

# **EXHIBIT 1**

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF TEXAS  
MARSHALL DIVISION

LODSYS, LLC, et al.,

Plaintiffs,

v.

BROTHER INTERNATIONAL  
CORPORATION, et al.,

Defendants.

CIVIL ACTION NO. 2:11-cv-90-JRG  
LEAD CASE

LODSYS GROUP, LLC,

Plaintiff,

v.

COMBAY, INC., et al.,

Defendants,

v.

APPLE INC.,

Intervenor Defendant.

CIVIL ACTION NO. 2:11-cv-272-JRG

**HEARING REQUESTED**

**REDACTED**

**APPLE'S REDACTED OPPOSITION TO LODSYS'S MOTION TO DISMISS**

## INTRODUCTION

Lodsys concedes that the only question presented in its Motion to Dismiss (the “Motion”) is whether the Court should decline to exercise its discretionary power to hear Apple’s declaratory judgment claims now, in this case, upon a fully developed record. Neither of the arguments Lodsys advances in support of its Motion provides good reason for the Court to defer the resolution of Apple’s claims indefinitely, as Lodsys would prefer, and the Motion should accordingly be denied.

*First*, Lodsys somewhat confusedly contends that Apple will not be prejudiced by dismissal because the Court has not yet adjudicated Apple’s claims. Mot. at 4. Lodsys has it backwards: Apple will suffer prejudice by the *lack* of a substantive resolution of its claims at this late stage of the case, forcing Apple to present them all over again in another case. Indeed, based on Lodsys’s conduct to date—voluntarily dismissing its iOS claims against app developers or settling them ██████████ before the Court has a chance to hear their defenses—it is obvious that Lodsys intends to try to avoid adjudication of Apple’s claims for as long as possible, whether in this or any subsequent case.

*Second*, Lodsys contends that the Court cannot resolve Apple’s claims without reference to specific infringement claims against “a particular named defendant” and that, following Lodsys’s settlement with Electronic Arts, Inc. (“EA”), no such claims remain in this case. Mot. at 5. Again, Lodsys’s argument is logically flawed. Even if it might be necessary, solely for purposes of illustration, to refer to the interaction of Apple’s licensed technology with particular iOS-based apps in order to analyze the extent to which Apple’s licensed technology embodies the accused in-app purchasing process, there is no reason such an analysis cannot be conducted without a pending claim against an app developer party. As Lodsys knows well, the

opinions rendered by Apple's expert in his report are not confined to any particular product or defendant, but apply generally to *any* use of Apple's iOS-based in-app purchasing technology to enable purchases through the Apple App Store. Lodsys, on the other hand, does not even argue that there is any material difference in the nature of its infringement contentions against iOS-based app developers depending on the specific characteristics of their products. To the contrary, Lodsys continues to serve the same cookie-cutter infringement contentions, and those contentions in turn continue to rely upon Apple's licensed technology to purport to meet the necessary limitations of Lodsys's claims.

In short, Lodsys's Motion is a transparent attempt to avoid resolution of Apple's declaratory judgment claims. It is equally obvious that Lodsys's purpose is to buy time in which it can continue to hold up iOS-based app developers for settlements of claims that Lodsys knows it has no right to assert. In light of Apple's estimate that there are more than 6 million developers of iOS-based apps, the potential number of such claims is virtually limitless. Unless and until Lodsys unconditionally waives any right to assert claims of infringement against iOS-based app developers—which it has not done and apparently refuses to do—it should not be heard to argue that Apple's claims for enforcement of its contractual right to prevent such conduct are moot. For all of these reasons, Lodsys's motion should be denied.

## **FACTUAL AND PROCEDURAL BACKGROUND**

### **I. Lodsys Launches a General Campaign Against Apple App Developers**

More than two years ago, Lodsys began sending letters to large numbers of Apple iOS-based app developers accusing them of infringing the two patents-in-suit, U.S. Patent Nos. 7,222,078 (the "'078 patent") and 7,620,565 ("'565 patent" and, collectively, the "patents-in-

suit”).<sup>1</sup> Lodsys did not conduct any meaningful investigation into the function and operation of the relevant Apple technology or the application of Apple’s license to Lodsys’s claims before threatening Apple’s app developers.<sup>2</sup> Despite being told by Apple that it was targeting licensed technology, Lodsys filed suit against seven iOS-based app developers in May 2011 and later sued several more.<sup>3</sup>

When Apple subsequently moved to intervene in this case to assert its rights under its license and to protect its developers, Lodsys opposed Apple’s motion [REDACTED]

[REDACTED]”<sup>4</sup> The Court nevertheless granted Apple’s motion, holding that Apple was entitled to intervene as a matter of right to defend its own interest in its license and that, in the alternative, permissive intervention was appropriate.<sup>5</sup> In its decision, the Court anticipated much of what has since occurred in this case, noting that “[i]t is certainly possible that the Developers may be interested in resolving this case as quickly and inexpensively as possible, while Apple’s interest in protecting its broader license rights may result in a different litigation strategy.”<sup>6</sup>

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<sup>1</sup> Declaration of Jonathan C. Sanders (“Sanders Decl.”) ¶¶ 2-3, Exs. A-B (representative notice letters sent to Illusion Labs and Rovio).

<sup>2</sup> See Dkt. No. 767 (Apple’s Motion for Summary Judgment) at 14-15.

<sup>3</sup> See *id.* at 15.

<sup>4</sup> Sanders Decl. ¶ 4, Ex. C (April 4, 2012 Hrg. Tr.) at 21:10-15.

<sup>5</sup> See Case No. 2:11-cv-00272, Dkt. No. 105 (Order) at 3-6. The Court thereby implicitly ruled that there is an independent jurisdictional basis for Apple’s claims.

<sup>6</sup> *Id.* at 4.

Apple subsequently filed an amended Answer in this case that is not limited to the seven original named defendants or, for that matter, to any particular defendant or developer. Rather, Apple alleges generally that its “License expressly permits Apple to offer and otherwise make available to its Developers products and services that embody the inventions contained in the patents in suit” and that “Plaintiff’s infringement claims against the Developers are based substantially or entirely on the Developers’ use of products and services that Apple is authorized to provide under the License and which Lodslys claims embody the patents in suit.”<sup>7</sup>

## **II. Lodslys Proceeds to Settle Its iOS-Based Claims Quickly and Cheaply**

Many of the defendants identified by Lodslys in its Motion may appear unfamiliar to the Court, and for good reason: Lodslys settled with most of them quickly and cheaply. Lodslys reached settlements with (or dismissed its claims against) all but three defendants even before it had served its infringement contentions.<sup>8</sup> In those settlements, [REDACTED]

[REDACTED]

[REDACTED].<sup>9</sup>

## **III. Lodslys Serves Substantially Identical Infringement Contentions on the Remaining Apple App Developers**

On September 17, 2012, Lodslys served infringement contentions on the three iOS-based app developers with whom it had not yet settled.<sup>10</sup> There was no material difference between the contentions served on the different developers.<sup>11</sup> For example, each set of infringement contentions identified an identical blue Apple confirmation dialog box as satisfying

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<sup>7</sup> Case No. 2:11-cv-00272, Dkt. No. 107 (Answer to Amended Complaint) ¶ 56.

<sup>8</sup> Dkt. Nos. 357, 454, 486, 488; *see* Case No. 2:11-cv-00272, Dkt. Nos. 32, 68, 101, 126.

<sup>9</sup> *See, e.g.*, Sanders Decl. ¶ 9, Ex. H (representative settlement agreements).

one of the necessary elements for alleged infringement of the '078 patent, and each identified Apple software and hardware such as the iPhone to demonstrate alleged infringement of the '565 patent.<sup>12</sup> To this date, Lodsys has never asserted that its infringement theories differ substantively with regard to any iOS-based app or app developer.

**IV. Lodsys Fails to Take Any Meaningful Discovery Regarding the Accused Apple Technology, Apple Moves for Summary Judgment, and Lodsys Voluntarily Dismisses Its iOS Claims**

Despite ample opportunity, Lodsys then failed to take any meaningful discovery regarding the accused Apple technology. For example, Apple made available voluminous source code for inspection at a time of Lodsys's choosing, which neither Lodsys nor its putative expert ever bothered to inspect.<sup>13</sup> And while Lodsys did depose Apple's corporate designee on technical subjects, it studiously refrained from inquiring as to the extent to which Apple-supplied technology and services form the basis of Lodsys's infringement contentions; to the contrary, it failed to mark its own contentions as an exhibit and refused to present them to the witness, despite repeated invitation to do so.<sup>14</sup>

On July 22, 2013, Apple moved for summary judgment on the grounds that Lodsys's infringement contentions expressly targeted licensed Apple technology, and that

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<sup>10</sup> See, e.g., Sanders Decl. ¶¶ 5-7, Exs. D-F (EA, QuickOffice, and Rovio contentions).

<sup>11</sup> See generally *id.*

<sup>12</sup> See, e.g., Sanders Decl. ¶ 5, Ex. D (EA contentions) at Exhibits B, C; Sanders Decl. ¶ 6, Ex. E (QuickOffice contentions) at Exhibits A, B.

<sup>13</sup> Dkt. No. 930 at 9-10.

<sup>14</sup> Sanders Decl. ¶ 12, Ex. K (Kelly Tr.) at 96:21-101:13.

Lodsys's claims against iOS-based app developers were therefore barred by one or more provisions of Apple's license or, in the alternative, by the doctrine of patent exhaustion.<sup>15</sup> In support of its motion, Apple submitted the expert report of Dr. Benjamin Goldberg, whose opinions make reference to the apps of the particular defendants in this case but are not confined to them or to their products. To the contrary, Dr. Goldberg explained that "the opinions I have formed are not limited to any particular app developer or to the particular apps identified in the Lodsys Infringement Contentions" and that, "[b]ased upon my analysis, my conclusions would apply equally to *all* apps that are developed to incorporate the Apple In-App Purchase functionality according to Apple's design."<sup>16</sup>

As described in technical detail in Dr. Goldberg's report, the vast majority of the technology involved in the accused in-app purchasing process consists of software, hardware and services that Apple provides to developers generally, and which does not vary depending on any individual developer. *See, e.g., id.* ¶ 11 (opining that Apple provides all material elements of accused functionality such as the Apple confirmation dialog box, communication to and from the Apple App Store, and licensed Apple hardware). And even the minimal contributions the developers make to this process do not differ materially by defendant, as each developer must interact with Apple's StoreKit API and other technology in substantially the same fashion and in accordance with Apple's guidelines in order to invoke the in-app purchasing functionality.<sup>17</sup>

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<sup>15</sup> *See generally* Dkt. No. 767 at 19-30.

<sup>16</sup> Declaration of Benjamin Goldberg in Support of Apple's Motion for Summary Judgment, Dkt. No. 767, ¶ 2, Ex. A (Expert Report) ¶ 7 (emphasis added).

<sup>17</sup> *See generally id.* (describing substantively uniform interaction between developer code, Apple's UIKit and StoreKit code, and other Apple software and hardware).



Lodsys's response to Apple's showing is telling. Shortly after Apple filed its motion, Lodsys voluntarily dismissed its last remaining iOS-based claims in this case, [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] With that voluntary dismissal in hand, Lodsys then argued in its opposition papers that the Court should ignore Apple's motion as moot.

**V. Lodsys Engages in a Pattern of Settling or Dismissing Claims to Avoid Resolution on the Merits**

Lodsys's gamesmanship with respect to its EA claims is part of a pattern of conduct aimed at avoiding judicial resolution of its iOS-based claims generally. For example, Lodsys obtained a stay of its case against QuickOffice, the second-to-last iOS-based app developer in this action, on the putative ground of a pending settlement, but several weeks have now passed without any definitive settlement agreement apparently being reached.<sup>20</sup> In no fewer than seven recently-filed cases, Lodsys has systematically settled or dismissed its claims against iOS-based app developers [REDACTED]. Its strategy of "take what you can and run" becomes particularly clear in those cases where the developers vigorously

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18 Sanders Decl. ¶ 8, Ex. G [REDACTED]

19 [REDACTED]

20 Dkt. Nos. 796, 891.

21 Sanders Decl. ¶ 9, Ex. H ([REDACTED])  
[REDACTED]

fight back. For example, Lodsys sued TMSOft, an app developer founded and owned by Todd Moore, after Mr. Moore made certain public statements concerning Lodsys and what he termed its “patent trolling” activities on a radio show and related blog.<sup>22</sup> After TMSOft filed a motion to dismiss the suit on the grounds that, *inter alia*, Lodsys’s retaliatory conduct violated the Texas Citizens Participation Act, Lodsys promptly settled with TMSOft and voluntarily dismissed its claims with prejudice, once again receiving virtually no consideration in return.<sup>23</sup>

#### **VI. Lodsys Continues to Assert Substantively Identical Infringement Allegations Against Apple App Developers**

Lodsys has continued to threaten and to sue large numbers of Apple app developers in its ceaseless quest for quick and easy settlements. For example, on April 2, 2013, Lodsys sued ten additional developers, two that sell only iOS-based products and eight that sell both iOS-based and Android products.<sup>24</sup> Similarly, on April 16, 2013, Lodsys sued five more developers of iOS-based products, one of which sells Android products as well.<sup>25</sup> Finally, on May 9, 2013, Lodsys sued five more developers, two that sell only iOS-based products and three that sell products for use with both iOS and Android devices.<sup>26</sup>

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<sup>22</sup> *Lodsys Group, LLC v. TMSOft, LLC*, Case No. 2:13-cv-00255-JRG, Dkt. No. 17.

<sup>23</sup> *Id.*, Dkt. Nos. 20, 25; *see also* Sanders Decl. ¶ 10, Ex. I at 1 (blog post noting that neither TMSOft nor Mr. Moore was required to pay any money to Lodsys or sign a license agreement in exchange for the dismissal with prejudice, and that TMSOft agreed only to make a small donation to charity).

<sup>24</sup> *See* Dkt. No. 1 in each of 2:13-cv-00253-JRG, 2:13-cv-00254-JRG, 2:13-cv-00248-JRG, 2:13-cv-00249-JRG, 2:13-cv-00252-JRG, 2:13-cv-00256-MHS-RSP, 2:13-cv-00247-JRG, 2:13-cv-00250-JRG, 2:13-cv-00251-JRG, and 2:13-cv-00255-JRG

<sup>25</sup> *See* Dkt. No. 1 in each of 2:13-cv-00272-JRG, 2:13-cv-00274-JRG, 2:13-cv-00275-JRG, 2:13-cv-00273-JRG, and 2:13-cv-00276-JRG

<sup>26</sup> *See* Dkt. No. 1 in each of 2:13-cv-00388-JRG, 2:13-cv-00391-JRG, 2:13-cv-00389-JRG, 2:13-cv-00390-JRG, 2:13-cv-00392-JRG.

Lodsys's Complaints and infringement contentions in these new actions continue to make substantively identical infringement allegations based on the use of licensed Apple technology.<sup>27</sup> The only difference is that now, in an almost farcical attempt to conceal the true nature of its claims, Lodsys has edited its contentions to remove the screenshots and other specific references to Apple technology it formerly displayed.<sup>28</sup> And while Apple is of course not privy to all of the notice letters that Lodsys sends, based on Lodsys's pattern of conduct to date and public reports, Apple has good grounds to believe that Lodsys continues to threaten still more app developers with claims of infringement and that many of those threats result in payments to Lodsys before the point of public suit.

### **LEGAL STANDARD**

As this Court recently reaffirmed, it is within a trial court's discretion to treat an intervenor's claims as a separate action following dismissal of the plaintiff's original causes of action. *See generally Lodsys Group, LLC v. Dow Jones & Co.*, Dkt. No. 22 (August 26, 2013 Order) at 2. More specifically, as Lodsys concedes in its motion to dismiss, "when a separate and independent jurisdictional basis exists, a federal court has the discretion to treat an intervention as a separate action, and may adjudicate it despite dismissal of the main demand if failure to do so might result in unnecessary delay or other prejudice." *Arkoma Assoc. v. Carden*, 904 F.2d 5, 7 (5th Cir. 1990). Thus, courts routinely find that a claim in intervention need not be dismissed whenever dismissal would result in unnecessary delay, expense, or prejudice. *Id.* ("A dismissal of [intervenor's] claims . . . would result only in further delay and expenses to the

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<sup>27</sup> *See, e.g.*, Sanders Decl. ¶ 11, Ex. J (representative infringement contentions against Caesars Interactive).

<sup>28</sup> *See, e.g., id.*

parties and a cavalier waste of increasingly limited judicial resources, both trial and appellate.”).

## ARGUMENT

### **I. The Court Should Exercise its Discretion to Hear Apple’s Claims to Avoid Undue Prejudice and Delay**

In light of Lodsys’s concession that the Court has the discretionary power to treat Apple’s claims as a separate action, Mot. at 4, the *only* question the Court needs to decide is whether the dismissal of Apple’s claims at the eleventh hour would result in undue delay or prejudice. *See, e.g., Arkoma*, 904 F.2d at 7.<sup>29</sup> We have demonstrated the substantial prejudice that Apple would incur in our summary judgment reply, Dkt. No. 930, and will not repeat that argument here.

Lodsys’s only attempt to assert otherwise is its contention that Apple will suffer no prejudice because its claims have not yet been (and will not be) adjudicated in this case. Mot. at 4 (relying on the Court’s Order in *Dow Jones*). But Lodsys has the situation exactly backwards: the fact that the Court has not yet had an opportunity to rule on Apple’s motion for summary judgment or to try Apple’s claims, after two and a half years of litigation, is the *reason* that Apple would be prejudiced by a dismissal. Moreover, unlike in *Dow Jones*, which had just recently been filed, Apple’s claims here are set to be tried or otherwise resolved in a matter of

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<sup>29</sup> Lodsys erroneously refers to the issue here as one of “mootness.” *See* Mot. at 1. A case is not moot as long as “the issue remains live and in dispute.” *Laserfacturing, Inc. v. Old Carco Liquidation Trust*, 494 Fed. Appx. 72, 73 (Fed. Cir. 2012) (refusing to find case moot despite plaintiff’s waiver of claims against appellee, where infringement determination could still have downstream effect on parties or their successors); *accord, e.g., Christopher Village, Ltd. Partnership v. Retsinas*, 190 F.3d 310, 315 (5th Cir. 1999) (noting that a “request for a declaratory judgment continues to present a live dispute [where] th[e] court can still provide adequate relief”). Thus, whether Lodsys’s infringement claims based on Apple’s in-app purchasing technology are barred by Apple’s license is not “moot.” That disputed issue continues to be litigated in approximately a dozen other cases before this Court, and Lodsys continues to threaten an unknown number of other Apple developers based on the same groundless claims.

weeks. The suggestion that Apple would not be prejudiced by dismissal on the eve of trial, forcing it to relitigate all of its claims from scratch in another case, is simply absurd.

Moreover, in light of Lodsys's pattern of litigation conduct to date, if the Court declines to hear Apple's claims now, it is doubtful that Apple would *ever* succeed in reaching a judicial resolution of its claims in any of the dozens of other cases Lodsys has filed. As set out at length above, Lodsys's consistent practice has been to threaten and, if necessary to extract a payment, to sue large numbers of developers, to settle with most of them as quickly as possible, and then to dismiss or stay any claims that have not yet been settled by the time Apple's claims are ripe for decision.<sup>30</sup> Because of the relatively short time that most of these cases will remain open, and because Lodsys appears willing to dismiss its claims for almost nothing when necessary to avoid resolution of Apple's claims, this case falls within the classic exception to the mootness doctrine involving disputes that are capable of repetition while otherwise evading review.<sup>31</sup> Indeed, as noted above, the Court expressly recognized in its Order permitting intervention that it was possible the developers would be motivated to settle quickly, while Apple would likely wish to pursue a broader strategy of resolving its claims in a manner applicable to all developers. *See* Dkt. No. 105 (Order) at 4.

Finally, Lodsys is mistaken in contending that Apple's declaratory judgment claim is limited in scope to the original named defendants in this action. *Cf.* Mot. at 4. As set out above, the declaration Apple seeks encompasses *all* Apple developers who may be subject to

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<sup>30</sup> *See supra*, Factual and Procedural Background § V.

<sup>31</sup> *See, e.g., Spencer v. Kemna*, 523 U.S. 1, \*17-18 (U.S. 1998) (explaining that capable-of-repetition doctrine applies where "(1) the challenged action [is] in its duration too short to be fully litigated prior to cessation or expiration, and (2) there [is] a reasonable expectation that the same complaining party [will] be subject to the same action again").

Lodsys's threats or claims,<sup>32</sup> and the opinion furnished by Apple's expert applies equally to *all* developers who use Apple's in-app purchasing technology.<sup>33</sup> For its part, Lodsys has presented no evidence or even any reason to believe that its infringement contentions differ materially between EA, QuickOffice, Rovio, or any other app developer it might sue in this case or any later action. Lodsys could not in all events make such an argument in good faith, in light of the substantively identical contentions it has to date served on each developer.<sup>34</sup>

Indeed, Lodsys has failed to offer any assurance that it will not threaten or sue even more developers based on identical contentions. Apple estimates that there are 6 million developers of iOS-based apps, all of whom are potential future targets for Lodsys's baseless claims.<sup>35</sup> So long as these developers must continue to operate under threat of a demand letter or legal complaint from Lodsys, Apple will continue to be deprived of its rights under its license,

[REDACTED]. As set out in Apple's summary judgment reply, anything short of an unconditional promise by Lodsys that it will not assert infringement claims against Apple *or its customers* is insufficient to render this dispute moot. *Cf. Already, LLC v. Nike, Inc.*, 133 S. Ct. 721, 728 (2012) (finding unconditional covenant not to sue sufficient to render case moot where it "reache[d] beyond [party] to protect [party's] *distributors and customers*") (emphasis added).

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<sup>32</sup> See *supra*, Factual and Procedural Background §§ I-IV.

<sup>33</sup> See generally *id.*

<sup>34</sup> See *id.*

<sup>35</sup> See generally <http://www.apple.com>; [http://www.forbes.com/fdc/welcome\\_mjx.shtml](http://www.forbes.com/fdc/welcome_mjx.shtml) (noting Apple announcement that it "has over 6 million developers[,] with 1.5 million added in the last year.").

## II. The Resolution of Apple's Claims Does Not Require the Presence of Any Particular Defendant

Lodsys's second and only other argument for dismissal is that it would purportedly be "impossible to determine the application of Apple's claims based on the doctrine of patent exhaustion divorced from the specifics of the infringement claims asserted by Lodsys against a particular named defendant," and that the settlement of its infringement claims against particular defendants therefore makes it impossible to decide Apple's motion. Mot. at 5. Lodsys's reasoning once again is fatally flawed.

*First*, as set out above, the resolution of Apple's claims does not and cannot depend on Lodsys's infringement contentions against any particular product or defendant. Apple's expert makes clear in his report that his opinions apply equally to *all* developers who use Apple's in-app purchasing technology.<sup>36</sup> While the Court might need—as did Apple's expert—to point to illustrative examples from Lodsys's infringement contentions with respect to specific products in the course of its analysis, Lodsys has presented *no* evidence or argument to explain why the presence of a particular defendant as an active party to the case is necessary to do so.

*Second*, [REDACTED]

[REDACTED]

[REDACTED]<sup>37</sup> [REDACTED]

[REDACTED] then those claims may similarly be resolved in this action, by reference to Lodsys's infringement contentions against products sold by EA or QuickOffice, or by reference to any other representative iOS-based app.

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<sup>36</sup> See *supra*, Factual and Procedural Background §§ I-IV.

<sup>37</sup> See *supra*, Factual and Procedural Background § I.

*Finally*, Lodsys’s suggestion that Apple’s declaratory judgment claims cannot be decided until infringement is proven, Mot. at 5, is contrary to settled Federal Circuit law. The very purpose of a license is to **avoid** the need for a lengthy and costly legal proceeding to determine liability for infringement. A defendant (or declaratory judgment plaintiff) therefore need not “prove” infringement—or wait for infringement to be proven—in order to assert a license as a **defense** to infringement. *See, e.g., Arris v. British Telecommunications PLC*, 639 F.3d 1368, 1380 (Fed. Cir. 2011) (rejecting proposed requirement that declaratory judgment plaintiffs allege or show that their products infringe before seeking a declaration of noninfringement); *accord, e.g., Arkema*, 706 F.3d at 1359 (“[A] party need not concede infringement to demonstrate a justiciable controversy . . . .”); *Arrowhead Indus. Water, Inc. v. Ecolochem, Inc.*, 846 F.2d 731, 738 (Fed. Cir. 1988) (same); *ABB Inc. v. Cooper Industries, LLC*, 635 F.3d 1345, 1348 (Fed. Cir. 2011) (same); *AstraZeneca LP v. Breath Limited*, 2013 2404167, at \*3-4 (D.N.J. May 31, 2013) (same).

In short, Lodsys presents no reason for the Court to deny Apple the opportunity to prove its claims of license and exhaustion simply because no particular defendant has yet been found to infringe. Should the Court find that Apple is entitled to prevail on its claims and enter declaratory judgment in Apple’s favor, there will be no need for trial of **any** iOS-based infringement claims against **any** app developer. If Lodsys is correct (and it is not) that the accused in-app purchasing technology infringes its patents, then Apple’s license applies, and neither it nor the iOS-based app developers who make use of that technology can be liable for any such alleged infringement. If, on the other hand, the accused in-app purchasing technology does not infringe, then Lodsys’s infringement claims fail, and it has no right to trouble anyone concerning them. Either way, judicial economy and the interests of justice will be served by



allowing Apple to prove its claims now, reducing the potential burden on this Court of countless claims against Apple iOS-based app developers and sparing those developers the needless burden and expense of defending against claims that should not be brought in the first instance.

**CONCLUSION**

For the reasons set out above, Apple respectfully submits that Lodsys's motion to dismiss should be denied.

Dated: September 16, 2013

Respectfully submitted,

By /s/ Melissa Richards Smith

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**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 on this the 16th of September, 2013.

/s/Melissa Richards Smith  
Melissa Richards Smith

**CERTIFICATE OF AUTHORIZATION TO FILE UNDER SEAL**

This is to certify that this reply brief should be filed under seal because it contains confidential material and is covered by Protective Order approved and entered in this case as Dkt. No. 376 on October 15, 2012.

/s/Melissa Richards Smith  
Melissa Richards Smith

**ORDER**

Before the Court is Plaintiff Lodsys Group, LLC's Motion to Dismiss (the "Motion"). Having considered the Motion and the briefing and argument in support of and in opposition thereto, the Court finds that the Motion should be and hereby is DENIED.

The Court hereby ORDERS the parties to meet and confer within ten (10) days regarding one or more representative products on which Apple's Counterclaim shall be tried.