Apple Inc. v. Samsung Electronics Co. Ltd. et al Doc. 1371

Exhibit B
(Filed Under Seal)

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

APPLE, INC.,)
)
Plaintiff)
)No. 11-CV-01846-LHK
vs.)
)
SAMSUNG ELECTRONICS, LTD.)
et al.,)
)
Defendants)
----------)

***
ATTORNEYS' EYES ONLY
PURSUANT TO THE PROTECTIVE ORDER
***

VIDEOTAPED DEPOSITION OF JANUSZ A. ORDOVER
New York, New York
Friday, April 27, 2012

Reported by:
THOMAS A. FERNICOLA, RPR
JOB NO. 49019

are other aspects to it. And the fact that they can go in and ask for an injunction and there is perhaps a probability they will obtain it, is something that is of a competitive concern, at least to me.

Certainly not necessarily to Dr. Teece. He doesn't think that there is anything wrong with asking for an injunction unless there are some competitive concerns that doing so triggers.

Q. Could you please turn to paragraph 24 of your report at page 12.

A. Okay.

Q. I'm sorry, it's actually the first bullet point on page 13.

A. "Samsung Conduct"?

Q. Correct.

A. Let me read that.

(Document Review.)

Yes.

Q. In your opinion, is the harm to downstream competition that Samsung might cause contingent upon it prevailing on its claims?

A. It says if Samsung were to prevail, that would harm downstream competition.

Q. So in the absence of Samsung prevailing on its claims, there would not be harm to downstream competition?

A. Yes. It's like, you know, attempted murder doesn't -- it's still bad news, but it's not the same thing as killing somebody.

Q. Well, sorry. I appreciate the editorializing, but just answer the questions clearly.

If Samsung doesn't prevail in its claims, then there is no harm to downstream competition; correct?

A. That is true within that limited issue that I'm addressing here. And, in particular, if Samsung does not prevail, it will be competing against Apple. Apple will be competing against Samsung. Consumers will be benefiting.

And sooner or later across all these many jurisdictions, a resolution of the dispute the dispute is going to come to some resolution -- the dispute is going to come to some resolution regarding the FRAND rate and all the other aspects of this litigation, yes.

Q. If Samsung does prevail, is it the

case that it's the court's action in enjoining Apple that causes the antitrust entry?

A. It would be hard to blame the court for causing an antitrust injury. The court makes a ruling in response to Samsung's request or demand for injunctive relief.

I am opposed to the whole concept of Samsung asking for injunctive relief, given its repeated FRAND commitments on these seven patents, the blanket commitment and then the individual FRAND commitments relating to each one of those seven patents made late but, nevertheless, they were made.

Q. Are you aware of any actual -- strike that.

Is it your opinion that Apple has sustained any actual injury to date -- strike that again.

Is it your opinion that Apple has sustained antitrust injury to date?

MS. MILLER: Objection.

A. I think that "antitrust injury" is a term of art. It certainly sustained certain harm due to the needs to defend itself across a broad range of jurisdictions, that is no doubt

significant cost.

So that's a harm to Apple. It has yet to harm competition because Apple, at this point, can pay the bills. It does not have to necessarily cut back on its R&D. So we are lucky that that's the -- that they are the target as opposed to some other company which may have a lesser ability to survive the multi-jurisdictional litigation that Samsung has rolled out in this particular situation.

So someone else may actually have -- be forced to exit, and such exit may, in fact, harm competition and, therefore, be an antitrust injury.

Q. But -- so the only injury you're aware of Apple sustaining to this point is incurring litigation costs; correct?

A. No. I believe that they are also incurring additional costs, such as the time of the management that's being diverted perhaps from other matters that they should be paying attention to. It's a competitive environment. It's a highly -- it's a quickly moving marketplace and, clearly, there's been a lot of time and energy spent at Apple trying to

I just have a couple of questions for Dr. Ordover.

(A Discussion was Held off the Record.)

EXAMINATION BY MS. MILLER:

Q. Dr. Ordover, I'd like you to assume for purposes of this question that Apple is correct in its claim that Samsung misrepresented its willingness to offer FRAND licenses. Okay?

A. Okay.

Q. Assuming this to be true, did this conduct have any anti-competitive effect in any of the upstream technology markets that you define in your report?

MR. WALL: Objection to the form.

A. To the extent that that conduct caused ETSI working groups to standardize on Samsung technologies as opposed to on some other alternative technologies, that would, in my view, constitute harm in the upstream technology market.

There was an exclusion flowing from the alleged misconduct, assuming that Apple is

correct.

MS. MILLER: I have no further questions.

FURTHER EXAMINATION BY MR. WALL:

BY MR. WALL:

Q. To follow up on that question, are you aware of whether any of Samsung's conduct actually caused ETSI working groups to standardize Samsung's technology as opposed to another technology?

MS. MILLER: Objection.

A. Well, it's my understanding from reading the technical expert's reports that there were alternatives available at the time the standard was being formulated; and, therefore, insofar as Samsung engaged in conduct that -- no.

Had, as per Apple, Samsung engaged in the clear, clear disclosure of the fact that it's not going to -- to support its -- or not stick to its FRAND obligations and, in fact, act contrary to the FRAND objectives that it plausibly follows, that these other technologies at least would have been

1 considered and possibly chosen.
2 Q. Do you have any empirical evidence to
3 suggest that in the event that Samsung's FRAND
4 declarations -- strike that.
5 MR. WALL: I have no further
6 questions.
7 MS. MILLER: I have one more.
8
9 FURTHER EXAMINATION BY MS. MILLER:
10 Q. Dr. Ordover, do you know of any rules
11 within the ETSI IPR policy that would govern an
12 instance where a party did not provide a FRAND
13 license or where a party said clearly that it
14 was not going to give a FRAND license?
15 A. Well, to the best of my recollection,
16 the ETSI rules would prohibit that firm's
17 technology to be included in the standard.
18 And, therefore, some other technologies would
19 have to be included or that particular feature
20 would have been dropped.
21 MS. MILLER: I have no further
22 questions.
23 MR. WALL: No further questions.
24 THE VIDEOGRAPHER: That concludes the
25 video record for today. The time is now