

**UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
MARSHALL DIVISION**

SOLOCRON MEDIA, LLC,

Plaintiff,

v.

VERIZON COMMUNICATIONS INC., CELLCO
PARTNERSHIP D/B/A VERIZON WIRELESS,
AT&T MOBILITY LLC, SPRINT SPECTRUM L.P.,
AND T-MOBILE USA, INC.,

Defendants.

Case No. 2:13-cv-1059-JRG-RSP

[JURY TRIAL DEMANDED]



Redacted Version

DEFENDANTS' MOTION TO SEVER

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I. INTRODUCTION

Plaintiff Solocron’s joinder of four unrelated competitors—Verizon, AT&T, T-Mobile and Sprint—in a single lawsuit runs afoul of Federal Rule of Civil Procedure 20 as well as the strict joinder requirements of the America Invents Act. Solocron’s complaint and infringement contentions accuse different products, each of which was independently developed and were independent implemented across the four competitor defendants. As such, no shared set of aggregate facts supports Solocron’s improper attempt to join Defendants in a single action. Therefore, pursuant to Federal Rule of Civil Procedure 21, Defendants respectfully request that the Court sever the claims levied against each Defendant into separate actions.

II. BACKGROUND

A. Legal Background

Federal Rule of Civil Procedure 20(a)(2) provides that multiple defendants may be joined in a single action if (1) any claim asserted against each of them arises out of the *same transaction, occurrence, or series of transactions or occurrences*, and (2) there is a question of law or fact common to all defendants that will arise in the action. Importantly, the accused products or processes must be “the same” and “even the existence of some similarity . . . cannot satisfy the ‘same transaction’ requirement.” See *Lodsys, LLC v. Brother Int’l Corp.*, No. 2:11-cv-90-JRG, 2013 WL 1338767, at *3 (E.D. Tex. Jan. 14, 2013) (analyzing *In re EMC*, 677 F.3d 1351, 1359 (Fed. Cir. 2012)); see also *SimpleAir, Inc. v. Microsoft Corp.*, No. 2:11-cv-416-JRG, Dkt. No. 416, slip op. at 4 (E.D. Tex. Aug. 9, 2013) (same). Following *EMC*, this Court noted that, among others, “pertinent factual considerations” underlying joinder under Rule 20 include “the existence of some relationship among the defendants,” “the use of identically sourced components,” “licensing of technology agreements between the defendants,” and “overlap of the

products’ or processes’ development and manufacture.” *Lodsys*, at *3 (quoting *EMC I* at 1359-60). As explained below, no such overlapping facts exist in this case.

In addition to satisfying the requirements of Rule 20, Solocron must also satisfy the more strict standards of 35 U.S.C. § 299.¹ Pursuant to 35 U.S.C. § 299, accused infringers can be joined in the same action “only if” the right to relief arises out of “the *same transaction*, occurrence, or series of transactions or occurrences relating to the making, using, . . . , or selling of the *same accused product or process*; and questions of fact common to all defendants or counterclaim defendants will arise in the action.” 35 U.S.C. § 299(a) (emphasis added).² In other words, under § 299(a), there must be one transaction, or set of transactions, relating to the making, using or selling of one accused product or process. *In re Nintendo*, 544 Fed. Appx. 934, 939 (Fed. Cir. 2013); *Reese v. Sprint Nextel Corp.*, No. 2:13-cv-3811-ODW, 2013 U.S. Dist. LEXIS 98635, *1 (C.D. Cal. July 15, 2013) (severing action against T-Mobile, AT&T, Verizon, and Sprint—the same Defendants as in this case—because the “[n]ewly enacted statute, 35 U.S.C. § 299, requires a higher standard for joinder.”). And, while joinder *requires* that the claims share questions of law or fact common to all defendants in addition to arising out of the same transaction or occurrence, the Federal Circuit has held that satisfaction of those requirements is still not sufficient to support joinder; rather, courts must also consider “principles of fundamental fairness” and “prejudice.” *Nintendo*, 544 Fed. Appx. at 939. Neither the requirements of Section 299, nor “principles of fundamental fairness” support joinder of Defendants in this case.

¹ Solocron’s complaint was filed December 6, 2013. See Dkt. No. 1. “Effective September 16, 2011, joinder in patent cases is governed by the America Invents Act . . . 35 U.S.C. § 299.” *In re Nintendo Co.*, 544 Fed. Appx. 934, 939 (Fed. Cir. 2013).

² The statute explicitly prohibits joining multiple defendants “based solely on allegations that they each have infringed the patent or patents-in-suit.” 35 U.S.C. § 299(b).

“Plaintiffs bear the burden of demonstrating that joinder is proper....” *Arroyo v. PHH Mortg. Corp.*, No. 13-cv-2335(JS)(AKT), 2014 U.S. Dist. LEXIS 68534, *7 (E.D.N.Y. May 19, 2014); *see also Brandeis Univ. v. East Side Ovens, Inc.*, No. 11-cv-619-BBC, 2012 U.S. Dist. LEXIS 18902, *4 (W.D. Wis. Feb. 15, 2012). In cases of misjoinder, the Court may “at any time . . . sever any claim against a party.” Fed. R. Civ. P. 21 (emphasis added); *see also Net Nav. Sys., LLC v. Cisco Sys., Inc.*, 4:11-cv-660, 2012 WL 7827543, at *2 n.2 (E.D. Tex. Aug. 22, 2012) (“If parties are misjoined in violation of AIA [§ 299], Federal Rule of Civil Procedure 21 provides the remedy of severance.”); *Norman IP Holdings, LLC v. Lexmark Int’l, Inc.*, 6:12-cv-508, 2012 WL 3307942, at *2 (E.D. Tex. Aug. 10, 2012) (“An improperly joined party may be dropped from the action or have the claims against them severed [under] Fed. R. Civ. P. 21.”).

B. Factual Background

This case now involves six patents from the same patent family: four patents relating to downloadable ringtones (the “Ringtone Patents”), and two patents allegedly relating to Multimedia Messaging Service (“MMS Patents”).³ *See generally* Am. Compl. (Dkt. No. 20). With respect to the Ringtone Patents, Solocron separately accuses Defendants’ respective “ringtones stores” of providing “audio files [that] can be received by Defendants’ customers, and programmed into their mobile phones, for use as an audio notifications [sic] of incoming telephone calls.” *Id.* at ¶ 51. The infringement accusations against each Defendant relate to different products:

- For Verizon, Solocron identifies the Verizon Media store.
- For AT&T, Solocron identifies the AppCenter and “Shop Music” ringtone stores.

³ Solocron’s Original and Amended Complaints asserted seven patents; Solocron recently withdrew one of the Ringtone Patents.

- For Sprint, Solocron identifies the “Sprint Music Plus” store.
- For T-Mobile, Solocron identifies “Megatones,” “HiFi Ringtones,” and “Callertunes” stores.

See *id.* at ¶¶ 52–55. Solocron does not allege that any Defendant shares its ringtone store with another Defendant, that Defendants worked together to develop their respective ringtone stores, or that Defendants acquired or established the accused stores in a single transaction or set of related transactions.

Regarding the two MMS Patents, Solocron alleges in its Amended Complaint that each Defendants’ server “allow[s] Defendants’ customers to, for example, send text, picture, video, and/or audio messages from the customer’s mobile device to another mobile device provided by the same or a different Defendant.” *Id.* at ¶ 56. While Solocron references an industry standard in the Complaint, it again fails to allege that Defendants worked together to implement their respective systems or acquired the accused systems in a single transaction or series of transactions.

Moreover, since filing its Amended Complaint, Solocron has yet to identify any overlap in Defendants’ accused instrumentalities, their operations, or any related transaction associated with the accused stores and servers. Consistent with the allegations in its Amended Complaint, Solocron’s infringement contentions accuse different products and services for each Defendant:

Defendant	Ringtone Instrumentalities	MMS Instrumentalities
T-Mobile ⁴	T-Mobile’s server(s), software, and Internet site(s) associated with T-Mobile’s ringtone stores including at least the “MegaTones,” “HiFi Ringers,” “T-Mobile	T-Mobile’s Multimedia Messaging Services Center and related servers

⁴ Ex. A (Infringement Contentions against T-Mobile, dated Apr. 14, 2014) at 3–5. The exhibits cited herein are attached to the accompanying Declaration of David J. Tobin in support of Defendant’s Motion to Sever.

Defendant	Ringtone Instrumentalities	MMS Instrumentalities
	Mall HiFi Ringers,” and http://tmomystore.hcac.com/ringtone stores. Wireless telephones made, used, sold, and/or offered for sale by T-Mobile that are capable of accessing T-Mobile’s ringtone stores and operating on T-Mobile’s wireless network.	for MMS messaging.
AT&T ⁵	AT&T’s server(s), software, and Internet site(s) associated with AT&T’s ringtone stores including at least the “Music Shop” located at att.uglabs.net/shopmusic3. Wireless telephones made, used, sold, and/or offered for sale by AT&T that are capable of accessing AT&T’s ringtone stores including at least the “Music Shop” located at att.uglabs.net/shopmusic3 and operating on AT&T’s wireless network.	AT&T’s Multimedia Messaging Services Center and related servers for MMS messaging.
Verizon ⁶	Verizon’s server(s), software, and Internet site(s) associated with Verizon’s ringtone stores including at least the “Verizon Media Store” (mediastore.verizonwireless.com); “VZW Media Store” application for Android; “VCAST Tones”; and “Verizon Tones” ringtone stores. Wireless telephones made, used, sold, and/or offered for sale by Verizon that are capable of accessing Verizon’s ringtone stores including at least the “Verizon Media Store” (mediastore.verizonwireless.com); “VZW Media Store” application for Android; “VCAST Tones”; and “Verizon Tones” ringtone stores and operating on Verizon’s wireless network.	Verizon’s Multimedia Messaging Services Center and related servers for MMS Messaging.
Sprint ⁷	Sprint’s server(s), software, and Internet site(s) associated with Sprint’s ringtone stores including at least the mobilemusic.sprint.com, Sprint Music Plus, Sprint Music Plus application for Android; and Sprint Music Plus application for iOS ringtone stores. Wireless telephones made, used, sold, and/or offered	Sprint’s Multimedia Messaging Services Center and related servers for MMS messaging.

⁵ Ex. B (Infringement Contentions against AT&T, dated Apr. 14, 2014) at 3–5.

⁶ Ex. C (Infringement Contentions against Verizon, dated Apr. 14, 2014) at 3–5.

⁷ Ex. D (Infringement Contentions against Sprint, dated Apr. 14, 2014) at 3–5.

Defendant	Ringtone Instrumentalities	MMS Instrumentalities
	for sale by Sprint that are capable of accessing Sprint's ringtone stores including at least the mobilemusic.sprint.com, Sprint Music Plus, Sprint Music Plus application for Android; and Sprint Music Plus application for iOS ringtone stores and operating on Sprint's wireless.	

Since receiving Solocron's infringement contentions, and pursuant to the docket control order, Defendants have produced to Solocron substantial numbers of technical and other documents. Despite that discovery, Solocron has failed to identify any basis for joining Defendants in a single action.

In addition, with the benefit of Defendants' documents, Solocron has narrowed its asserted claims pursuant to the Docket Control Order (Dkt. No. 116) and General Order 13-20. Even after that narrowing, Solocron does not assert the same claims against all Defendants. For example, Solocron asserts claim 10 of U.S. Pat. No. 7,257,395 and claim 19 of U.S. Pat. No. 7,295,864 against AT&T and Verizon, but not against T-Mobile or Sprint. *Compare* Dkt. No. 117 (Notice Concerning Preliminary Election of Asserted Claims) *with* Exs. A–D. In an effort to obviate the need for this Motion, on July 21, 2014, counsel for T-Mobile sent a letter to counsel for Solocron requesting consent to severance for trial purposes on the grounds that “Defendants’ accused instrumentalities are materially different from each other and are obviously not the ‘same accused product or process.’” Ex. E. Counsel for T-Mobile and Solocron then met and conferred on August 4, 2014, at which point Solocron requested that Defendants defer moving for severance until after Solocron reduced the number of asserted claims. Defendants complied with Solocron's request. After Solocron narrowed its claims and filed its Notice Concerning Preliminary Election of Asserted Claims on November 14, 2014, T-Mobile's counsel, on behalf of Defendants, met and conferred with Solocron on December 1 and December 10, 2014 and

again asked Solocron to agree to severance for trial purposes. Solocron confirmed on December 17, 2014 that it opposes severance.

Accordingly, Defendants hereby respectfully request that the Court sever Plaintiff's claims against Defendants for trial purposes. Defendants are agreeable to proceeding on a consolidated basis for pretrial purposes, including *Markman* proceedings.

III. ARGUMENT

A. Joinder Is Improper Because the Accused Products and Processes Are Not “the Same.”

As explained above, § 299(a) permits accused infringers to be joined in one action only if the right to relief arises out of the *same* transaction or occurrence relating to the *same* accused product or process. Here, joinder is improper, because Defendants' Accused Products are neither “the same” nor did Defendants acquire or develop those Accused Products out of the “same transaction.” Indeed, the chart below identifies the vendors used by each Defendant since December 2007 for their accused ringtone and MMSC products—six years prior to when Solocron filed its complaint (*see* Dkt. No. 1). As the chart below shows, Defendants independently sourced and/or obtained the Accused Products.

Defendant	Ringtone Store	MMSC
T-Mobile ⁸	[REDACTED]	[REDACTED]
AT&T ⁹	[REDACTED]	[REDACTED]
Verizon ¹⁰	[REDACTED]	[REDACTED]
Sprint ¹¹	[REDACTED]	[REDACTED]

As this Court acknowledged, “[u]nless there is an actual link between the facts underlying each claim of infringement, independently developed products using differently sourced parts are not part of the same transaction, even if they are otherwise coincidentally identical.” *SimpleAir*, slip op. at 4; *Summit 6 LLC v. HTC Corp.*, No. 7:14-cv-0014-O, 2014 U.S. Dist. LEXIS 126800, *43 (N.D. Tex. Sept. 10, 2014) (granting severance because “Apple’s accused products are not the same as the accused products of the remaining Defendants, a requirement for joinder under the AIA”). Given these undisputed facts, severance is required.

B. Joinder Is Improper Because the Transactions or Occurrences Are Not “the Same.”

Even if the accused products and processes had been the same (and they are not), joinder here would still be improper because the transactions or occurrences at issue across the various Defendants are not the same. Indeed, Defendants T-Mobile, Verizon, AT&T and Sprint compete

⁸ Ex. F (T-Mobile’s 1st Supp’l Resp. to Interrog. No. 1).

⁹ Ex. G (AT&T’s 2nd Supp’l Resp. to Interrog. No. 1).

¹⁰ Ex. H (Verizon’s 1st Supp’l Resp. to Interrog. No. 1).

¹¹ Ex. I (Sprint’s 1st Supp’l Resp. to Interrog. No. 1).

with one another in the marketplace, and each Defendant sourced the accused products independently. As such, Solocron can point to no common transaction or occurrence that satisfies Section 299. Indeed, this Court (among numerous other courts) has recognized that severance is appropriate in cases involving defendants who are competitors. *SimpleAir*, slip op. at 5 (analyzing *In re EMC* and severing case because “defendants are, in fact, competitors in the smartphone marketplace”); see also *IpVenture, Inc. v. Acer, Inc.*, 879 F. Supp. 2d 426, 430 (D. Del. 2012) (The defendants “are all direct competitors, which also significantly counsels against their joinder in the same case.”).

Furthermore, while the absence of a common transaction as required by Section 299 renders the Rule 20 factors¹² identified by the Federal Circuit in *EMC* moot, none of those factors support joinder in any event:

- **Factor One**—the time period of alleged infringement—differs among Defendants.

For example,

[REDACTED]

[REDACTED] Thus, for the Ringtones Patents, the damages period for at least [REDACTED] will differ from the damages periods [REDACTED]

- **Factor Two**—the existence of some relationship among defendants—fails. Defendants’ relationship is one of competition, and Defendants have no common contractual (or other) relationship covering the accused products and services, either in their development or implementation.
- **Factors Three and Five**—use of identically sourced components and overlap in the development of the accused produces or process—as explained above, Defendants separately sourced and/or obtained the accused components, and no overlap exists among the accused products and services, either in their development or manufacture. *SimpleAir*, slip op. at 5; see also *Lodsys*, 2013 WL 1338767, at *4 (ordering severance because “[i]t is clear that each of the accused products are independently designed and manufactured”).

¹² *Lodsys*, 2013 WL 1338767, at *3 (quoting *In re EMC*, 677 F.3d at 1359–60); see also *Norman IP Holdings*, 2012 WL 3307942, at *2.

- **Factor Four**—licensing of technology agreements between defendants—Solocron does not allege, nor can it allege, licensing of relevant technology agreements between Defendants. *See* Ex. K (Pl.’s Initial Disclosures Related to Damages, dated April 28, 2014).
- **Factor Six**—whether plaintiff asserts a claim for lost profits—Solocron has not disclosed any theory of lost profits. *See id.*

As indicated above, none of the six factual considerations identified by the Federal Circuit and repeated in *Lodsys* support joinder of Defendants.

C. Solocron’s Allegations Do Not Satisfy the Joinder Requirements.

No “link” exists between the facts underlying the claims against each respective Defendant. Indeed, regarding the Ringtone Patents, Solocron does not even allege in its Amended Complaint or Infringement Contentions any “sameness” of Defendants’ instrumentalities, nor does it allege any common set of operative facts.

Regarding the two MMS Patents, Solocron’s allegations of commonality fail. Solocron, for example, alleges that the “operation of Defendants’ hardware and software in accordance with [the OMA MMS] standards constitutes important evidence of infringement.” *See* Am. Compl. (Dkt. No. 20) at ¶ 26. But as this Court held, assertions of common operation, even if assumed, *arguendo*, to be true, are irrelevant because “the fact that all of the accused products employ similar but independent [messaging] services is insufficient to prevent severance.” *SimpleAir*, slip op. at 5. Furthermore, other courts have rejected similar arguments of commonality based solely on implementation of an industry standard. For example, in *WiAV Networks, LLC v. 3Com Corp.*, No. C 10-03448 WHA, 2010 WL 3895047, at *2 (N.D. Cal. Oct. 1, 2010), the court rejected joinder under Rule 20 based on plaintiff’s assertion that each “defendant[] sells products that implement the IEEE 802.11 wireless protocol.” In ordering dismissal for misjoinder, the court explained that the plaintiff “makes no such assertion” that “the asserted claims in WiAV’s patents will cover *all* implementations of the protocol,” and “no

showing has been made that practicing the asserted patents is essential to complying with the protocol in all instances.” *Id.* at *3 (analyzing *Fujitsu Ltd. v. Netgear*, 620 F.3d 1321 (Fed. Cir. 2010)); *see also Medsquire LLC v. Quest Diagnostics, Inc.*, No. 2:11-cv-04504-JHN-PLAx, 2011 WL 7710202 (C.D. Cal. Dec. 1, 2011) (finding allegations “that each Defendant makes and sells software that complies with a federal standard” to be insufficient for joinder under Rule 20).

Here, “Solocron has not declared any of the Patents-In-Suit essential or necessary to practice any Standard.” Ex. L (Solocron’s 9/29/2014 Resp. to Interrog. No. 14) at 22–23. Nor does Solocron allege that the relevant provisions of the OMA standard are even mandatory. *See id.* “All in all, plaintiff cannot escape the fact that it is suing unrelated and competing defendants for their own independent acts of patent infringement.” *WiAV*, 2010 WL 3895047, at *3 (noting that “infringement issues will vary from product to product [as will] the damages issues”). In quoting from the *WiAV* opinion, the Federal Circuit explained that “accused defendants—who will surely have competing interests and strategies—are also entitled to present individualized assaults on questions of non-infringement, invalidity, and claim construction.” *In re EMC*, 677 F.3d at 1355 (quoting *WiAV*, 2010 WL 3895047, at *2). The reasoning applied in *WiAV* and *EMC* apply with equal force to this case.

Solocron’s contention that certain unidentified customers of one cellular carrier (*e.g.*, AT&T) may happen to transmit an MMS message to a customer of another carrier (*e.g.*, Verizon) is also insufficient to establish joinder. *See* Am. Compl. (Dkt. No. 20) at ¶ 27. In *SimpleAir*, this Court rejected a similar proposition. Indeed, in the *SimpleAir* case, Microsoft, Google, Nokia, and Ericsson were accused of providing infringing wireless messaging and notification services. Slip op. at 2–4. In response to the defendants’ motion to sever, the Patentee sought to establish a “link” between the defendants by asserting, among other theories,

that a user of a Google Android phone, using Facebook, could send a message to a user of a Microsoft Windows phone, who was also using Facebook. In other words, Facebook served as the “link” between these two disparate accused products. This Court rejected that theory of joinder, finding that “[w]hile each of the four accused products may operate in a similar manner,” each claim of infringement did not share an aggregate of operative facts. *Id.* at 5. The Court found that the four accused instrumentalities “are different products,” “are independently manufactured by four unrelated companies,” and the “defendants are, in fact, competitors.” *Id.* The same is true for Defendants here. Accordingly, Solocron cannot meet its burden to satisfy the joinder requirements.

IV. CONCLUSION

For the foregoing reasons, the Defendants respectfully request that the Court sever Plaintiff’s claims against Defendants for purposes of trial. In the interests of judicial economy and efficiency, Defendants are agreeable to proceeding on a consolidated basis for pre-trial purposes, including *Markman* proceedings.

Dated: December 17, 2014

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing document was filed electronically in compliance with Local Rule CV-5(a). As such, this document was served on all counsel who have consented to electronic service on December 17, 2014. In compliance with Local Rule CV-5(c), the sealed exhibits were promptly served via electronic mail.

/s/ Mark N. Reiter
Mark N. Reiter

CERTIFICATE OF AUTHORIZATION TO FILE UNDER SEAL

This will certify that Defendants' Motion to Sever and certain exhibits are filed under seal as authorized by the Court in accordance with the Protective Order entered on April 30, 2014 (Dkt. No. 96).

/s/ Mark N. Reiter
Mark N. Reiter

CERTIFICATE OF CONFERENCE

Pursuant to Local Rule CV-7(i), the undersigned certifies that he has complied with Local Rule CV-7(h) regarding Defendants' Motion to Sever ("Motion") and that the Motion is opposed. Pursuant to Local Rule CV-7(h), counsel for Defendants conferred via telephone on August 1, December 1, and December 10, 2014 with counsel for Plaintiff. Plaintiff informed Defendants on December 17, 2014 that it opposed the requested relief, thus leaving an open issue for the Court to resolve.

/s/ Mark N. Reiter
Mark N. Reiter

**UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
MARSHALL DIVISION**

SOLOCRON MEDIA, LLC,

Plaintiff,

v.

VERIZON COMMUNICATIONS INC.,
CELLCO PARTNERSHIP D/B/A VERIZON
WIRELESS, AT&T MOBILITY LLC,
SPRINT SPECTRUM L.P., AND T-MOBILE
USA, INC.,

Defendants.

CASE NO. 2:13-CV-1059-JRG-RSP

ORDER

Before the Court is a Motion to Sever filed by Verizon Communications Inc. and Cellco Partnership D/B/A Verizon Wireless (“Verizon”), AT&T Mobility LLC (“AT&T”), Sprint Spectrum L.P. (“Sprint”), and T-Mobile USA, Inc. (“T-Mobile” and collectively “Defendants”). After consideration of the Motion and accompanying papers, the Court is of the opinion that it should be GRANTED.

IT IS THEREFORE ORDERED that Defendants’ Motion to Sever be GRANTED. It is further ORDERED that case number 2:13-cv-1059-JRG-RSP is to be severed into separate causes of action against Verizon, AT&T, Sprint, and T-Mobile, respectively. It is further ORDERED that the four causes of action shall be consolidated for pre-trial purposes.

IT IS SO ORDERED.

DATE: December ____, 2014.

U.S. District Court Judge