

**UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT**

IN RE EMC CORP., DECHO CORP., AND IOMEGA CORP.,

Petitioners.

ON PETITION FOR A WRIT OF MANDAMUS TO THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TEXAS (SHERMAN DIVISION) IN CASE NO. 4:10-CV-435, JUDGE MICHAEL H. SCHNEIDER

**BRIEF FOR PETITIONERS
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CERTIFICATE OF INTEREST

Pursuant to Federal Circuit Rule 47.4, counsel of record for Petitioners, EMC Corporation, Decho Corporation, and Iomega Corporation certifies as follows:

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

EMC Corporation
Decho Corporation
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2. The names of the real parties in interest represented by me are:

See response to number 1.

3. All parent corporations and any publicly held companies that own 10

percent or more of the stock of the parties represented by me are:

Decho Corporation and Iomega Corporation are wholly owned subsidiaries of EMC Corporation.

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

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Dated: September 7, 2011

TABLE OF CONTENTS

	Page
INTRODUCTION	1
STATEMENT OF RELIEF SOUGHT	2
ISSUE PRESENTED	2
STANDARD OF REVIEW	3
STATEMENT OF FACTS	3
ARGUMENT	8
I. THE DISTRICT COURT ERRED IN REFUSING TO DISMISS OR SEVER EMC FROM LITIGATION INVOLVING UNRELATED DEFENDANTS	8
A. The District Court Conflated The Two Separate Requirements Of Rule 20	9
B. The Fifth Circuit Would Follow The Text Of Rule 20	12
C. The District Court’s Decision Is Contrary To The Overwhelming Majority Of Decisions Addressing Rule 20(a)(2)	15
II. THE DISTRICT COURT’S ERROR REGARDING RULE 20 WARRANTS A WRIT OF MANDAMUS	18
A. EMC Faces The Loss Of Fundamental Due Process Rights	19
B. A Writ Should Issue To Stop Oasis From Circumventing The Court’s Transfer Rulings	21
C. The Action Of The Court Below Does Not Conserve Judicial Resources	24
CONCLUSION	26

TABLE OF AUTHORITIES

	Page(s)
FEDERAL CASES	
<i>Acevedo v. Allsup’s Convenience Stores, Inc.</i> , 600 F.3d 516 (5th Cir. 2010)	9
<i>Adrain v. Genetec, Inc.</i> , No. 2:08-CV-423, 2009 WL 3063414 (E.D. Tex. Sept. 22, 2009)	6, 15
<i>Arista Records LLC v. Does 1-11</i> , No. 1:07-CV-2828, 2008 WL 4823160 (N.D. Ohio Nov. 3, 2008)	18
<i>Arista Records LLC v. Does 1-4</i> , 589 F. Supp. 2d 151 (D. Conn. 2008).....	18
<i>Bear Creek Techs., Inc. v. RCN Commc’ns</i> , No. 2:11-cv-103, 2011 WL 3626787 (E.D. Va. Aug. 17, 2011).....	17
<i>Better Educ., Inc. v. Einstruction Corp.</i> , No. 2:08-cv-446, 2010 WL 918307 (E.D. Tex. Mar. 10, 2010).....	15
<i>Children’s Network, LLC v. Pixfusion LLC</i> , 722 F. Supp. 2d 404 (S.D.N.Y. 2010)	17
<i>Concept Design Elecs. and Mfg., Inc. v. Duplitronics, Inc.</i> , 104 F.3d 376 (Fed. Cir. 1996)	12, 13
<i>Cont’l Grain Co. v. Barge FBL-585</i> , 364 U.S. 19 (1960).....	24
<i>DIRECTV, Inc. v. Boggess</i> , 300 F. Supp. 2d 444 (S.D. W. Va. 2004).....	18
<i>EIT Holdings LLC v. Yelp!, Inc.</i> , No. C 10–05623, 2011 WL 2192820 (N.D. Cal. May 12, 2011).....	16
<i>Eolas Tech., Inc. v. Adobe Systems Inc.</i> , No. 6:09-CV-446, 2010 WL 3835762 (E.D. Tex. Sept. 28, 2010)	5, 15
<i>Eon-Net LP v. Flagstar Bancorp</i> , No. 2009-1308, 2011 WL 3211512 (Fed. Cir. July 29, 2011)	20, 21, 22

<i>Fener v. Operating Eng’rs Const. Indus. and Miscellaneous Pension Fund</i> , 579 F.3d 401 (5th Cir. 2009)	21
<i>Golden Scorpio Corp. v. Steel Horse Bar & Grill</i> , 596 F. Supp. 2d 1282 (D. Ariz. 2009)	18
<i>Hertz Corp. v. Friend</i> , 130 S. Ct. 1181 (2010).....	22
<i>In re Genentech, Inc.</i> , 566 F.3d 1338 (Fed Cir. 2009)	22
<i>In re Google Inc.</i> , 412 F. App’x 295 (Fed. Cir. 2011)	23, 24
<i>In re Hoffmann-La Roche Inc.</i> , 587 F.3d 1333 (Fed. Cir. 2009)	21, 22
<i>In re Indep. Serv. Orgs. Antitrust Litig.</i> , 203 F.3d 1322 (Fed. Cir. 2000)	12
<i>In re Microsoft Corp.</i> , 630 F.3d 1361 (Fed. Cir. 2011)	21, 22
<i>In re Oracle Corp.</i> , 399 F. App’x 587 (Fed. Cir. 2010)	22
<i>In re Supreme Beef Processors, Inc.</i> , 391 F.3d 629 (5th Cir. 2004), <i>overruled in part on other grounds</i> , 468 F.3d 248 (5th Cir. 2006) (en banc)	13, 14
<i>In re TS Tech USA Corp.</i> , 551 F.3d 1315 (Fed. Cir. 2009)	3, 21, 23
<i>In re Vistaprint Ltd.</i> , 628 F.3d 1342 (Fed. Cir. 2010)	24
<i>In re Volkswagen of America, Inc.</i> , 545 F.3d 304 (5th Cir. 2008) (en banc)	21
<i>In re Zimmer Holdings, Inc.</i> , 609 F.3d 1378 (Fed. Cir. 2010)	12, 21, 22

<i>Innovative Global Sys. LLC v. Turnpike Global Techs., LLC</i> , No. 6:09-cv-157, 2009 WL 3754886 (E.D. Tex. Oct. 20, 2009)	15
<i>Kohus v. Toys R Us, Inc.</i> , 282 F.3d 1355 (Fed. Cir. 2002)	12
<i>Lehigh Min. & Mfg. Co. v. Kelly</i> , 160 U.S. 327 (1895).....	22
<i>Mannatech, Inc. v. Country Life, LLC</i> , No. 3:10-CV-533, 2010 WL 2944574 (N.D. Tex. July 26, 2010)	15
<i>Miller & Lux, Inc. v. East Side Canal & Irrigation Co.</i> , 211 U.S. 293	22
<i>Moore v. New York Cotton Exch.</i> , 270 U.S. 593 (1926).....	13
<i>Morris v. Gilmer</i> , 129 U.S. 315 (1889).....	22
<i>Mosley v. Gen. Motors Corp.</i> , 497 F.2d 1330 (8th Cir. 1974)	14
<i>Multi-Tech Sys., Inc. v. Net2Phone, Inc.</i> , No. 00-346 ADM/RLE, 2000 WL 34494824 (D. Minn. Jun. 26, 2000)	17
<i>MyMail, Ltd. v. Am. Online, Inc.</i> , 223 F.R.D. 455 (E.D. Tex. 2004)	6, 15, 17, 25
<i>New Jersey Mach. Inc. v. Alford Indus., Inc.</i> , No. 89-1879 (JCL), 1991 WL 340196 (D.N.J. Oct. 7, 1991), <i>aff'd</i> , 983 F.2d 1087 (Fed. Cir. 1992)	17
<i>Ormet Primary Aluminum Corp. v. Ballast Techs., Inc.</i> , No. 10-30710, 2011 WL 2342687 (5th Cir. June 14, 2011)	13
<i>Paine, Webber, Jackson & Curtis, Inc. v. Merrill Lynch, Pierce, Fenner & Smith, Inc.</i> , 564 F. Supp. 1358 (D. Del. 1983).....	15
<i>Pergo Inc. v. Alloc Inc.</i> , 262 F. Supp. 2d 122 (S.D.N.Y. 2003)	17, 18

<i>Philips Elecs. N. Am. Corp. v. Contec Corp.</i> , 220 F.R.D. 415 (D. Del. 2004)	16
<i>Revere Copper and Brass Inc. v. Aetna Cas. and Sur. Co.</i> , 426 F.2d 709 (5th Cir. 1970)	13
<i>Rudd v. Lux Prods. Corp.</i> , No. 09-cv-6957, 2011 WL 148052 (N.D. Ill. Jan. 12, 2011)	16
<i>SB Designs v. Reebok Int’l, Ltd.</i> , 305 F. Supp. 2d 888 (N.D. Ill. 2004).....	18
<i>Sorensen v. DMS Holdings, Inc.</i> , No. 08-cv-559, 2010 WL 4909615 (S.D. Cal. Nov. 24, 2010)	16
<i>Storage Tech. Corp. v. Cisco Sys., Inc.</i> , 329 F.3d 823 (Fed. Cir. 2003)	12
<i>WiAV Networks, LLC v. 3Com Corporation</i> , No. 10-03448, 2010 WL 3895047 (N.D. Cal. Oct. 1, 2010).....	16

FEDERAL STATUTES

28 U.S.C. § 1407(a)	21
---------------------------	----

RULES

Fed. R. Civ. P. 20	passim
Fed. R. Civ. P. 13	14

OTHER AUTHORITIES

7 Charles Alan Wright & Arthur Miller, <i>Federal Practice and Procedure</i> § 1651 (3d ed. 2005)	10, 14
Alex Blumberg and Laura Sydell, <i>When Patents Attack</i> , NPR (July 22, 2011)	7, 8
Christopher J. Gaspar and Isabella Fu, <i>Formulating Litigation-Hold Instructions and Identifying Accused Instrumentalities in Multi- Defendant Patent Litigation</i> (2010) available at http://www.aipla.org/learningcenter/library/papers/am/2010/Documents/ Fu_Paper.pdf	25

The Honorable John D. Love, <i>Sample Consent Docket Control Order</i>	19
James Pistorino, <i>Concentration of Patent Cases in Eastern District of Texas Increases in 2010</i> , BNA’s Patent, Trademark & Copyright Journal, (April 15, 2011).	25
John Marlot, <i>NPES and Pre-Litigation Considerations</i> , Patent Litigation 2010, PLI Order No. 24179 (Sept. – Nov. 2010)	19
Mary Kane, <i>Original Sin and the Transaction In Federal Civil Procedure</i> , 76 Texas L. Rev. 1723, 1728-29 (1998).....	14
Oxford English Dictionary 427 (2d ed. 1989)	11
<i>Proceedings of Meeting of Advisory Committee on Rules for Civil Procedure of the Supreme Court of the United States</i> (Friday, November 15, 1935)	10

INTRODUCTION

The district court committed clear error under Rule 20 of the Federal Rules of Civil Procedure by allowing the plaintiff to join many unrelated companies in a single infringement action based merely on an allegation that the companies each independently offer the same type of service. In doing so, the District Court endorses an increasingly common practice of nonpracticing entities who file patent infringement suits in the Eastern District of Texas. Their newest tactic is to sue a large number of unrelated and geographically dispersed defendants, accuse them of infringing the same patent without regard to service or product differences, resist severance, and then oppose transfer of the action to a different forum. EMC seeks a writ of mandamus to correct the District Court's clear error in endorsing this improper use of joinder.

Misjoinder of multiple defendants in a single patent infringement action not only has become a tool for forum shopping, but it is increasingly being used to undermine defendants' due process rights. If a writ of mandamus does not issue, EMC will be forced to defend infringement claims alongside competitors with different services or products and possibly different strategies. Defendants most likely will be pressured to compromise on claim construction strategies, even though they may have significantly different positions, and share precious time at hearings and trial. Each defendant runs the risk that the jury, inundated with facts

about numerous different products and services, will be unable to distinguish one defendant and its products or services from another. Being thrown in with others as part of a “defense group” also raises the risk of guilt by association.

This new tactic of misjoining multiple defendants, which has now become standard procedure in lawsuits filed by nonpracticing entities in the Eastern District of Texas, substantially distorts the merits of patent litigation and facilitates “shakedown” lawsuits. This Court should issue a writ of mandamus to correct the clear error below.

STATEMENT OF RELIEF SOUGHT

Petitioner EMC Corp. and its subsidiaries Decho Corp. and Iomega Corp. (collectively, “EMC”) respectfully request that the Court grant this petition for a writ of mandamus, vacate the July 25, 2011 Order of the United States District Court for the Eastern District of Texas denying their motions to dismiss for misjoinder or in the alternative to sever and transfer the claims against them, and remand with instructions either to dismiss the claims or sever and transfer them to the United States District Court for the District of Utah.

ISSUE PRESENTED

Two or more defendants may be joined in a single action if the plaintiff’s allegations “arise out of the same transaction, occurrence, or series of transactions or occurrences” and a question of law or fact common to all defendants will arise

in the action. Fed. R. Civ. P. 20(a)(2). The question presented is whether Rule 20 allows a plaintiff to join patent infringement claims against multiple unrelated parties solely because the companies offer the same type of product or service and without regard to whether the companies independently designed, developed, and marketed those products or services.

STANDARD OF REVIEW

“The writ of mandamus is available in extraordinary situations to correct a clear abuse of discretion or usurpation of judicial power.” *In re TS Tech USA Corp.*, 551 F.3d 1315, 1318 (Fed. Cir. 2009). A district court abuses its discretion if it “relied on clearly erroneous factual findings, made erroneous conclusions of law, or misapplied the law to the facts.” *Id.* at 1319. A “clear” abuse of discretion exists where the court below reached a “patently erroneous result.” *Id.* (quotations and citations omitted). Where there are no other means of correcting a patently erroneous result, the right to issuance of a writ of mandamus is “clear and indisputable.” *Id.*

STATEMENT OF FACTS

Plaintiff Oasis Research LLC (“Oasis”), a nonpracticing patent enforcement entity, filed suit in the Sherman Division of the Eastern District of Texas against EMC and thirteen other defendant groups (which included parent and subsidiaries), claiming that each infringes the patents-in-suit through the supply of online data

backup or storage services.¹ A3. The patents-in-suit are U.S. Patent Nos. 5,771,354; 5,901,228; 6,411,943; and 7,080,051. In its complaint, Oasis did not allege that each group of corporate defendants is related to the other groups or that they acted in concert in allegedly infringing the asserted patents. Nor does Oasis seek joint or several relief from the defendants.

The pleadings themselves demonstrate that each defendant's services are different. Specifically, Oasis alleges:

- EMC offers the “Mozy” branded services with operations based in Utah. A120-21.
- Iron Mountain offers the “Connected” branded services with operations based in Massachusetts. A123-43.
- Pro Softnet offers the “IBackup” and “IDrive” branded services with operations based in California. A144-46.
- Nirvanix offers the “Storage Delivery Network” branded services with operations based in California. A149-51.
- GoDaddy offers backup and storage services through their Web sites with operations based in Arizona. A152-54.
- Carbonite offers backup and storage services through their Web sites with operations based in Massachusetts. A155-57.
- Officeware Corp. offers backup and storage services through their Web sites with operations based in Texas. A173.

¹ On July 30, 2010, one month before Oasis filed its complaint, it received an assignment of the patents-in-suit from Intellectual Ventures Computing Platforce Assets LLC (“IV”). A114. IV has retained a financial interest in the outcome of this litigation. A181.

EMC and six other defendant groups (representing ten of the original eighteen defendants) separately moved to dismiss for misjoinder under Federal Rule of Civil Procedure 20(a)(2) or, in the alternative, to sever and transfer the claims to appropriate venues. A2-3. The Magistrate Judge to whom the motions were referred recommended denial of all misjoinder and transfer motions. While recognizing that the Eastern District of Texas departs from virtually every other federal judicial district in allowing liberal joinder of patent infringement claims, the Magistrate Judge elected to follow prior rulings of the District endorsing the practice. The District Court adopted the Magistrate Judge's recommendations by Order dated July 25, 2011 without any independent analysis. A1.

The Magistrate Judge relied on a general notion of service similarity to find both prongs of Rule 20(a)(2) satisfied. The Magistrate Judge ruled "Defendants' products offer the same service, online backup/storage, and the Court finds this is sufficient to satisfy" the "same transaction or occurrence prong" of Rule 20. A5. He then proceeded to use the same rationale to find the second prong of Rule 20(a)(2) satisfied. "Courts in this District have consistently held that as long as the Defendants' allegedly infringing products are not dramatically different, then determining Defendants' liability will involve substantially overlapping questions of law and fact." A5 (citing *Eolas Tech., Inc. v. Adobe Systems Inc.*, No. 6:09-CV-446, 2010 WL 3835762 (E.D. Tex. Sept. 28, 2010) (emphasis added); *Adrain v.*

Genetec, Inc., No. 2:08-CV-423, 2009 WL 3063414, at *2 (E.D. Tex. Sept. 22, 2009); and *MyMail, Ltd. v. Am. Online, Inc.*, 223 F.R.D. 455, 457 (E.D. Tex. 2004)). In a hearing on the motions to dismiss, the Magistrate Judge acknowledged that the Eastern District of Texas is an apparent outlier in its construction of Rule 20. A85 (“And from what I can tell, and I’ll give you this preface before I let y’all talk about it, is that every judge in our district has basically come out in favor of the Plaintiff’s view. And I think one court in Louisiana, and it seems like **all the other courts around the country have come in favor of what the Defendants’ position in this case is.**” (emphasis added)).

The Magistrate Judge based his critical conclusion that the defendants’ services are “not dramatically different” on the bare conclusory allegation of the complaint that defendants “each offer[] an online backup/storage service to its customers that allegedly infringes Plaintiff’s patents.” A5. Other than this conclusory allegation, the complaint does not allege that the services are the same (or even similar), much less explain in what way the services are allegedly the same or similar. The complaint, for example, does not allege that the service are the same or similar or that the services operate in the same or similar fashion. So too, the Magistrate Judge cited nothing but this conclusory allegation in ruling that

the accused services are “not dramatically different” and did not articulate what it means for accused services to be “not dramatically different.”²

The Magistrate Judge also denied the transfer motions, noting that the “defendants[’] motions to transfer are contingent upon the Court finding severance to be warranted.” A10. Because he had recommended denial of the misjoinder motions, the Magistrate Judge did not consider whether the Eastern District of Texas is the appropriate forum for any of the claims against the defendants. As a consequence, the Magistrate Judge did not take into account that neither Oasis nor any of the defendants have any connection to the Eastern District of Texas. Nor did the Magistrate Judge explore whether Oasis alleged a sham address in Marshall, Texas in an improper attempt to manufacture venue. In its original complaint, Oasis alleged that it has “its principal place of business at 104 E. Houston Street, Suite 190, Marshall, TX 75670.” Complaint, *Oasis v. Adrive, et al.*, No. 4:10-CV-435 (E.D. Tex. Aug. 30, 2010), ECF No. 1. After the original complaint was filed, National Public Radio aired a report on “patent trolls” featuring Oasis and found no evidence that Oasis has any legitimate presence in Marshall, Texas. *See* Alex Blumberg and Laura Sydell, *When Patents Attack*, NPR

² Oasis has stated that AT&T’s Synaptic service is based on an EMC product. A42. Oasis may argue that the Synaptic service offered by AT&T is related to EMC’s “Atmos” product. No such relation is pled in the complaint, and no evidence was submitted to explain why joinder would be proper.

(July 22, 2011, 8:04 PM) (“[Oasis] appear[s] to have no employees. [It is] not coming up with new inventions. [Oasis is] in Marshall, Texas because [it is] filing lawsuits for patent infringement.”).³ EMC’s investigation also revealed that Oasis’s claim of a business in Marshall was a sham. A178-79.

Oasis now concedes it has no connection to the Eastern District of Texas. After EMC challenged the veracity of Oasis’s allegation, Oasis filed an amended complaint in which it dropped the allegation of a business in Marshall. The amended complaint does not allege a principal place of business at all, simply averring that Oasis has a “private mail box” in Fort Worth. A14.

As a consequence of the Order below, this case has assumed a familiar profile for many cases filed in the Eastern District of Texas: a nonpracticing entity with no contacts in the District sues numerous unrelated defendants who also have no contacts in the District on claims joined in violation of the Federal Rules.

ARGUMENT

I. THE DISTRICT COURT ERRED IN REFUSING TO DISMISS OR SEVER EMC FROM LITIGATION INVOLVING UNRELATED DEFENDANTS

The District Court misapplied Rule 20(a)(2) to permit joinder of individual claims against unrelated defendants to the substantial prejudice of the defendants.

In doing so, the District Court conflated the rule’s two separate requirements,

³ See <http://www.npr.org/blogs/money/2011/07/26/138576167/when-patents-attack>.

misapplied Fifth Circuit joinder law, and parted ways with the vast majority of courts to consider the same question.

A. The District Court Conflated The Two Separate Requirements Of Rule 20

The text of Rule 20(a) establishes two conditions for permissive joinder:

Persons . . . may be joined in one action as defendants if:

(A) any right to relief is asserted against them jointly, severally, or in the alternative with respect to or **arising out of the same transaction, occurrence,** or series of transactions or occurrences; **and**

(B) any question of law or fact common to all defendants will arise in the action.

Fed. R. Civ. P. 20(a)(2) (emphasis added).

Recognizing that Rule 20 has an “(A)” and a “(B),” the Fifth Circuit has held that the two conditions are separate requirements: “Courts have described Rule 20 as creating a two-prong test, allowing joinder of plaintiffs when (1) their claims arise out of the ‘same transaction, occurrence, or series of transactions or occurrences’ and when (2) there is at least one common question of law or fact linking all claims.” *Acevedo v. Allsup’s Convenience Stores, Inc.*, 600 F.3d 516, 521 (5th Cir. 2010).

Proper application of Rule 20 is important as it preserves a defendant’s due process rights. Specifically, the two-prong test of Rule 20 is designed to protect defendants from the prejudice and potential confusion of being forced to defend

claims alongside unrelated parties with different products or services and possibly different strategies. The Advisory Committee on the Federal Rules of Civil Procedure settled on Rule 20 after extensive debate about allowing joinder to promote judicial economy only if it preserves the ability of defendants to protect their individual interests. Rule 20 was derived largely from the English Rules of Practice, which generally permitted party joinder whenever claims by or against the joined parties arose out of the same transaction and presented common questions of law or fact. 7 Charles Alan Wright & Arthur Miller, *Federal Practice and Procedure* § 1651 (3d ed. 2005). In commenting on the importance of protecting defendants, one committee member stated:

I cannot possibly see any justification in compelling a single defendant to come into a lawsuit, with, perhaps, 20 others, and with as many different lawyers, and **saddle him [sic] the additional expense and trouble of having his attorney watch all of those others to be sure that something is not done in the suit by which he would be injuriously affected.**

See Proceedings of Meeting of Advisory Committee on Rules for Civil Procedure of the Supreme Court of the United States at 490-91 (Friday, November 15, 1935), available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Minutes/CV11-1935-min-Vol2.pdf> (emphasis added).

Indeed, the notion of due process and fundamental fairness is implicit in the requirements of Rule 20. As another commentator stated:

I think the right of the defendant is to be sued **under circumstances that protect him**, and I think it would be an undue hardship to bring me as a sole connection with 25 or 30 other people with whom I have no connection whatever in a transaction to which I am not a party, because there is a common question of law involved.

Id. at 505 (emphasis added).

The District Court converted the Rule 20(a)(2) inquiry into a single test that ignores the rule's plain text and purpose. The Court stated that the "similarity of Defendants' products is sufficient to satisfy the same transaction or occurrence prong," *i.e.*, the first prong. A5. But the Court had no record of product or service similarity. And, as a matter of plain language, "similar" is not the same as "same" and "not dramatically different" is even less the same as "same." *See, e.g.*, Oxford English Dictionary 427 (2d ed. 1989) (first definition of "same" is "identical"). Nor does the Court explain why the focus is on the accused "products" when the text requires the same "transaction or occurrence." Instead, the Court explained that mere similarity satisfies the first prong because this general level of "similarity" of the products satisfies the *second* prong: "as long as Defendants' allegedly infringing products are not dramatically different, then determining Defendants' liability will involve substantially overlapping questions of law and fact." A5. The Court reasoned that because the second prong of Rule 20 was satisfied due to the general similarity of the services, the first prong of Rule was automatically satisfied as well.

Nothing in the text of the rule suggests that meeting the second prong of Rule 20(a)(2) necessarily satisfies the first prong. And, as explained below (at II.B.), the District Court’s error eliminates the fairness protections embodied in Rule 20.

B. The Fifth Circuit Would Follow The Text Of Rule 20

Not only does the District Court’s decision violate the text of Rule 20, it is contrary to the way the Fifth Circuit would interpret Rule 20 in this context. Just as Eastern District of Texas rulings on transfer motions are governed by Fifth Circuit law, *Storage Tech. Corp. v. Cisco Sys., Inc.*, 329 F.3d 823, 836 (Fed. Cir. 2003); *In re Zimmer Holdings, Inc.*, 609 F.3d 1378, 1380 (Fed. Cir. 2010), so too are Eastern District of Texas rulings on motions to dismiss or sever for misjoinder governed by the law of the Fifth Circuit.

The Fifth Circuit has not directly ruled on whether an allegation of “same service” can satisfy both prongs of Rule 20. “When a circuit has not addressed an issue, we must ‘determine how that circuit would likely resolve the issue; the precedent of other circuits is instructive in that consideration.’” *Kohus v. Toys R Us, Inc.*, 282 F.3d 1355, 1358 n.4 (Fed. Cir. 2002) (quoting *In re Indep. Serv. Orgs. Antitrust Litig.*, 203 F.3d 1322, 1328 (Fed. Cir. 2000)). See also *Concept Design Elecs. and Mfg., Inc. v. Duplitronics, Inc.*, 104 F.3d 376 (Fed. Cir. 1996) (declining to resolve whether Fourth Circuit or Federal Circuit law applies because

“[u]nder either our law or our prediction of Fourth Circuit law, the result will be the same”).

In the analogous context of joinder of claims, the Fifth Circuit has held that the “same transaction” terminology of the Federal Rules refers to claims that arise “out of the same aggregate of operative facts.” *Revere Copper and Brass Inc. v. Aetna Cas. and Sur. Co.*, 426 F.2d 709, 715-16 (5th Cir. 1970). *Revere* relied heavily on *Moore v. New York Cotton Exchange*, 270 U.S. 593, 610 (1926), where the Supreme Court explained that the scope of a single “[t]ransaction” turns on the “logical relationship” between occurrences. *Id.* The Fifth Circuit has since reaffirmed *Revere*, ruling that where the claims against two defendants have “disparate factual predicates” and the “two claims simply do not bear a logical relationship to one another,” the claims do not arise from the same “operative facts.” *In re Supreme Beef Processors, Inc.*, 391 F.3d 629, 634 (5th Cir. 2004), *overruled in part on other grounds*, 468 F.3d 248 (5th Cir. 2006) (en banc). *Accord Ormet Primary Aluminum Corp. v. Ballast Techs., Inc.*, No. 10-30710, 2011 WL 2342687, at *2 (5th Cir. June 14, 2011) (claims arise from the same transaction or occurrence where there is a “logical relationship” between them, meaning “the same operative facts serve[] as the basis of both claims” (citations omitted)).

Revere, *In re Supreme Beef*, and *Ormet* involve joinder of claims, but those rules use the “same transaction” terminology that is used in Rule 20. Courts and commentators have recognized the common sense proposition that the “logical-relationship test employed” in the joinder of claims rules “seems consistent with the philosophy underlying the passage of Rule 20.” Wright & Miller, § 1653 at 410. *See, e.g., Mosley v. Gen. Motors Corp.*, 497 F.2d 1330, 1333 (8th Cir. 1974) (“construction of the terms ‘transaction or occurrence’ as used in the context of Rule 13(a) counterclaims offers some guide as to application of th[e] test”); Mary Kane, *Original Sin and the Transaction In Federal Civil Procedure*, 76 Texas L. Rev. 1723, 1728-29 (1998) (discussing together joinder of claims and parties).

Thus, in the Rule 20 context, the Fifth Circuit will predictably rule that where the claims against two defendants have disparate factual predicates, the claims do not arise from the same “operative facts” and joinder is therefore improper. As noted above, there was no evidence or even allegation that Oasis’s claims arose “out of the same aggregate of operative facts.” Indeed, the Magistrate Judge and District Court did not require Oasis to provide any justification for naming unrelated defendants in a single action—other than they are accused of separately infringing the same patents. Oasis’s complaint does not allege that the services were jointly designed or operate in the same manner. The Court can and should predict that the Fifth Circuit would not permit joinder here.

C. The District Court’s Decision Is Contrary To The Overwhelming Majority Of Decisions Addressing Rule 20(a)(2)

In holding that Rule 20 allows joinder of multiple unrelated defendants in a patent infringement case if the accused services are generally similar, the Magistrate Judge followed a number of prior decisions from the Eastern District of Texas. *See, e.g., Eolas Tech* 2010 WL 3835762; *Adrain*, 2009 WL 30633414, at *2; and *MyMail*, 223 F.R.D. at 457.⁴ But those decisions are out of step with virtually every other jurisdiction to have ruled on the question.⁵

Courts throughout the country have long held that “[a]llegations of infringement against ... unrelated parties based on different acts do not arise from the same transaction.” *Paine, Webber, Jackson & Curtis, Inc. v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 564 F. Supp. 1358, 1371 (D. Del. 1983). The majority rule is that joinder of unrelated defendants in a patent infringement action, where there is no evidence of the defendants acting in concert, is improper under Rule 20(a). A number of the key rulings are listed below:

⁴ *See also Better Educ., Inc. v. Einstruction Corp.*, No. 2:08-cv-446, 2010 WL 918307, at *1 (E.D. Tex. Mar. 10, 2010); *Innovative Global Sys. LLC v. Turnpike Global Techs., LLC*, No. 6:09-cv-157, 2009 WL 3754886 (E.D. Tex. Oct. 20, 2009).

⁵ Outside the Eastern District of Texas, only one case appears to have followed *MyMail*. *See Mannatech, Inc. v. Country Life, LLC*, No. 3:10-CV-533, 2010 WL 2944574 (N.D. Tex. July 26, 2010).

California: *EIT Holdings LLC v. Yelp!, Inc.*, No. C 10–05623, 2011 WL 2192820, at *2 (N.D. Cal. May 12, 2011) (“Plaintiff cannot escape the fact that it is suing unrelated defendants for their own independent acts of patent infringement. In such situations, numerous courts have found that joinder is improper.”) (“[P]roof of infringement necessarily would require proof of facts specific to each individual defendant and to each accused website.”); *Sorensen v. DMS Holdings, Inc.*, No. 08-cv-559, 2010 WL 4909615, at *1 (S.D. Cal. Nov. 24, 2010) (“[A]lleging a common manufacturer and infringement of the same patent is not enough to support joinder where defendants are unrelated companies, selling different products.”); *WiAV Networks, LLC v. 3Com Corporation*, No. 10-03448, 2010 WL 3895047, at *3 (N.D. Cal. Oct. 1, 2010) (“[N]umerous courts have found that ‘joinder is often improper where [multiple] competing businesses have allegedly infringed the same patent by selling different products.’”).

Delaware: *Philips Elecs. N. Am. Corp. v. Contec Corp.*, 220 F.R.D. 415, 418 (D. Del. 2004) (The fact that defendants “may have infringed the same patents” is an “insufficient basis to join unrelated parties as defendants in the same lawsuit.”) (discussing “risk of prejudice” to defendants).

Illinois: *Rudd v. Lux Prods. Corp.*, No. 09-cv-6957, 2011 WL 148052, at *3 (N.D. Ill. Jan. 12, 2011) (“[A] party fails to satisfy Rule 20(a)’s requirement of a common transaction or occurrence where unrelated defendants, based on different

acts, are alleged to have infringed the same patent.”) (“After researching the issue, the Court determines that *MyMail*’s approach is in the minority.”).

Minnesota: *Multi-Tech Sys., Inc. v. Net2Phone, Inc.*, No. 00-346 ADM/RLE, 2000 WL 34494824, at *6 (D. Minn. Jun. 26, 2000) (“[W]here patent infringement claims are brought against multiple, unrelated defendants, courts have held joinder to be inappropriate pursuant to Rule 20.”).

New Jersey: *New Jersey Mach. Inc. v. Alford Indus., Inc.*, No. 89-1879 (JCL), 1991 WL 340196, at *2 (D.N.J. Oct. 7, 1991) (“[C]laims of infringement against unrelated defendants, involving different machines, should be tried separately against each defendant.”), *aff’d*, 983 F.2d 1087 (Fed. Cir. 1992).

New York: *Children’s Network, LLC v. Pixfusion LLC*, 722 F. Supp. 2d 404, 415 (S.D.N.Y. 2010) (“Joinder of unrelated parties into one action is generally inappropriate where, as here, the infringement of the same patent is alleged, but the products are different.”); *Pergo Inc. v. Alloc Inc.*, 262 F. Supp. 2d 122, 128 (S.D.N.Y. 2003) (“[T]hat two parties may manufacture or sell similar products, and that these sales or production may have infringed the identical patent owned by the plaintiffs is not sufficient to join unrelated parties as defendants in the same lawsuit pursuant to Rule 20(a).”).

Virginia: *Bear Creek Techs., Inc. v. RCN Commc’ns*, No. 2:11-cv-103, 2011 WL 3626787, at *5 (E.D. Va. Aug. 17, 2011) (denying joinder where

defendants “are not related entities” and have no “legal or business relationships” to indicate coordinated action to infringe asserted claims).

When this issue has arisen in other intellectual property contexts, such as copyright and trademark matters, courts have likewise rejected the notion that infringement allegations based on the same intellectual property suffices to justify joinder of multiple defendants. Courts have found no transactional relatedness where plaintiffs alleged that unrelated defendants independently violated the same copyright, *see, e.g., Arista Records LLC v. Does 1-11*, No. 1:07-CV-2828, 2008 WL 4823160 (N.D. Ohio Nov. 3, 2008) (O’Malley, J.), discussed in *Arista Records LLC v. Does 1-4*, 589 F. Supp. 2d 151, 154-55 (D. Conn. 2008); or infringed the same trademark, *see, e.g., Golden Scorpio Corp. v. Steel Horse Bar & Grill*, 596 F. Supp. 2d 1282, 1285 (D. Ariz. 2009); *SB Designs v. Reebok Int’l, Ltd.*, 305 F. Supp. 2d 888, 892 (N.D. Ill. 2004); or intercepted the same broadcast or satellite signals, *see, e.g., DIRECTV, Inc. v. Boggess*, 300 F. Supp. 2d 444 (S.D. W.Va. 2004).

II. THE DISTRICT COURT’S ERROR REGARDING RULE 20 WARRANTS A WRIT OF MANDAMUS

A writ of mandamus is the only remedy available to EMC to protect its due process rights. EMC does not have a remedy by way of an appeal from an adverse final judgment because EMC will not be able to try its case alone. By the time the case is tried and appealed, the harm will have been done. Absent a writ, EMC will

face the prejudice of having to defend itself alongside unrelated codefendants in an action in which misjoinder gives the plaintiff all of the strategic advantages.

A. EMC Faces The Loss Of Fundamental Due Process Rights

When a patent owner is permitted to bring allegations against multiple unrelated defendants in a single action, defendants run the risk of losing key due process rights. Misjoinder distorts the litigation process to the advantage of the plaintiff.⁶ For example, if Oasis can force EMC to defend itself as part of a “defense group,” EMC will face numerous obstacles:

- EMC will most likely face a limitation on the claim terms it can submit for construction because of the large defense group.⁷ Defendants are pressured to agree with each other on claim construction positions even though their services or products may be very different, leading to different legal positions.
- EMC may be forced to share experts with its codefendants.
- EMC will likely be required to share precious trial time with

⁶ John Marlot, *NPES and Pre-Litigation Considerations*, Patent Litigation 2010, PLI Order No. 24179 (Sept. – Nov. 2010) (common nonpracticing patent entity litigation strategies include “[f]iling suit against multiple defendants, which can cause defense coordination problems, court management issues, and increase litigation costs” and also stating “NPEs often file suit against multiple defendants in a “divide and conquer” strategy, since the existence of multiple defendants in a single case may increase the cost and complexity of coordinating the defense.”).

⁷ See, e.g., The Honorable John D. Love, *Sample Consent Docket Control Order*, available at <http://www.txed.uscourts.gov> (follow “Court Information,” “John D. Love,” and “Consent Docket Control Order”) (“[T]he parties shall meet and confer to limit the terms in dispute, jointly identifying and prioritizing a maximum of 10 terms ... A maximum of 10 terms will be construed, unless parties have received other instruction from the Court.”).

codefendants, each required to prove the features of its services or products amidst the clutter of facts being presented to the jury about other services and products.

- EMC faces the risk of guilt by association or the difficulty of a jury distinguishing among scores of unrelated products and services.
- EMC will pay increased litigation expenses to coordinate with the other defendants.⁸

In *Eon-Net LP v. Flagstar Bancorp*, No. 2009-1308, 2011 WL 3211512

(Fed. Cir. July 29, 2011), this Court recently focused on the impropriety of a nonpracticing entity filing multiple meritless lawsuits against diverse defendants and then demanding settlement “at a price far lower than the cost of litigation.” *Id.* at *10. The Court recognized that “liberal discovery” rules imposed “disproportionate discovery costs” on defendants while the nonpracticing entity faces “little risk” because it has no “business activities” that might be subject to counterclaims or suffer from loss of patent protection. *Id.* at *11. Indeed, courts have recognized the reality that plaintiffs’ pleading tactics can often amount to an

⁸ If common issues of law or fact do arise, there are procedures available to achieve judicial economy without resorting to a violation of Rule 20(a)(2). Under 28 U.S.C. § 1407(a), for example, “[w]hen civil actions involving one or more common questions of fact are pending in different districts, such actions may be transferred to any district for coordinated or consolidated pretrial proceedings.” Consolidation under Section 1407(a) is only for pretrial proceedings—defendants would not be forced to appear as codefendants with their competitors throughout an entire trial in a foreign venue. 28 U.S.C. § 1407(a) (“Each action so transferred shall be remanded by the panel at or before the conclusion of such pretrial proceedings to the district from which it was transferred unless it shall have been previously terminated.”).

improper “shakedown” of defendants. *See, e.g., Fener v. Operating Engineers Const. Industry and Miscellaneous Pension Fund*, 579 F.3d 401, 406 (5th Cir. 2009) (“Some have observed that seeking class certification to force favorable settlements does not benefit small investors but instead resembles a shakedown.”).

The assault on the integrity of the legal system resulting from “shakedown” single defendant lawsuits is magnified many times over when patent owners are allowed to join numerous unrelated defendants merely because they allegedly provide the same types of services. Regardless of the merits of Oasis’s claims, EMC is not only faced with the extraordinary cost of discovery, but EMC must negotiate defense theories and share time and compromise defense strategies with unrelated and competing defendants, disadvantages Oasis does not face. Rule 20 was designed to protect defendants from this type of prejudice.

B. A Writ Should Issue To Stop Oasis From Circumventing The Court’s Transfer Rulings

The decision below allows Oasis to circumvent this Court’s recent transfer rulings. Since 2009, this Court has made clear that a district court abuses its discretion by, among other things, “giving inordinate weight to the plaintiff’s choice of venue” and “denying transfer from a venue with no meaningful ties to the case.” *TS Tech*, 551 F.3d at 1320, 1321 (discussing *In re Volkswagen of America, Inc.*, 545 F.3d 304 (5th Cir. 2008) (en banc)). *See also In re Microsoft Corp.*, 630 F.3d 1361 (Fed. Cir. 2011); *In re Zimmer*, 609 F.3d 1378; *In re*

Hoffmann-La Roche Inc., 587 F.3d 1333 (Fed. Cir. 2009); *In re Genentech, Inc.*, 566 F.3d 1338 (Fed. Cir. 2009); *In re Oracle Corp.*, 399 F. App'x 587 (Fed. Cir. 2010).

This Court's transfer decisions are fully consistent with established Supreme Court precedent. In *Microsoft*, this Court explained that the "Supreme Court has long urged courts to ensure that the purposes of jurisdictional and venue laws are not frustrated by a party's attempt at manipulation." 630 F.3d at 1364 (citing *Miller & Lux, Inc. v. East Side Canal & Irrigation Co.*, 211 U.S. 293 (1908); *Lehigh Min. & Mfg. Co. v. Kelly*, 160 U.S. 327 (1895); and *Morris v. Gilmer*, 129 U.S. 315 (1889)). The Court also quoted from the Supreme Court's recent decision on a corporation's principal place of business for diversity purposes—a case where the Supreme Court stated that "[i]f the record reveals attempts at manipulation" the Court should instead look at the actual realities of the business. 630 F.3d at 1364 (quoting *Hertz Corp. v. Friend*, 130 S. Ct. 1181, 1195 (2010)). Accord *In re Zimmer*, 609 F.3d at 1381 (describing *Hertz* as "urging courts to ensure that the purposes of jurisdictional and venue laws are not frustrated by a party's attempts at manipulation").

Because of its error on joinder, the District Court did not even examine whether this lawsuit properly belongs in the Eastern District of Texas. After attempting to manufacture venue through a sham address, Oasis now concedes that

it has no relationship to the Eastern District of Texas. *See* A14. EMC has no significant relationship to the Eastern District either. While EMC likely provides its services to Texas citizens, those services are “sold throughout the United States.” *TS Tech*, 551 F.3d at 1321. None of the other defendants apparently have any significant connection to the Eastern District of Texas. Accordingly, “the citizens of the Eastern District of Texas have no more or less of a meaningful connection to this case than any other venue.” *Id.*

Although this dispute plainly does not belong in Texas, the District Court kept the case in the Eastern District by invoking the consequences of its Rule 20 error. After refusing to sever the unrelated defendants, the Court found that for the “entire case” no one venue is more convenient than any other. A10. The Court maintained venue in the Eastern District without regard to the criteria of *TS Tech*, essentially endorsing Oasis’s use of misjoinder to forum shop.

In so holding, the District Court invoked *In re Google Inc.*, 412 F. App’x 295 (Fed. Cir. 2011). In *In re Google*, the main issue was the request by all defendants to transfer the matter to a single forum. This Court affirmed the denial of that request, noting that “four of the defendants were headquartered in the Eastern District of Texas.” *Id.* at *296. A subset of the movants also raised severance and transfer issues. In one paragraph that did not refer to (a) Rule 20, (b) Fifth Circuit caselaw, (c) lower court decisions on severance or (d) prejudice to

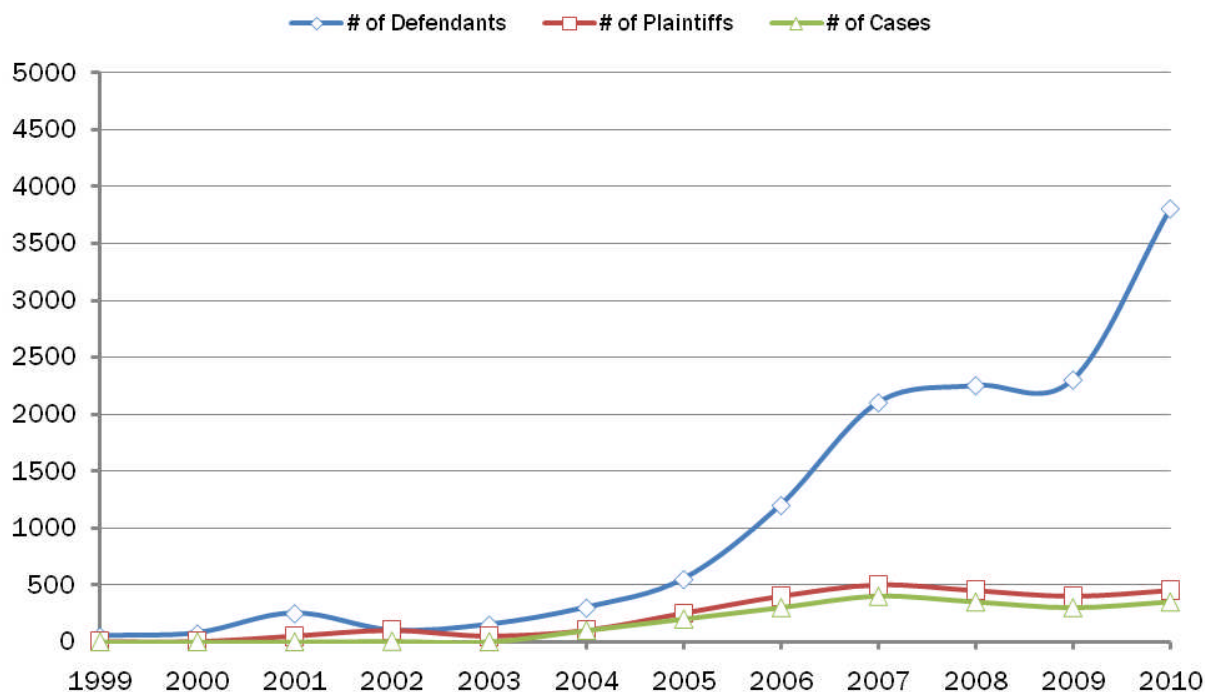
defendants, the Court affirmed the rejection of those requests, citing a Supreme Court transfer case, *Cont'l Grain Co. v. Barge FBL-585*, 364 U.S. 19 (1960), and a Federal Circuit transfer case, *In re Vistaprint Ltd.*, 628 F.3d 1342, 1346 (Fed. Cir. 2010). The *In re Google* decision is an unpublished opinion that may not reflect the fully vetted and considered views of the Court.

C. The Action Of The Court Below Does Not Conserve Judicial Resources

The District Court cited judicial economy as a rationale for his rulings. According to the District Court, the “results of granting Defendants’ motions to sever and transfer would be division of a single action into seven different lawsuits scattered across the country.” A7. That supposition is unfounded. Oasis sued multiple unrelated defendants in a single action because, viewing the precedent in the Eastern District of Texas, it no doubt calculated it would be allowed to do so. If that option were not available, there is no indication it would have filed seven lawsuits as the District Court assumed.

In any event, an interest in limiting the number of lawsuits cannot trump the Federal Rules or a defendant’s entitlement to a fair trial. And the problem of multiple-defendant patent cases is clearly growing. The chart below shows that in 2009 and 2010 the number of defendants sued in the Eastern District dramatically accelerated over the already-high levels of the previous five years:

**Figure 3: 1999 Patent Litigation in ED Tex
(Excluding False Marking Cases)**



James Pistorino, *Concentration of Patent Cases in Eastern District of Texas*

Increases in 2010, BNA’s Patent, Trademark & Copyright Journal, at 3 (April 15, 2011). See also Christopher J. Gaspar and Isabella Fu, *Formulating Litigation-Hold Instructions and Identifying Accused Instrumentalities in Multi-Defendant Patent Litigation* 4-5 (2010), available at http://www.aipla.org/learningcenter/library/papers/am/2010/Documents/Fu_Paper.pdf (“since 2006 the Eastern District of Texas has risen steadily in terms of the number of defendants per case”).

Moreover, as the chart shows, in 2004 the number of defendants sued in the Eastern District of Texas started to soar even though the number of plaintiffs and cases increased only slightly. Tellingly, in 2004 the Eastern District of Texas

issued its first decision misconstruing Rule 20 to permit joinder of multiple unrelated competing defendants. *See MyMail*, 223 F.R.D. at 455.

If Rule 20 is correctly applied, there is a greater likelihood proper lawsuits will be brought in proper venues, unlike the situation today. That would achieve true judicial economy while preserving the due process safeguards of Rule 20.

CONCLUSION

EMC respectfully requests that the Court grant this petition for a writ of mandamus, vacate the July 25, 2011 Order, and remand with instructions that the District Court either dismiss the claims against EMC or sever and transfer them to the District of Utah.

Dated: September 7, 2011

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that on September 7, 2011, I caused an original and four true and correct copies of the PETITION FOR WRIT OF MANDAMUS OF EMC CORP., DECHO CORP., and IOMEGA CORP. to be served on the Clerk of the United States Court of Appeals for the Federal Circuit and I further certify that I caused the following individuals to be served with a true and correct copy of the foregoing via Federal Express.

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