HONORABLE MARSHA J. PECHMAN

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

INTERVAL LICENSING LLC,

Plaintiff,

v.

AOL, INC.; APPLE, 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

DEFENDANT YAHOO! INC.'S REPLY IN SUPPORT OF ITS RENEWED MOTION TO DISMISS OR SEVER FOR MISJOINDER PURSUANT TO FED. R. CIV. P. 20 AND 21

Noted for Consideration:
March 25, 2011

ORAL ARGUMENT REQUESTED

Defendant Yahoo! Inc. ("Yahoo!") respectfully submits this reply in support of its Renewed Motion to Dismiss or Sever for Misjoinder Pursuant to Fed. R. Civ. P. 20 and 21.

I. ARGUMENT

Plaintiff Interval Licensing LLC's ("Interval") misjoinder of Yahoo! is improper because Interval fails to meet the "same transaction" requirement under Federal Rule of Civil Procedure ("Rule") 20. Interval defends its violation of Rule 20 with extraneous conjecture that Interval's "infringement case against each defendant is likely to be very similar." (Interval's Response, Docket Item No. ("D.I.") 200 at 4.) Interval also inaccurately suggests that joinder would be proper if the Court were to disregard the overwhelming weight of relevant authority favoring severance under Rules 20 and 21, and instead looked to inapposite case law pertaining to Rule 13.

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(*See id*. at 6-9.) Finally, without citation to supportive authority, Interval urges the Court to hold off on deciding the merits of Yahoo!'s motion. (*See id*. at 12-14.) As demonstrated below, Interval's justifications for its improper joinder are meritless and should be rejected. Yahoo! should be severed from Interval's claims against the other ten Defendants pursuant to Rule 21.

A. Interval Cannot Satisfy the Transactional-Relatedness Requirement Under Rule 20(a)

As explained in Yahoo!'s Motion, the Ninth Circuit has interpreted the phrase "same transaction, occurrence, or series of occurrences" to require a degree of factual commonality underlying the claims. *Coughlin v. Rogers*, 130 F.3d 1348, 1350 (9th Cir. 1997). In *Lake Tahoe*, cited by Interval, the Ninth Circuit permitted joinder of claims against a regional agency and three developers because the plaintiffs sought relief for the *same area of land* alleged to be ecologically harmed by the developers' projects, in purported violation of the same interstate compact. *League To Save Lake Tahoe v. Tahoe Reg. Plan. Agcy*., 558 F.2d 914, 917 (9th Cir. 1977) ("If these developers are not joined, then . . . the actual harm sought to be prevented, the upsetting of the ecological balance, would have already occurred, thereby denying appellants their requested relief, even if they are successful.").

Similarly, in patent infringement cases, the "same transaction test will be met when the conduct of the infringers is interrelated or each infringer occupies a position in a chain of production, distribution, and use of the accused infringing product." Donald S. Chisum, *Chisum on Patents: A Treatise on the Law of Patentability, Validity and Infringement*, Vol. 8, § 21.03[6][a] (2005). "Contrariwise, the test will not be met when the conduct of the accused infringers is not so interrelated and the only basis for joinder is that they are engaged in similar acts of infringement." *Id*.

Interval's unsupported assertion that the eleven Defendants' 175 accused instrumentalities and 145 accused websites are "apparently similar" (*id*. at 4) is *not* sufficient to establish that the claims against Yahoo! arise out of the same transaction, occurrence, or series thereof as the claims against the other Defendants. *Pergo, Inc. v. Alloc, Inc.*, 262 F. Supp. 2d 122, 129 (S.D.N.Y. 2003) ("The fact that multiple "parties may manufacture or sell similar products [that

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allegedly] infringe[] the identical patent . . . is not sufficient to join unrelated parties."). Interval does not deny in its Response that the eleven Defendants are unrelated and that their accused products were independently created. In addition, Interval does not dispute that there is no connection between Yahoo!'s alleged acts of infringement and those of the other Defendants. Moreover, despite Interval's speculation that its "infringement case against each defendant is likely to be very similar" (D.I. 200 at 4), Interval has not and cannot establish that Yahoo!'s accused websites and instrumentalities actually *function* similarly – let alone in the *same* manner – as those of the other ten Defendants. Accordingly, Interval fails to meet Rule 20's express "same transaction" requirement. *WIAV Networks LLC v. 3COM Corp.*, No. C 10-03448 WHA, 2010 WL 3895047, at *3 (N.D. Cal. Oct. 1. 2010) (holding that "numerous courts" have found that 'joinder is often improper where [multiple] competing businesses have allegedly infringed the same patent by selling different products.'") (citations to cases omitted).

B. There Is No "Logical Relationship" Among the Defendants that Justifies Joinder Even Under the Flexible Interpretation of "Same Transaction" Applied in Rule 13 Cases

District courts around the country, including district courts in this circuit, have looked to whether there is some connection between the acts of infringement of the accused infringers, and have not allowed joinder simply because the accused products are allegedly similar. *WIAV Network*, 2010 WL 3895047, at *3 (citations omitted). Interval mischaracterizes the majority view of district courts, arguing that these cases applied a *per se* rule against joinder of multiple defendants in patent cases. (D.I. 200 at 8.) Yet, none of the cited cases apply a "*per se*" rule. On the contrary, in each of the cited cases, the courts examined the pleadings, and where applicable the case record, in determining that the claims did not arise from "the same transaction, occurrences or series of transactions or occurrences." (*See* D.I. 193 at 6-8 and the cited cases.)

Interval ignores the relevant authority regarding joinder in patent cases under Rule 20 and instead relies on cases interpreting the "'same transaction' in the context of Rule 13." (*See* D.I. 200 at 6-9.) The "logical relationship" test under Rule 13 requires that "the same operative facts serves [sic] as the basis of both claims." *Plant v. Blazer Fin. Servs., Inc.*, 598 F.2d 1357,

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1361 (5th Cir. 1979) (quotation omitted). Notably, none of the Ninth Circuit decisions cited by Interval have adopted the "logical relationship" test for the purposes of Rule 20.

Nevertheless, joinder of Yahoo! would be improper even under the "logical relationship" standard. *See e.g., Norwood v. Raytheon*, No. 04-127, 2007 WL 2408480, at *3 (W.D. Tex. May 1, 2007) (denying joinder under logically-related test where claims arise out of arguably similar events, *not* the *same* events). There is no "logical relationship" between the operative facts underlying Interval's claims against Yahoo! – such as the design, development, manufacture, marketing, and use of Yahoo!'s accused websites and instrumentalities – and the "operative facts" that give rise to Interval's infringement claims against the ten other Defendants.

The only established commonality Yahoo! shares with the other Defendants is that it is improperly joined in Interval's lawsuit. Indeed, the Eighth Circuit decisions on which Interval relies in support of the "logical relationship" test are inapposite and do *not* support the improper joinder of Yahoo!. (D.I. 200 at 6-8 (citing *Alexander v. Fulton County Ga.*, 207 F.3d 1303, 1324 (11th Cir. 2000) (finding that plaintiff's claims arose out of allegations of the *same* pattern of discriminatory conduct by the *same* sheriff in the *same* year) and *Mosley v. Gen. Motors Corp.*, 497 F.2d 1330, 1333 (8th Cir. 1974) (finding the *same* "company-wide policy purportedly designed to discriminate").

C. Interval's Request to Delay Severance Is Unsupported by the Law

Yahoo! moved for relief under Rules 20 and 21 so as to minimize any burden or delay that might otherwise flow from Interval's plain violation of Defendants' rights under Rule 20(a). As discussed in detail in its Motion, Yahoo! will be unfairly prejudiced before and during trial by being lumped in with the other ten Defendants who will "surely have competing interests and strategies." *WIAV Networks*, 2010 WL 3895047, at *16. Yahoo! will suffer unfair prejudice at trial because a jury could easily become confused by a proceeding involving a multitude of unrelated products, infringement theories, and defenses. *Coleman*, 232 F.3d at 1296.

Recognizing that the Court will have to address "issues unique to the individual defendants," Interval contends that the Court "should do so when those unique issues have been more clearly identified and can be balanced against the benefits from proceeding jointly." (*See*

D.I. 200 at 14.) There is no basis to permit improper joinder, and allow a party to circumvent the Federal Rules of Civil Procedure, because there may be "benefits" to "proceeding jointly." *Colt Def. LLC v. Heckler & Koch Def., Inc.*, No. 2:04cv258, 2004 U.S. Dist. LEXIS 28690, at *16 (E.D. Va. Oct. 22, 2004). The delay requested by Interval would subject Yahoo! to the very prejudice and loss of rights that Rule 20(a) exists to protect. *See id*. Courts can factor in "considerations of judicial economy" when determining whether to sever claims against defendants *only after* "the plaintiff has first satisfied the requirements of Rule 20(a)." *Id*. Moreover, this Court has the ability to achieve efficiency objectives without condoning improper joinder of claims arising out of different transactions and occurrences through, for example, consolidation of cases under Rule 42. *Cf. Johnson v. Manhattan Ry. Co*., 289 U.S. 479, 496-97 (1933) (consolidation "does not merge the suits into a single case, or change the rights of the parties, or make those who are parties in one suit parties in another").

Interval argues that the Court should deny Yahoo!'s Motion because the Court's recent March 15, 2011 Order (D.I. 195) allows Yahoo! to "seek appropriate relief at the appropriate time." (D.I. 200 at 14.) The "appropriate time" for the relief from improper joinder is now.

II. CONCLUSION

Yahoo! respectfully requests that the Court dismiss Yahoo! from this case, or sever the claims against it, because joinder of Defendants here is improper.

Dated: March 25, 2011

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CERTIFICATE OF SERVICE

I hereby certify that on March 25, 2011, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following counsel of record:

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