

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

DOGGIE DENTAL, INC., *et al.*,

Plaintiff,

v.

CDOFFICE, *et al.*,

Defendants.

Civil Action No. 2:21-cv-00271

Chief Judge Mark R. Hornak

MEMORANDUM ORDER

Before the Court is Defendant kanhap's¹ Motion to Dismiss Plaintiffs' claims against it in their entirety pursuant to Federal Rules of Civil Procedure 20(a) and 21.² For the reasons that follow, Defendants' Motion to Dismiss (ECF No. 76) is denied without prejudice. Defendant kanhap shall file an answer on or before October 7, 2021.

I. BACKGROUND

On February 25, 2021, the Plaintiffs Doggie Dental Inc. and Peter Dertsakyan filed a Complaint in this Court in which they pled that the Defendants³ had willfully infringed one or

¹ The Court notes that at the time Defendant kanhap originally filed its Motion to Dismiss on April 23, 2021 (ECF No. 76), the Motion also covered Defendant Yeepee. Plaintiffs filed a Notice of Voluntary Dismissal of Defendant Yeepee on July 1, 2021 (ECF No. 118), which this Court approved on July 22, 2021. (ECF No. 119.). The Court further notes that the parties have been somewhat inconsistent in their capitalization of "kanhap." The Court will use the lowercase form in accordance with the Store Name listed at row 38 of Schedule "A." (See Complaint, ECF No. 2, at 31). Defendant kanhap will be referred to hereafter as either "kanhap" or "Defendant".

² In the alternative, kanhap asks that this Court sever the claims against it or sever the claims against all defendants. (See Defs.' Mot. to Dismiss, ECF No. 76, at 1.)

³ There were originally 291 defendants, including kanhap. Since the Complaint was first filed, however, the Plaintiffs have at times both added and voluntarily dismissed various defendants, and this Court has entered default against others. Kanhap along with dozens of others remain in the case.

more claims of the Plaintiffs' Patent (U.S. Patent No. 10,477,838) by "offering for sale, selling, and distributing knock-off versions of Plaintiffs' BRISTLY[®] dog toothbrush." (See ECF No. 2, at 5.)⁴ Plaintiffs allege, *inter alia*, that Defendants' actions deprive Plaintiffs of the right to fairly compete, result in actual confusion for consumers, cause harm to Plaintiffs' reputations and brand, and increase Plaintiffs' costs of marketing its goods via the Internet. (*Id.* ¶ 35).

The Complaint also includes allegations of coordination between the Defendants. For example, Plaintiffs aver that, "[o]n information and belief, Defendants are working together to manufacture, arrange the manufacture of and/or sell and otherwise distribute the Infringing Products." (*Id.* ¶ 11). Plaintiffs also allege that "Defendants are employing and benefiting from substantially similar, paid advertising and marketing and advertising strategies," (*id.* ¶ 14(f)), and that they have "cooperated, communicated their plans with one another, shared information, and coordinated their efforts, all in order to create an illegal marketplace operating in parallel to the legitimate marketplace [for Plaintiffs' goods]," (*id.* ¶ 14(g)). Plaintiffs offered Declarations in support of these allegations. (ECF Nos. 7, 8, 9, 12, & 13.)

On April 23, 2021, Defendant Kanhap filed a Motion to Dismiss Pursuant to Rule 20, requesting, in the alternative, that this Court either dismiss this case in its entirety, sever all defendants in the case, or sever only Defendant Kanhap. (ECF No. 76, at 1.) In support of its Motion, Kanhap argued that there was "insufficient similarity between the defendants" to justify joining them under Federal Rule of Civil Procedure 20(a). (*Id.* at 2.) Kanhap further argued that Plaintiffs had failed to meet either of the required conditions under Rule (20)(a)(2): that Plaintiffs had failed to allege an issue of law or fact common to all defendants and that Plaintiffs' claims

⁴ Plaintiff Dertsakyan is the inventor of the BRISTLY[®] dog toothbrush and owner of the intellectual property related thereto; Plaintiff Doggie Dental, Inc. is the exclusive licensee of the intellectual property relating to BRISTLY[®] dog toothbrush. (*Id.* ¶¶ 16-17.)

did not arise out of the same transaction, occurrence, or series of transactions or occurrences as required under the Rule. (*Id.* at 3.)

Plaintiffs filed a Memorandum in Opposition to Motion to Dismiss on May 7, 2021 (ECF No. 93), and Defendant filed a reply on May 14, 2021, (Defs.' Reply to Pls.' Opp'n to Mot. to Dismiss, ECF No. 99). The Court has reviewed these documents as well supplementary material filed by Plaintiffs on May 26, 2021 (ECF No. 104), June 7, 2021 (ECF No. 110), and July 29, 2021 (ECF No. 120).

II. LEGAL STANDARD

Under Federal Rule of Civil Procedure 20, the court may join defendants in one action if the plaintiffs seek relief “jointly, severally, or in the alternative with respect to arising out of the same transaction, occurrence or series of transactions or occurrences;” and “any question of law or fact common to all defendants will arise in the action.” Fed. R. Civ. P. 20(a)(2). These requirements “promote trial convenience and expedite the final resolution of disputes,” *Horton Co. v. Int'l Tel. & Tel. Corp.*, 85 F.R.D. 369, 371 (W.D. Pa. 1980), and are to be liberally construed in service of those ends, *Salley v. Wetzel*, No. CIV.A. 3:12-1515, 2013 WL 3157558 (M.D. Pa. June 20, 2013), *aff'd sub nom. Salley v. Sec'y Pennsylvania Dep't of Corr.*, 565 F. App'x 77 (3d Cir. 2014). While “the impulse is toward entertaining the broadest possible scope of action consistent with fairness to the parties,” *United Mine Workers of Am. v. Gibbs*, 383 U.S. 715, 724 (1966), Rule 20 does not confer unlimited discretion on the court to join parties. Rather, joinder is only proper when both requirements under the Rule are satisfied. *Horton*, 85 F.R.D. at 371.

III. DISCUSSION

A. Rule 20(a)(2)(B): Common Questions of Law and Fact

Defendant kanhap's Motion to Dismiss first argues that Plaintiffs fail to meet the requirement of a common question of law or fact, as required by Rule 20(a)(2)(B). Defendant states that "[t]he only core facts that defendants have been alleged to share in common are that they offered the alleged infringing product for sale, and allegedly infringed the same patent." (ECF No. 76, at 3.) In determining whether the requirement of Rule 20(a)(2)(B) is satisfied, courts have often looked to the commonality requirement under Federal Rule of Civil Procedure 23(a), a requirement which presents a "very low threshold." *Miller v. Hygrade Food Prods. Corp.*, 202 F.R.D. 142, 145 (E.D. Pa. 2001) (quoting *Barnes v. Am. Tobacco Co.*, 161 F.3d 127, 141 n. 15 (3d Cir. 1998)).

In a case involving intellectual property, such as this one, there will generally be at least one common issue of law or fact for all defendants, namely, whether the Plaintiffs have a valid claim to ownership of the intellectual property in question. *See, e.g., AF Holdings, LLC v. Does 1-1058*, 752 F.3d 990, 998 (D.C. Cir. 2014); *Donkeyball Movie, LLC v. Does*, 810 F. Supp. 2d 20, 30 (D.D.C. 2011); *SRI Int'l, Inc. v. Internet Sec. Sys., Inc.*, No. Civ. 04-1199-SLR, 2005 WL 851126 at *4 (D. Del. Apr. 13, 2005). In order to prevail on their claims for patent infringement in this case, Plaintiffs must prove, *inter alia*, that they own the patent for the BRISTLY[®] dog toothbrush and that the defendants' products infringe on at least one claim of the patent. (*See* ECF No. 2, ¶¶ 47–48.) The Court concludes that Plaintiffs have satisfied the requirements of Rule 20(a)(2)(B).⁵

⁵ Defendant also argues that even if there are common questions of law or fact with respect to the merits of the Plaintiffs' claims, "there are no common questions of law or fact with respect to damages because not all defendants

B. Rule 20(a)(2)(A): Same Transaction or Occurrence

Defendant next argues that even if Plaintiffs can satisfy Rule 20(a)(2)(B), joinder is still impermissible under Rule 20(a)(2)(A). Rule 20(a)(2)(A) requires that Plaintiffs assert a right to relief against the joined defendants that “aris[es] out of the same transaction, occurrence, or series of transactions or occurrences.” Fed. R. Civ. P. 20(a)(2)(A). Analysis under Rule 20(a)(2)(A) is conducted on a case-by-case basis. *Spence v. Schafer*, No. 2:13-CV-0016, 2013 WL 1364025, at *6 (W.D. Pa. Mar. 7, 2013), *report and recommendation adopted*, No. 2:13-CV-0016, 2013 WL 1352079 (W.D. Pa. Apr. 3, 2013); *Miller*, 202 F.R.D. at 144. In examining a related issue—the degree of relatedness required for compulsory counterclaims under Federal Rule of Civil Procedure 13—the Third Circuit held that the covered events must bear a “logical relationship to one another” and feature “the same factual issues [or] the same factual and legal issues.” *Transamerica Occidental Life Ins. Co. v. Aviation Off. of Am., Inc.*, 292 F.3d 384, 390 (3d Cir. 2002).⁶

Defendant asserts that any similarities between its actions and those of other defendants are the result of coincidence rather than coordinated action, and accordingly, that there is no

have the same number of sales of the alleged infringing products or generate the same amount of revenue.” (ECF No. 76, at 2.) The Court finds no need to address the merits of this legal argument for a couple of reasons. First, there need not be commonality across all issues, as Defendant seems to implicitly contend. Second, Defendant is incorrect that there are no common questions of law or fact involved in the calculation of damages. Plaintiffs are requesting “damages adequate to compensate” for defendants’ infringement, “but in no event less than a reasonable royalty.” (ECF No. 2, ¶ 50.) This is consistent with statutory law, *see* 35 U.S.C.A. § 284, as well as the approach of the Federal Circuit. *See, e.g., Minks v. Polaris Indus., Inc.*, 546 F.3d 1364, 1372 (Fed. Cir. 2008). The Federal Circuit continues to consider the “Georgia-Pacific factors” in calculating a reasonable royalty. *Powell v. Home Depot U.S.A., Inc.*, 663 F.3d 1221, 1239 & n.3 (Fed. Cir. 2011). Among the factors to be considered is “[t]he established profitability of the product made under the patent; its commercial success; and its current profitability.” *Georgia-Pac. Corp. v. U.S. Plywood Corp.*, 318 F. Supp. 1116, 1120 (S.D.N.Y. 1970), *modified sub nom. Georgia-Pac. Corp. v. U.S. Plywood-Champion Papers, Inc.*, 446 F.2d 295 (2d Cir. 1971); *accord Lucent Techs., Inc. v. Gateway, Inc.*, 580 F.3d 1301, 1335 (Fed. Cir. 2009). The duration of the patent is also a consideration. *Georgia-Pac. Corp.*, 318 F. Supp. at 1120. The Court concludes that these are common questions of fact which would apply to all Defendants.

⁶ The Court notes that while Rule 13(a)(1)(A) requires that compulsory counterclaims arise out of the same “transaction or occurrence,” Rule 20 also allows for joinder of claims that arise out of the same “series of transactions or occurrences.” Fed. R. Civ. P. 13(a)(1)(A); Fed. R. Civ. P. 20(a)(2)(A).

common transaction or occurrence justifying joinder. (ECF No. 99, at 5.) Plaintiffs, on the other hand, allege that Defendants have engaged in “a coordinated effort to sell products that infringe Plaintiff’s patent.” (ECF No. 93, at 2.) Plaintiffs submitted a supporting declaration stating that their investigation had identified several manufacturers that were offering the infringing products direct to consumers through their own storefronts while also supplying those same infringing products to the other defendants. (*See* Decl. of Peter Dertsakyan (“Dertsakyan Decl.”), ECF No. 7, ¶ 20.) As to this contention, at the end of the day, the Defendant may turn out to be correct, but the inference of coordination that the Plaintiffs say can be drawn from the various similarities they rely upon may not be robust, but it is permissible, and at this stage, that is sufficient.

Defendant further argues that Plaintiffs have done no more than make allegations based on information and belief, and points to caselaw from the Northern District of Illinois and Seventh Circuit to argue that this is insufficient to justify joinder. (*See* ECF No. 99, at 8.) Although the present Motion is a Motion to Dismiss for Improper Joinder under Rule 20, the Court will look to the applicable pleading standards under Rule 12(b)(6) for guidance. *See Salley v. Sec’y Pennsylvania Dep’t of Corr.*, 565 F. App’x 77, 81–82 (3d Cir. 2014) (finding that a District Court did not abuse its discretion when it denied joinder after eliminating allegations of a conspiracy between the defendants that the Court found to be conclusory).

The Third Circuit follows a three-step test in evaluating whether a complaint contains sufficient factual allegations to support a motion to dismiss. *Connelly v. Lane Constr. Corp.*, 809 F.3d 780, 787 (3d Cir. 2016). Step one is to note the elements necessary to state a claim. *Id.* (citing *Ashcroft v. Iqbal*, 556 U.S. 662, 675 (2009)). Here, the Court will consider in place of those elements the findings required to justify joinder—namely, a common occurrence or transaction (or series of occurrence or transactions). As discussed *supra*, the applicable test

requires that the claims against the joined defendants have a “logical relationship to one another” and feature “the same factual issues [or] the same factual and legal issues.” *Transamerica*, 292 F.3d at 390. In the Court’s estimation, that box is checked here, based on the allegations of the Complaint, and the inferences that can be fairly drawn from them.

Step two is to identify and exclude allegations that “being merely conclusory, are not entitled to the presumption of truth.” *Connelly*, 809 F.3d at 789. The relevant allegations here are that Defendants engaged in “a coordinated effort to sell products that infringe Plaintiff’s patent.” (ECF No. 93, at 2.) Plaintiffs further state that Defendants have “cooperated, communicated their plans with one another, shared information, and coordinated their efforts.” (ECF No. 2, ¶ 14(g).)⁷ Defendant argues that Plaintiffs’ allegations are conclusory and are therefore insufficient under Rule 20. (ECF No. 99, at 5.)

A panel of the Third Circuit has held that a Plaintiff “may plead allegations based upon information and belief, “so long as there are no ‘boilerplate and conclusory allegations’ and ‘[p]laintiffs . . . accompany their legal theory with factual allegations that make their theoretically viable claim plausible.” *McDermott*, 649 F. App’x 263, 268 (3d Cir. 2016) (alterations and omissions in original) (quoting *In re Rockefeller Ctr. Props., Inc. Sec. Litig.*, 311 F.3d 198, 216 (3d Cir. 2002)). This is particularly so when the factual information required to substantiate those allegations is “peculiarly within the defendant’s knowledge or control.” *Id.* at

⁷ Plaintiffs additionally allege that “Defendants are employing and benefiting from substantially similar, paid advertising and marketing and advertising strategies.” (*Id.* ¶ 14(f).) One inference that might be fairly drawn from those averments is that the result that is pled is not a coincidence, but the result of common activity if not express coordination. At this stage of the case, that permissible inference must be considered in evaluating the pending Motion.

267–68 (quoting *In re Rockefeller*, 311 F.3d at 216).⁸ And finally, the Third Circuit directs that “the clearest indication that an allegation is conclusory and unworthy of weight in analyzing the sufficiency of a complaint is that it embodies a legal point.” *Connelly*, 809 F.3d at 790.

Plaintiffs in this case allege that defendants engaged in direct coordination. Plaintiffs support that allegation with a declaration stating that certain defendants manufactured counterfeit goods and supplied them to other defendants. (Dertsakyan Decl., ECF No. 7, ¶ 20.) Plaintiffs also aver that Defendant worked together with others by sharing information and communicating their plans with each other. (ECF No. 2, ¶ 14(g).) The Court concludes that these allegations provide more than a conclusory boilerplate statement that defendants were working in concert. Rather, they explain *how* the defendants allegedly worked together in a common scheme to profit off the unauthorized use of Plaintiffs intellectual property. *Cf. McDermott*, 649 F. App’x at 268 (“We find that the allegations in the Amended Complaint do not ‘paraphrase in one way or another the pertinent statutory language or elements of the claims in question.’ Instead, the allegations explain how [the Defendant] allegedly breached the contract.”) (quoting *Connelly*, 809 F.3d at 790). Given that the information necessary to further substantiate these allegations—for example, records of any communications between defendants—is peculiarly within the control of the Defendant and other defendants, the Court concludes that the allegations must at this stage of the case be credited.

Step three is to construe the allegations in the Plaintiffs’ favor. *Connelly*, 809 F.3d at 790. After *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), “there must be some showing sufficient to justify moving the case beyond the pleadings to the next stage of litigation.” *Phillips*

⁸ And that would certainly appear to be the situation here, where the allegations of the Complaint are that most of the challenged conduct would have occurred outside of the United States. (*See* ECF No. 2, ¶ 21; Dertsakyan Decl., ECF No. 7, ¶ 20; Decl. of Stanley D. Ference III (“Ference Decl.”), ECF No. 12, ¶ 12.)

v. Cnty. of Allegheny, 515 F.3d 224, 234–35 (3d Cir. 2008). The allegations must be plausible but need not be probable. *Id.* at 234. Moreover, the standard of review remains “highly favorable,” and after excluding boilerplate legal conclusions at step two, the Court should “assume all remaining factual allegations to be true, construe those truths in the light most favorable to the plaintiff, and then draw all reasonable inferences from them.” *Connelly*, 809 F.3d at 790.

Applying these principles, the Court concludes that the Plaintiffs have set forth sufficient allegations to satisfy the requirements of Rule 20(a)(2)(A). The Plaintiffs aver that the Defendants are engaged in a common, coordinated scheme to “manufacture, arrange the manufacture of and/or sell and otherwise distribute the Infringing Products.” (ECF No. 2, ¶ 11.) The Plaintiffs provide supporting declarations grounding this belief in their independent investigation, which they allege found that certain defendants were manufacturing and distributing Infringing Products to other defendants. (Dertsakyan Decl., ECF No. 7, ¶ 20.) Taking these allegations as true, as the Court must at this juncture, Plaintiffs’ record averments demonstrate the “logical relationship” required to meet the common transaction or occurrence requirement under Third Circuit precedent. *See Transamerica*, 292 F.3d at 390.

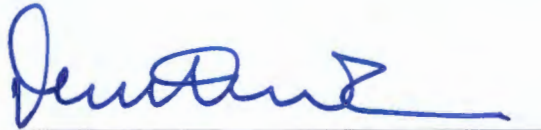
IV. CONCLUSION

Rule 20 requires that plaintiffs seeking to join multiple defendants in a single suit meet two requirements. Under Rule 20(a)(2)(A), the rights to relief against the joined defendants must arise “out of the same transaction, occurrence, or series of transactions or occurrences.” Under Rule 20(a)(2)(B), there must be a “question of law or fact common to all defendants.” Because the Court concludes that Plaintiffs have satisfied both requirements, Defendant Kanhap’s Motion

to Dismiss Pursuant to Rule 20 is DENIED. Defendant kanhap is directed to file an Answer on or before October 7, 2021.

The Court further notes that Rule 21 provides courts with the authority to consider the issue of joinder “at any time” either by motion or *sua sponte*. Fed. R. Civ. P. 21. Accordingly, the Court will deny Defendant kanhap’s Motion without prejudice. Should Plaintiffs’ averments in support of joinder prove to be without merit as this litigation progresses, Defendants will be able to renew their Motion.⁹ With that in mind, the Court notes that the proper remedy in the case of misjoinder would be severance, not dismissal. Fed. R. Civ. P. 21.

Dated: 9/7/2021



Mark R. Hornak
Chief United States District Judge

⁹ In their briefing, the parties devote considerable discussion to whether and how the requirements of Rule 20(a)(2)(A)—the common transaction or occurrence requirement—can be met in the absence of allegations of express coordination. For example, both parties discuss *Bose Corp. v. Partnerships & Unincorporated Associations Identified on Schedule "A"*, which posits that “an ‘occurrence’ of mass harm easily can be inflicted even if there is no express ‘transactional’ coordination among the attackers.” 334 F.R.D. 511, 516 (N.D. Ill. 2020). *Bose* further explains that in the context of mass counterfeiting facilitated by the internet, “it is plausible that [counterfeiters] understand that their ability to profit through anonymous internet stores is enhanced as their numbers increase, even though they do not engage in direct communication or coordination.” *Id.* Under this theory, Plaintiffs are harmed by the “swarm” of attacks on their intellectual property, with each attack both inflicting its own distinct injury while simultaneously making it more difficult for Plaintiffs to defend against the collective attack. *Id.* at 517. Because the Plaintiffs here do allege express coordination between the defendants, and the Court concludes that those allegations are sufficient at this stage in the litigation, the Court need not accept the parties’ invitation to at this juncture to take a position on whether such an uncoordinated “swarm” meets the requirements of Rule 20.