

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

LODSYS GROUP, LLC,

Plaintiff,

v.

TMSOFT, LLC,

Defendant,

v.

APPLE INC.,

Intervenor and Counter-
Claimant

CIVIL ACTION NO. 2:13-cv-255

**DEFENDANT TMSOFT, LLC'S MOTION TO DISMISS
UNDER THE TEXAS CITIZENS PARTICIPATION ACT
AND FOR LACK OF PERSONAL JURISDICTION**

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Defendant TMSOFT, LLC, (“TMSOFT”) respectfully moves the Court to dismiss Plaintiff Lodsys Group, LLC's (“Lodsys”) Complaint under the Texas Citizens Participation Act (“CPA”) and for lack of personal jurisdiction. TMSOFT also moves under the CPA an award of its costs, attorneys fees and expenses, and for sanctions.

I. INTRODUCTION

TMSOFT is just one of many defendants Lodsys has sued for patent infringement in this Court, but TMSOFT is different from the others in one significant way: Lodsys brought this suit as retaliation against TMSOFT's owner, Todd Moore, for publicly criticizing Lodsys. Such a retaliatory motive violates the Texas Citizens Participation Act (“CPA”), which directs dismissal of a case brought in response to a party's exercise of free speech. Accordingly, the Court should dismiss the Complaint, award TMSOFT its costs, attorneys fees, and expenses, and order sanctions against Lodsys.

Lodsys' Complaint also merits dismissal for lack of personal jurisdiction. TMSOFT is a small company located in northern Virginia that provides applications and related electronic media files for mobile devices to third party distributors who offer them to their users. TMSOFT has no office in Texas and does not direct any activities or advertising at Texas. TMSOFT does not directly sell its apps and related electronic media files. Simply putting them into the “stream of commerce” is insufficient for Lodsys to carry its burden to show that due process is satisfied.

II. STATEMENT OF THE ISSUES

1. Whether the Complaint for patent infringement filed by Lodsys to retaliate against

TMSOFT's owner for publicly criticizing Lodsys should be dismissed under the Texas Citizens Participation Act.

2. Whether the Court can exercise personal jurisdiction over TMSOFT in this action.

III. FACTUAL BACKGROUND

Since 2011, Lodsys has threatened to sue, and actually sued, dozens of companies for infringement of its patents related to interacting with customers over the internet in relationship to products and services. Concerned that such aggressive patent assertion is harmful to society, TMSOFT's founder and owner, Todd Moore (the "TM" in TMSOFT), an outspoken commentator on technology policy issues, criticized Lodsys on his podcast and blog. In response, Lodsys sent TMSOFT a letter accusing TMSOFT of using its patents and then filed this patent infringement action. Counsel for Lodsys even admitted to counsel for TMSOFT that this suit was motivated by a desire to retaliate against Moore for his public criticism.

In addition, Lodsys filed this action in Texas despite the fact that TMSOFT is a small business located in Virginia that has no offices in, does no business in, and does not purposefully direct any activities at Texas.

A. Lodsys' Patent Assertion Campaign

In the spring of 2011, Lodsys began a significant patent assertion campaign. See, e.g., *Lodsys, LLC v. Brother International Corp et al.*, 2:11-cv-00090-JRG (E.D. Tex.) (filed February 11, 2011) (12 defendants); *Lodsys, LLC v. Combay, Inc. et al.*, 2:11-cv-00272-JRG (E.D. Tex.) (filed May 31, 2011) (11 defendants); *Lodsys, LLC v. Adidas America, Inc. et al.*, 2:11-cv-00283-

JRG (E.D. Tex.) (filed June 20, 2011) (10 defendants). To date, Lodsys has filed over 50 patent infringement suits in this Court, including 37 in just the first half of 2013 alone.

Lodsys' patent assertion goes beyond the courts, as it also sends threatening letters to those it believes are infringing its patents. Brian Chen, *Patent Troll Shakes Down iPhone App Programmers*, ArsTechnica, May 13, 2011, available at <http://arstechnica.com/apple/2011/05/patent-troll-shakes-down-iphone-app-programmers/>; Florian Mueller, *Lodsys Update: More Letters To Android App Devs, First Known Letter To BlackBerry App Dev, Upcoming EFF Boot Camp*, FOSS Patents, August 28, 2011, available at <http://www.fosspatents.com/2011/08/lodsys-update-more-letters-to-android.html>.

Indeed, Lodsys boasted on its own webpage that, “As of October 8, 2012, there are greater than 150 companies which obtained the rights to use the Lodsys Group patent portfolio, and more than 4 out of 5 of these companies have entered into licenses outside of the litigation process.” *Licensing Momentum*, Lodsys Group LLC, October 8, 2012, available at <http://www.lodsys.com/1/post/2012/10/-licensing-momentum.html>.

B. TMSOFT's Todd Moore Publicly Criticizes Lodsys

TMSOFT's founder and owner, Todd Moore, is not only a highly talented computer programmer, and published author; he is also an outspoken activist who expresses strong opinions about matters of public policy relating to technology. D. Moore, ¶¶ 2, 17, 20.¹ In the past, Moore co-hosted a radio show in Washington D.C. called the “Tech 411 Radio Show”

¹ The nomenclature D. [NAME] refers to a declaration by that individual submitted herewith.

addressing issues relating to technology, including specifically legal issues impacting technological development. D. Moore, ¶ 17. The radio show transitioned into the “Tech 411 Show” podcast in May 2011 and has, at times, been the number one top technology podcast available through Apple's iTunes. D. Moore, ¶ 18. Moore also authors a blog in which he discusses issues similar to those discussed on the Tech 411 Show. D. Moore, ¶ 16.

Moore has a strong public policy opposition to companies that make patent infringement allegations against individuals and small businesses who are unable to cover the costs associated with a patent infringement defense. D. Moore, ¶ 20. The May 26, 2011, episode of Moore's Tech 411 Show discussed Lodsys' threatening of mobile device application developers. D. Moore, ¶ 21. During that episode, Moore said that Lodsys was “patent trolling” with “evil letters” that were “complete b.s.” D. Moore, ¶ 21 (referencing Tech 411 Show 1, available at <http://tech411.libsyn.com/webpage/2011/05>). Moore specifically identified as an example a twelve person company that received a threatening letter from Lodsys. D. Moore, ¶ 21.

The following week, on June 2, 2011, Moore again criticized Lodsys on his Tech 411 Show. D. Moore, ¶ 22 (referencing Tech 411 Show 2, available at <http://tech411.libsyn.com/webpage/2011/06>). During that episode, Moore called Lodsys a “patent troll” and said regarding Lodsys' patent assertion tactics, “it makes me sick” and “it just makes me so mad.” D. Moore, ¶ 22. After noting that he had not received a letter from Lodsys, Moore continued to decry Lodsys and its actions, saying “it's ridiculous”, “stifles innovation”, “shame on them,” and “the more we get the news out about this company the better shot we have

of bringing attention to it and getting them to stop.” D. Moore, ¶ 22.

Then, on June 23, 2011, Lodsys sent Moore's company, TMSOFT, a patent infringement letter exactly like those it had sent others that Moore had so heavily criticized. D. Moore, ¶ 23. (referencing June 23, 2011 Letter from Lodsys to TMSOFT, attached as Exhibit A-1 thereto). On his July 1, 2011, Tech 411 Show, Moore disclosed that, “Now I have a little more skin in the game,” because “I just received one of the infamous Lodsys letters against my own application called White Noise.” D. Moore, ¶ 24 (referencing Tech 411 Show 5, available at <http://tech411.libsyn.com/webpage/2011/07>). Later during that episode, Moore interviewed a registered patent attorney who had reviewed the Lodsys matters and determined, in his opinion, that the Lodsys patents were invalid. D. Moore, ¶ 24.

Moore's criticism of Lodsys did not end with his repeated Tech 411 Show discussions, but also continued onto his blog, where on August 1, 2011, he wrote:

Patent trolls have been all over the press lately with companies like Lodsys suing Rovio Mobile, the maker of Angry Birds. They also have been going after small iOS and Android developers too. They are claiming they own the rights to in-app-purchase, upgrade buttons, and even links to the App Store. It kind of feels like a new form of the Mafia.

D. Moore, ¶ 25 (referencing Todd Moore, *Patent Trolls: The End of Innovation as We Know It*, August 1, 2011, available at <http://toddmooore.com/2011/08/01/patent-trolls-the-end-of-innovation-as-we-know-it/>).

C. Lodsys' Counsel Admits This Suit Was Motivated By Moore's Speech

After the Complaint in this matter was served on TMSOFT, counsel for TMSOFT and

Lodsys had some telephone conversations. During the first conversation about the matter, on May 14, 2013, counsel for Lodsys, Christopher Huck, admitted to counsel for TMSOFT, Daniel Ravicher, that this suit was motivated by Moore's public criticism of Lodsys, and particularly Moore's calling Lodsys a "patent troll." D. Ravicher, ¶ 3. During that May 14 conversation, Huck said Moore did not respond to Lodsys' June 23, 2011, letter in "a reasonable way" but instead "crossed the line" by publishing "some blog posting" about Lodsys being a patent troll. D. Ravicher, ¶ 3.

Two days after that conversation, Ravicher sent Huck an email asking him to identify the specific public statements made by Moore that upset Lodsys. D. Ravicher, ¶ 4 (referencing email from Ravicher to Huck dated May 16, 2013, attached as Exhibit B-1 thereto). Neither Huck nor any another Lodsys attorney ever responded to Ravicher's request.

D. TMSOFT's Lack Of Contacts With Texas

TMSOFT is a Virginia limited liability company with its principal place of business in Arlington, Virginia. D. Moore, ¶ 6. TMSOFT has never maintained a place of business, facility or office, telephone listings or mailing addresses in Texas. D. Moore, ¶ 7. It has never owned real property or purchased or leased property within the State of Texas. D. Moore, ¶ 8.

TMSOFT's business is providing apps and related electronic media files to online stores such as Apple iTunes, Google Play Store, BlackBerry App World, Amazon Appstore, TuneCore, and others for them to make available to users of their products and services. D. Moore, ¶ 9. TMSOFT does not make any direct sales of its mobile apps and related electronic media files.

D. Moore, ¶ 10. TMSOFT has not advertised in any way that is directed specifically toward residents in Texas. D. Moore, ¶ 12. TMSOFT's website is located at <http://www.tmssoft.com/>. D. Moore, ¶ 13. One cannot purchase TMSOFT's mobile apps and related electronic media files through TMSOFT's website. D. Moore, ¶ 14.

IV. ARGUMENT

A. This Action Should Be Dismissed Under The CPA

The Texas Citizens Protection Act (“CPA”) was passed by a unanimous vote of the Texas legislature in 2011 and immediately signed into law by Governor Rick Perry. Laura Lee Prather, *A Primer on the Texas Anti-SLAPP Statute*, available at <http://slappedintexas.com/primer/> (“First Amendment lawyer, Laura Lee Prather, is a partner at Haynes & Boone and formed and spearheaded the coalition that worked for and obtained passage of HB 2793/SB 1565 (the Texas Anti-SLAPP statute).”). The purpose of the CPA is to, “encourage and safeguard the constitutional rights of persons to [] speak freely.” Tex. Civ. Prac. & Rem. Code § 27.002. The CPA, “shall be construed liberally to effectuate its purpose and intent fully.” Tex. Civ. Prac. & Rem. Code § 27.011(b).

Under the CPA, a party that believes it has been sued in Texas because of its exercise of free speech may bring a motion to dismiss. Tex. Civ. Prac. & Rem. Code § 27.003(a). The Court is to hold a hearing within 60 days of the filing of such a motion and issue a ruling within 30 days of the hearing. Tex. Civ. Prac. & Rem. Code §§ 27.004 (as amended by recent enactment of Texas H.B. No 2935 which became law on June 14, 2013), 27.005(a). “[A] court shall dismiss a

legal action against the moving party if the moving party shows by a preponderance of the evidence that the legal action [] is in response to the party's exercise of [] the right of free speech." Tex. Civ. Prac. & Rem. Code § 27.005(b). In addition, "at the request of a party making a motion under Section 27.003, the court shall issue findings regarding whether the legal action was brought to deter or prevent the moving party from exercising constitutional rights and is brought for an improper purpose, including to harass or to cause unnecessary delay or to increase the cost of litigation." Tex. Civ. Prac. & Rem. Code § 27.007(a).

TMSOFT moves to dismiss this action under CPA Section 27.003 because it was brought in response to Moore's exercise of free speech. TMSOFT also requests that the Court make the findings described in Section 27.007(a). TMSOFT relies on the existing record in this case and the declarations submitted herewith to support its motion. Tex. Civ. Prac. & Rem. Code § 27.006(a). Specifically, as discussed above, the facts plainly show that TMSOFT was sued by Lodsys in response to Todd Moore's public criticism of Lodsys. Counsel for Lodsys has admitted as much. Thus, TMSOFT has proven by a preponderance of the evidence that this case was in response to Moore's exercise of free speech.

TMSOFT recognizes that, under CPA Section 27.005(c), "[t]he court may not dismiss a legal action [] if the party bringing the legal action establishes by clear and specific evidence a prima facie case for each essential element of the claim in question." Tex. Civ. Prac. & Rem. Code § 27.005(c) (emphasis added). Lodsys' bare-bones template Complaint fails to satisfy this requirement, however, as it makes only very general infringement allegations without any "clear

and specific” evidence supporting those claims. Lodsys' June 23, 2011, letter accusing TMSOFT of infringement is similarly unclear and unspecific in that it merely shows images of a TMSOFT application displayed next to select fragments of claim language with no explanation of how infringement occurs. D. Moore, Exhibit A-1. To overcome TMSOFT's showing that this case was motivated by Moore's speech, the burden is on Lodsys to make a “clear and specific” showing that TMSOFT has infringed its patents, and it has not done so.

Further, a recently enacted amendment to Section 27.005 of the CPA adds new subsection (d), which states:

(d) Notwithstanding the provisions of Subsection (c), the court shall dismiss a legal action against the moving party if the moving party establishes by a preponderance of the evidence each essential element of a valid defense to the nonmovant's claim.

Texas H.B. No 2935 (effective June 14, 2013). Thus, even if Lodsys “establishes by clear and specific evidence a prima facie case for each essential element” of its claim against TMSOFT as required by 27.005(c), TMSOFT is prepared to establish by “a preponderance of the evidence each essential element of a valid defense to” Lodsys' claim as per the newly enacted 27.005(d), which would still compel a dismissal of the Complaint. TMSOFT can not establish defenses until Lodsys first meets its burden of establishing its claims. If and when Lodsys does so, TMSOFT will then establish its defenses.

Upon granting TMSOFT's motion to dismiss under the CPA, the Court is to award TMSOFT, “(1) court costs, reasonable attorney’s fees, and other expenses incurred in defending

against the legal action as justice and equity may require; and (2) sanctions against the party who brought the legal action as the court determines sufficient to deter the party who brought the legal action from bringing similar actions described in this chapter.” Tex. Civ. Prac. & Rem. Code § 27.009(a). TMSOFT will submit an accounting of its costs, attorneys fees, and other expenses to be awarded by the Court after its CPA motion is granted.

Anti-SLAPP statutes like the CPA are routinely applied in federal court. *Henry v. Lake Charles American Press*, 566 F.3d 164 (5th Cir. 2009) (applying Louisiana’s anti-SLAPP statute in federal court); *Godin v. Schencks*, 629 F.3d 79 (1st Cir. 2010) (applying Maine’s anti-SLAPP statute in federal court); *United States ex rel Newsham v. Lockheed Missiles & Space Co.*, 190 F.3d 963 (9th Cir. 1999) (applying California’s anti-SLAPP statute in federal court).

While a sister district court held that the Supremacy Clause forbids application of the CPA to federal claims, that decision is contrary to the law, and currently on appeal to the 5th Circuit. *NCDR LLC v. Mauze & Bagby, PLLC*, L-12-36 (S.D.Tx. Oct. 5, 2012). The CPA can apply to the federal claims in this case because the CPA neither interferes with nor is contrary to any applicable federal law. *Hillsborough Cnty., Fla. v. Auto. Med. Labs., Inc.*, 471 U.S. 707, 712 (1985) (“It is a familiar and well-established principle that the Supremacy Clause, U.S. Const., Art. VI, cl. 2, invalidates state laws that interfere with or are contrary to federal law”) (internal quotations omitted); *see also Williamson v. Mazda Motor of Am., Inc.*, 131 S.Ct. 1131 (2011).

The CPA has a built-in safety valve to prevent any conflict with any federal law on which a complaint is based, because by its letter, dismissal is *only* appropriate if the plaintiff *fails* to

establish a claim or the defendant fails to establish a defense. Tex. Civ. Prac. & Rem. Code § 27.005(c) and (d). Thus, if Lodsys has a valid claim and TMSOFT does not have a valid defense, the CPA itself says the Complaint should not be dismissed. In this way, the CPA does not prevent meritorious federal claims, including the claims for patent infringement in this case, from proceeding.

TMSOFT's motion to dismiss under the CPA will also not interfere with the procedures set forth in the Federal Rules of Civil Procedure, as anti-SLAPP statutes have been applied in several federal cases without conflict before. *See, e.g., Henry*, 566 F.3d 164; *Godin*, 629 F.3d 79; and, *United States ex rel Newsham*, 190 F.3d 963. Thus, the CPA, the FRCP and the Patent Act can all be followed in this case without conflict or interference. *Gade v. National Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 98 (1992). This result respects the rights of states to pass laws to protect the Constitutional rights of their citizens, as Texas has done with the CPA.

With respect to a hearing date for its motion, TMSOFT's counsel is a law professor at Benjamin N. Cardozo School of Law and has academic commitments already scheduled, some of which include international travel, from July 5-19 and August 2-9. Other than those dates, counsel for TMSOFT is available for a hearing on the CPA motion at the Court's convenience.

B. The Court Does Not Have Personal Jurisdiction Over TMSOFT

Federal Circuit law controls personal jurisdiction in patent cases. *See Avocent Hunstville Corp. v. Aten Int'l Co.*, 552 F.3d 1324, 1328 (Fed. Cir. 2008). To establish personal jurisdiction over an out-of-state defendant, the plaintiff must show: (1) that the forum state's long-arm statute

applies; and (2) that the due process requirements are satisfied. *See Id.* at 1329. “Because the Texas long-arm statute extends to the limits of federal due process, the two-step inquiry collapses into one federal due process analysis.” *Johnston v. Multidata Sys. Int’l Corp.*, 523 F.3d 602, 609 (5th Cir. 2008). “Federal due process requires a plaintiff to prove: (1) that the non-resident purposely availed himself of the benefits and protections of the forum state by establishing ‘minimum contacts’ with the state; and (2) that the exercise of jurisdiction does not offend ‘traditional notions of fair play and substantial justice.’” *Id.*

“There are two types of ‘minimum contacts’: those that give rise to specific personal jurisdiction and those that give rise to general personal jurisdiction.” *Id.* To establish general jurisdiction, a plaintiff must demonstrate that the defendant maintained “continuous and systematic” contacts with the forum state. *Avocent Hunstville*, 552 F.3d at 1330 (*citing Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 415–16 (1984)). “To establish specific jurisdiction, a plaintiff must demonstrate that the defendant has purposefully directed his activities at residents of the forum, and the litigation results from alleged injuries that arise out of or relate to those activities.” *Id.* (internal citations and quotation marks omitted) (*citing Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472–73 (1985)). In other words, for specific jurisdiction, the court looks only to the “contact out of which the cause of action arises.” *Revell v. Lidov*, 317 F.3d 467, 472 (5th Cir. 2002).

“Once a movant challenges a court’s jurisdiction over him, the party asserting jurisdiction bears the burden to show the movant has minimum contacts with the forum state to support

jurisdiction over the movant.” *Acceleron, LLC v. Egenera, Inc.*, 634 F. Supp. 2d 758, 769 (E.D. Tex. 2009). When considering a motion to dismiss, the court must accept as true the plaintiff’s non-conclusory, uncontroverted allegations and resolve all factual disputes in favor of the plaintiff. *C Constr. Co. v. City of Jacksonville*, No. 6:06-cv-313, 2007 U.S. Dist. LEXIS 51973, at *3–4 (E.D. Tex. July 18, 2007). “However, the Court is not required to credit conclusory allegations, even if uncontroverted.” *Kudu Co. v. Latimer*, No. 4:10-cv-680, 2011 U.S. Dist. LEXIS 94940, at *8 (E.D. Tex. Aug. 1, 2011). Therefore, “[p]laintiff must make more of a showing of minimum contacts than merely making conclusory statements that jurisdiction exists.” *Farmer Boys’ Catfish Kitchens Int’l, Inc. v. Golden W. Wholesale Meats, Inc.*, 18 F. Supp. 2d 656, 661–662 (E.D. Tex. 1998).

Of note, a plurality of the Supreme Court recently stated that, “those who live or operate primarily outside a State have a due process right not to be subjected to judgment in its courts as a general matter.” *J. McIntyre Mach. Ltd. v. Nicastro*, 131 S. Ct. 2780, 2787 (2011) (Kennedy, J. announcing the judgment of the Court and delivering an opinion, in which Roberts, C.J., Scalia, J., and Thomas, J. joined). As Justice Kennedy explained:

The defendant’s transmission of goods permits the exercise of jurisdiction only where the defendant can be said to have targeted the forum; as a general rule, it is not enough that the defendant might have predicted that its goods will reach the forum State.

Id. The Chief Judge of the Federal Circuit also recently noted, “the mere recitation of the stream of commerce theory is insufficient for a court’s exercise of jurisdiction. This court might reliably

require that 'something more' be present to satisfy personal jurisdiction requirements.” *AFTG-TG, LLC v. Nuvoton Technology Corp.*, 689 F. 3d 1358, 1368 (Fed. Cir. 2012) (Rader, C.J. concurring) (*citing McIntyre*). And this Court recently noted that a person's action of placing information on the internet is not sufficient by itself to subject that person to personal jurisdiction in each state in which the information is accessed. *Ward v. Rhode*, 2012 U.S. Dist. LEXIS 139359, at *18 (E.D. Tex. Sept. 7, 2012).

Here, Lodsys makes only conclusory allegations of personal jurisdiction in its Complaint:

This Court has general and specific personal jurisdiction over defendant, because defendant has substantial contacts with the forum as a result of conducting substantial business in the State of Texas and within this district. Upon information and belief, defendant regularly solicits business in the State of Texas and this district, derives revenue from products and/or services provided to individuals residing the State of Texas and this district; conducts business utilizing the claimed systems and methods with and for customers residing in the State of Texas and this district; and provides and/or markets products and services directly to consumers in this State of Texas and this district.

Complaint, ¶ 4. These bald formulaic allegations woefully fail to carry Lodsys' burden to establish personal jurisdiction over TMSOFT.

With respect to general jurisdiction, “The continuous and systematic contacts test is a difficult one to meet, requiring extensive contacts between a defendant and a forum.” *Johnston*, 523 F.3d at 609 (quotation and quotation marks omitted). “For an individual, the paradigm forum for the exercise of general jurisdiction is the individual’s domicile; for a corporation, it is an equivalent place, one in which the corporation is fairly regarded as at home.” *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S. Ct. 2846, 2853–54 (2011). TMSOFT does not have

“continuous and systematic” contacts with Texas. As discussed above, TMSOFT is a Virginia limited liability company with its principal place of business in Arlington, Virginia. D. Moore, ¶ 6. TMSOFT has never maintained a place of business, facility or office, telephone listings or mailing addresses in Texas. D. Moore, ¶ 7. It has never owned real property or purchased or leased property within the State of Texas. D. Moore, ¶ 8. Thus, TMSOFT can not be subject to general jurisdiction in Texas.

With respect to specific jurisdiction, TMSOFT has not purposefully directed any activities at Texas. *Avocent Hunstville*, 552 F.3d at 1330 (citing *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 774 (1984)). TMSOFT has never sold any of its apps or related electronic media files to persons in Texas, as it does not directly sell them at all. D. Moore, ¶ 10. TMSOFT also does not direct any advertising specifically at Texas. D. Moore, ¶ 12.

Lodsys' only hope is to make a lame “stream of commerce” argument that TMSOFT is subject to personal jurisdiction in Texas, that somehow by providing mobile apps and related electronic media files to online stores such as Apple iTunes, Google Play Store, etc., for them to make available to users of their products and services, TMSOFT deserves being hailed into court in Texas. Yet that is directly contrary to the opinions expressed by Justice Kennedy and three other Supreme Court Justices in *J. McIntyre Mach.* Chief Judge Rader in *AFTG-TG*, and this Court in *Ward*. 131 S. Ct. at 2787 (“it is not enough that the defendant might have predicted that its goods will reach the forum State”); 689 F. 3d at 1368 (“the mere recitation of the stream of commerce theory is insufficient for a court's exercise of jurisdiction”); 2012 U.S. Dist. LEXIS

139359, at *18 (E.D. Tex. Sept. 7, 2012) (finding that a party whose website did not allow consumers to order or purchase goods or services did not subject the party to personal jurisdiction in Texas).

Because Texas has neither general jurisdiction or specific jurisdiction over TMSOFT, Lodsys' Complaint fails to satisfy due process even without getting to the issue of whether forcing TMSOFT to defend itself in Texas would offend 'traditional notions of fair play and substantial justice.' *Johnston*, 523 F.3d at 609.

V. CONCLUSION

For the foregoing reasons, TMSOFT respectfully requests that the the Court dismiss Lodsys' Complaint under the CPA and for lack of personal jurisdiction. TMSOFT also requests under the CPA that the Court award TMSOFT its costs, attorneys fees and expenses, and issue sanctions against Lodsys.

Dated: July 1, 2013

Respectfully Submitted,

By: /s/ Daniel B. Ravicher

Daniel B. Ravicher
PUBLIC PATENT FOUNDATION
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Counsel for Defendant TMSOFT, LLC.

CERTIFICATE OF SERVICE

I hereby certify that all counsel of record who have consented to electronic service are being served with a copy of this document via the Court's CM/ECF system per Local Rule CV-5(a)(3) on this the 1st of July, 2013.

/s/ Daniel B. Ravicher

Daniel B. Ravicher

EXHIBIT A

Declaration of Todd Moore

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

LODSYS GROUP, LLC,

Plaintiff,

v.

TMSOFT, LLC,

Defendant,

v.

APPLE INC.,

Intervenor and Counter-
Claimant

CIVIL ACTION NO. 2:13-cv-255

DECLARATION OF TODD MOORE

I, Todd Moore, pursuant to 28 U.S.C. 1746, declare as follows:

1. I submit this declaration in support of Defendant TMSOFT, LLC's, motion to dismiss under the Texas Citizens Participation Act and for lack of personal jurisdiction.

2. I am a software developer with a bachelor's degree in Computer Science from Old Dominion University. I have previously worked for the federal government and held security clearances. I designed network security products for ManTech International and NetWitness corporation.

3. I am the founder and owner of TMSOFT, LLC.

4. I founded TMSOFT in 2008 to create applications for mobile devices ("apps").

5. Through TMSOFT, I have created apps for the Apple iOS, Google Android, BlackBerry, Windows Phone, Palm webOS, and Nokia platforms. I also create other electronic files for use with the TMSOFT apps, such as audio files.

6. TMSOFT is a Virginia limited liability company with its principal place of business in Arlington, Virginia.

7. TMSOFT has never maintained a place of business, facility or office, telephone listings or mailing addresses in Texas.

8. TMSOFT has never owned real property or purchased or leased property within the State of Texas.

9. TMSOFT's business is providing apps and other electronic files to online stores such as Apple iTunes, Google Play Store, BlackBerry App World, Amazon Appstore, TuneCore, and others for them to make available to users of their products and services.

10. TMSOFT does not make any direct sales of its mobile apps and related electronic media files for use with TMSOFT apps.

11. TMSOFT does not ship any product anywhere, much less to Texas. TMSOFT does not make or sell any physical product.

12. TMSOFT has not advertised in any way that is directed primarily toward residents in Texas.

13. TMSOFT's website is located at <http://www.tmssoft.com/>.

14. TMSOFT's mobile apps and related electronic media files cannot be purchased

through TMSOFT's website.

15. I authored a book called *Tap, Move, Shake* that teaches how to create apps.

16. I also write articles on technology and mobile apps for Tech Republic and through my blog at <http://toddmooore.com>.

17. Some years ago, I hosted the Tech 411 Radio show on 106.7 FM in Washington D.C. The Tech 411 Show addressed issues relating to technology, including specifically legal issues that relate to technological development.

18. In May 2011, my co-host and I relaunched the Tech 411 show in podcast form under the Mike O'Meara network, also known as MORE Broadcasting. At times, the podcast has been the number one top technology podcast available through Apple's iTunes.

19. In May 2011, I became aware of a company named Lodsys that was threatening to sue and suing many app developers for patent infringement. I was, and am, concerned that such aggressive patent assertion can be harmful to society and I have repeatedly criticized Lodsys and other companies that aggressively assert patents on my podcast and blog.

20. I particularly have a strong public policy opposition to companies that make patent infringement allegations against individuals and small businesses who are unable to cover the costs associated with a patent infringement defense.

21. During the May 26, 2011, episode of the Tech 411 Show, I discussed Lodsys' threatening of mobile device application developers. An audio recording of that episode, Tech 411 Show 1, is available from <http://tech411.libsyn.com/webpage/2011/05>. I said that Lodsys

was “patent trolling” with “evil letters” that were “complete b.s.”. I also specifically identified a twelve person company named the iconfactory who made the Twitteriffic app that received a threatening letter from Lodsys.

22. The following week, during the June 2, 2011, episode of the Tech 411 Show, I again criticized Lodsys. An audio recording of that episode, Tech 411 Show 2, is available from <http://tech411.libsyn.com/webpage/2011/06>. I called Lodsys a “patent troll” and said regarding Lodsys' patent assertion tactics, “it makes me sick” and “it just makes me so mad.” I noted that I had not received a letter from Lodsys, but continued to say regarding Lodsys' actions, “it's ridiculous”, “stifles innovation”, “shame on them,” and “the more we get the news out about this company the better shot we have of bringing attention to it and getting them to stop.”

23. On June 23, 2011, Lodsys sent a letter to me at TMSOFT accusing TMSOFT of patent infringement. It was exactly like the letters Lodsys sent others that I had so heavily criticized. A true and correct copy of the letter is attached hereto as Exhibit A-1.

24. During the July 1, 2011, Tech 411 Show, I told listeners that, “Now I have a little more skin in the game,” because “I just received one of the infamous Lodsys letters against my own application called White Noise.” An audio recording of that episode, Tech 411 Show 5, is available from <http://tech411.libsyn.com/webpage/2011/07>. During that episode, I interviewed a registered patent attorney named Patrick Igoe who had reviewed the Lodsys patents and posted on his blog applepatent.com that, in his opinion, they were invalid (see <http://www.applepatent.com/2011/05/lodsys-targets-small-ios-developers.html>).

25. I also criticized Lodsys on my blog on August 1, 2011, in a post titled, *Patent Trolls: The End of Innovation as We Know It*, that is available from <http://toddmoore.com/2011/08/01/patent-trolls-the-end-of-innovation-as-we-know-it/>. In that blog post I wrote: "Patent trolls have been all over the press lately with companies like Lodsys suing Rovio Mobile, the maker of Angry Birds. They also have been going after small iOS and Android developers too. They are claiming they own the rights to in-app-purchase, upgrade buttons, and even links to the App Store. It kind of feels like a new form of the Mafia."

I declare under penalty of perjury that the foregoing is true and correct.

Signed this 1st day of July, 2013


Todd Moore

CERTIFICATE OF SERVICE

I hereby certify that all counsel of record who have consented to electronic service are being served with a copy of this document via the Court's CM/ECF system per Local Rule CV-5(a)(3) on this the 1st of July, 2013.

/s/ Daniel B. Ravicher
Daniel B. Ravicher

Exhibit A-1

June 23, 2011 Letter from Lodsys to TMSOFT

Lodsys LLC

Thursday, June 23, 2011

Via Federal Express
Mr. Todd Moore
TM Soft, LLC
21800 Town Center Place # 266A
Sterling, VA 20164

Dear Mr. Moore,

Re: Infringement of U.S. Patent Nos. 5,999,908, 7,133,834, 7,222,078, and 7,620,565 (Abelow)

Lodsys, LLC a Texas limited liability company is the owner of United States Patents 5,999,908, 7,133,834, 7,222,078, and 7,620,565 (the "Lodsys Patents"). The Lodsys Patents are directed to systems and methods for providers of products and/or services to interact with users of those products and services to gather information from those users and transmit that information to the provider. Attached is a complete copy of the '908 patent as well as certain pages of the '834, '078, and '565 patents for your review.

The inventions described by these patents are used by companies to interact with users of their products and services to, among other things:

- provide online help, customer support, and tutorials
- conduct online subscription renewals
- provide for online purchasing of consumable supplies
- survey users for their impressions of their products and services
- assist customers to customize their products and services
- display interactive online advertisements
- collect information on how users actually use their products and services
- sell upgrades or complimentary products
- maintain products by providing users notice of available updates and assisting in the installation of those updates.

Some of the benefits companies receive from using these inventions are:

- increased product sales (of consumables, subscriptions, and complementary products)
- increased additional revenues (of in-product digital items and interactive advertising)
- more efficient design of subsequent products (through faster time to market, better targeted features, and the ability to interactively update products in the field)
- greater customer satisfaction (both in terms of future product development as a result of consumer input and through keeping products up to date or providing more effective online help resources in a cost efficient manner).

The inventions detailed in the various claims of these patents were developed by Daniel Abelow, an expert in usability and in the organization, presentation, and incorporation, of information in websites,

Lodsys LLC

products, services, and enterprise systems. Dan earned a Bachelor's of Science in Economics degree from the Wharton School of Business at the University of Pennsylvania in 1971 and a master's degree from Harvard University, which included graduate work at the Massachusetts Institute of Technology. As an independent consultant on presenting information via the internet, Dan's clients have included companies such as Accenture, Agilent Technologies, Cisco, Harvard Business School, IBM, and Lotus Development.

To date, companies including - **American Express, Apple, eBay, Google, Intuit, Microsoft, Nokia, Nokia-Siemens, Nvidia, SAP, Sony, Sony-Ericsson, Verizon, and several other Fortune 1000 companies** - have chosen to license the Lodsys Patents.

We have reviewed your use of the Lodsys Patents and have prepared the enclosed claim chart demonstrating at least one instance of how you utilize the inventions embodied in the Lodsys Patents. The images used in the charts are representative only and in addition to the charted claim of the referenced patent, you should consider the remaining claims of that patent and the other Lodsys Patents both with respect to the charted utilization and to other products and services offered by you.

The Lodsys Licensing Opportunity

Lodsys' patented technology provides numerous benefits to your company by reducing costs, increasing customer satisfaction, increasing revenues, and providing customer data and impressions that allow you to build more effective and relevant products faster and with greater certainty of meeting real customer needs. This is made possible by your collection of customer product usage details, demographic information, impressions on the usefulness of features or relevance of advertisements, and desires to customize your products or services and in what manner. It further occurs through the sale of consumable supplies and product upgrades or enhancements, the sale of complementary products, sales of subscription renewals, the provision of online support (to discover what customers do not understand or are having troubles with), and in product (or in website) customer satisfaction surveys and interactive advertising. These actions among many other instances of customer data collection, provide you with the opportunity to sell more products and services, build new versions faster in a competitive marketplace, have greater relevancy of your products and services (leading to greater customer satisfaction and greater brand value).

We are interested in reaching a negotiated non-litigation licensing arrangement with you for all of your uses of the Lodsys Patents under your brand names and would like to discuss this matter with you within 21 days of your receipt of this letter. Please contact the undersigned at your earliest convenience.

Lodsys, LLC

Lodsys is a limited liability company based in Marshall, Texas. We have retained the firms of Kelley, Donion, Gill, Huck & Goldfarb PLLC (www.kdg-law.com) based in Seattle, Washington, and The Davis

Lodsys LLC

Firm, P.C. (www.bdfirm.com) based in Longview, Texas, to assist the company in the licensing of the Lodsys Patents.

Sincerely,

A handwritten signature in black ink, appearing to read 'Mark Small', with a stylized flourish at the end.

Mark Small, CEO
Lodsys, LLC
Mark.Small@Lodsys.com
(903) 935-3202

Enclosures (3)

Notice

Lodsys LLC reserves all rights with regard to the '908, '834, '078, and '565 patents, including: (1) the right to seek damages anytime within the last six years that your company started to make use of Lodsys' patented technology; (2) the right to change its royalty rates at any time; (3) the right to change this licensing program at any time without notice, including variance to conform to applicable laws. You should not rely on any communication or lack of communication from Lodsys, Kelley, Donion, Gill, Huck & Goldfarb PLLC, or The Davis Firm Group as a relinquishment of any of Lodsys' rights.

TMSOFT, LLC – White Noise

Infringement Claim Chart for
Claim 1 U.S. Pat. No. 7,222,078

Claim 1 of U.S. Pat. No. 7,222,078

- A system comprising:
- Units of a commodity that can be used by respective users in different locations,
- A user interface, which is part of each of the units of the commodity, configured to provide a medium for two-way local interaction between one of the users and the corresponding unit of the commodity, and further configured to elicit, from a user, information about the user's perception of the commodity,
- A memory within each of the units of the commodity capable of storing results of the two-way local interaction , the results including elicited information about user perception of the commodity. A communication element associated with each of the units of the commodity capable of carrying results of the two-way local interaction from each of the units of the commodity to a central location and,
- A component capable of managing the interactions of the users in different locations and collecting the results of the interaction at the central location.

Claim 1 of U.S. Pat. No. 7,222,078: Units of a commodity that can be used by respective users in different locations,



Used by respective users in different locations as an iPad application.

Claim 1 of U.S. Pat. No. 7,222,078: : A user interface, which is part of each of the units of the commodity, configured to provide a medium for two-way local interaction between one of the users and the corresponding unit of the commodity, **and further** configured to elicit, from a user, information about the user's perception of the commodity,



Two-way interaction configured to elicit user perception information through an upgrade process.

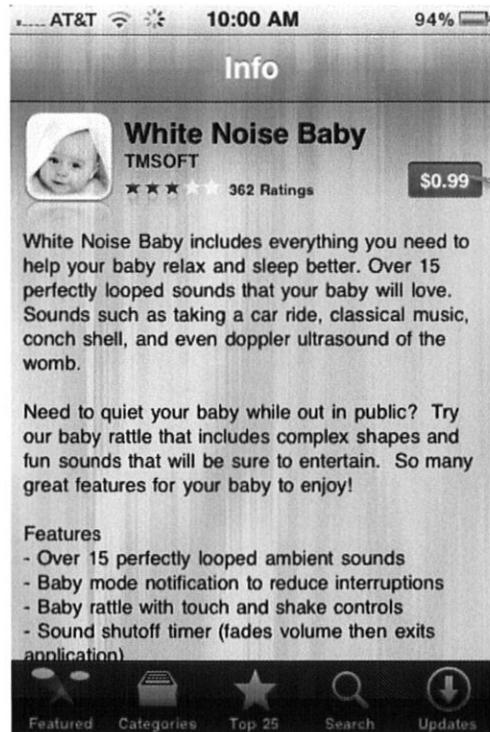
Claim 1 of U.S. Pat. No. 7,222,078: A memory within each of the units of the commodity capable of storing results of the two-way local interaction from each of the units of the commodity to a central location . A communication element associated with each of the units of the commodity capable of carrying results of the two-way local interaction from each of the units of the commodity to a central location, and



Storing results of the two-way interaction to a central location



Claim 1 of U.S. Pat. No. 7,222,078: A component capable of managing the interactions of the users in different locations and collecting the results of the interaction at the central location,



Collecting the results of the interaction from users in different locations in a central location to allow for an upgrade to occur in the product.

EXHIBIT B

Declaration of Daniel Ravicher, Esq.

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

LODSYS GROUP, LLC,

Plaintiff,

v.

TMSOFT, LLC,

Defendant,

v.

APPLE INC.,

Intervenor and Counter-
Claimant

CIVIL ACTION NO. 2:13-cv-255

DECLARATION OF DANIEL B. RAVICHER, ESQ.

I, Daniel Ravicher, pursuant to 28 U.S.C. 1746, declare as follows:

1. I am a member of the bar of the states of New York and Florida and have been admitted to this Court to represent Defendant TMSOFT, LLC, in this matter. I submit this declaration in support of Defendant TMSOFT, LLC's, motion to dismiss under the Texas Citizens Participation Act and for lack of personal jurisdiction. I make this declaration based upon my own personal knowledge, information and belief.

2. After the Complaint in this matter was served on TMSOFT and I was retained by TMSOFT to represent it in this matter, I had some communications by phone and email with Mr. Christopher Huck, counsel for Plaintiff Lodsyst.

3. On May 14, 2013, during my very first telephone conversation with Mr. Huck about this matter, he admitted to me that this suit was motivated by the fact that TMSOFT's owner, Todd Moore, had publicly criticized Lodsys. Huck told me that, in particular, Moore did not respond in "a reasonable way" to a letter Lodsys sent to TMSOFT on June 23, 2011, by publishing "some blog posting" calling Lodsys a "patent troll" that "crossed the line."

4. Two days after that conversation, on May 16, 2013, I wrote Huck an email asking him to identify the specific public statements made by Moore that upset Lodsys. A true and correct copy of that email is attached hereto as Exhibit B-1. Neither Huck nor any another Lodsys attorney ever responded to my request.

I declare under penalty of perjury that the foregoing is true and correct.

Signed this 1st day of July, 2013



Daniel Ravicher

CERTIFICATE OF SERVICE

I hereby certify that all counsel of record who have consented to electronic service are being served with a copy of this document via the Court's CM/ECF system per Local Rule CV-5(a)(3) on this the 1st of July, 2013.

/s/ Daniel B. Ravicher

Daniel B. Ravicher

Exhibit B-1

May 16, 2013 Email from Ravicher to Huck

**Dan Ravicher** <ravicher@gmail.com>

Lodsys v TMSOFT, 2:13-cv-255

Daniel B. Ravicher <ravicher@pubpat.org>

Thu, May 16, 2013 at 8:18 AM

To: Chris Huck <huck@kdg-law.com>

Chris,

Thanks again for taking the time to speak on Tuesday. Just FYI, my client is out all this week, so I won't be able to speak with him until next week. I'll get back to you as soon as I do. Thank you for your patience.

In the interim, might it be possible for you to point me to my client's blog posts, etc. that offended your client? If they're still up, maybe that's something your client would also want us to try to address?

All best,

--Dan

[Quoted text hidden]

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
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LODSYS GROUP, LLC,

Plaintiff,

v.

TMSOFT, LLC,

Defendant,

v.

APPLE INC.,

Intervenor and Counter-
Claimant

CIVIL ACTION NO. 2:13-cv-255

[PROPOSED] ORDER

After considering Defendant TMSOFT, LLC's, Motion to Dismiss Under the Texas Citizens Participation Act and For Lack of Personal Jurisdiction, for good cause show, the Court ORDERS that such Motion is GRANTED, and Defendant TMSOFT, LLC is DISMISSED from this action with prejudice, and Defendant TMSOFT, LLC may submit an accounting of its costs, attorneys fees and expenses for the Court to award against Plaintiff LODSYS GROUP, LLC, within thirty days of this Order.