

**BEFORE THE UNITED STATES JUDICIAL PANEL
ON MULTIDISTRICT LITIGATION**

**IN RE BRANDYWINE
COMMUNICATIONS
TECHNOLOGIES, LLC
PATENT LITIGATION**

MDL No. 2462

**MEMORANDUM IN OPPOSITION TO PLAINTIFF'S MOTION TO
TRANSFER PURSUANT TO 28 U.S.C. § 1407**

Defendants DLS Internet Services, Inc., Texas Communications, Inc., Graydog Internet, Inc., Cactus International, Inc., TMN, Inc., OM Networks, and Impulse Advanced Communications, LLC, (collectively "the Defendants herein") respond in opposition to Plaintiff's motion to transfer as follows.

RELATED BRIEFS

Related defendant Loretto, Inc., has filed an opposition brief in this matter (Docket No. 57). Rather than clutter the record with duplicative argument, the defendants herein concur with the well reasoned and well articulated positions in that brief and provide herein additional facts and argument that may be helpful to the panel.

BACKGROUND

The seven Defendants herein are all small businesses providing DSL services to customers in their respective geographical regions. All of the defendants herein rely on other larger service providers including AT&T, CenturyLink, Earthlink, and Verizon, either in part or in total, to provide DSL services to their respective customers. Most of the Defendants herein can fairly be characterized as small resellers who obtain customers by advertising under their own name and then utilize services, equipment, and infrastructure of larger service provider to provide the actual DSL service. All of the Defendants herein provide services other than DSL, making DSL only a fraction of their business. Each can be fairly characterized as a very small business.

The Plaintiff Brandywine does not provide DSL services or equipment to anyone, rather, Brandywine is in the business of licensing its patents and/or aggressively suing nearly all small companies that provide DSL services to the public yet curiously refraining from suing entities that manufacture the allegedly infringing equipment. Noticeably absent from Brandywine's lawsuit attacks are companies that actually make the equipment used to provide DSL services. Thus, the defendants who are sued are left to defend products they did not design if they choose to defend on the merits while the actual manufacturers of the alleged infringing products are excused at the whim of Brandywine.

Brandywine has taken every advantage of the liberal pleading rules and stated very little in its complaints with regard to the actual products or conduct it thinks constitutes infringement. Indeed the complaint for all seven of the Defendants herein is identical except for the information identifying the particular defendant. Even after months of litigation, the Defendants do not know Brandywine's theory of infringement, or the factual basis for Brandywine's suit.

Are the defendants being sued for advertising DSL services, for providing DSL services, for providing access to allegedly infringing product, for inducing others to infringe? If for allegedly infringing products, which products are allegedly covered by the patents? Does Brandywine contend it “owns” DSL service in its entirety or is its theory of infringement limited to particular aspects of DSL service? What is the reach of Brandywine's previously granted secret licenses and do those licenses reach these defendants? These are questions that are not addressed in Brandywine's cookie cutter complaint and the Defendants herein are left with the dubious choice of blindly paying a licensing fee for an unexplained patent license or enduring months of protracted litigation before even knowing Brandywine's theory of infringement. Now Brandywine moves to transfer all pending cases to an inconvenient and distant forum of its choosing, under the timing of its choosing, involving only the parties of its choosing, with a patent claims construction already decided.

PROPRIETARY OF PLAINTIFF MOTIVATED CONSOLIDATION

The Defendants herein are substantively prejudiced by a process that allows the Plaintiff to unilaterally choose numerous parameters of litigation. The Plaintiff already has unilaterally chosen who will and who not be sued, leaving these small defendants the heavy burden of defending products and practices of larger companies. The Plaintiff has already unilaterally extensively secretly licensed the underlying patents such that the Defendants herein have no way to tell if the equipment or services they utilize are licensed or not. The Plaintiff has chosen the timing of the initial suits, waiting until numerous small companies and entrepreneurs have made significant personal investments of time, talent, and scarce financial resources to build their DSL related businesses, to bring suit. Only after these defendants have endured significant business risk does Brandywine show up, taking no similar business risk to promulgate DSL, yet

demanding a significant portion of the defendants' revenue, without demonstrating or articulating legitimate infringement by the Defendants herein with any meaningful detail. Now Brandywine wants to further control the timing by choosing this very moment – not six months ago, not six months from now, but right now – to suddenly move to transfer all of the pending litigation to a single forum of its choosing, convenient to the Plaintiff, but inconvenient to the Defendants herein. If the Plaintiff's motion is granted, for all intents and purposes the Plaintiff will have chosen the claims construction that resulted from a process that the Defendants herein were not involved in, in a forum the Plaintiff has had the opportunity to “test drive” for over a year. This is not appropriate jurisprudence, this is abuse of process. There is no evidence that Brandywine's motive is to produce a just result; its past conduct suggests this tactical move by Brandywine is designed to further coerce hapless defendants to license or settle without their day in court (and a decision on the actual merits of Brandywine's dubious and vague patent infringement claims.)

DISCUSSION

Being sued in Federal Court is burdensome to any defendant, but the burden is particularly heavy on small businesses like these defendants who generally lack the means to both adequately defend a patent infringement charge and simultaneously keep their respective businesses afloat and thus the mere filing of a complaint, whether it has merit or not, is generally a devastating ordeal. Congress has recognized the inequity of a single patent holder bringing a single patent infringement action against numerous unsuspecting defendants, and thus, by express statute, now specifically prohibits patent holders like Brandywine from filing against multiple defendants in a single action. (35 USC § 299).

Unfortunately, the same abuse and the same harm can be achieved by aggressive patent holders like Brandywine by using this MDL panel to effectively achieve the result prohibited by

statute. The Defendants herein do not assert that an MDL transfer is never appropriate in a patent action, however, because of the obvious opportunity of abuse, the Defendants herein do argue that such actions to consolidate patent litigation cases must be subjected to heightened scrutiny to separate the cases appropriate for consolidation from those that are simply abusive or otherwise inappropriate for consolidation. The Defendants respectfully suggest that the following could assist the panel in its consideration of this particular request.

#1. For consolidation to be effective, the Plaintiff should be required to demonstrate by its prior conduct that it is taking reasonable precautions to ensure it is not subjecting unwary defendants from inappropriate litigation. This Plaintiff has not done so. As *Loretto* pointed out in its response (Docket No. 57) this plaintiff has filed over one-hundred complaints, most of which have the exact textual allegations. This is not just a procedural problem it also is substantive. Principles of consolidation require the plaintiff to both plead and illustrate that there is common basis of fact that makes consolidation appropriate. Here the Plaintiff failed to plead any defendant-specific facts, so neither the defendants nor this panel, can even begin to ascertain with any accuracy whether there is a sufficient common factual situation amongst the prospective co-defendants to warrant transfer and consolidation. At a minimum, this panel should apply its own pleading rules strictly and require the Plaintiff to properly plead and identify, for every defendant to be effectively joined by transfer, the common facts that would justify consolidation. A more appropriate remedy here in light of the Plaintiff's failure to plead any common facts would be to dismiss its motion.

#2. The *Loretto* response makes an exceedingly persuasive argument regarding licensing that cannot be understated. The Plaintiff herein indeed has granted extensive licenses to major industry participants that provide DSL service and/or DSL equipment that are used to provide

DSL service to the present defendant's DSL customers. One would think that such industry-wide licenses would be publicized but instead the Plaintiff and the licensee hold the terms in strict confidence, which hinders opportunity for legitimate pre-litigation licensing and promotes fertile opportunity for the plaintiff to aggressively sue the unwary. The Plaintiff failed to identify or acknowledge these important existing licenses in its numerous complaints, and then failed to provide the terms of the license to the defendants herein voluntarily. Defendant's counsel only (and not the defendant entities) has only 3 days ago been given access to the licenses (including the important RPX license referred to in the *Loretto* response) because Judge Acosta in the District of Oregon recently ordered them to do so (District of Oregon, Case No. 3:12-cv-02332, Docket No. 19).

The Defendants herein respectfully suggest that if a transfer is considered, that as a condition precedent, the Plaintiff be required to publicize to the world all of its licenses and immediately provide specific infringement contentions for each defendant so that common issues of fact can be identified by all.

At least two of the Defendants herein are Verizon customers. What possible basis does Brandywine have for suing them? Verizon's customers are licensed as third party beneficiaries of the RPX license referred to be *Loretto*. (RPX is a consortium whose membership is not generally known of which Verizon has been acknowledged to be a member.)

For this matter to be fairly litigated, RPX and all licensed RPX members who provide service and/or equipment utilized by these defendants to provide DSL services need to be identified and joined as Rule 19 indispensable parties so that alleged infringing conduct can be accurately characterized and categorized. The present tactic of this Plaintiff, to sue aggressive, plead vaguely, and hide licenses, has done nothing to promote judicial economy and everything

to waste judicial resources. The Plaintiff's request to now consolidate to promote judicial economy is disingenuous. Let the Plaintiff do its part to promote judicial economy before seeking the extraordinary procedural remedy of MDL consolidation.

#3. The Plaintiff proposes the Middle District of Florida (“FLMD”) for consolidation. While there is some basis for that suggestion because the Florida action was filed slightly before others, other districts, notably the Northern District of California (“CAND”), is a worthy, and perhaps more suitable alternative. Unlike FLMD, CAND has well tested local patent rules that facilitate judicial economy. Furthermore, many of the Defendants herein are in California and/or the Ninth Circuit and none are in the Eleventh Circuit, making the Plaintiff's forum selection particularly burdensome for each of the Defendants herein. The CAND judiciary is also experienced with these patents and this subject matter because of the Brandywine v. AT&T case being litigated there.

#4. As noted above, the Plaintiff has failed to plead any defendant-specific facts and thus has failed to plead any factual basis in its transfer motion as to why all of the named cases should be transferred to a single district. A transfer motion of this magnitude ought to give some consideration as to the propriety of transferring all named defendants to a single district. Transferring less than all such defendants might be more appropriate. For example, a better strategy might be to transfer the defendants using AT&T equipment and/or services to CAND where AT&T is being sued, transfer defendants using CenturyLink equipment and/or services to FLMD where CenturyLink is being sued, and outright dismiss any defendant that cannot be pled in good faith to be using unlicensed equipment to provide DSL services. Again, because of the Plaintiff's deficient pleadings in the present motion, the panel lacks the appropriate factual basis to make the most prudent decision regarding the propriety of numerous simultaneous transfers.

CONCLUSION

Although, in theory, a defendant has the same access to justice whether he or she is a sole defendant or one of many defendants, in practice, smaller defendants generally do not have the same access in a consolidation setting. To achieve the benefit of consolidation, the interests of single defendants at times are necessarily curtailed in favor of the matters of general applicability to the group.

Consolidation, pre-trial or otherwise, of patent cases by this Panel should not be done automatically or arbitrarily and should only be considered when the plaintiff can articulate in its motions good reason to consolidate. This plaintiff has not done so. Such a request should be scrutinized, and the statutory intent of 35 USC § 299, although not controlling, should be carefully considered. The cost and burden of such a transfer to the numerous small defendants should also be considered. If transfer is deemed appropriate, then the the selection of the appropriate collective forum needs to be better analyzed, and if the panel elects to transfer without further argument, the Defendants herein express their preference for the Northern District of California with the AT&T case serving as the lead case. If transfer is deemed appropriate, the Defendants herein respectfully request that the suggestions provided herein be considered and ordered by this Panel.

DATED: June 7, 2013

HUNTSMAN LAW GROUP, PLLC

By /s/Robert A. Huntsman

Robert A. Huntsman, Attorney for Defendants DLS Internet Services, Inc., Texas Communications, Inc., Graydog Internet, Inc., Cactus International, Inc., TMN, Inc., OM Networks, and Impulse Advanced Communications, LLC

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing document was served upon counsel for plaintiff, Lei Sun, Esq., FARNEY DANIELS LLP, 800 S. Austin, Suite 200, Georgetown, TX 78626, as well any other attorneys of record appropriately registered with ECF, by filing this document with the Panel's ECF electronic filing system, this 7th day of June, 2013.

/s/Robert A. Huntsman
Robert A. Huntsman