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January 31, 2011

VIA ECF - REDACTED

The Honorable Jeanne J. Graham
United States District Court For
The District of Minnesota
342 Federal Building
316 North Robert Street
St. Paul, MN 55101

Re: *Timebase v. Thomson* 07-cv-1687

Dear Judge Graham:

This is TimeBase's redacted letter pursuant to the Court's order of January 27.

TimeBase told the defendants last week that it would not object to a two to three-week change in the dates for expert reports. Based on news over the weekend, there is likely to be a blizzard of historic proportions in the Midwest, beginning Tuesday. (See http://www.weather.com as of Monday morning). The Chicago Tribune has reported the storm will have high winds and that travel will be dangerous. TimeBase's experts will probably be unable to travel to complete their reports this week. TimeBase's damages expert is still at a trial in Detroit. For those reasons, TimeBase recommends that the due date for expert reports be extended to February 28.

The Court's order of August 3, 2010 (document 166) altered dates where the parties agreed. The dates that were not changed were those for dispositive motions (February 4, 2011) and the trial-ready date (June, 2011). The defendants sought to change both of them in the joint motion (Document 164), and TimeBase opposed. The Court declined to change those dates. (Document 166, page 2). TimeBase remains opposed to changing the trial-ready date, or to postponing summary judgment motions to a date after the expert depositions occur.

The dispositive motion date: It should remain the same, or should be relaxed only slightly. In any event, dispositive motions currently precede expert discovery and should remain so.

The defendants' prior art list includes about one hundred twelve documents or web sites. Their general reference list includes forty-four more. They also listed the art cited in the prosecution of the patents, and in the reexamination; that adds about two hundred more. Their "motivation to combine" statement says that the claims are invalid in view of the references cited in their various charts, or in view of combinations of all those references. They have not particularly specified the combinations for obviousness, or which ones anticipate.

For a pool of one hundred references, there are 161,200 different possible combinations of three of the references.[1] That would allow an expert to be questioned for about 0.003 minutes (0.18 seconds) for each combination. For 200 references, there are over 1,300,000 combinations of three. Obviously the questioner must "choose wisely," or bear the painful consequence.

But, if TimeBase has the defendants' dispositive validity motion (or motions) first, it can pick out which trees in the defendants' rather large forest really require a close look. The Federal Rules are about disclosing, rather than obscuring, a party's facts and contentions, allowing each side to prepare accordingly. There is a point at which the defendants' tactics have to give way to the goal of a just result. That is why Fed.R.Civ.P. 1 says the rules are meant "to secure the just, speedy, and inexpensive determination of every action and proceeding."

Thus, the dispositive motions are correctly due before expert depositions, and that should not change.

The defendants may comment about the number of claims asserted, TimeBase has two observations. First, the defendants claimed at the Markman hearing last September that all of the claims of both patents had limitations in common. Thus, the number of claims should not be a burden. Second, most of the claims are dependent claims; as narrower claims, they can better survive the defendants' many prior art references.

The trial-ready date: The defendants asked last July that it be delayed by two months. (Document 164, page 6). They now ask that it be delayed by five months, to November, 2011. (Document 220, page 2). Their letter to Judge Ericksen does not provide reasons for the delay, and the defendants' email last week provided none to us.

TimeBase does have reasons why the current trial-ready date should not change. Delay steadily, irreversibly increases the prejudice to TimeBase. The pendency of the litigation frustrates licensing. The patents are wasting assets.

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[1] See *Fundamental Algorithms: The Art of Computer Programming,* 2d ed., Donald E. Knuth, Addison Wesley Publishing Co., Reading, Massachusetts, 1973, at p. 51.

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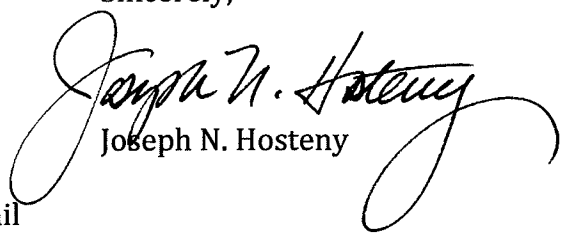
The exchange rate has also adversely affected TimeBase. For example, a U.S. dollar in damages would at point have yielded $1.40 Australian dollars. Now, however, it will yield only $0.99 Australian dollars.

The case was delayed for two years due to the reexamination of the '592. The defendants moved for stays, arguing that the issue of validity could be resolved in far less time, and at far less cost, than in litigation. They argued that the Court and parties could take advantage of the Patent Office's expertise. Those benefits have not been realized. Rather, the defendants continue to assert and rely upon even those prior art references explicitly discussed by the examiner during the reexamination. Time has been and will be wasted, not saved.

TimeBase therefore requests that the export reports be postponed by three weeks, to February 28; that dispositive motions be due at least two weeks before expert depositions occur; and that the trial-ready date not be changed.

Sincerely,



Joseph N. Hosteny

cc: Counsel of Record via ECF and email