IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

CIVIL ACTION NO. 1:22-CV-22706-RNS

BELL NORTHERN RESEARCH, LLC,

Plaintiff

v.

HMD AMERICA, INC.; HMD GLOBAL OY; SHENZHEN CHINO-E COMMUNICATION CO., LTD.; HON HAI PRECISION INDUSTRY CO., LTD; TINNO MOBILE TECHNOLOGY CORP.; SHENZHEN TINNO MOBILE CO., LTD.; TINNO USA, INC.; UNISOC TECHNOLOGIES CO., LTD.; SPREADTRUM COMMUNICATIONS USA, INC.; WINGTECH TECHNOLOGY CO.; LTD.; WINGTECH INTERNATIONAL, INC.; BEST BUY CO., INC.; BEST BUY STORES L.P.; TARGET CORP.; WALMART INC.,

Defendants.
_____/

REPLY IN SUPPORT OF DEFENDANTS' MOTION TO SEVER AND STAY THE CLAIMS AGAINST THE RETAIL DEFENDANTS

Defendants HMD America, Inc., HMD Global Oy (collectively, "HMD") and Best Buy Co., Inc., Best Buy Stores L.P., Target Corp., and Walmart Inc. (collectively, the "Retail Defendants"), by and through their undersigned counsel hereby file this Reply in support of their Motion to sever and stay the claims against the Retail Defendants until the claims against HMD in this case are resolved ("Motion"). Dkt. 232. Plaintiff Bell Northern filed its Opposition on November 2, 2023. Dkt. 237. Bell Northern has failed to present any legitimate reasons why the claims against the Retail Defendants should not be stayed. Accordingly, Defendants respectfully request that the Court grant their Motion.

I. Additional Factual Background

Defendants filed the present Motion on October 19, 2023. Dkt. 232.

On October 24 and 25, 2023—days after Defendants filed their Motion, less than six weeks before the close of fact discovery, and more than six months after receiving the Retail Defendants' discovery responses—Bell Northern for the first time demanded supplementation of written discovery responses by the Retail Defendants based on a slew of asserted discovery deficiencies, including that several Accused Products were missing from the Retail Defendants' past discovery responses. Bell Northern also sought to meet-and-confer regarding more than a dozen interrogatory responses and over 70 requests for production across the Retail Defendants. *See* Declaration of Matthew J. Moffa in Support of Reply at Exhibits ("Exs.") A, B, C.

On October 26, 2023, Bell Northern served Rule 30(b)(6) deposition notices on each of the Retail Defendants with less than 14 days' notice, bringing its total number of noticed depositions to fifteen—without seeking leave of court to take more than ten depositions. Ex. D. Bell Northern seeks to depose each Retail Defendant separately on over 40 topics, and during the Retail Defendants' busiest time of year—i.e., the holiday season.

On October 31, 2023, Bell Northern served Requests for Admissions on each of the Retail Defendants. Ex. E.

On November 2, 2023, Bell Northern filed its Opposition to the present Motion. Dkt. 237.

On November 3, 2023, Defendants filed a notice of discovery hearing to request an expedited protective order for a temporary stay of their discovery obligations until after the Court rules on Defendants' present Motion. Dkt. 238.

II. A Stay Of The Claims Against The Retail Defendants Is Appropriate Under The Customer Suit Exception

The "'customer-suit' exception … exists to avoid, if possible, imposing the burdens of trial on the customer, for it is the manufacturer who is generally the 'true defendant' in the dispute." *In re Nintendo of Am., Inc.*, 756 F.3d 1363, 1365 (Fed. Cir. 2014); *see also Katz v. Lear Siegler, Inc.*, 909 F.2d 1459, 1464 (Fed. Cir. 1990). The critical question in deciding whether to apply the doctrine "is whether the issues and parties are such that the disposition of one case would be dispositive of the other." *Katz*, 909 F.2d at 1463.

In the present case, Bell Northern admits that its infringement claims against the Retail Defendants derive entirely from its infringement claims against HMD—that is, the infringement claims against the Retail Defendants are based entirely on their selling and/or offering to sell the finished ***HMD*** products that are accused of infringement. Bell Northern (BNR) states, "BNR also agrees that the Retail Defendants are accused of infringing the asserted patents by 'sell[ing] or offer[ing] to sell' these accused products." Opposition at 1. Bell Northern does not otherwise allege that the Retail Defendants do anything to the HMD products to make them infringe, or to make them infringe in some different manner. Therefore, Bell Northern does not dispute that disposition of its infringement claim against HMD would be dispositive of its infringement claims against the Retail Defendants.

Furthermore, Bell Northern does not dispute and cannot legitimately deny that a stay would potentially avoid substantial litigation burdens on the Retail Defendants. To the contrary, Bell Northern is currently pressing the Retail Defendants to provide extensive fact discovery in a belated and improper manner. Those efforts include recently (1) demanding extensive supplementation of the Retail Defendants' responses to Bell Northern's initial written discovery requests more than six months after the Retail Defendants served responses, (2) serving for the

first time deposition notices on the Retail Defendants with less than 14 days' notice and far exceeding the permissible total number of depositions without leave of court, and (3) serving for the first time requests for admission. If the Court were to stay Bell Northern's infringement claims against the Retail Defendants, the extensive fact discovery that Bell Northern now seeks from the Retail Defendants would be avoided. (Meanwhile, and to allow time for the Court to issue a report and recommendation on the instant motion and for the parties to brief any oppositions thereto, Defendants are separately seeking an expedited protective order from Bell Northern's belated and improper fact discovery efforts, for which a hearing before Magistrate Judge Goodman has been set for next week on November 15.)

Importantly, under 35 U.S.C. § 299(a), each Retail Defendant has a right to its own trial separate from the other Retail Defendants and HMD. Section 299 "is more stringent than Rule 20, and adds a requirement that the transaction or occurrence must relate to making, using, or selling of the same accused product or process." *In re Nintendo Co., Ltd.*, 544 F. App'x 934, 939 (Fed. Cir. 2013). Bell Northern does not and cannot allege pursuant to Section 299 (1) that the various Defendants are jointly and severally liable, or (2) that, in the alternative, Bell Northern's asserted right to relief involves the same transactions or occurrences relating to allegedly infringing acts. To the contrary, Bell Northern admits that its infringement claims against the Retail Defendants are based on each Retail Defendant's independent selling or offering to sell distinct HMD phones. The relevant transactions and occurrences relating to each Retail Defendant's accused sales and offers to sell are unique to each Retail Defendant and are not the same acts alleged with respect to the other Retail Defendants or HMD.

The Retail Defendants have not waived their right to have separate trials. Accordingly, a stay of the claims against the Retail Defendants would have the benefit of potentially avoiding

imposing the burdens of trials on multiple customers. *In re Nintendo of Am., Inc.*, 756 F.3d at 1365; *see also Katz*, 909 F.2d at 1463.

Bell Northern's Opposition is founded on the assertion that Defendants' Motion is an "eleventh hour motion" filed at a "late stage of the case." Opposition at 1. Not so. In this regard, Bell Northern attempts to distinguish the cases cited by Defendants as involving early motions to stay, and further cites *Vehicle IP, LLC v. AT&T Mobility LLC*, 227 F. Supp. 3d. 319, 332 (D. Del. 2016). Opposition at 3-4. *Vehicle IP* is distinguishable for at least two major reasons: First, in *Vehicle IP*, the manufacturer and customer defendant were heading to a consolidated trial. *Vehicle IP*, 227 F. Supp. 3d. at 332. In contrast, as explained above, the Retail Defendants in the present action are entitled to separate trials and have not waived their right to separate trials. Second, in *Vehicle IP*, discovery was complete. *Id.* In the present action, however, discovery is not complete and significant discovery burdens remain ahead. While the Retail Defendants contend that Bell Northern's belated fact discovery demands are defective and legally inoperative under Local Rules 26.1(g)(2) and (h), the fact remains that a substantial amount of fact discovery is still being sought by Bell Northern from the Retail Defendants, and expert discovery has not yet even begun. Bell Northern cannot deny that a stay at this time would potentially avoid the extensive fact discovery that Bell Northern now seeks from the Retail Defendants, and would obviate any need to them to participate in expert discovery entirely.

III. A Stay Of The Claims Against The Retail Defendants Is Appropriate Under Traditional Stay Factors

A stay of Bell Northern's claims against the Retail Defendants also would be appropriate under traditional stay factors. Defendants' Motion does not address the likelihood of ultimately prevailing on the merits, but the other factors weigh heavily in favor of a stay.

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