

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

AGIS SOFTWARE DEVELOPMENT LLC §
v. § CASE NO. 2:21-cv-00072-JRG
§ (Lead Case)
§

T-MOBILE USA, INC., and T-MOBILE
US, INC. §
§
§

AGIS SOFTWARE DEVELOPMENT LLC §
v. § CASE NO. 2:21-cv-00026-JRG
§ (Member Case)
§

UBER TECHNOLOGIES, INC., d/b/a UBER §
§
§

**UBER TECHNOLOGIES, INC.'S OBJECTIONS TO THE SEPTEMBER 3, 2021
REPORT AND RECOMMENDATION DENYING UBER'S MOTION
TO DISMISS U.S. PATENT NO. 10,341,838 FOR IMPROPER VENUE**

Defendant Uber Technologies, Inc. (“Uber”) respectfully objects to the Magistrate’s Report and Recommendation (“Report”) denying Uber’s Motion to Dismiss U.S. Patent No. 10,341,838 (“the ’838 patent”) for Improper Venue. For the reasons stated below, the conclusion of the Report should be reversed and Uber’s motion granted.

In response to the Complaint filed by Plaintiff AGIS Software Development LLC (“AGIS”), Uber moved to dismiss based on multiple grounds, including improper venue as to the ’838 patent. Dkt. 24. With respect to improper venue and the ’838 patent, Uber explained that in its Complaint, AGIS had failed to present facts that plausibly alleged Uber committed an act of infringement in the District with respect to the ’838 patent. Indeed, the “Jurisdiction and Venue” section of the Complaint, provides only boilerplate language regarding an act of infringement: “Uber has transacted business in the Eastern District of Texas, and has committed acts of direct and indirect infringement in the Eastern District of Texas.” Dkt. 1 ¶ 5; *see also id.* ¶ 26.¹ In the “Infringement of the ’838 Patent” section (COUNT IV) of the Complaint, AGIS alleged that Uber “has and continues to” directly and indirectly infringe at least claim 1 of the ’838 patent. *Id.* 78-80. In paragraph 82, AGIS purported to support that allegation by reciting the entirety of claim 1 of the ’838 patent and beginning that recitation with the phrase “Defendant directly infringes and/or indirectly infringes by practicing [language of claim 1].” *Id.* ¶ 82.

Claim 1, however, recites “[a] method performed by one or more servers each having one or more processors, the method comprising: ...” *Id.* Because claim 1 recites a method performed by one or more servers, and because Uber has no servers in the Eastern District of Texas, AGIS

¹ Although the Complaint defines “Accused Products” to include “Uber, Uber Driver, Uber Eats, Uber Fleet, Uber Freight, Uber Eats Orders, and Uber Eats Man[a]ger Applications and the related services and/or servers for the applications” (*id.*), AGIS has dropped Uber Eats, Uber Eats Manager, Uber Eats Orders, and Uber Freight.

failed to identify an act of infringement in this District, whether by Uber directly or indirectly, and Count IV of AGIS's complaint must be dismissed for improper venue.

I. AGIS Has Not Alleged Any Facts Supporting an Act of Infringement in this District

As this Court is well aware, “[f]or purposes of determining whether venue is proper in a district other than one in a state in which a defendant is incorporated, a court must determine, among other things, ‘where the defendant has committed acts of infringement.’” *Valeant Pharm. North America LLC v. Mylan Pharm. Inc.*, 978 F.3d 1374, 1378 (Fed. Cir. 2020). AGIS bears the burden to establish venue. *In re ZTE (USA) Inc.*, 890 F.3d 1008, 1013 (Fed. Cir. 2018). That burden is not carried by boilerplate allegations but must be supported with facts showing that venue is proper. *Westech Aerosol Corp. v. 3M Co.*, 927 F.3d 1378, 1382 (Fed. Cir. 2019).

A. AGIS's Allegations Are Not Directed to Texas or to the '838 Patent Claims

Both in its Complaint and in its briefing in response to Uber's motion to dismiss, AGIS failed to identify a single act of infringement in this District, whether performed by Uber itself or by Uber's customers, that ties to the elements of claim 1 of the '838 patent. First, as to Uber, in support of its motion, Uber submitted the Declaration of Jeff Rapipong, wherein Mr. Rapipong explained that “[n]one of the servers that Uber uses for its ride-sharing, food delivery and freight brokerage technology are located in Texas.” Dkt. 24-2 ¶ 2. AGIS did not directly challenge Mr. Rapipong's declaration. Instead, AGIS asserted, and the Report accepted, that Uber “publicly disclosed that it engages in a ‘classic hybrid cloud approach’ which utilizes co-located data centers located in the United States and multiple third-party cloud computing services.” Dkt. 43 at 8; Dkt. 142 at 6. AGIS further asserted, and the Report accepted, that Uber has a “massive network” consisting of “tens of millions of Drivers, consumers, restaurants, shippers, carriers, and dockless e-bikes and e-scooters, as well as underlying data, technology, and shared infrastructure” that it “collect[s], use[s], and process[es] a variety of personal data, such as email addresses, mobile

phone numbers, profile photos, location information” and reliance on “third-party service providers to host or otherwise process some of our data and that of platform users.” *Id.*

Based on these assertions, AGIS concluded, and the Report apparently also accepted, that the “physical infrastructure used by [Uber] appears to be much broader than just the ‘servers,’ as submitted by Mr. Rapipong and [Uber].” *Id.* But none of these assertions tie any of the so-called “massive network” to Texas, much less the sole claim identified in the Complaint—claim 1—of the ’838 patent. In fact, by focusing on this alleged “massive network,” while disregarding that the claim focuses only on operating one or more servers, both AGIS and the Report erroneously side-step what it takes to allegedly infringe the ’838 patent and thereby properly establish venue.

In response to Uber’s motion, AGIS relied on *Seven Networks, LLC v. Google LLC*, 315 F. Supp. 3d 933, 943 (E.D. Tex. 2018), where this Court held that “not *all* of the alleged infringing activity needs to have occurred within the District so long as some act of infringement took place there.” (Emphasis in original; citations omitted). But here, AGIS has failed to allege *any* act of infringement committed by Uber in this District, and the Report erred when it likewise failed to recognize the absence of any such facts. AGIS’s references to Uber’s broad “infrastructure” does not translate to plausible allegations that any part of that infrastructure actually exists in this District or is tied to the elements of claim 1 of the ’838 patent, particularly in view of the un rebutted Rapipong declaration. Thus, as in *Westech Aerosol*, 927 F.3d at 1382, where the Federal Circuit found that the plaintiff failed to plead any facts showing that the defendant had a regular and established place of business located in the district, AGIS has failed to plead (or otherwise identify) any fact showing Uber committed an act of infringement in this District. And to be clear, neither in its motion nor in these objections, does Uber suggest that AGIS must satisfy its burden to prove

infringement on the merits; rather, AGIS must present *facts* that plausibly support its allegation of infringement and, thereby, proper venue.

B. AGIS’s Indirect Infringement Allegations Are Equally Flawed

AGIS also argued, again relying on *Seven Networks*, that it need not establish venue only through acts of direct infringement, and that allegations of indirect infringement can support venue. Dkt. 43 at 9. In support of this argument, AGIS asserted that “customers and end-users of Uber’s Accused Products can access the Uber servers from this District” and that Uber has “instruct[ed] users of the Accused Products to perform at least the method of claim 1 in the ’838 Patent.” *Id.* AGIS referred to “training videos, demonstrations, brochures, installations, and/or user guides” as well as paragraph 87 of its Complaint where it alleged that “the Uber, Uber Driver, and Uber Eats Applications provides and stores the phone number of users and drivers in the memories of their respective phones (*e.g.* through communication with a server).” Dkt. 43 at 15-16 & n.2. This latter allegation—the storing of phone numbers—is not an element of the ’838 patent claim 1, which Uber explained in its Reply. Dkt. 51 at 2-3. Indeed, “phone number” appears nowhere in the claim language of the ’838 patent. Removing this non-element from the argument leaves AGIS with only boilerplate allegations that Uber induces customers to infringe.² But “conclusory allegations or legal conclusions masquerading as factual conclusions will not suffice to prevent a motion to dismiss.” *McZeal v. Sprint Nextel Corp.*, 501 F.3d 1354, 1356 (Fed. Cir. 2007). As with its direct infringement arguments, AGIS’s indirect infringement arguments ignore entirely that the sole identified claim in the Complaint recites a method performed by one or more servers. With the servers all located outside of this District, AGIS cannot plausibly allege that an Uber

² In its motion to dismiss, Uber also challenged the sufficiency of AGIS’s pleading of indirect infringement. Dkt. 24 at 35-36. The Report only addressed the motion “with respect to the defense of improper venue.” Dkt. 142 at 1.

Explore Litigation Insights

Docket Alarm provides insights to develop a more informed litigation strategy and the peace of mind of knowing you're on top of things.

Real-Time Litigation Alerts



Keep your litigation team up-to-date with **real-time alerts** and advanced team management tools built for the enterprise, all while greatly reducing PACER spend.

Our comprehensive service means we can handle Federal, State, and Administrative courts across the country.

Advanced Docket Research



With over 230 million records, Docket Alarm's cloud-native docket research platform finds what other services can't. Coverage includes Federal, State, plus PTAB, TTAB, ITC and NLRB decisions, all in one place.

Identify arguments that have been successful in the past with full text, pinpoint searching. Link to case law cited within any court document via Fastcase.

Analytics At Your Fingertips



Learn what happened the last time a particular judge, opposing counsel or company faced cases similar to yours.

Advanced out-of-the-box PTAB and TTAB analytics are always at your fingertips.

API

Docket Alarm offers a powerful API (application programming interface) to developers that want to integrate case filings into their apps.

LAW FIRMS

Build custom dashboards for your attorneys and clients with live data direct from the court.

Automate many repetitive legal tasks like conflict checks, document management, and marketing.

FINANCIAL INSTITUTIONS

Litigation and bankruptcy checks for companies and debtors.

E-DISCOVERY AND LEGAL VENDORS

Sync your system to PACER to automate legal marketing.