IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

SPRINT COMMUNICATIONS COMPANY, LP,

Plaintiff,

vs. Case No. 05-2433

VONAGE HOLDING CORPORATION,

Defendant.

TRANSCRIPT OF TELEPHONE PROCEEDINGS
before
HONORABLE JOHN W. LUNGSTRUM
on
JULY 20, 2007

APPEARANCES

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MR. WEBB: The court calls Case No. 05-2433, Sprint Communications Company L.P. versus Vonage Holding Corporation and others. Would the parties state their appearances, beginning with counsel for the plaintiff.

MR. WEBB: Trent Webb, Eric Buresh, and Adam Seitz at Shook, Hardy & Bacon for the plaintiff.

THE COURT: Thank you. For the defendants?

MR. GOLOB: Barry Golob, and I have Pat McFerson and Don McPhail here in Washington, and Lauren DeBruicker in Philadelphia, and I believe that we have Mr. Lolli and Mr. Campbell on the phone as well.

MR. LOLLI: Yes, Judge. Don Lolli in Kansas City.

MR. CAMPBELL: Terry Campbell in Lawrence, your Honor.

THE COURT: Welcome to you all today. I asked to have this telephone conference really in response to the e-mail communications that I received concerning the defendant's perceptions of some problems in processing this case and readying it for trial. I would say as a matter of just an aside under all of the circumstances here I really don't have any strong problem with this issue having been

presented to me this way because it really was going to necessitate a phone conference, so I don't object to your simply notifying me that you had this issue, obviously. However, where formal relief is sought, the appropriate vehicle is a motion. This isn't a motion; this is simply a request to talk about this and to see whether there's something that might be done to accommodate people's concerns, but I want to make that clear, that where formal action is requested and where formal rulings are to be expected there probably needs to be a motion of some kind made.

In any event, I've reviewed the e-mail traffic I've received, and I'll be happy to hear from counsel at this time.

MR. WEBB: Your Honor, this is Barry Golob for Vonage. As the court may recall, we had a conference call May 14, and the court inquired about Markman at that time. Both parties informed the court that Markman would be handled through the vehicle of summary judgment; however, Vonage was concerned about the number of patents and the number of claims in issue and that we could not address all of the claim terms in our summary judgment brief with the page limits that were presently available to us.

The court may also recall you gave us ten extra pages to try to do that, but we also informed you that we didn't think that that was going to make it. Then we went through and had summary judgment briefs filed, and Vonage filed summary judgment addressing some of the claim terms in the page limitations that we had, but Sprint filed with no Markman-type issues contained in their brief.

Since that time the parties have been attempting to cooperate in an effort to come up with a way to do this. As the court may appreciate, we were aware of the timeliness problem, and we were negotiating on trying to work out some process, but as you can see from the letters, Sprint's counsel still believes that this request is premature, but nevertheless, given the situation where we have 61 claims in issue, of which Sprint hasn't reduced their claim numbers yet -- and we have other outstanding issues. We have claim terms that are going to need to be construed by the court. In addition to that, we just received, about four weeks ago, some documents that we have been asking for for about six months that we were told don't exist. These documents actually have Vonage mentioned specifically in them and have a direct bearing on the case. As the court may recall,

those documents are the subject of our 56(g) motion in our summary judgment along with our request that we need reconsideration of Judge Waxse's order denying us the ability to have these extra affirmative defenses or evidence relating thereto. We're going to need additional discovery because those document are not complete. We're also going to need depositions relating to those documents that were received.

THE COURT: This is all way beyond what you've presented to me in your e-mail.

MR. GOLOB: This little part is, yes, your Honor.

THE COURT: Well, then, why are you raising this to me?

MR. GOLOB: I'm just trying to put it all in context. I can stick straight to the Markman.

THE COURT: That would be good.

MR. GOLOB: Basically, we need to have a process in place to deal with the terms that were not the subject of the summary judgment motion. We have exchanged terms; we are in the process of exchanging definitions; and that is basically where we are.

MR. WEBB: Barry, can I jump in here?

Briefly, your Honor -- this is Trent Webb at

Shook, Hardy. The Federal Circuit has held that the court is only to construe the terms in controversy to the extent it is necessary to resolve the controversy. It is fine to move for summary judgment on every claim for noninfringement. In their motions they addressed the terms they believed were necessary to resolve the controversy. Under federal law that's all the court needs to do to dispatch its obligations under Markman. That case, if you want a case cite, that's Vivid Technologies versus American Science & Engineering, 200 F.3d 795; pinpoint cite would be 803.

The Federal Circuit also has held there is no requirement that you hold a Markman hearing. As a matter of fact, the court has said, as long as the trial court construes the claims to the extent necessary to determine whether the accused device infringes, the court may approach its claim construction task in any way that it deems best. And that's the Ballard Medical Products case versus Allegiance Healthcare Corp., and you can find that at 268 F.3d 1353; pinpoint cite, 1358.

Courts across this country, your Honor, do not hold Markman hearings. Oftentimes they find it to be unnecessary. As a matter of fact, we have cases

pending in our office where we have cases where there are no Markman hearings and the parties are progressing perfectly fine, which brings me back to this case.

In December of '05 the parties got on the phone, agreed that it was not necessary to hold a Markman hearing. At that time also seven patents were involved in the case. We told Vonage at the time to assume that every claim would be asserted, and the parties agreed it was not necessary to have a Markman hearing.

In December of '06 the parties moved jointly, moved for a three-month extension of discovery. At that time the possibility of a Markman hearing could have been raised by anyone. It was not.

The pretrial order which was filed in this case, the parties could have raised the possibility of a need for a supplemental claim construction exercise, but no one did.

May 14 there was a conference call with your Honor, at which time the parties agreed a Markman procedure was again not necessary.

The following day the parties moved for summary judgment. That was May 15, yet Vonage waited until July 13 to tee this up with your Honor. In fact,

this may be a complex case, as is often the case with patent cases. Your Honor is aware of that. The fact that the page limitation may have restricted Vonage's ability to address every claim it thought necessary is immaterial. The day this case was filed, there was a 30-page limitation. Despite that clear rule, Vonage did not request Markman at the time. In fact, your Honor gave Vonage an additional ten pages at that time in connection with their request to extend the page limitation. They didn't mention the need for another Markman hearing. Sprint's motion covered defenses that Vonage has raised that Sprint believed are not founded in the law. We're under no obligation to move for claim construction. The fact that Vonage is disappointed we didn't is not really material. The fact is, this is an attempt by Vonage to move the trial. A few months ago they filed a motion to extend trial by six months. Your Honor rejected that and held fast to the trial setting on September 4. Vonage moved to add a defense of implied license. In that motion they suggested that trial would have to be moved. We obviously opposed that. What is happening, your Honor, is they want to have a Markman hearing during the week this trial was scheduled and that trial should be postponed until

four weeks after your Honor makes a ruling on claim construction, and we submit that is just entirely improper. This court is known for keeping to its trial settings and holding fast to its schedules. Typically in this court cases go to trial within 18 to 19 months. This trial setting is 23 months after the filing of the case. There's no need to move the trial. We can handle every one of these claim issues in the context of jury instructions. We have exchanged terms that the parties believe need construction. Sprint would suggest, every term you need to construe, you can do that in a summary judgment motions. At most there may be an additional three or four terms that may require construction. Vonage has submitted 50 terms for construction, including such terms as "generate, external, in response, select, couple, user communication," things that -- your Honor, these don't require construction at all. The critical issue is not whether Vonage wants them to be construed; the issue is what terms need to be construed for the court to do its job in assessing infringement or for the jury to do its job in ultimately assessing infringement. The parties agreed from day one that could be done through jury instructions. This is a patent case. Your Honor is

well versed in handling jury instructions. It's just another instruction. Our view is, and always has been, that claim construction is not necessary separate and apart from jury instructions. We can easily do this under the schedule we currently have. If your Honor wants additional time for jury instructions, we're willing to move those up. What we're willing to do is to move this trial one day. Our client, our witnesses have all made arrangements to be at this trial, and we're ready to go.

MR. GOLOB: May I respond, your Honor?

THE COURT: You may.

MR. GOLOB: I think there's a fundamental disconnect here. We never agreed not to have a Markman hearing. We agreed to have Markman done in conjunction with summary judgment, and we never agreed that the terms that were -- there's no possibility that somebody could move for summary judgment and put every term in with a 30-page limit.

For Mr. Webb to say we didn't agree to a Markman is really quite disingenuous. We agreed Markman would be handled through summary judgment. As the court knows, this court is very familiar with patent cases, as Mr. Webb said, and the court has had many Markman hearings, rulings, and so forth. And given

61 claims, it seems that Mr. Webb is saying if the word is a simple word it doesn't need to be construed. But it's being construed in light of the rest of the words in the claim. And, you know, if they have an ordinary meaning, tell us what the ordinary meaning is. If we agree, that will be less terms the court needs to construe. But just because they think it has an ordinary meaning doesn't mean that it doesn't need to be construed by the court.

And also we're a little bit offended by the fact that he says we waited until July 13. We have been talking to them since the summary judgment to try to work out a process, and they have consistently said, this is premature, as they said in their letter, so the problem is, the reason we wrote the letter was because we need a process to handle the claims that were not part of the summary judgment motion in conjunction with summary judgment so that we can do it all at one time as a Markman process in conjunction with summary judgment.

MR. WEBB: Your Honor, this is Trent Webb.

THE COURT: I've heard all I need to hear.

MR. WEBB: Thank you, your Honor.

THE COURT: We are not moving the trial date. I think the defendant made a bad decision to

have agreed to begin with to the particular procedure that you did. Frankly, I agree with Mr. Webb that you don't need to have a Markman hearing, and I believe, in fact, we will be able to deal with claim construction during the course of the trial, as cumbersome and time consuming as that might be for me, and for you, and for those reasons, had I been working with you on this case, I might have encouraged you to approach this a different way. But experienced counsel on both sides decided long ago that the appropriate process was the one that you agreed to here. That is, to the extent that claim construction issues were going to raised, they would be brought to the court's attention through the summary judgment process. I did question that on May 14, and you all indicated to me at that time that you felt you could go ahead and take care of it that way.

Now, I want to address this page-limit issue. I think that is a total red herring because I've reviewed, frankly, the defendant's briefs, and probably if you had had 20 more pages you wouldn't have helped yourself much more than you have in what you've already submitted, but you were on notice from the time this case was filed and from the scheduling

process in this case that there was a page limitation on summary judgment motions. That should have been something you factored into your thought process when you decided that you were willing to forego some more traditional approach to claims construction. When you presented that issue to me on the telephone, I offered you the extra pages. In fact, quoting from the transcript, I said, "If I gave you 40 pages, would you be able to address it?" meaning the claims issues.

Mr. Golob's response was, "I think at this point, your Honor, we would be happy with what we could get."

My response was, "That's what you can get."

Counsel for the defendant did not say, no, we cannot address those issues with ten more pages. Obviously, you could have said that. You could have kept my feet to the fire if you thought that was really a problem. Moreover, those motions were filed the next day. At that point in time defendants knew that plaintiffs hadn't moved for summary judgment for issues that would invoke some of the claims construction issues that the defendants wanted to come to grips with. Whether or not you addressed those issues among yourselves, I don't get any

communication that there's any difficulty with regard to the defendant's perspective on this case until virtually two months after those motions have been filed, when they are virtually at issue and I'm getting ready to rule on things. The defendants waited until the last minute to tumble to the problems they thought might exist with regard to the page limit. They waited until the last minute, until they tumbled to the issue they wanted to raise to the court. And, frankly, I think this is purely -- the inference I draw is a tactic to delay the trial of this case. This trial will not be delayed. If you don't think you're in a position to handle this case based on the schedule we have, perhaps you ought to devote some time to trying to get it settled, but we're not going to move this trial because you perceive that the process has not worked out the way you thought it should based upon the conscious decisions you made, being fully informed from the very beginning of this case. I've seen nothing presented to me that causes me to have any inclination to do anything further in this case other than to encourage you to try to narrow the scope of the disputes you have with regard to claim terms to facilitate their construction in connection with jury

instructions at trial.

Are there any further questions? Hearing none, thank you for your appearances.

MR. GOLOB: Your Honor, is there going to be a procedure in place to handle the claim terms that have not been addressed at summary judgment?

THE COURT: If you have issues to be raised at the instruction conference before the jury is instructed, we will certainly tell you what the answers are going to be. You're going to have to get them to my attention through proposed instructions so that I am aware that you have an issue you want an instruction on, including a claims construction, and we will take them up in connection with the instructions in the case.

MR. CAMPBELL: Your Honor, would the court be willing to entertain claim construction issues in trial briefs as well?

THE COURT: I would be willing to entertain anything you want to put in a trial brief to be able to support what your rationale is for a particular requested jury instruction. Anything else?

MR. WEBB: Nothing from plaintiff, your Honor.

THE COURT: All right. Then we are in

recess.

(Court was adjourned.)

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CERTIFICATE

STATE OF KANSAS |
| ss
COUNTY OF JOHNSON |

I, Rebecca Ryder, RMR, CRR, a Certified Shorthand Reporter and official reporter for the United States District Court, District of Kansas, do hereby certify that as such official reporter I was present at and reported in machine shorthand the above and foregoing proceedings.

I further certify that a transcript of my shorthand notes was prepared and that the foregoing transcript is a true and correct transcript of my notes in said case to the best of my knowledge and ability.

S/REBECCA S. RYDER
REBECCA S. RYDER, RMR, CRR