IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

ROSETTA-WIRELESS CORP., an Illinois Corporation,	)	
Plaintiff	)	
v.	)	Civil Action No. 15-cv-00799
APPLE INC., a California Corporation	)	Judge Joan H. Lefkow
Defendant.	)	

MOTION FOR PRETRIAL CONSOLIDATION PURSUANT TO F.R.C.P. 42(a)

Pursuant to Federal Rule of Civil Procedure 42(a), Plaintiff Rosetta-Wireless Corp. ("Rosetta") respectfully moves this Court to consolidate the pretrial proceedings in Case Nos. 1:15-cv-00799; 1:15-cv-10603, 1:15-cv-10605, 1:15-cv-10608 and 1:15-cv-10611. In particular, Rosetta requests that the Court provide for a common schedule, coordinated discovery, consolidated depositions, consolidated *Markman*, *Daubert* and summary judgment proceedings, and consolidated pretrial motions and disclosures.

Consolidation is appropriate and largely undisputed. All of the cases in question are brought by Rosetta against smartphone manufacturers, and all are based on allegations that the Defendants infringe U.S. patent 7,149,511 through the sale of smartphone products that operate as wireless personal servers. Defendants have agreed that pretrial consolidation would, in principle, be appropriate. *See* Dkt. No. 103. The Court has also commented that "consolidation in the future may serve the interests of judicial economy and allow the cases to be effectively resolved." Dkt. No. 109 at 5.

Accordingly, because consolidation would avoid duplication and reduce the burdens on the Court and the parties, Rosetta respectfully requests that the Court consolidate the pretrial proceedings.

I. DISCUSSION

A. Consolidation Is Undisputed and Plainly Warranted.

It is undisputed that these cases should be consolidated for most pretrial proceedings. In responding to Rosetta's request that the cases be coordinated following severance, Defendants stated that "[t]o be clear, Defendants agree that these cases should be structured as efficiently as possible to avoid any unnecessary costs for the parties and the Court." Dkt. No. 103 at 1. Defendants also stated that they "do not, in principle, object to consolidated *Markman* proceedings and a common schedule (other than pretrial and trial dates)…." *Id.* at 2. After reviewing the parties' positions, the Court indicated that consolidation may well be warranted. Dkt No. 109 at 5 (citing Federal Rule of Civil Procedure 42(a)).

Rule 42(a) provides that the court may join one or more matters at issue in separate litigations if the separate actions "involve a common question of law or fact." The rule is designed to permit courts to consolidate proceedings in whole or in part in order to avoid wasteful overlap and inconsistent rulings. *See Unified Messaging Sols., LLC v. United Online, Inc.*, No. 13-343, 2013 WL 1874211, at *4 (N.D. Ill. May 3, 2013) (Lefkow, J.). The court has broad discretion to fashion a litigation structure that improves efficient adjudication of the matters in question. *Id.*

Consolidation under Rule 42(a) is appropriate even when joinder is not proper. *See id.* at *7 (holding, in MDL case, that 35 U.S.C. § 299's "prohibition on joinder of unrelated defendants based on common acts of infringement does not obviate a … court's discretionary

ability to order pretrial consolidation"); *Body Sci. LLC v. Boston Sci. Corp.*, 846 F. Supp. 2d 980, 986 (N.D. Ill. 2012); *see also In re EMC Corp.*, 677 F.3d 1351, 1360 (Fed. Cir. 2012) ("In exercising its discretion, the district court should keep in mind that even if joinder is not permitted under Rule 20, the district court has considerable discretion to consolidate cases for discovery … under Rule 42[.]"). Indeed, "[o]ne of the ways in which district courts have sought to temper the waste of judicial resources [created by the America Invents Act's joinder prohibitions] is by consolidating associated patent actions for *pretrial* matters[.]" *Global Touch Solutions, LLC v. Toshiba Corp.*, 2:14-cv-346, 2015 WL 3798085, at *1 (E.D. Va. June 15, 2015) (emphasis in original, citing Fed. R. Civ. Proc. 42).

Consolidation is warranted, as Defendants and the Court have already acknowledged. First, common questions of law and fact abound. Each of Rosetta's cases concerns the same patent and substantially overlapping validity, infringement and damages questions. Second, Defendants will suffer no tangible prejudice from consolidation. To the contrary, consolidation will spare the Defendants from expensive, duplicative litigation of common issues and from taking overlapping discovery. Were the cases adjudicated separately, the Court would have to hear the same arguments on the same issues litigated over and over again by similarly situated parties. There is no reason for such waste, particularly consolidation of most pretrial issues is generally unopposed.

B. Coordinated Discovery and Pretrial Hearings Would Spare Judicial and Party Resources.

Although agreeing to coordination and joint scheduling as a general matter, and consolidated *Markman* proceedings in particular, Defendants oppose consolidated depositions of Rosetta witnesses and consolidated pretrial hearing dates. *See* Dkt No. 103 at 2. There is no legitimate justification for duplication of efforts on either of these issues.

First, Rosetta's witnesses—likely the inventors and other members of Rosetta's executive team—should not be forced to sit for five separate depositions each, in which they would be asked the same questions over and over. This would not only place severe burdens on the witnesses, it would also grant Defendants an improper tactical advantage by wearing down or confusing the witnesses possibly to the point that they inadvertently provide inaccurate testimony. Moreover, two of the three inventors are no longer directly affiliated with the company, thereby implicating the strict restrictions on discovery of third-party witnesses. *See, e.g.*, *Charvat v. Travel Services*, 12 CV 5746, 2015 WL 76901, at *1 (N.D. Ill. Jan. 5, 2015) (explaining the court's "duty to protect nonparties from unnecessary or burdensome discovery"); *Mintel Int'l. Grp., Ltd v. Neerghen*, 08 CV 3939, 2009 WL 249227, at *6 (N.D. Ill. Feb. 3, 2009); *Jones v. McMahon*, 5:98-CV-0374 FJS/GHL, 2007 WL 2027910, at *16, n. 42 (N.D.N.Y. Jul. 11, 2007) (collecting cases). Such procedure would also improperly multiply Rosetta's litigation costs by an order of magnitude, as Rosetta's counsel would be required to prepare and defend the witnesses five times—with each subsequent deposition involving attorney and witness review or re-review of all of the prior ones.

Second, a consolidated pretrial hearing would spare the Court the substantial and unnecessary burden of hearing repetitious argument on the same pretrial issues—both substantive and logistical. Because of the overlap in the issues, there is a high likelihood of common evidentiary disputes among the cases, and also identical issues impacting jury instructions and the verdict form. There will also likely be common housekeeping matters which can and should be discussed and ruled upon in a single pretrial hearing.

II. CONCLUSION

For all the foregoing reasons, Rosetta respectfully requests that the Court order as

follows:

(1) That Case Numbers 1:15-cv-00799; 1:15-cv-10603, 1:15-cv-10605, 1:15-cv-10608 and 1:15-cv-10611 be consolidated under Federal Rule of Civil Procedure 42(a) for all pretrial proceedings, including a common schedule, coordinated discovery, consolidated depositions, consolidated *Markman*, *Daubert* and summary judgment proceedings, and consolidated pretrial motions and disclosures; and

(2) That the parties be ordered to meet and confer, and to submit within 14 days of the Court's Order a joint scheduling proposal and joint proposed order governing discovery.

Date: December 7, 2015

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