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16 BURST.COM, INC.

17
18 UNITED STATES DISTRICT COURT
19 NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

20 APPLE COMPUTER, INC.,
21 Plaintiff/Counterdefendant,
22 v.
23 BURST.COM, INC.,
24 Defendant/Counterclaimant.

§
§ CASE NO. C06-00019 MHP
§
§ JOINT CASE MANAGEMENT
§ STATEMENT & PROPOSED ORDER
§

1 The parties to the above-entitled action jointly submit this Case Management Statement
2 and Proposed Order and request the Court to adopt it as its Case Management Order in this case.
3

4 **DESCRIPTION OF THE CASE**

5 **1. A brief description of the events underlying the action:**

6 This is a patent infringement case that Plaintiff Apple Computer, Inc. ("Apple") initiated
7 by a complaint for declaratory judgment against Defendant Burst.com, Inc. ("Burst"). Burst has
8 filed a counterclaim seeking damages and injunctive relief and demanding a jury trial. The
9 counterclaim alleges that Apple infringes United States Patent Numbers 4,963,995 ("the '995
10 patent"), 5,164,839 ("the '839 patent"), 5,995,705 ("the '705 patent"), and 5,057,932 ("the '932
11 patent") (collectively the "patents-in-suit"). Burst alleges that Apple has infringed and is
12 presently infringing the patents-in-suit through its digital audio and video products and services,
13 including iPod devices, iTunes software, and the iTunes Store; its personal and server computer
14 products and bundled software; and its QuickTime suite of software products. Apple alleges that
15 the patents-in-suit are invalid and not infringed by Apple.
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17

18 **2. The principal factual issues which the parties dispute:**

- 19 a. Whether Apple has infringed, and continues to infringe the patents-in-suit,
20 directly, contributorily, or by inducement;
21
22 b. Whether any such infringement is willful;
23
24 c. Whether the patents-in-suit are invalid; and
25
26 d. The amount of Burst's damages for any infringement.

27 **3. The principal legal issues which the parties dispute:**

- 28 a. The proper construction of the claims of the patents-in-suit;

- 1 b. Whether any party is entitled to attorneys' fees and costs pursuant to 35 U.S.C. §
- 2 285;
- 3 c. Whether Burst is entitled to treble damages pursuant to 35 U.S.C. § 284; and
- 4 d. Whether Burst is entitled to injunctive relief.
- 5

6 Other disputed legal issues may arise in the course of litigation, but no other principal legal
7 issues have been identified at this time.

8 **4. The other factual issues which remain unresolved for the reason stated below and**
9 **how the parties propose to resolve those issues:**

10 There are no unresolved factual issues regarding service of process, personal jurisdiction,
11 subject matter jurisdiction or venue. Other factual issues may arise in the course of the litigation.

12 **5. The parties which have not been served and the reasons:**

13 All parties have been served.

14 **6. The additional parties which the below-specified parties intend to join and the**
15 **intended time frame for such joinder:**

16 The parties do not intend to join any additional parties at this time.

17 **7. The following parties consent to assignment of this case to a United States**
18 **Magistrate Judge for jury trial:**

19 Neither party consents to assignment of this case to a United States Magistrate Judge for
20 jury trial.

21 **ALTERNATIVE DISPUTE RESOLUTION**

22 **8. The parties have filed a Stipulation and Proposed Order Selecting an ADR**
23 **process: Private Mediation.**

24 **9. Please indicate any other information regarding ADR process or deadline.**

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1 The Court entered an Order on the parties' stipulation to refer this case to private
 2 mediation on March 29, 2006. The parties have agreed on a mediator. Because the parties
 3 engaged in unsuccessful settlement negotiations prior to the filing of litigation, the parties agree
 4 that it would be most useful to schedule the mediation after some further development of the
 5 facts and the respective positions of the parties in this litigation. The parties are discussing the
 6 appropriate timing for conducting a useful mediation and expect to advise the court on the result
 7 of those discussions at the initial case management conference on May 8, 2006.
 8

9 DISCLOSURES

10 **10. The parties certify that they have made the following disclosures:**

11 The parties have not yet made any disclosures. The parties will complete their initial
 12 disclosures pursuant to Fed. R. Civ. P. 26(a)(1) at the same time that Burst makes its disclosures
 13 under Patent L.R. 3-2 on May 22, 2006.
 14

15 DISCOVERY AND PRETRIAL SCHEDULE

16 **11. The parties agree to the following discovery plan and pretrial schedule:**

17 DATE	EVENT
18 May 22, 2006	Parties comply with Rule 26(a)(1) initial disclosures
19 May 22, 2006	Burst serves PLR 3-1 disclosures
20 May 22, 2006	Burst produces documents specified in PLR 3-2
21 July 6, 2006	Apple serves PLR 3-3 disclosures
22 July 6, 2006	Apple produces documents specified in PLR 3-4
23 July 20, 2006	Parties exchange PLR 4-1(a) information on claim terms
24 August 9, 2006	Parties exchange preliminary claim constructions under PLR 4-2(a)
25 August 9, 2006	Parties provide preliminary identification of extrinsic evidence under PLR 4-2(b)
26 September 26, 2006	Parties file Joint Claim Construction and Prehearing Statement and comply with PLR 4-3, except with respect to disclosure of experts under 4-3(d)
27 October 13, 2006	Parties identify experts and serve expert reports, as required by PLR 4-3(d)
28 November 3, 2006	Deadline for completion of discovery relating to claim construction, including depositions of any witnesses (including experts) identified in the Joint Claim Construction and Prehearing Statement (PLR 4-4)

1 2 3 4	November 20, 2006	Burst files claim construction brief and supporting evidence (PLR 4-5(a))
5	December 8, 2006	Apple files responsive claim construction brief and supporting evidence (PLR 4-5(b))
6	December 22, 2006	Burst files reply brief and rebuttal evidence on claim construction (PLR 4-5(c))
7	First week of February 2007	Claim Construction Hearing

8 The parties have not reached agreement regarding the remainder of the discovery and
 9 pretrial schedule. Each party sets forth its position below and will present argument for its
 10 position at the initial case management conference. The points of disagreement and issues for
 11 the Court to address are (1) whether a fact discovery cut-off should precede the service of expert
 12 witness reports and expert discovery; (2) whether the Court should set a schedule for the
 13 discovery cut-off and other events following claim construction now, or, instead, wait to set that
 14 schedule at a status conference to be held after the Court issues its ruling on claim construction;
 15 and (3) the length of trial.

16
 17 Burst's position on these issues is as follows: (1) there should be a single discovery cut-
 18 off for both fact and expert discovery; in other words, the parties should be permitted to continue
 19 fact discovery after the agreed date for commencement of expert discovery; (2) the Court should
 20 set a complete case schedule now, with the understanding that the schedule may be revisited at a
 21 status conference held after the Court issues its ruling on claim construction; and (3) the length
 22 of trial can be estimated at 15 trial days. Burst specifically proposes the following schedule for
 23 the remaining case events to which the parties have not reached agreement:

24 25 26	April 20, 2007	Disclosure of expert witnesses, service of reports, and production of documents regarding expert testimony on issues as to which each party bears the burden of proof (FRCP 26(a)(2))
27 28	May 11, 2007	Deadline by which all witnesses identified on April 20 must be produced for deposition

1	May 25, 2007	Disclosure of expert witnesses, service of reports, and production of documents regarding expert testimony in response to disclosures served on April 20, 2007
2		
3	June 4, 2007	Deadline by which all witnesses identified on May 25 must be produced for deposition
4	June 4, 2007	Cut-off for all discovery
5	June 29, 2007	Deadline for dispositive motions
6	July 31, 2007	Due date for responses to dispositive motions
7	August 14, 2007	Due date for reply briefs in support of dispositive motions
8	October 15, 2007	File joint final pretrial conference statement and proposed order
9	October 15, 2007	Lodge exhibits and other trial material
10	October 15, 2007	Serve and file motions in limine
11		
12	October 15, 2007	Serve and file requests for voir dire questions, jury instruction, and verdict forms
13	October 15, 2007	Serve and file statements designating deposition excerpts, interrogatory answers, and responses to requests for admission to be used at trial
14	October 29, 2007	Deadline for serving objections to admission of exhibits and deposition testimony
15	November 9, 2007	Deadline for filing objections requiring action by the Court
16	November 2007	Final pretrial conference
17		
18	December 3, 2007	Trial begins

19

20 Apple's position on these issues is as follows: (1) the fact discovery cutoff should

21 precede the deadline for submitting initial expert reports by sufficient time to allow those reports

22 to be prepared based on all fact discovery; (2) the Court should set a case schedule for the events

23 following claim construction after the Court issues its ruling on claim construction; and (3) it is

24 not productive to estimate the length of trial at this point because there are 186 claims currently

25 at issue. Apple specifically proposes the following schedule for the remaining case events to

26 which the parties have not reached agreement. The proposed schedule below contains

27 substantially the same spacing between events as Burst's proposed schedule, but differs with

28

1 regard to the placement of the fact discovery cutoff and because it suggests making deadlines
2 relative to the issuance of the claim construction order:

3	Completion of fact discovery	100 days after claim construction ruling
4	Expert reports (burden of proof)	128 days after claim construction ruling (+4wks)
5	Deadline to produce b.o.p. experts for deposition	149 days after claim construction ruling (+3wks)
6	Expert reports (rebuttal)	163 days after claim construction ruling (+2wks)
7	Deadline to produce rebuttal experts for deposition	177 days after claim construction ruling (+2wks)
8		
9	Dispositive Motions	
10	- Motion filing cutoff	205 days after claim construction ruling (+4wks)
11	- Oppositions to motions due	233 days after claim construction ruling (+4wks)
12	- Replies due	247 days after claim construction ruling (+2wks)
13	- Hearing re: Dispositive Motions	Set by Court at post-claim construction CMC
14	Pretrial Conference	Set by Court at post-claim construction CMC (~100 days after close of dispositive motion briefing)
15	Trial	Set by Court at post-claim construction CMC (~130 days after close of dispositive motion briefing)
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22 Limitations on Discovery

23 In addition, the parties propose the following provisions regarding written and deposition
24 discovery:
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- 26 a. The parties will adhere to the numerical and temporal limits on deposition
27 discovery in Fed. R. Civ. P. 30, except that each side may identify one witness
28 whom it may depose for up to two days of seven hours each (thus giving each

1 party a total of eleven days of deposition). The parties reserve all rights to object
2 to particular depositions, including the right to object that the particular witness
3 chosen by the other side for the two-day deposition should not be deposed for two
4 days. The depositions of expert witnesses shall not count against the numerical
5 limitations of Fed. R. Civ. P. 30(a)(2).
6

7 b. Every seven hours or fraction thereof of deposition testimony pursuant to Fed. R.
8 Civ. P. 30(b)(6) shall count as one day of deposition testimony for purposes of
9 Fed. R. Civ. P. 30(a)(2).
10

11 c. The parties will adhere to the numerical limitations on interrogatories set forth in
12 Fed. R. Civ. P. 33(a).
13

14 TRIAL SCHEDULE

15 **12. The parties request a trial date as follows.**

16 The parties have not reached agreement on a proposed trial date. Burst requests that the
17 Court set a specific trial date of December 3, 2007, or as soon thereafter as the Court's calendar
18 permits. Burst further requests that once the Court issues its claim construction decision, it
19 schedule a status conference to occur soon thereafter, at which the Court and the parties may
20 address whether developments in the case necessitate a change in the trial setting or other
21 deadlines then in place.
22

23 Apple requests that the Court set a trial date at case management conference to be held
24 shortly after issuance of a claim construction ruling.

25 **13. The parties expect that the trial will last for the following number of days.**

26 The parties have not reached agreement on the expected length of trial. Based on the
27 experience of Burst's counsel in other patent cases, Burst estimates that the trial will last for 15
28

1 trial days. If developments in the case demonstrate that this estimate is either too long or too
2 short, a revision of the estimate can be discussed by the parties and the Court at the status
3 conference that Burst recommends in Paragraph 12 above. Apple believes that it is not
4 productive to estimate the length of trial at this point because there are 186 claims currently at
5 issue. Apple suggests that the parties present estimated trial lengths at a case management
6 conference to be held shortly after issuance of a claim construction ruling.
7

8
9 Dated: April 28, 2006

Respectfully submitted,

/s/

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CASE MANAGEMENT ORDER

The Case Management Statement and Proposed Order is hereby adopted by the Court as the Case Management Order for the case and the parties are ordered to comply with this Order.

Dated: _____

**THE HONORABLE MARILYN HALL PATEL
UNITED STATES DISTRICT JUDGE**

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CERTIFICATE OF SERVICE

I hereby certify that on the date written above, that I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system. The Court or the CM/ECF system will send notification of such filings to all CM/ECF participants. I further certify that a true and correct copy of this document was sent via U.S. first-class mail, postage pre-paid to all non-CM/ECF participants.

/s/ Floyd G. Short