

**UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION**

J&H WEB TECHNOLOGIES, LLC,	§	
	§	
Plaintiff,	§	
	§	CIVIL ACTION NO. 4:17-cv-119
v.	§	
	§	JURY DEMAND
VADE RETRO TECHNOLOGY, INC.,	§	
	§	
Defendant.	§	

**PLAINTIFF J&H WEB TECHNOLOGIES, LLC’S SUR-REPLY IN OPPOSITION TO
DEFENDANT VADE SECURE, INC.’S NOTICE OF MOTION AND MOTION TO
DISMISS PURSUANT TO FED. R. CIV. P. 12(B)(2) AND 12(B)(6) (DKT. NO. 14)**

I. INTRODUCTION & STATEMENT OF ISSUES

Nothing in Vade’s Reply (Dkt. No. 30) alters the analysis of the issues raised in its Motion to Dismiss (Dkt. No. 14). Vade’s Reply attempts to bolster its personal jurisdiction argument by relying on a supplemental declaration from Adrien Gendre (Dkt. No. 30-1, “Gendre Supp. Decl.”); however, despite the careful wording of Mr. Gendre’s statements, he does not deny that Vade had a business relationship with cPanel to develop an accused product in Texas. And despite his improper legal conclusion otherwise, that cPanel business relationship constituted an infringing offer for sale of an accused product, which subjects Vade to personal jurisdiction in Texas. *See* Dkt. No. 29-2, Opp. Ex. B (Vade App listing on cPanel’s marketplace offering App download and pricing structure); *see also Rotec Indus., Inc. v. Mitsubishi Corp.*, 215 F.3d 1246, 1254–55 (Fed. Cir. 2000) (§271(a)’s “offer to sell” liability analyzed via a traditional contractual analysis).

Further, Vade has not and cannot prove that the ’342 patent claims are directed at patent-ineligible subject matter. The ’342 patent claims are directed at email technology focusing on

specific automated processes and apparatuses for unsubscribing email accounts from Internet subscriptions in bulk. As such, the claims do not merely cover an abstract idea. Instead, the claims are “necessarily rooted in computer technology” to “overcome a problem specifically arising in the realm of computer networks” and are therefore patent-eligible under 35 U.S.C. § 101. *See DDR Holdings, LLC v. Hotels.com, LP*, 773 F.3d 1245, 1257 (Fed. Cir. 2014) (analogous facts).

II. THE MOTION TO DISMISS SHOULD BE DENIED.

A. This Court has personal jurisdiction over Vade.

Vade asks this Court to rule on personal jurisdiction in the absence of an evidentiary hearing or jurisdictional discovery. “[O]n a motion to dismiss for lack of jurisdiction, uncontroverted allegations in the plaintiff’s complaint must be taken as true, and conflicts between the facts contained in the parties’ affidavits must be resolved in the plaintiff’s favor for purposes of determining whether a *prima facie* case for personal jurisdiction exists.” *Bullion v. Gillespie*, 895 F.2d 213, 217 (5th Cir. 1990). Under that analysis, personal jurisdiction exists over Vade, and the Motion should be denied because:

- Vade committed direct patent infringement in Texas by offering to sell an accused product to cPanel in Texas (Compl. ¶¶ 4, 26, 28; Gendre Decl. (Dkt. No. 14-1) ¶¶ 4, 7 (admitting that Vade offered to sell the accused technology to cPanel); Gendre Supp. Decl. ¶¶ 5 (admitting the Vade App was available on cPanel’s website));
- Vade committed direct patent infringement by selling accused products to customers in Texas (Compl. ¶¶ 4, 28); and
- Vade indirectly infringed the asserted patent by inducing its customers to sell accused products, including customers it knew had distribution channels where the products

would end up in Texas (Compl. ¶¶ 4, 29; Gendre Decl. ¶ 3 (admitting that Vade sells to providers and enterprises in the United States who incorporate Vade’s products into their own); Gendre Supp. Decl. ¶ 7 (admitting that Vade sells products to Cisco and not denying that Cisco’s distribution channels extend throughout the United States, including in Texas)).

Vade’s patent infringements in Texas are the commission of torts, which subjects Vade to personal jurisdiction in Texas. *Trintec Indus., Inc. v. Time to Invent, LLC*, 395 F.3d 1275, 1280 (Fed. Cir. 2005). Moreover, Texas has a vested interest in resolving this dispute because J&H is headquartered in Houston, Texas. Compl. ¶¶ 1, 5.

In support of Vade’s Reply, Mr. Gendre improperly draws legal conclusions in his supplemental declaration. See Gendre Supp. Decl. ¶ 4. In particular, he wrongly concludes that the “proposal” to cPanel was not an offer for sale. See *Rotec*, 215 F.3d at 1254–55 (§271(a)’s “offer to sell” liability analyzed via a traditional contractual analysis). As demonstrated by a printout of the Vade subpage of cPanel’s website, Vade caused its App to be listed on the cPanel website with pricing information, which constitutes an offer for sale. Dkt. No. 29-2, Opp. Ex. B. Even Mr. Gendre admits that he did not ask cPanel to remove the App from its website until January 30th of this year, two weeks after the filing of the Complaint. Gendre Supp. Decl. ¶ 5.

Mr. Gendre also admits that Vade does business in the United States by selling to providers and enterprises, including Cisco, who incorporate Vade’s accused software into their own products. Gendre Decl. ¶¶ 3, 7. That distribution model puts Vade’s accused products into the stream of commerce, and Vade had a reasonable expectation that at least some of those products would be sold or offered for sale in Texas, including products from Cisco. Gendre Supp. Decl. ¶ 7.

Vade's attempts to discredit the evidence demonstrating Vade's contacts with Texas are litigation-inspired and unpersuasive. Indeed, Vade's jurisdictional arguments are premised on a misguided semantics game that relies on narrowly defining who Vade's customers are and where they are sold products—for example, Mr. Gendre initially claimed that Vade had no customers running the cPanel plugin (Vade App) but did not address whether cPanel has customers running the Vade App. Gendre Decl. ¶ 4. Vade also claimed via Mr. Gendre's initial Declaration that "Vade Secure decided to cancel this product prior to introduction onto the marketplace." Gendre Decl. ¶ 4. Yet, Mr. Gendre was later forced to concede in his Supplemental Declaration that Vade did not ask cPanel to remove the App from cPanel's website until January 30th of this year and that the App was still present on cPanel's website. Gendre Supp. Decl. ¶ 5. With respect to Vade's other customers (Compl. ¶ 29; Opp. Ex. D), Mr. Gendre did not contest that Vade's customers registered to do business in Texas are selling products that incorporate Vade's accused products in Texas. Gendre Supp. Decl. ¶¶ 6, 8. In fact, Mr. Gendre acknowledged that Vade partners with security providers, such as Internet Service Providers, IT Service Providers, and Email Security Vendors, that do business in the United States. Gendre Decl. ¶ 3. When evaluating personal jurisdiction on a motion to dismiss, the Court must accept the uncontroverted facts and analyze controverted facts in the light most favorable to J&H. *See Bullion*, 895 F.2d at 217. Doing so necessarily results in the conclusion that J&H has established a *prima facie* case of personal jurisdiction over Vade.

Nor is there anything unfair about the exercise of personal jurisdiction over Vade. Vade has sought the benefit of offering to sell and selling accused products to consumers in Texas. This is particularly true with respect to cPanel, which Vade's declarant himself touted: "Our new cPanel Plugin is another critical step we are taking to maintain our position as the leader in

graymail management and email security.” Ex. F (screenshot from <https://pingzine.com/vade-retro-strengthens-its-position-in-the-hosting-world-with-a-new-cpanel-plugin-for-235-million-inboxes-globally/> (*last accessed* April 11, 2017)). Vade cannot on the one hand seek to profit from its business dealings in Texas and on the other hand legitimately dispute the exercise of personal jurisdiction over it. Moreover, the full extent of Vade’s contacts with Texas is unknown as J&H has not had the opportunity to take jurisdictional discovery.

For the above reasons, the Court has personal jurisdiction over Vade, and J&H respectfully requests that the Court deny Vade’s motion to dismiss on personal jurisdiction grounds. If the Court believe the allegations pled are insufficient to establish jurisdiction over Vade, J&H requests that the Court grant J&H discovery into these jurisdictional issues.

B. The ’342 patent contains patent-eligible subject matter and is not invalid.

Vade’s Reply in support of its Motion to Dismiss on § 101 grounds erroneously attempts to shift the burden to J&H. *See* Reply at 5. The ’342 patent bears the presumption that it is valid and directed to patent-eligible subject matter. 35 U.S.C. § 282. It is Vade’s burden to prove otherwise by clear and convincing evidence—a burden Vade cannot meet. The ’342 patent claims are directed at computerized email technology focused on specific automated processes and apparatuses for unsubscribing email accounts from Internet subscription lists in bulk. Those claims are not abstract ideas under Federal Circuit or Supreme Court precedent.

Vade’s argument that the claims merely automate clicking on an unsubscribe hyperlink is a gross misrepresentation of the patented invention. Reply at 5. As discussed in J&H’s Opposition, the ’342 patent claims contain numerous meaningful limitations that demonstrate they are not directed at an abstract idea. *See* Opp. at 15–17. For example, claim 1 requires “identifying list-unsubscribe headers in a message header.” ’342 pat., cl. 1.

Further, Vade's argument that there is no claim limitation directed at bulk unsubscribing is also demonstrably false. Reply at 6. Claim 1 requires, in part, the steps of "processing, at least a subset of the email messages in the mailbox" and "presenting to the user subscriptions previously identified." '342 pat., cl. 1. Independent claims 14 and 16 contain similar limitations. '342 pat., cls. 14 & 16. Thus, the '342 patent claims are clearly directed at the automatic processing of bulk email. Vade elevates form over substance by arguing this case is distinguishable from recent precedent affirming the patentability of computer-related technology merely because the claims of the '342 patent do not recite "automatic." Reply at 6–7.¹

In addition, Vade's argument that the "entire process can be completed manually" also highlights a potential claim construction dispute between the parties. See Reply at 7–8 (including Table 1). The intrinsic record does not and cannot support Vade's interpretation of the '342 patent claims. The '342 patent recognizes that manually unsubscribing from email subscription lists can be "time consuming and complicated." '342 pat. at 1:64–65. That is one problem the invention sought to solve. For example, the detailed description of the '342 patent begins with the following description:

Described herein is a method for detecting and unsubscribing an address from a series of subscriptions. A computing system is programmed such that a user may identify email accounts and settings to allow the system to access the email accounts and examine the contents of the accounts' ("Mailboxes"/ "Postal Boxes") therein. The system attempts to identify emails which are from Subscription services and then to identify from the messages the method of unsubscribing from the messages. The system is then configured to group the messages by Subscription which sent them. Further the system is configured to group the identified methods of unsubscribing by Subscription.

¹ Vade also claims in the Reply that J&H is importing limitations from Figure 2 into the claims. Reply at 2. It is unclear what Vade refers to as the Opposition did not reference or rely on Figure 2 of the '342 patent.

'342 pat. at 2:41–52. In addition, the Abstract describes “unsubscribing from the Subscriptions either automatically, or in a semi-manual method.” '342 pat., Abstract. This intrinsic evidence, along with similar passages throughout the '342 patent specification, demonstrate that the claims should not be interpreted to encompass a manual unsubscribe process as Vade advocates. Specifically, Vade has completely read out or misconstrued at least the following limitations in order to make its “manual” argument: “processing,” “presenting to the user,” “identifying methods of unsubscribing,” and “identifying list-unsubscribe headers in a message header.” '342 pat., cl. 1. Moreover, on a motion to dismiss for lack of subject matter eligibility in the absence of full claim construction proceedings, the Court should credit J&H’s interpretation of the claims, which completely contradicts Vade’s manual argument and thereby undermines Vade’s § 101 argument. *See, e.g., Mantissa Corp. v. Ondot Systems, Inc.*, 2016 U.S. Dist. LEXIS 10665, *2–*3 (S.D. Tex. Aug. 11, 2016) (refusing to make a final decision about patent eligibility until after claim construction has occurred in light of the Federal Circuit’s decision in *Enfish, LLC v. Microsoft Corp.*, 822 F.3d 1327, 1335 (Fed. Cir. 2016)).

Vade also errs in claiming that the '342 patent claims have the same scope. Reply at 4. Claims are presumed to have different scopes as a matter of law. *Forest Labs., Inc. v. Abbott Labs.*, 239 F.3d 1305, 1310 (Fed. Cir. 2001) (“Where claims use different terms, those differences are presumed to reflect a difference in the scope of the claims.”); *see also* 37 C.F.R. § 1.75(b) (“More than one claim may be presented [in an application for patent] provided they differ substantially from each other.”). Claim 1 is directed at a “method of processing subscriptions,” claim 14 is directed to a “computing system,” which includes software within the scope of its limitations, and claim 16 is directed to a “computing apparatus,” i.e., tangible

hardware that may be programmed with software. Vade has not offered any evidence to overcome the presumption that those claims have different scopes.

III. CONCLUSION

For the reasons stated herein and in the Opposition, Vade's Motion should be denied in its entirety. This Court has personal jurisdiction over Vade, who has conducted business in and committed patent infringement in the State of Texas. Further, the '342 patent contains patent-eligible subject matter and is not invalid. J&H therefore respectfully requests that the Court deny Vade's Motion.

Dated: April 19, 2017

Respectfully submitted,

/s/ Chris N. Cravey

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**ATTORNEYS FOR PLAINTIFF
J&H WEB TECHNOLOGIES, LLC**

CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing document was filed electronically in compliance with Local Rule CV-5(a). As such, this document was served on all counsel who has consented to electronic service on this 19th day of April, 2017. Local Rule CV-53(a)(3)(A).

/s/ Chris N. Cravey

Exhibit F

https://www.pingzine.com/vade-retro-strengthens-its-position-in-the-hosting-world-with-a-new-cpanel-plugin-for-235-million-inboxes-globally/

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marketing and newsletters and another 25% are interpersonal & transactional emails. Although users can opt out of receiving these marketing emails, senders often times don't respect the unsubscribe requests of the user which is a major pain.

Vade Retro is the only company that can provide graymail management with both classification and unsubscribe options and doesn't require any complicated action to integrate the heuristic filter. Additional cPanel features include webmail integration, account management. With the new cPanel Plugin, hosting companies can improve their client's email environment and manage subscriptions easily through the popular Linux control panel (WHIM). Customers are also able to manage features one by one (unsubscribe, antispam and graymail classification) to add and or delete them.

"Our new cPanel Plugin is another critical step we are taking to maintain our position as the leader in graymail management and email security," says Adrien Gendre, VP of Product Management. "We've worked with hosting companies such as OVH before and now we're going even further to help them mitigate their customer's love/hate relationship with email, as well as compete equally against major players like Gmail and Office 365."

In addition to the new cPanel Plugin, Vade Retro has an assortment of other enterprise software products. Its Vade Retro Gateway solution Mailcube that provides a full range of filtering, classification and email management tools. While the Vade Retro Cloud is efficient, flexible and continuously updated to guarantee high availability of any messaging system. For more information on Vade Retro, please visit www.vade-retro.com/en/.

About Vade Retro

Vade Retro is the next-generation email-filtering platform, and the only solution today capable of classifying emails by priority, and eliminating low priority emails (Graymail) using an automated safe unsubscribe. Vade Retro's heuristic filtering engine has the industry's best record for ensuring zero-day responses against security threats and low-volume botnet attacks. Vade Retro gateway solutions (Cloud and Virtual MailCube) are already protecting over 235 million email inboxes in 76 countries. Vade Retro is a global company with 4 international offices (San Francisco, Montréal, Hem and Hong Kong).

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