HON. MARSHA J. PECHMAN

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

INTERVAL LICENSING LLC,

Plaintiff,

v.

AOL, INC.; GOOGLE, 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

DEFENDANTS eBAY INC., NETFLIX, INC., OFFICE DEPOT, INC., AND STAPLES, INC.'S RENEWED MOTION TO SEVER OR DISMISS FOR MISJOINDER PURSUANT TO FED. R. CIV. P. 20 AND 21

Note on Motion Calendar: March 25, 2011

ORAL ARGUMENT REQUESTED

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TABLE OF CONTENTS

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TABLE OF AUTHORITIES

Cases **Page**

Other Authorities

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Rules

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Pursuant to Fed. R. Civ. P. 20 and 21, defendants Google Inc. and YouTube, LLC (together, "Google"), moved this Court to dismiss or sever them from the above-captioned action for misjoinder. (Dkt. No. 65). Defendants eBay Inc., Netflix, Inc., Office Depot, Inc., and Staples, Inc. ("Movants") joined in that Motion. (Dkt. No. 83). The Court terminated that motion without prejudice to re-filing. Movants hereby renew their motion under Fed. R. Civ. P. 20 and 21 that each Movant be severed or dismissed from this action. Movants incorporate by reference the points and authorities set forth in Google's motion (Dkt. No. 65), and supplement that submission on a ground further bolstered by Plaintiff's subsequent infringement contentions.

Joinder of any Movant in this action is improper because no "right to relief is asserted against" any Movant and another defendant "jointly, severally, or in the alternative." Fed. R. Civ. P. 20 (a)(2)(A). This requirement of Rule 20 is not met when a plaintiff names multiple defendants as alleged infringers of the same patents, unless the defendants are alleged to have conspired or colluded in their infringement. No such allegation is made here. Plaintiff's infringement contentions do not allege any joint infringement by any Movant with any other defendant in this action.

I. PLAINTIFF ASSERTS NO RIGHT TO RELIEF JOINTLY, SEVERALLY, OR IN THE ALTERNATIVE

Joinder of multiple defendants is proper under Rule 20 only if **each** of three requirements is met. Two are the requirements of a common underlying transaction and a common question of law or fact. (See Dkt. No. 65). Rule 20's third requirement for joinder is that the plaintiff must assert against the defendants a right to relief "jointly, severally, or in the alternative." Plaintiff asserts no such right to relief here. To explain this additional ground for severance, the meaning of "joint," "several" and "alternative" liability must be considered.

A. Plaintiff May Recover Only Once For A Single Injury

"Under elementary principles of tort law a plaintiff is entitled to only one recovery for a wrong. Payments [by one party] made in partial satisfaction of a claim are credited against the remaining liability." *Screen Gems-Columbia Music, Inc. v. Metlis & Lebow Corp.*, 453 F.2d

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552, 554 (2nd Cir. 1972) (copyright case); *accord BUC Int'l Corp. v. Int'l Yacht Council Ltd.*, 517 F.3d 1271, 1278 (11th Cir. 2008) (same); *Bender v. City of New York*, 78 F.3d 787, 793 (2nd Cir. 1996) ("A basic principle of compensatory damages is that an injury can be compensated only once.").

Where multiple parties contribute to a single injury, the plaintiff's right to collect its single recovery for that injury is governed, under common law, by principles of "joint," "several," and/or "alternative" liability. These forms of liability, each referenced in Rule 20, depend in part on rules that vary from state to state, although overriding common law principles generally apply. What is most important here, however, is that none of these forms of shared liability for a single injury applies to separate claims seeking separate remedies for separate injuries.

"Joint" liability is imposed only when two parties act in concert to cause the plaintiff's injury, or cause "a single harm (injury or damage) and [it] is impossible to determine what proportion each tortfeasor contributed . . . ." 1 Stuart M Speiser, Charles F Krause & Alfred W Gans, The American Law of Torts § 3:7 at 417 (2003). "Several" liability likewise is invoked only where multiple parties are responsible for the same injury. *E.g.*, *Aetna Cas. & Sur. Co. v. Leahey Constr. Co.*, 219 F.3d 519, 546 (6th Cir. 2000) ("Tortfeasors will not generally be held jointly **or** severally liable, however, where their independent, concurring acts have caused **distinct and separate injuries to the plaintiff**, ...") (emphasis added) (citation omitted) (stating Ohio law); Restatement (Third) of the Law, Torts: Apportionment of Liability § 11 at 108 (2000) ("When, under applicable law, a person is severally liable for an indivisible injury, the injured party may recover only the several liable person's comparative-responsibility share of the injured person's damages.") And alternative liability is applied in the rare case where only one of two parties caused the plaintiff's injury, and the burden is placed on each defendant to show that he was not the one responsible for that injury. *Summers v. Tice*, 33 Cal. 2d 80, 199 P.2d 1 (1948) (the plaintiff was injured when two hunters simultaneously fired gunshots in his direction).

When independent acts cause separate, divisible damages, none of joint, several, and/or alternative liability applies. *See Wynn v. Nat'l Broad. Co., Inc.*, 234 F. Supp. 2d 1067, 1096 (C.D. Cal. 2002) (dismissing allegation of joint and several liability where "to the extent that the harm Plaintiffs allege is the economic injury stemming from a refusal to hire, it is not indivisible [because] [o]ne Defendant's refusal to hire a Plaintiff is clearly divisible from another Defendant's refusal to hire that same Plaintiff."). Instead, "where independent torts result in separate injuries, each tortfeasor is separately responsible for his or her own torts." 1 J.D. Lee & Barry A. Lindahl, Modern Tort Law § 19.03 at 653 (Rev. ed. 1988).

B. Rule 20 Requires A Shared-Liability Theory Of Relief

Under common law, joinder of multiple defendants was permitted only if they were jointly liable for the plaintiff's entire injury. Rule 20 changed this. By adding "several" and "alternative" liability as a basis for joinder, Rule 20 broadened joinder practice to solve a common-law problem of multiple suits risking possibly inconsistent results. 7 Charles A. Wright, Arthur R. Miller & Mary K. Kane, Federal Practice and Procedure § 1654 at 417 (3d ed. 2001) ("Several and Alternative Joinder"). Rule 20 did not, however, open the floodgates to permit joinder of parties who allegedly committed separate torts causing separate injuries. On the contrary, Rule 20 requires assertion of a right to relief based on shared liability that is joint, several or in the alternative.

Prior to amendment in 1987, Fed. R. Civ. P. 20(a) read:

> All persons may be joined in one action as defendants **if there is asserted against them jointly, severally, or in the alternative, any right to relief** in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all of them will arise in the action.

See 4 James Wm. Moore et al., Moore's Federal Practice at 20 App.-1 to -4 (3rd ed. 2010) (emphasis added).

Thus, former Rule 20 expressly contained three requirements of commonality: (1) assertion of shared-liability relief against the defendants, (2) arising from a common underlying transaction(s), and (3) presenting a common question of law or fact. Rule 20's amendment in

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1987 kept intact each of these three requirements. "The amendments are technical. No substantive change is intended." Fed. R. Civ. P. 20 Advisory Committee Notes.

As rewritten in 1987, Section (a)(2) of Fed. R. Civ. P. 20 expressly requires of any claims asserted against joined defendants the same three types of commonality — including "any right to relief is asserted against them jointly, severally, or in the alternative":

> Persons — as well as a vessel, cargo, or other property subject to admiralty process in rem — **may be joined in one action as defendants if:**
>
> (A) **any right to 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 transactions or occurrences; and
>
> (B) any question of law or fact common to all defendants will arise in the action. (Emphasis added.)

This requirement that a right to relief be asserted against the defendants jointly, severally or in the alternative, is seldom contested or even discussed in the case law. Nonetheless, it has been recognized as a separate requirement. *Compare* 7 Charles A. Wright, Arthur R. Miller & Mary K. Kane, Federal Practice and Procedure § 1654 (3d ed. 2001) ("Several and Alternative Joinder") *with id.* § 1653 ("The Transaction and Common-Question Requirements"); *cf. Tapscott v. MS Dealer Serv. Corp.*, 77 F.3d 1353, 1360 (11th Cir. 1996) ("Joinder of defendants under Rule 20 requires: (1) a claim for relief asserting joint, several, or alternative liability **and** arising from the same transaction, occurrence, or series of transactions or occurrences, and (2) a common question of law or fact. Fed. R. Civ. P. 20 (a).") (emphasis added), *overruled on other grounds by Office Depot v. Cohen*, 204 F.3d 1069 (11th Cir. 2000). *Bravado Int'l Group Merch. Servs. v. Cha*, 2010 WL 2650432, at *4 (C.D. Cal. June 30, 2010) recognized Rule 20(a)(2)(A)'s requirement that a complaint against multiple defendants (not asserting alternative liability for the same injury) must assert a right to relief jointly or severally:

> In this case, Plaintiff's Complaint is entirely devoid of any allegations that Defendants conspired with one another to infringe Plaintiff's trademarks and copyrights. *See Arista Records*, LLC v. Does 1-4, 589 F. Supp. 2d 151, 155 (D. Conn. 2008) ("The 'same transaction' requirement [of Rule 20(a)(2)] means that there must be some allegation that the joined defendants 'conspired or acted jointly.'" (citation omitted) (emphasis

> added)); *Magnavox Co. v. APF Elecs., Inc*., 496 F. Supp. 29, 34 (N.D. Ill. 1980) (finding joinder improper in patent infringement suit where "the complaint . . . [was] devoid of allegations concerning any connection between" the items sold by one defendant retailer and those sold by another defendant." (emphasis added)). Furthermore, the Complaint does not seek joint or several liability against Defendants.

Id. at *4.

One reason why the right-to-relief requirement is rarely discussed may be that current Rule 20 lacks the same grammatical clarity of the former rule, and is occasionally misread to require an assertion of "joint or several liability" **or** a common transaction. *See*, *e.g.*, *Pergo, Inc. v. Alloc, Inc.*, 262 F. Supp. 2d 122, 127 (S.D.N.Y. 2003). The error appears to be reading "in the alternative" not as a reference to "alternative liability" (which it is), but as meaning "or." Yet, as noted above, the pre-1987 version of Rule 20 shows that reading is incorrect — joinder requires a right to relief asserted jointly, severally, and/or in the alternative, **and** claims arising out of the same transaction or occurrence or series of transactions, **and** a common question of law or fact. *Accord Tapscott*. The 1987 rewrite retained all three substantive requirements. The amendments were merely technical in nature.

Further, some confuse "several liability" with "separate liability," but, as noted above, these are distinct and mutually exclusive concepts, and only the former satisfies Rule 20:

> The joinder of the malpractice claim against Dr. Housman with the other general negligence and product liability claims was inappropriate because **the claims do not** both involve common questions of law or fact and **assert joint, several, or alternative liability** 'arising out of the same transaction, occurrence, or series of transactions or occurrences.' Fed. R. Civ. P. 20(b). Any liability that may be found against either Guidant/EVT or Dr. Housman would not be a basis for liability as to the other. However, **separate liability as to each could be separately found**.

In re Guidant Corp. Implantable Defibrillators Prod. Liab. Litig., 2007 WL 2572048 at *2 (D. Minn. 2007) (emphasis added).

C. Plaintiff Does Not Assert A Right To Relief From Multiple Parties For The Same Injury

Neither Plaintiff's First Amended Complaint nor its infringement contentions mentions joint, several or alternative liability. Plaintiff does not allege that any Movant shares liability with any other defendant for **the same injury**. It does, of course, accuse each of the defendants

of patent infringement, and it may later allege the same type of harm arising from the alleged infringements. But, alleging that two parties inflicted the **same type of harm** is a far cry from alleging that they caused the **same harm**. *E.g.*, *Arista Records LLC v. Does 1-4*, 589 F. Supp. 2d 151, 155 (D. Conn. 2008) ("Further, as the Magistrate Judge noted, because Plaintiffs did not allege that the Doe Defendants caused the same harm (rather than the same type of harm), joinder is improper . . . .").

Nor does Plaintiff allege that any Movant and another defendant are joint infringers or joint tortfeasors. It does not allege that any Movant acted in concert with any other defendant. It does not allege that separate defendants contributed to an indivisible injury. Instead, the First Amended Complaint purports to assert distinct causes of action against Movants, allegedly causing distinct harms. Any liability would be separate and independent, not shared (whether joint or several or alternative) with another defendant. Nor do Plaintiff's infringement contentions allege any joint, several, or alternative liability theory of infringement against any Movant and another defendant. Thus, the defendants cannot be joined in the same action.

D. Whether Liability Is Shared Or Separate Is Important

That Plaintiff fails to assert shared liability for the same injury has substantive significance. Were Plaintiff to pursue such a theory of joint and/or several and/or alternative liability for a single injury, it would need to plead that the defendants acted in concert or other facts sufficient to state a shared-liability right to relief. Under such a theory, Plaintiff's damages recovery from one defendant would be reduced by its recovery from each other defendant, under the single recovery rule. Were it to pursue a theory of "several liability," that would further impose on Plaintiff the risk of insolvency of one or more unnamed parties responsible for its alleged injury. Restatement (Third) of the Law, Torts: Apportionment of Liability § B18 cmt. at 168 (2000). If that is truly Plaintiff's theory of relief in this case, which is unlikely, then it should be forced to plead that theory. If not, then the failure to assert a shared-liability right to relief is an additional reason why Plaintiff's joinder of Movants in this action violates Fed. R. Civ. P. 20.

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II. CONCLUSION

For all of the above reasons, and those briefed by Google, Movants' motion to sever or dismiss should be granted.

DATED this 3rd day of March, 2011.

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By: /s/John D. Vandenberg

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CERTIFICATE OF SERVICE

I hereby certify that on March 3, 2011, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing on all counsel who are deemed to have consented to electronic service.

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