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

REPLY IN SUPPORT OF 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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In their Renewed Motion (Dkt. No. 192), Defendants eBay Inc.; Netflix, Inc.; Office Depot, Inc.; and Staples, Inc. ("Movants") briefed an additional ground for severance or dismissal. Namely, to permit joinder of multiple defendants, Rule 20(a)(2)(A) requires the Complaint to assert against the defendants a right to relief "jointly, severally, or in the alternative," but the First Amended Complaint in this case asserts no such right to relief. Interval's response (Dkt. No. 200 at 9:17-12:17) narrows the dispute on this additional ground to the following question: is "several" liability the same as "separate" liability, such that "severally" in Fed. R. Civ. P. 20 really means "separately"? Based on the authorities cited in their Motion and below, Movants assert that the answer is no.

Interval does not deny that Rule 20 permits joinder of multiple defendants in an action only if a right to relief is asserted against them jointly, severally, or in the alternative. (Dkt. No. 192 at 3:9-5:22). *E.g.*, *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).

Nor does Interval deny that its Amended Complaint fails to assert any conspiracy or other shared-liability claim against Movants. (Dkt. No. 192 at 5:25-6:27). *Cf. Bravado Int'l Group Merch. Servs. v. Cha*, 2010 WL 2650432, at *4 (C.D. Cal. June 30, 2010) (denying joinder in part because the Complaint did not allege conspiracy or any other basis for "joint or several" shared-liability against the defendants.)

Instead, Interval contends that "several liability" is the same as "separate liability"—without addressing the contrary conclusions found in the Torts treatises cited by Movants (Dkt. No. 192 at 2:20-23, 3:6-8, 6:21-24), and without reference to any supporting legal precedent. According to Interval, the liability of one joined defendant may be entirely separate from that of each other defendant, as in this case. In other words, Interval's position is that the language

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"jointly, severally, or in the alternative" in Rule 20 is superfluous, and imposes no restriction whatsoever on joinder of defendants in a single action. The law is to the contrary.

6th Cir.: As quoted in the Renewed Motion (Dkt. No. 192 at 2:16-20), the Court of Appeals for the Sixth Circuit distinguished "several" liability (for a single injury) from (separate) liability for distinct and separate injuries: "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, ..." *Aetna Cas. & Sur. Co. v. Leahey Constr. Co.*, 219 F.3d 519, 546 (6th Cir. 2000) (emphasis added) (citation omitted) (stating Ohio law). Interval's only response appears to be that the *Aetna* Court must have meant jointly "**and**" severally when it expressly wrote jointly "**or**" severally, and thus must have distinguished only "joint and several" liability from separate liability. (Dkt. No. 200 at 12:9-13). But, this theory—that the *Aetna* Court meant "and" when it wrote "or"—is debunked by the treatise upon which the *Aetna* Court indirectly relied. *Id*. at 546 (citing *Williams v. Gragston*, 455 N.E.2d 1075, 1077 (1982) (quoting "the general rule found in 22 American Jurisprudence 2d (1965) 30, Damages, Section 14, that '* * * tort-feasors generally will not be held **jointly or severably** (*sic*) **liable** where their independent, concurring acts have caused distinct and separate injuries to the plaintiff, or where some reasonable means of apportioning the damages is evident' . . . .")) (emphasis added). Plainly, *American Jurisprudence 2d* and the 6th Circuit each meant "or" when they wrote "or," and each deliberately (and correctly) distinguished several liability from separate liability.

D. Minn.: As quoted in the Renewed Motion (Dkt. No. 192 at 5:15-22), the U.S. District Court for the District of Minnesota likewise distinguished "several liability" from "separate liability," and held the latter insufficient for joinder under 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**.

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In re Guidant Corp. Implantable Defibrillators Prod. Liab. Litig., MDL No. 05-1708 (DWF/AJB), 2007 WL 2572048, at *2 (D. Minn. August 30, 2007) (emphasis added). If "severally" meant "separately" in Rule 20, as urged by Interval, this quoted language in *Guidant* would make no sense. Interval offers no response to the *Guidant* trial court holding that the "separate liability" of the defendants **barred** their joinder.

C.D. Cal.: As quoted in the Renewed Motion (Dkt. No. 192 at 4:20-5:4), the U.S. District Court for the Central District of California likewise rejected an attempted joinder of defendants, in part because "the Complaint does not seek joint **or** several liability against Defendants." *Bravado Int'l Group Merch. Servs. v. Cha*, No. 2:09-cv-09066-PSG-CW, 2010 WL 2650432, at *4 (C.D. Cal. June 30, 2010) (emphasis added). Because the liability of each defendant was separate from the other defendants, they could not be joined in the same action.

Interval correctly points out that the *Bravado* court cited additional reasons why joinder was improper, yet Interval ignores the fact that sub-section (a)(2)(A) of Rule 20 states two requirements, **both** of which must be met: a right to relief must be "asserted against [the defendants] jointly, severally, or in the alternative" **and** such right must be "with respect to or arising out of the same transaction, occurrence, or series of transactions or occurrences." The fact that the *Bravado* court found that the plaintiff there had not satisfied either requirement is of no bearing here, and does not diminish what *Bravado* makes clear: joinder under Rule 20(a)(2)(A) requires that a complaint against multiple defendants (not asserting alternative liability for the same injury) must assert a right to relief jointly or severally, and an assertion of separate liability bars joinder under Rule 20. (See Dkt. No. 192 at 4:20-5:4).

In sum, each of these three cases discussed in Movants' Renewed Motion distinguished "several liability" from "separate liability," and the two District Court cases held that Rule 20 bars joinder where separate liability is asserted. Interval cites no authority to the contrary.

For all of the above reasons, and those briefed by Google and Yahoo! on the other requirements for joinder under Rule 20, Movants' motion to sever or dismiss should be granted.

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DATED this 24th 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 24, 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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