Misc. No. 2013-M151

United States Court of Appeals for the Federal Circuit

IN RE NINTENDO CO., LTD, NINTENDO OF AMERICA, INC., BEST BUY PURCHASING, LLC, BEST BUY STORES, L.P., BESTBUY.COM, LLC, BJ'S WHOLESALE CLUB, INC., COMPUSA.COM INC., GAMESTOP CORP., KMART CORPORATION, PC CONNECTION, INC., QVC, INC., RADIOSHACK CORPORATION, SEARS, ROEBUCK AND CO., TARGET CORPORATION, TIGERDIRECT, INC., TOYS "R" US-DELAWARE, INC., and TRANS WORLD ENTERTAINMENT CORPORATION

Petitioners.

On Petition for a Writ of Mandamus to the
United States District Court for the Eastern District of Texas
In Case Nos. 6:11-CV-496, 6:11-CV-571
Judge Leonard Davis

BRIEF OF AMICUS CURIAE RETAIL LITIGATION CENTER IN SUPPORT OF PETITIONERS SEEKING A WRIT OF MANDAMUS

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CERTIFICATE OF INTEREST

Counsel for the *amicus curiae* Retail Litigation Center certifies the following:

1. The full name of every party or amicus represented by me is:

   Retail Litigation Center.

2. The name of the real party in interest represented by me is:

   Retail Litigation Center.

3. All parent corporations and any publicly held companies that own 10 percent or more of the stock of the party or amicus curiae represented by me are as follows:

   a) Retail Litigation Center; and

   b) No publicly held companies own ten percent (10%) or more of the stock of Retail Litigation Center.

4. The names of all law firms and the partners or associates that appeared for the party or amicus now represented by me in the trial court or agency or are expected to appear in this court are:

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Date: May 17, 2013

/s/ Sanford E. Warren, Jr.
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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

OTHER AUTHORITIES

INTEREST OF AMICUS CURIAE

The Retail Litigation Center ("RLC") submits this brief in support of Nintendo Co., LTD, et al. (collectively "Petitioners").

RLC is a public policy organization that identifies and contributes to legal proceedings affecting the retail industry. RLC's members include many of the country's largest and most innovative retailers. They employ millions of workers throughout the United States, provide goods and services to tens of millions of consumers, and account for tens of billions of dollars in annual sales. RLC seeks to provide courts with retail-industry perspectives on important legal issues impacting its members, and to highlight the potential industry-wide consequences of significant pending cases.

RLC has a significant interest in the proper interpretation of joinder and severance under Rules 20 and 21 as retailers are often targeted by non-practicing entities ("NPEs")[1] for strategic purposes. As such, RLC recognizes the threat to retailers posed by allowing plaintiffs to sidestep the joinder restrictions of 35 U.S.C. § 299 through adding claims under Rule 18, and courts' subsequent refusal to sever the retailers under Rule 21. RLC submits that the Court should grant the writ of

[1] A "non-practicing entity" is an entity that does not use, sell, or manufacture the inventions for which it holds patents. Instead, these entities acquire and monetize patents, asserting them against other entities for profit.

mandamus to protect the function and intent of § 299 and to prevent NPEs from circumventing the patent joinder rules.

RLC files this brief as an attachment to its Motion for Leave to File *Amicus Curiae* in accordance with Fed. R. App. P. 29(a). No party's counsel authored this brief, in whole or in part; no party nor any party's counsel contributed money that was intended to fund preparing or submitting this brief; and no person, other than RLC, contributed money that was intended to fund preparing or submitting this brief. RLC discloses that representatives from Target Corp. and Wal-Mart Stores, Inc., defendants in the underlying suit, sit on the Board of Directors of RLC.

SUMMARY OF ARGUMENT

In 2011, Congress enacted 35 U.S.C. § 299 to end plaintiffs' practice of manipulating the joinder provisions to maintain venue and accuse numerous defendants of patent infringement despite selling very dissimilar products.[2] UltimatePointer in this case, however, side-stepped the joinder limitations of Rule 20 and § 299. Once Nintendo and the retailers were joined based on accusing Nintendo-only products, UltimatePointer subsequently asserted claims against the retailers on over 2,000 newly accused products made by over 200

[2] Subsection (b) of § 299 provides, in relevant part, "…accused infringers may not be joined in one action as defendants…based solely on allegations that they each have infringed the patent or patents in suit."

different manufacturers. In effect, the district court allowed UltimatePointer to perform the exact joinder practices Congress intended to preclude.

In allowing the new claims under Rule 18 and denying the retailers' Rule 21 motion to sever, the district court reopened the loophole specifically closed by Congress's enactment of § 299. This loophole motivates plaintiffs to use joinder as a tool to force retailers to defend highly complex patent cases when they do not have the institutional or actual technical knowledge to mount a strong defense. This Court has held the "true defendants" in these cases are the manufacturers of the products, not the "peripheral" retailers. Plaintiffs, and in particular UltimatePointer, are using retailers as mere proxies when they assert these numerous infringement claims without the manufacturers. NPEs know the retailers will likely mount a weaker defense, if any, compared to manufacturers, and are more likely to settle cases with tenuous claims for nuisance value.

Section 299 was enacted to end these practices—practices that were thwarting the purposes of the patent system and inflicting high societal costs. Yet UltimatePointer and other NPEs are doggedly attempting to keep these tactics in their arsenal. In this case, UltimatePointer is asserting that a procedural technicality should reprieve its violation of § 299. But courts must look to substance over form when applying the rules, and must ensure that procedural technicalities do not override the constitutional principle of due process.

NPEs' litigation tactics are rapidly increasing institutional and societal costs with little to no benefit. These tactics, such as the joinder loophole used by UltimatePointer, are putting retailers at such a disadvantage that they are forced to settle cases based on litigation costs and risk rather than any value associated with the asserted patents. Due to the increased likelihood of being sued as a peripheral defendant, retailers must divert funds destined for profit building ventures to paying for large in-house legal departments and eDiscovery infrastructure. These substantial costs threaten the retailers' already razor-thin profit margins.

The district court abused its discretion when it denied Petitioners' motion to sever. The district court's discretion to sever under Rule 21 was transformed into a mandate to do so because of the joinder manipulation and due process implications present in this case. Thus, the Court should grant the writ of mandamus and vacate the district court's order denying the Petitioners' motion to sever.

ARGUMENT

I. The District Court's Ruling Is Contrary to the Purpose of the Leahy-Smith America Invents Act (AIA) and Rule 20.

As part of the AIA, Congress enacted § 299 to end the practice of joining multiple defendants under Rule 20 simply because they allegedly infringed the same patent(s). By enacting § 299, Congress demonstrated its clear intent to close the joinder loophole previously available to Plaintiffs such as UltimatePointer. If this Court upholds the district court's ruling, this Court will act contrary to congressional intent by creating an alternative loophole. Instead, this Court should recognize that severance under Rule 21 is not only proper, but mandatory, in light of the due process implications arising from failing to sever. Additionally, severance prevents NPEs from using retailers to maintain improper venue.

A. Congress intended to end abusive joinder tactics by passing § 299.

Under Rule 20, defendants may be joined in patent litigation if "any right to relief is asserted against them jointly, severally, or in the alternative with respect to or arising out of the s*ame transaction, occurrence or series of transactions* [and] any question of law or fact common to all defendants will arise in [the] action." Fed. R. Civ. P. 20(a)(2) (emphasis added). As the Federal Circuit noted in *In re EMC Corp.*, the majority of courts interpreted Rule 20 to allow plaintiffs to join defendants in patent litigation if they were tied to the same accused products, such as manufacturers and retailers of the same product. *See In re EMC Corp.*, 677 F.3d 1351, 1356-58 (2012).

A minority of courts, however, interpreted Rule 20 more broadly to permit joinder if the defendants allegedly violated the same patent with different products. *See, e.g.*, *MyMail, Ltd. v. America Online, Inc.*, 223 F.R.D. 455 (E.D. Tex. 2004). Plaintiffs, and in particular NPE's, took advantage of the minority interpretation by joining dozens of different defendants and unrelated accused products in the same litigation. As of 2010, the average number of defendants per case in the minority jurisdictions was 7.0, compared to 2.9 defendants in the majority jurisdictions. James Pistorino, *Concentration of Patent Cases in Eastern District of Texas Increases in 2010*, 81 Pat. Trademark & Copyright J. (BNA) 803, 805 tbl. 1 (2011).

Congress took note of this excessive joinder. To "address[] problems occasioned by the joinder of defendants (sometimes numbering in the dozens) who have tenuous connections to the underlying disputes in patent infringement suits," Congress enacted § 299. H.R. Rep. No. 112-98, pt. 1, at 55 (2011), *reprinted in* 2011 U.S.C.C.A.N. 67, 85. With § 299, Congress sought to "clarif[y] that joinder will not be available if it [is] based solely on allegations that a defendant has infringed the patent(s) in question." *Id.* Instead, joinder is proper only if the infringement accusations arise 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."[3] *Id.* (emphasis added).

Congress intended to end the minority's application of joinder under Rule 20 in patent cases and to conform the application of Rule 20 to the majority interpretation. *See* H.R. Rep. No. 112-98, at 55 n. 61. But § 299 is not simply a procedural clarification; it is a substantive attempt to close a loophole that permitted plaintiffs to make scores of infringement allegations against numerous defendants in the same suit, to improperly maintain venue, and to make adequate defense difficult and

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[3] While the AIA was not intended to apply retroactively, this Court has addressed the minority view of Rule 20, as applied to cases filed before the AIA went into effect, and rejected it. *See In re EMC Corp.*, 677 F.3d at 1356-58.

settlement more likely. *See* Sara Jeruss et al., *The America Invents Act 500: Effects of Patent Monetization Entities on US Litigation*, 11 Duke L. & Tech. J. 358, 379 (2012).

B. The district court's opinion re-opens the loophole Congress attempted to close.

As soon as Congress closed the joinder loophole, NPEs began looking to open another. The underlying case before this Court is the perfect example of an NPE exploiting a new loophole. UltimatePointer filed two suits against Nintendo and a number of retailers, accusing only Nintendo-related products of infringing U.S. Patent Nos. 7,746,321 and 8,049,729. A9; A24; A42. The retailers subsequently moved to sever since their liability hinged on Nintendo's liability as a manufacturer and because Nintendo agreed to indemnify the retailers.

UltimatePointer exposed its full strategy when, in response to the motion to sever, it accused additional "different products with different bases of liability." A182; A205; *see also* A218; A225. In its subsequent Infringement Contentions, UltimatePointer identified over 2,000 products manufactured or developed by over 200 companies, only one of which—Nintendo—was a named defendant. A242; A262-A264; A269-A273; A281-A368. The retailers were left to defend claims against the remaining accused products without the manufacturers who actually developed the accused products. *See id.*

Nintendo and the retailers challenged UltimatePointer's avoidance of § 299 and again sought severance. The district court found for UltimatePointer on a technicality.

Because the retailers were previously joined under Rule 20 (or § 299) based on the Nintendo-related products, "Rule 18 explicitly allows for the joinder of as many claims as Plaintiff has against an opposing party." *See* A6-A7; Fed. R. Civ. P. 18. In doing so, the district court allowed UltimatePointer to circumvent the function of §299 and its fundamental purpose to prevent plaintiffs from joining numerous different parties and products in a single case.

There is no functional difference between the Rule 20 loophole Congress closed by enacting § 299 and the combined Rule 20-Rule 18 loophole UltimatePointer persuaded the district court to open. Under both loopholes, the Plaintiff is able to improperly accuse numerous different products or processes made by different manufacturers that bear little, if any, similarity. A240; A244; *see* Petition for Writ of Mandamus 6-7, *In Re Nintendo, Co., Ltd., et al.*, No. 2013-M151, May 10, 2013, ECF. No. 2.

The district court's allowance of the Rule 18 claims, and subsequent refusal to sever the non-Nintendo claims and parties, threaten to eviscerate the purpose and function of § 299. Other courts, such as the Central District of California, have already recognized and solved this problem—under similar facts, the Central District of California rejected the plaintiff's overt attempts to circumvent § 299 by improper joinder and severed all retailer defendants under Rule 21. *See Digitech Image Techs., LLC v. AGFAPHOTO Holding GMBH, et al.*, No. 8:12-cv-1153-ODW, 2012 WL 4513805 (C.D. Cal. Oct. 1, 2012).

C. Severance of defendants under Rule 21 shuts the loophole Congress closed by enacting § 299.

This Court, and the Eastern District of Texas, have long held that the manufacturer "is the true defendant" in patent infringement suits joining manufacturers and the retailers. *See Katz v. Lear Siegler, Inc.*, 909 F.2d 1459, 1464 (Fed. Cir. 1990); *Ciena Corp. v. Nortel Networks Inc.*, No. 2:05-cv-14, 2005 WL 1189881, at *9 (E.D. Tex. May 19, 2005). The manufacturer holds the requisite technical knowledge to defend the products. The retailers, however, are merely peripheral and often fail to provide substance to the non-infringement and invalidity defenses. *See id.* Looking to substance over form and applying Rule 21, courts often sever the peripheral retailers to focus on the true dispute: the patent holder versus the manufacturers. *See Spread Spectrum Screening LLC v. Eastman Kodak Co.*, 657 F.3d 1349 (Fed. Cir. 2011). The Supreme Court stresses applying substance over form, particularly where "the record reveals attempts at manipulation" of the Rules. *Hertz Corp. v. Friend*, 130 S. Ct. 1181, 1195 (2010).

While *form* may technically allow plaintiff to add the additional claims under Rule 18, Rule 21 provides the court the necessary *substance* to remedy the problem—sever the non-Nintendo defendants to prevent plaintiff from circumventing § 299. This remedy is well within the district court's discretionary powers under Rule 21. The real parties in interest are the manufacturers, such as Nintendo, since they form the real dispute with the patent holders. The retail defendants are peripheral and merely proxies for the unnamed manufacturers and their accused products.

Relying on the fact that joinder is *technically* correct under Rules 20 and 18, the district court emphasizes *form* over *substance* and ignores the reality that § 299 precluded joinder in this case. *See Freeman v. Northwest Acceptance Corp.*, 754 F.2d 553, 555 (5th Cir. 1985). Severance under Rule 21 provides courts the legal and practical solution to NPEs' abuse of the joinder rules, and the ability to avoid undermining Congress's intent in enacting § 299.

D. Constitutional requirements of due process and fair play require severance of defendants under Rule 21.

While Rule 21 is generally a discretionary tool, ensuring each party is given due process is a constitutional mandate. *See United Mine Workers of Am. V. Gibbs*, 383 U.S. 715, 724 (1966). If joinder under Rule 20 would not satisfy due process, then the joinder would be impermissible. *Perry v. Blum*, 629 F.3d 1, 16-17 (1st Cir. 2010). Conversely, if severance is required to satisfy due process, the application of Rule 21 is no longer discretionary. *See Gibbs*, 383 U.S. at 724; *Moore v. Knowles*, 482 F.2d 1069, 1075 (5th Cir. 1973).

The constitutional principles of due process and fundamental fairness require the severance of the retail defendants. Infringement is asserted against over 2,000 products made by over 200 manufacturers. A242; A262-A264; A269-A273; A281-A368. Only one manufacturer (Nintendo), responsible for only 10% of those products, is a named defendant. *See id.* The remaining defendants are retailers that must stand in the shoes of the non-joined manufacturers without the necessary information to adequately defend the case. The "true defendant[s]" are the manufacturers—the "peripheral" retailers are at an inherent and unfair disadvantage in trying to defend the thousands of different products without the manufacturers.

Given the number of accused products and the district court's short trial schedule, the defendants will have insufficient time to adequately defend their individual cases. To fit within the trial schedule, the case will devolve into a level of generality that precludes defendants from presenting any fair individual defenses. This Court previously held that Rule 20 and § 299 are designed to prevent this type of procedural unfairness and impingement on due process. *In re EMC Corp.*, 677 F.3d at 1358. That same procedural unfairness and impingement on due process exists here and requires severance of the retailer defendants under Rule 21.

E. Severance of defendants under Rule 21 also prevents plaintiffs from manipulating venue.

NPEs, such as UltimatePointer, also rely on joinder to maintain venue in favorable jurisdictions. It is no coincidence that every joined retailer in this litigation is either headquartered in Texas or parts of the eastern United States, while all western-based retailers (closer to Nintendo's Washington headquarters) were excluded. A123; A157. Neither UltimatePointer nor Nintendo has any meaningful connection to the Eastern District of Texas.

If this litigation were only between UltimatePointer and Nintendo, as it should be, this case likely would be litigated in Washington. But by joining Texas-based retailers, UltimatePointer has created a nominal venue hook that effectively negates any potential venue transfer. This Court has already weighed in disapprovingly on plaintiffs manipulating joinder for venue purposes. *Spread Spectrum,* 657 F.3d at 1349; *Amperex Elec. Corp. v. Perry*, 168 U.S.P.Q. 615, 617 (7th Cir. 1970). Thus, issuing the writ serves to reaffirm the decision of this Court, and others, that the use of joinder should not be manipulated for litigation strategy.

II. The Interests of the Patent System and the Public Are Best Served by Stopping NPEs' Litigation Tactics.

Manipulation of joinder provisions is just one maneuver in a long list of litigation tactics employed by NPEs that undermines the goals of the patent system. These tactics promote settlements unrelated to the market value of the patented technology and, coupled with the exponential growth of NPE litigation, inflict heavy societal costs with little to no benefit. Allowing NPEs, such as UltimatePointer, to exploit the Rule 20-Rule 18 loophole allowed by the district court will only facilitate this taxing NPE behavior going forward. By manipulating the joinder rules, NPEs purposely (1) increase the scale and complexity of the anticipated litigation by adding dozens of different defendants and products, (2) preserve improper venue, and (3) pressure defendants into settlements regardless of the merits of the claims.

A. NPE manipulation of joinder exacerbates targeting peripheral retailers.

A recent trend in NPE litigation strategy is to file suit against retailers or end-users instead of the manufacturer or developer. Brian J. Love & James C. Yoon, *Expanding Patent Law's Customer Suit Exception* 4-5 (2013), *available at* http://digitalcommons.law.scu.edu/facpubs/637. Noted NPE Innovatio, for example, has recently asserted its alleged Wi-Fi patent rights against hundreds of small businesses, such as coffee shops and hotels that provide wireless internet to their customers, instead of the product manufacturers. *Id.* Similarly, NPE Project Paperless accused small offices of infringing its patents by using copiers that are enabled to email scanned files instead of suing the copier manufacturers. *Id.* at 6. UltimatePointer's case is just another example of this strategy.

By going after retailers and end-users, NPEs capitalize on the defendants' relative lack of knowledge of the technology. In order to mount a successful defense in any patent litigation, the defendant must develop strong invalidity and non-infringement positions. Manufacturers are in a far better position than retailers or end-users to develop these technical defenses. Manufacturers, unlike retailers, have institutional knowledge of the technology and have a far better understanding of the state of the art, any prior art, and the functionality of the accused technology and products. *Id.* at 22.

NPEs also target retailers or end-users, instead of manufacturers, because they have less incentive to litigate. Retailers sued by NPEs are often one-time defendants accused of infringing technology wholly peripheral to their business. *See id.* at 17. As an example, retailer JCPenney has been sued for "displaying catalog images and having drop down menus on [their] website, activating a gift card at the point of sale, browsing a website on a mobile phone or enabling a customer to put her purchases in an electronic shopping bag or cart . . . [and] subjected to multiple claims for providing information regarding [their] store locations to a mobile phone." *Abusive Patent Litigation: The Impact on American Innovation and Jobs, and Potential Solutions* U.S. H. of Reps. Comm. on Judiciary, Subcomm. on Courts, Intell. Prop. and the Internet 113th Cong. 3-4, available at http://judiciary.house.gov/hearings/113th/03142013_2/Dhillon%2003142013.pdf (prepared statement of Janet L. Dhillon, Executive Vice President, General Counsel, and Corporate Secretary, JCPenney). Thus, along with being a business distraction, retailers have little incentive to litigate unless the cost to settle approaches the cost to defend. *See* Love & Yoon, *supra*, at 17. When an NPE sues a manufacturer, however, the accused products or processes are part of the manufacturer's core business. Thus, manufacturers have the incentive and capabilities to effectively and efficiently litigate the case.

Additionally, NPEs minimize their litigation costs by filing suit against retailers knowing that their asserted patent(s) likely will never be challenged. This motivates

NPEs to assert weak patents with tenuous claims against retailers—an incentive that undercuts the very aims of the patent system.

The manipulation of the joinder provisions magnifies this effect. Using UltimatePointer's combined Rule 20-Rule 18 loophole, NPEs can (1) join a limitless number of retailer defendants (under Rule 20) that sell the same products made by one manufacturer, and (2) subsequently assert limitless claims against the retailers (under Rule 18) for products made by other unnamed manufacturers once the retailers are joined. Once joined, retailers often find obtaining information from those unnamed manufacturers difficult or taxing because manufacturers are hesitant to produce internal confidential documents that reveal trade secrets or business strategies. *See id.* at 24-25.

NPEs further employ joinder tactics to trap a defendant in a plaintiff-advantageous forum without any meaningful contacts to that forum whatsoever. By combining the increased case complexity with the "accelerated timelines, broader discovery requirements, and severe sanctions for non-compliance" that exist in these plaintiff-friendly forums, NPEs stack the deck against the retailer defendant. Mark Liang, *The Aftermath of TS Tech: The End of Forum Shopping in Patent Litigation and Implications for Non-Practicing Entities*, 19 Tex. Intell. Prop. L.J. 29, 43 (2010). In the face of these tactics, the retailer's incentive to litigate plummets, providing NPEs the necessary leverage to obtain unwarranted settlements.

B. NPE litigation tactics force settlement amounts unrelated to the market value of the patented technology.

To maximize their profits, NPEs employ these litigation tactics to force retailers to settle based on the expected costs of litigation, not on the market value (if any) of the patented technology. These persistent cost-driven settlements undermine the patent system.

By placing retailers instead of manufacturers at the defense table, NPEs are able to face opponents that are less likely to properly value the patented technology. *See* Love & Yoon, *supra*, at 27-32. Additionally, their one-off status and lower incentive to litigate means that the retailers generally evaluate their settlement decisions based on the costs of litigation alone, not the merits. *See id.* By joining a large number of retailers, NPEs profit from obtaining multiple nuisance value settlements from a significant portion of the defendant pool. NPEs use joinder provisions to increase the complexity of those cases and keep them in plaintiff-friendly venues, further magnifying those costs and the likelihood of an inequitable settlement.

In her further testimony before Congress, JCPenney General Counsel Janet Dhillon testified that "the cost of defense is why so many of [NPE] cases settle without a judgment on the merits, which means that companies often settle even though no actual infringement might have occurred and patent holders are compensated far beyond any incremental value of the claimed invention." Statement by Dhillon, *supra*, at 4.

Indeed, suits by NPEs settle more often than suits by any other group. And studies show that the merits of the case play a minimal role in a retailer's decision to litigate or settle. *See* Jeruss et al., *supra*, at 386. Moreover, the cost of defense does not appear related to the size of the defendant; instead, they are highly correlated to the amount at stake in the suit. *See* Am. Intell. Prop. L. Assn., Report of the Economic Survey 2011 I-155-56; *see also* Emery G. Lee & Thomas E. Willging, *Defining the Problem of Cost in Federal Civil Litigation*, 60 Duke L.J. 765, 772 (2010).

Thus, the high cost of litigation coupled with the NPEs' litigation tactics facilitate an environment where the retailer defendant will settle a patent suit for far greater than the value of the patented technology, so long as that settlement is below the cost of litigation. And with the most recent data suggesting that the median cost of patent litigation for a small trial is over $600,000, there is a large margin for NPEs to exploit. *See* Am. Intell. Prop. L. Assn., Report of the Economic Survey 2011 I-155-56.

C. NPE litigation strategy inflicts heavy costs on retailers.

By one study's estimation, NPE litigations cost companies half a trillion dollars between 1990 and 2010. James Bessen et al., *The Private and Social Costs of Patent Trolls* 18 (Boston Univ. School of L. Working Paper No. 11-45 2011), *available at* http://www.bu.edu/law/faculty/scholarship/workingpapers/2011.html. These costs will only continue to grow. Between 2004 and 2010, there has been a 500% increase in lawsuits filed by NPEs. Bessen et al., *supra*, at 3. And NPE litigation is overwhelming: from 2007 to 2011, patent suits by NPEs went from accounting for about 22% of all patent suits filed to nearly 40%. Jeruss et al., *supra*, at 377. Sadly, little to no societal benefit results from this litigation. Instead, retailers' rising direct costs, increased overhead, and loss of market capitalization divert funding away from beneficial business activity and long term investment.

Rising litigation costs coupled with the increasing frequency of NPE suits require retailers to exhaust money on peripheral patent litigation instead of profit-generating corporate goals. According to a well-cited study, the "[a]ggregate direct costs of NPE patent assertions grew rapidly from about $7 billion in 2005 to $29 billion in 2011." James Bessen & Michael J. Meurer, *The Direct Costs from NPE Disputes* 19 (Boston Univ. School of L. Working Paper No. 12-34 2012), *available at* http://www.bu.edu/law/faculty/scholarship/workingpapers/2012.html.

To manage this increase in litigation, some retailers hire additional inside counsel and associated staff, steps that further tax the balance sheet. On top of that, expansive discovery requirements and the exponential increase in patent suits have forced some retailers to invest in expensive internal eDiscovery systems to handle the continuous production of documents for these lawsuits. Management resources suffer as well, shifting their focus off of productive activity to litigation defense tasks. Bessen et al., *supra*, at 18.

These costs and the specter of litigation can suppress stock prices of publicly traded retailers, decrease market capitalization, and minimize available funds for long-term investment. *See id.* at 16-18. Cumulatively, retailers are left with less money to direct towards productive goals, which impedes innovation and market efficiency.

If these costs provided some social value, they may be justified. A common counter-argument by the NPEs is that they promote innovation by providing a mechanism for inventors to capitalize on their inventions. But unfortunately, that argument is misplaced. Instead, the studies show that very little of the massive transfer of wealth from defendants to NPEs reaches the actual inventors. *Id.* Thus, this inefficient transfer of wealth rewards NPE litigation but not innovation, inflicting social costs without any benefit. *See* Carl Shapiro, *Patent Reform: Aligning Reward and Contribution*, in 8 Innovation Policy and the Economy 111, 111 (Adam B. Jaffe et al. eds. 2008), *available at* http://www.nber.org/chapters/c10778.pdf.

Studies actually paint a starker picture; these costs directly impede innovation. *See* Bessen et al., *supra*, at 21. The evidence shows that as a company's R&D spending increases, likelihood of being sued for patent infringement also increases. *Id.* Taken together, NPE litigation strategies, such as the strategy UltimatePointer asks this Court to permit, place undue risk and barriers to innovation.

CONCLUSION

It is no secret that NPE litigation is on the rise. Congress enacted § 299 to slow the tide of litigation by closing the Rule 20 joinder loophole. Now, UltimatePointer and NPEs everywhere are hoping to re-open that loophole and circumvent the clear message from Congress that NPE litigation has gotten out of hand. If UltimatePointer is successful, retailers and end-users will suffer the consequences—so, too, will innovation and the patent system as a whole. UltimatePointer should not be allowed to contravene congressional intent simply by procedural technicalities. Instead, the district court should have used its discretion to grant the Petitioners' motion to sever. The district court abused its discretion in denying the motion to sever and this Court should grant the petition for writ of mandamus.

CERTIFICATE OF SERVICE

I hereby certify that on May 17, 2013 BRIEF OF AMICUS CURIAE RETAIL LITIGATION CENTER IN SUPPORT PETITIONERS SEEKING A WRIT OF MANDAMUS was electronically filed with the Clerk of the Court using CM/ECF, and was served on the following counsel via the CM/ECF system in accordance with Federal Rule of Appellate Procedure 25, Federal Circuit Rule 25, and ECF-6 of this Court's Administrative Order Regarding Electronic Case Filing.

Date: May 17, 2013

/s/ Sanford E. Warren, Jr.
Sanford E. Warren, Jr.
Counsel for Amicus Curiae
RETAIL LITIGATION CENTER

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), the undersigned hereby certifies that this brief complies with the type-volume limitation of Fed. R. App. P. 28.1(e)(2)(A).

1. Exclusive of the exempted portions of the brief, as provided in Fed. R. App. P. 32(a)(7)(B) and Fed. Cir. R. 32(b), the brief contains 5,170 words.

2. The brief has been prepared in proportionally spaced typeface using Microsoft Word 2007 in 14 point Garamond font. As permitted by Fed. R. App. P. 32(a)(7)(C), the undersigned has relied upon the word count feature of this word processing system in preparing this certificate.

Date: May 17, 2013

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