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

LODSYS, LLC, *et al*., Plaintiffs, v. BROTHER INTERNATIONAL CORPORATION, *et al*., Defendants.	Civil Action No. 2:11-cv-00090 JRG **LEAD CASE**
LODSYS, LLC, *et al*., Plaintiffs, v. COMBAY, INC., *et al*., Defendants, v. APPLE, INC. Intervenor Defendant.	Civil Action No. 2:11-cv-00272 JRG

BRIEF OF *AMICI CURIAE* APPLICATION DEVELOPERS ALLIANCE AND ELECTRONIC FRONTIER FOUNDATION IN SUPPORT OF APPLE INC.'S OPPOSITION TO LODSYS, LLC'S MOTION TO DISMISS THE INTERVENTION OF APPLE INC.

Dismissing Apple from this suit now—after summary judgment has been fully briefed—creates enormous risk and uncertainty not only to many defendants currently before this Court, but to potentially millions of app developers worldwide. *Amici* respectfully request that this

Court deny Lodsys's motion and rule on Apple's exhaustion argument. At the minimum, this Court should rule on Apple's currently pending motion for summary judgment.

Amici's members are those who often find themselves facing patent litigation or demands from non-practicing entities ("NPEs"). The Application Developers Alliance ("Alliance") is a global association of more than 25,000 individual software developers and more than 125 companies who design and build apps for use on mobile devices like smartphones and tablets. Apps run on software platforms, including Google's Android, Apple's iOS, and Facebook, and are sold or distributed through virtual stores like Apple's App Store, Google's Play Store, Amazon.com, and Handango. The Alliance was formed to promote continued growth and innovation in the rapidly growing app industry, and routinely speaks as the industry's voice to legislators and policy-makers.

The Electronic Frontier Foundation ("EFF") is a non-profit civil liberties organization that has worked for more than 20 years to protect consumer interests, innovation, and free expression in the digital world. EFF and its more than 24,000 active donors have a strong interest in helping the courts and policy-makers in striking the appropriate balance between intellectual property and the public interest. Many of those members are small innovators and tinkerers who often find themselves facing patent litigation or demands.

Millions of Americans and tens of millions of individuals world-wide are currently involved in app development; in fact, the app economy has created hundreds of thousands of jobs in the United States alone. Dr. Michael Mandel, *Where the Jobs Are. The App Economy,* (Feb. 7, 2012) at 7.[1] App development is one of the fastest growing industries in America and has transformed the software industry. Yet, app development is still a nascent industry and the

[1] Available at: http://www.technet.org/wp-content/uploads/2012/02/TechNet-App-Economy-Jobs-Study.pdf

majority of app developers report making less than $15,000 a year. Amy Cravens, *A Demographic and Business Model Analysis of Today's App Developer,* GigaomPro (Sept. 2012) at 11.[2] Two-thirds of those app developers report working either independently or in a group of three or fewer. *Id.* at 12. Put simply, the majority of app developers are not in a position to mount a defense to patent litigation in federal court. Even defending a patent case on the basis of license or exhaustion is far too expensive for most app developers (especially where the relevant license is between non-parties and requires complex third-party discovery). The result is that app developers are effectively forced to settle patent litigation even if they have meritorious defenses.

Lodsys has sued more than 30 app developers for patent infringement, 11 in this case and at least 20 more in other cases pending in this district court.[3] *Amici* believe that Lodsys has further sent out hundreds of letters to app developers demanding settlement and threatening litigation. In these cases, Lodsys alleges that app developers infringe its patents by using Apple's iOS-based in-app purchasing technology to enable purchases through the Apple App Store. Literally, millions of developers use iOS-based applications, including in-app purchasing and upgrade functionality. Thus, a ruling on whether or not Lodsys's claims against iOS-based app developers are barred or exhausted by Apple's license would provide crucial guidance to millions of app developers. It is far more efficient for this issue to be litigated now, between the parties currently before the Court, than to allow Lodsys to continue a campaign against hundreds or thousands of app developers, few of which have the resources or incentive to mount a full exhaustion defense.

[2] Available at: http://appdevelopersalliance.org/files/pages/GigaOMApplicationDevelopers.pdf

[3] *See, e.g.,* Case No. 2:12-cv-00729; *see also* Apple's Opposition to Lodsys's Motion to Dismiss (ECF No. 995-1) at 8.

Lodsys's conduct is part of a recent trend of patentees targeting those who use generally available technology. In fact, "six out of the top ten patent litigation campaigns exclusively named companies for whom the adoption of another's technology was the basis for infringement." Colleen V. Chien and Edward Reines, *Why Technology Customers are Being Sued En Masse for Patent Infringement & What Can Be Done,* Santa Clara University School of Law Working Paper No. 20-13 (August 2013)[4] ("Chien & Reines") at 2. And the research shows that the

> burden for these suits falls disproportionately on small companies, and too often results in nuisance settlements based on the high cost of defending a patent case, not the merits of the claim

Id. at 4.

Take for instance, Innovatio, a company that, "using a portfolio of 31 patents directed at the 802.11 wireless communication standard (most of which are expired or lapsed) … has made demands of over 13,000 small and large end-users of wi-fi technology using devices sold by Cisco, Netgear, Apple, and others." *Id.* at 19. Or, MPHJ, an NPE that has sent letters to thousands of small businesses around the country demanding steep license fees for the use of standard office scanners. *Id.* at 10.

These NPEs are targeting consumers who use widely available products and services to conduct their businesses. Most, if not all, did not develop, manufacture, or sell the allegedly infringing technology. Most, if not all, had no idea that any patent existed that might prohibit how they use those products. This behavior is not only dangerous to potential litigants, but to the patent system as a whole. As Professor Chien and Mr. Reines write: "But the greatest harm of

[4] Available at: http://digitalcommons.law.scu.edu/cgi/viewcontent.cgi?article=1799&context=facpubs.

these suits may be to the reputation of the US patent system." Chien & Reines at 4. Policymakers have also voiced concern. Senators Patrick Leahy and Mike Lee, for instance, just wrote

> The result of this misuse of the patent system is a drag on our economy. It also tarnishes the image of legitimate patent holders. This is not the patent system provided for in our Constitution.

Sen. Patrick Leahy and Sen. Mike Lee, *America's Patent Problem,* Politico (Sept. 15, 2013)[5]

Lodsys's behavior fits this mold. Here, Lodsys's pattern of sending out demand letters, suing a seemingly random sampling of app developers and then settling with those app developers, promises that those developers' claims of a right to use the technology in question will never be heard. The resulting uncertainty leaves developers in limbo. In fact, there have been reports that app developers are indeed pulling apps out of the U.S. markets entirely. Charles Arthur, *App Developers Withdraw from US as Patent Fears Reach 'Tipping Point'*, The Guardian (July 15, 2011).[6]

Apple's claims in this case surrounding its license to the Lodsys patents and whether Lodsys's claims have been exhausted under *Quanta Computer, Inc. v. LG Electronics, Inc.,* 553 U.S. 617 (2008), are important questions that promise to be recurring. At a very minimum, it appears likely that Apple will move to intervene in one of Lodsys's 13 other pending cases[7] in this district. Moreover, if this Court rules in Apple's favor, it would also grant certainty to the millions of app developers in this country who face an open-ended threat from Lodsys. It would have the added benefit of putting litigants and potential targets in other en masse end-user suits on notice of the scope of risk they might be undertaking when they face these demands.

---

[5] Available at: http://www.politico.com/story/2013/09/patrick-leahy-war-on-patent-trolls-96822.html.

[6] Available at: http://www.theguardian.com/technology/appsblog/2011/jul/15/app-developers-withdraw-us-patents.

[7] These are just the current pending suits in the Eastern District of Texas. Data show that Lodsys has in fact sued 192 end-users in the last three years. Chien & Reines at 3.

In light of the foregoing, and because this dispute is ripe, of great importance and promises to be recurring, *amici* respectfully request that this Court deny Lodsys's Motion to Dismiss the Intervention of Apple, Inc.

Dated: September 18, 2013

Respectfully submitted,

/s/ Daniel Nazer
DANIEL NAZER
ELECTRONIC FRONTIER FOUNDATION
815 Eddy Street
San Francisco, CA 94109
Telephone: (415) 436-9333
Facsimile: (415) 436-9993
Email: daniel@eff.org

Counsel for Amici Curiae
Electronic Frontier Foundation