

**IN UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA**

CASE NO. 22-CV-61407-SMITH

SHENZHEN HAPPY VAPING
TECHNOLOGY LTD.,

Plaintiff,

v.

LOGIC TECHNOLOGY DEVELOPMENT
LLC, and
JAPAN TOBACCO INTERNATIONAL
U.S.A., INC.,

Defendants.

**DEFENDANTS' MOTION FOR CLARIFICATION OR, IN THE
ALTERNATIVE, FOR LEAVE TO REFILE MOTION TO DISMISS AND
INCORPORATED MEMORANDUM OF LAW**

Defendants, Logic Technology Development LLC (“Logic”) and Japan Tobacco International U.S.A., Inc. (“JTI USA”) (collectively “Defendants”), through their undersigned counsel, hereby file this Motion for Clarification regarding the status of Defendants’ Notice of Reasserted Motion to Dismiss for Improper Venue or to Transfer Venue (ECF 24) (hereinafter “Reasserted Motion to Dismiss” or “ECF 24”) filed in response to Plaintiff’s First Amended Complaint or, in the alternative, Motion for Leave to Refile the Reasserted Motion to Dismiss, and further states:

I. INTRODUCTION

While Defendants await the Court’s ruling on Defendants’ Reasserted Motion to Dismiss, Plaintiff has now, for the first time in a Court filing since ECF 24 was filed six months ago,

taken the surprising and blatantly disingenuous position that ECF 24 does not constitute a pending motion to dismiss the First Amended Complaint. While it is beyond dispute that ECF 24 is pending and awaits this Court's ruling, given Plaintiff's newly raised position, and in an abundance of caution, Defendants have filed the present Motion for Clarification, requesting confirmation that ECF 24 remains pending before the Court as a motion to dismiss Plaintiff's First Amended Complaint.¹ In the unlikely need for an alternative, Defendants request leave to refile ECF 24 with an amended title (e.g. by removing "Notice" from the title), or in any other manner, as directed by the Court, for this Court's consideration on the merits.²

II. BACKGROUND

1. Plaintiff filed its original Complaint (ECF 1) on July 28, 2022, alleging patent infringement of U.S. Patent No. 9,924,744 ("the '744 patent") by the "Logic Pro." ECF 21, ¶¶ 23-44.

2. The original Complaint incorrectly alleged patent venue based on several addresses in Florida, none of which constitutes a "regular and established place of business" of either Defendant, which is required to show patent venue. *See* ECF 13 and 25.

3. On December 15, 2022, Defendants filed a Motion to Dismiss for Improper Venue or to Transfer Venue ("Motion to Dismiss") (ECF 13) because venue is improper in this Court. This case should be dismissed for improper patent venue, as the Defendants do not have a "regular and established place of business" in Florida under the Supreme Court's interpretation

¹ Defendants maintain that the Reasserted Motion to Dismiss is a pending motion awaiting the Court's ruling, as explained in its "Reply Memorandum in Support of Defendants' Renewed Motion to Stay Discovery and Other Deadlines" (ECF 52), filed concurrently herewith, and incorporated herein by reference.

² To the extent that the Court determines that good cause must exist for this request, the requirement is clearly met where, as here, Defendants timely responded to the First Amended Complaint by filing ECF 24.

of the patent venue statute and are incorporated elsewhere (i.e., Delaware and California). *See id.* at 1, 5-11.

4. Plaintiff filed its Response in Opposition to Defendants' Motion to Dismiss on December 29, 2022 (ECF 17), and, for the first time, "request[ed] limited venue-related discovery to investigate the related corporate entities of Defendants." *See* ECF 17 at 11.

5. On January 5, 2023, Plaintiff filed its First Amended Complaint (ECF 21) ("First Amended Complaint") continuing to allege the same addresses in Florida relied upon in the original Complaint to establish venue in this Court.

6. The First Amended Complaint raised an improper legal theory for venue, but it did not allege new facts and did not in any way moot the venue issues raised in Defendants' Motion to Dismiss.

7. Accordingly, on January 17, 2023, Defendants moved for this Court to dismiss the First Amended Complaint for improper venue or, in the alternative, transfer the case to the District of New Jersey, where venue is proper by filing a "Notice to Reassert Motion to Dismiss for Improper Venue or to Transfer Venue" (ECF 24), which states:

Pursuant to Fed. R. Civ. P. 12(b)(3) and 7(b)(1), as well as 28 U.S.C. § 1406(a), Defendants Logic Technology Development LLC ("Logic") and Japan Tobacco International U.S.A., Inc. ("JTI USA") respectfully *move the Court to: (1) dismiss Plaintiff's Amended Complaint* [ECF 21] for improper venue or, in the alternative, to transfer venue to the District of New Jersey where venue is proper; (2) reassert and incorporate herein Defendants' Motion to Dismiss or Transfer for Improper Venue [ECF 13] ("Defendants' Motion"), in response to Plaintiff's Amended Complaint [ECF 21]; and (3) request oral argument on Defendants' Motion.

ECF 24 (emphasis added).

8. The Reasserted Motion to Dismiss reasserted and incorporated by reference its previous Motion to Dismiss in response to Plaintiff's First Amended Complaint in a procedural manner consistent with that sanctioned by courts in this district. *See Ct.-Appointed Receiver for Lancer Mgmt. Grp. LLC v. Cable Rd. Invs. Ltd.*, No. 05-60145-CIV, 2007 WL 9698235, at *3 (S.D. Fla. Jan. 17, 2007) ("Any defendant may reassert its motion to dismiss to the Third Amended Complaint by filing a new motion to dismiss or by filing a notice to the Court that it wishes to reassert its previously filed motion to dismiss."). Although Plaintiff focuses on the term "Notice" in the title as a basis to erroneously argue that it is not a motion to dismiss, as set forth above, the Reasserted Motion to Dismiss: (i) explicitly states that it is made "[p]ursuant to Fed. R. Civ. P. 12(b)(3)," the Federal Rule providing that improper venue is challenged via a motion; (ii) explicitly states that it is made pursuant to Rule 7(b)(1), the Federal Rule for specifying that a request for court order is made by motion; and (iii) explicitly states that Defendants "*respectfully move the Court to: (1) dismiss the Amended Complaint [ECF 21] for improper venue* or, in the alternative, to transfer venue to the District of New Jersey where venue is proper; (2) reassert and incorporate herein Defendants' Motion to Dismiss or Transfer for Improper Venue [ECF 13] ('Defendants' Motion')." ECF 24 at 2 (emphasis added).

9. Defendants filed their Reply to Plaintiff's Response in Opposition to Defendants' Motion to Dismiss (ECF 25) on January 17, 2023, concurrent with the filing of the Reasserted Motion to Dismiss. The Reply specifically addressed the allegations in the First Amended Complaint and explained why the new allegations presented in the First Amended Complaint regarding the same addresses relied on in the Complaint still failed to show that venue is proper in this district, including for the reasons previously presented in Defendants' Motion to Dismiss.

10. On February 6, 2023, without seeking leave from the Court to serve jurisdictional discovery, Plaintiff served its first set of requests for production on Defendants, including the jurisdictional discovery it informally requested in its Response on December 29, 2022, but that the Court has not yet ruled on.

11. On June 15, 2023, the Court entered a paperless order (ECF 44) denying as moot the initial Motion to Dismiss (ECF 13) on the basis that Plaintiff subsequently filed the First Amended Complaint, but the Court did not rule on the Reasserted Motion to Dismiss at ECF 24.

12. Also on June 15, 2023, the Court entered orders denying as moot Defendants' Motion to Stay (ECF 45) and Defendants' Motion for Hearing (ECF 46).

13. Defendants' Reasserted Motion to Dismiss remains fully briefed, pending, and case dispositive.

14. On June 20, 2023, Plaintiff served a Second Set of Discovery Requests, seeking discovery of electronically stored information ("ESI") for fifteen (15) custodians, including individuals previously identified in Plaintiff's venue-related theories, even though the parties have not agreed to ESI procedures in this case and the Court has not granted Plaintiff's informal request for jurisdictional discovery. On June 23, 2023, Plaintiffs served their First Set of Interrogatories. Many of these requests and interrogatories seek documents and information that are irrelevant to the substantive question of patent infringement that underlies Plaintiff's cause of action. Instead, they are jurisdictional requests aiming for facts to support Plaintiff's baseless allegations of venue, despite Plaintiff's procedurally improper, informal request for jurisdictional discovery that has not yet been ruled on by this Court.

15. In light of Plaintiff's continued and improper jurisdictional discovery efforts, Defendants filed a Renewed Motion to Stay (ECF 49) on June 30, 2023.

16. On July 14, 2023, Plaintiff filed its Response to Defendants' Renewed Motion to Stay Discovery and Other Deadlines (ECF 50, hereinafter "Response") and, for the first time in a filing before the Court, took the position that Defendants never responded to the First Amended Complaint and that Plaintiff does not view ECF 24 as a pending motion before the Court. Plaintiff's assertion is not supported by any legal authority, and Defendants view this position as merely an attempt to obscure Plaintiff's weak position on the merits of its legally improper venue analysis. Defendants' Reasserted Motion to Dismiss demonstrates why Plaintiff has not met its burden of establishing venue in this Court as to either Defendant in the First Amended Complaint. It was supported by several sworn declarations of corporate officers and directors of the Defendants. *See, e.g.*, ECF 13-1, 13-2; *see also* ECF 25-1, 25-2. Plaintiff never challenged these declarations. Defendants' Reasserted Motion to Dismiss is particularly likely to succeed on the merits because "[o]n a motion to dismiss based on improper venue, the plaintiff has the burden of showing that venue in the forum is proper," a burden that Plaintiff has fallen woefully short of meeting here. *See Wai v. Rainbow Holdings*, 315 F. Supp. 2d 1261, 1268 (S.D. Fla. 2004). The First Amended Complaint relies on the same Florida addresses as the original Complaint to try and establish venue, even after Defendants explained why none of those addresses constitute a "regular and established place of business" of either Defendant—a requirement to show patent venue. *See* ECF 13 at 1; ECF 25 at 5-7; *see also TC Heartland LLC v. Kraft Foods Grp. Brands LLC*, 137 S. Ct. 1514, 1517-21 (2017); 28 U.S.C. § 1400(b).

17. Moreover, Plaintiff leaves unexplained why it failed to raise any objection to the Reasserted Motion to Dismiss before this Court in the six months following its filing on January 17, 2023. Instead, a review of the record during those six months reveals that Plaintiff was well aware of the pendency and nature of the Reasserted Motion to Dismiss. *See, e.g.*, ECF 31 at 8

(indicating that the issue of venue was “pending before this Court”); ECF 37 at 2 (showing that Plaintiff took no action to correct Defendants’ statements that a motion to dismiss was pending); ECF 42 at fn. 1 (acknowledging that “Defendants renewed its Motion to Dismiss as to Plaintiff’s Amended Complaint on January 17, 2023. *See* Defendants’ Notice to Reassert Motion to Dismiss for Improper Venue or to Transfer Venue (ECF 24).”).

18. By filing the present Motion for Clarification, Defendants seek: clarification from the Court that the fully briefed Reasserted Motion to Dismiss remains pending before the Court, despite Plaintiff’s recent allegation to the contrary; or, in the alternative, leave to refile ECF 24 with an amended title (e.g., by removing “Notice” from the title), or in any other manner, as directed by the Court, for the Court’s consideration on the merits.

III. ARGUMENT

Plaintiffs’ newly raised argument that “Defendants did not respond (and have yet to respond) to the First Amended Complaint,” *see* ECF 50 at 5, is wholly unsupported by the factual record and the law. Most notably, Plaintiff’s do not cite a single case in support of its erroneous allegation that Defendants have not responded to the First Amended Complaint. ECF 50 at 5.

Defendants’ Reasserted Motion to Dismiss explicitly and clearly states that it is made “pursuant to Fed. R. Civ. P. 12(b)(3)” and “7(b)(1)” and explicitly requests the “*Court to: (1) dismiss Plaintiff’s Amended Complaint [ECF 21] for improper venue or, in the alternative, to transfer venue to the District of New Jersey where venue is proper; (2) reassert and incorporate herein Defendants’ Motion to Dismiss or Transfer for Improper Venue [ECF 13] (‘Defendants’ Motion’).*” ECF 24 at 2 (emphasis added). The substance of ECF 24 thus makes clear that it is a motion to dismiss the First Amended Complaint.

Rather than engage with the weight of the case law to the contrary, Plaintiff asks this Court to rely on a single word (“Notice”) in an attempt to circumvent the clear statements made in the Reasserted Motion to Dismiss (ECF 24) itself. Doing so is improper and legally unsupportable. To the extent that this Court entertains this wholly unsupported argument, however, federal courts look beyond the linguistic form of a document to its substance in determining its nature and legal effect. *See, e.g., Peterson v. Islamic Republic of Iran*, 224 F. Supp. 3d 17, 25 (D.D.C. 2016) (explaining that “[c]ourts ‘must determine the proper characterization of a motion by the nature of the relief sought,’ and not by its heading or legend.”) (citations omitted).³ In this case, the substance of the Reasserted Motion to Dismiss is clear: It is a motion to “*dismiss Plaintiff’s Amended Complaint [ECF 21] for improper venue.*” ECF 24 at 2 (emphasis added). The statements made on the face of the Reasserted Motion to Dismiss (ECF 24) also make clear that it is properly characterized as a motion to dismiss the First Amended Complaint.

Nonetheless, given Plaintiff’s disingenuous and newly raised position, in an abundance of caution, Defendants have filed the present Motion for Clarification, requesting confirmation that ECF 24 is pending before the Court as a motion to dismiss Plaintiff’s First Amended Complaint. To the extent this Court finds that ECF 24 does not constitute a motion—although it should not—Defendants request leave to refile its reasserted dismissal motion with an amended title

³ *Andersen v. United States*, 298 F.3d 804, 807 (9th Cir. 2002) (construing motion in accordance with the relief sought therein, rather than its styling, because “[t]he substance of the motion, not its form, controls its disposition.”); *Monte Vista Lodge v. Guardian Life Ins. Co. of Am.*, 384 F.2d 126, 129 (9th Cir. 1967) (binding a party to the “proper nomenclature” for its filing “would be a retreat to the strict common law.”); *Sturgis Motorcycle Rally, Inc. v. Rushmore Photo & Gifts, Inc.*, 908 F.3d 313, 343 (8th Cir. 2018) (finding that mislabeling a filing does not subject the filing to “the rules that apply to that label.”); *Britt v. Whitmire*, 956 F.2d 509, 513 (5th Cir. 1992) (explaining that “the true nature of the relief sought,” rather than the “label that a party places on a motion,” determines its classification).

(e.g. by removing “Notice” from the title, or in any other manner, as directed by the Court, for ruling on the merits.

WHEREFORE, Defendants respectfully request that this Court enter an Order clarifying that the pending Reasserted Motion to Dismiss (ECF 24) directed at Plaintiff’s First Amended Complaint remains pending and will be ruled upon by Court on the merits, or, in the alternative, that this Court enter an Order granting Defendants leave to refile ECF 24 with an amended title (e.g., by removing “Notice” from the title), or in any other manner, as directed by the Court, for the Court’s consideration on the merits.

CERTIFICATE OF COMPLIANCE WITH S.D. FLA. L. R. 7.1(a)(3)(A)

Pursuant to Local Rule 7.1(a)(3)(A), we hereby certify that undersigned counsel for Defendants conferred with Plaintiff’s counsel on July 19, 2023, in a good faith effort to resolve the issues raised herein, but the parties were unable to resolve the issues.

Respectfully submitted,

**KLUGER, KAPLAN, SILVERMAN, KATZEN &
LEVINE, P.L.**

/s/ Terri Ellen Tuchman Meyers

Terri Ellen Tuchman Meyers

Fla. Bar No. 881279

tmeyers@klugerkaplan.com

201 S. Biscayne Boulevard, 27th Floor

Miami, FL 33131

Tel: (305) 379-9000

**FINNEGAN, HENDERSON, FARABOW, GARRETT
& DUNNER, LLP**

C. Gregory Gramenopoulos (admitted *pro hac vice*)

c.gregory.gramenopoulos@finnegan.com

Kelly S. Horn (admitted *pro hac vice*)

kelly.horn@finnegan.com

Matthew R. Ritter (admitted *pro hac vice*)

matthew.ritter@finnegan.com

901 New York Avenue N.W.
Washington, DC 20001
Tel: (202) 408-4000

*Attorneys for Defendants Logic Technology Development
LLC and Japan Tobacco International U.S.A., Inc.*