lodsys patents," which was defined as including the '908, the '834, the '078 and the '565 patents.... [Lodsys] has provided Bass Pro with an "infringement claim chart" for Claim 1 of [the '078 patent] .... [And Lodsys] has written essentially the same letter and provided similar claims charts to other RightNow customers....

*Id.* at ¶¶14-17. In other words, RightNow alleges that Lodsys sent notice letters and claim charts to RightNow customers describing that they are infringing the '565 patent and the '078 patent, and providing an opportunity for those customers to license the '565 patent and the '078 patent, as well as the other two patents in the patent portfolio.

Tellingly however, RightNow has not alleged that Lodsys has made any specific allegations of infringement of the '834 patent against a RightNow customer, let alone specifically asserted infringement of the '834 patent based on that customer's use of a RightNow product. Indeed, Lodsys' communications with RightNow customer Bass Pro merely offered a license to all of the patents in the portfolio and described that "[b]ased on Lodsys' review, this letter constitutes our notice that Bass Pro Online, Inc. is infringing at least claim 1 of US 7,620,565 and claim 1 of US 7,222,078," which assertion does not include a specific reference to the '834 patent. *See id.* at Ex. E. Likewise, RightNow alleges that the claim chart provided to Bass Pro described infringement of only the '078 patent, and RightNow does not allege the communications with Bass Pro included any claim chart describing infringement of the '834 patent. *See id.* ¶16 at Ex. F.

This is not sufficient to create an actual case or controversy between the parties regarding the '834 patent. For example, in *Applera Corporation*, Applied Biosystems, the owner of sixty-two patents, sent letters to Michigan Diagnostics, in which Applied Biosystems (1) advised of its extensive patent portfolio; (2) listed the sixty-two patents; (3) urged Michigan Diagnostics to review those patents; (4) notified Michigan Diagnostics that it may be infringing Applied Biosystems' patents; and (5) suggested that the parties enter into licensing discussions. *See* 594 F. Supp. 2d at 158-59. After the parties' further discussions regarding the patents, Applied Biosystems sued Michigan Diagnostics for infringement of seven of the sixty-two patents. *See id.* at 159-60. Michigan Diagnostics counterclaimed for declaratory judgment of non-infringement as to all sixty-two Applied Biosystems patents. *See id.* at 155. But since Applied Biosystems had not made any specific allegations of infringement beyond the seven patents upon which it sued, the Court dismissed Michigan Diagnostics' declaratory judgment counterclaim as to all but those seven patents. *See id.* at 160. The Court held that it was "far from clear" from the parties' interactions "that any dispute actually exists as to the fifty-five patents [and that a]s to them it may be fairly said that Michigan Diagnostics is essentially seeking an advisory opinion." *Id.*; *see also SanDisk Corp. v. Audio MPEG, Inc.*, C06-02655 RMW, 2007 WL 30598, \*4 (N.D. Cal. Jan. 3, 2007) ("The letter makes no specific assertion that any of the nine patents-in-suit here were being infringed or that infringement action would be brought as to the nine patents-in-suit. SanDisk's emphasis that the notice accused all of its MP3 products and made general references to the need for a patent license is not adequate to show that there was an objectively reasonable apprehension of suit as to the specific nine patents at issue."); *Research Elecs. & Devices Co. v. Neptune Meter Co.*, 156 F. Supp. 484, 485 (S.D.N.Y. 1957) ("The law is sufficiently clear that the mere act of calling a competitor's attention to his alleged infringement

of a specific patent does not by itself call into contest the infringement of other patents, and as to these other patents no justiciable controversy exists.").

More is needed to create declaratory judgment jurisdiction — namely a patent owner must make specific, particularized assertions of infringement, which are not present here regarding the '834 patent. *See Applera*, 594 F. Supp. 2d at 160 ("The problem that arises when the other side does not sue ... is not a problem, or at least not the same problem, when the other side has not made any particularized suggestion of infringement and may never sue. [The patent owner] broadly, and with some palpable bravura, suggested a review of its entire patent portfolio, but it did not make any specific allegations of infringement except within its pleading in this lawsuit.") (internal quotation omitted); *Furminator, Inc.*, 246 F.R.D. at 589-90 (dismissing declaratory judgment counterclaims as to plaintiff's patents that plaintiff had not explicitly indicated defendant was infringing, since "there is no evidence plaintiff has made a demand to the defendants that identifies how any new product infringes *specific* claims of any of plaintiff's patents ... there is no evidence in this case that plaintiff has *explicitly identified* the patents it believes the defendants are infringing, the *relevant claims* of those patents, or the *relevant product* that it alleges infringes those patents") (emphasis added); *Black & Decker Inc. v. Robert Bosch Tool Corp.*, 371 F. Supp. 2d 965, 968-69 (N.D. Ill. 2005) ("Courts have found that no actual controversy existed regarding patent claims that the patentee did not assert, even when the patentee was asserting other claims *from that same patent.*") (emphasis added).

Because RightNow has failed to meet its burden of showing a sufficient case or controversy for declaratory relief jurisdiction regarding the '834 patent, RightNow's Second Claim for Relief and Sixth Claim for Relief regarding that patent should therefore be dismissed under Rule 12(b)(1).

#### **IV. CONCLUSION**

For all of the above reasons, Lodsyst respectfully requests that the Court dismiss or, in the alternative, transfer or stay this action in favor of the first-filed action in the Eastern District of Texas. In the alternative, Lodsyst respectfully requests that the Court dismiss the Second Claim for Relief and Sixth Claim for Relief of RightNow's Second Amended Complaint for lack of subject matter jurisdiction.

Dated this 16th day of May, 2012.

s/Aaron T. Olejniczak

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