UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO
LAS CRUCES DIVISION

STC.UNM,

Plaintiff,

v.

INTEL CORPORATION

Defendant.

Civil No. 1:10-cv-01077-RB-WDS

PLAINTIFF'S REPLY BRIEF ON MOTION FOR BIFURCATION AND EARLY TRIAL ON DAMAGES

On the very day that STC.UNM filed this motion, the Chief Judge of the Court of Appeals for the Federal Circuit, in addressing a judicial conference, implored judges in patent cases "to take the initiative to improve patent procedure by intervening ourselves to get a realistic valuation of the case much earlier." Ex. E, at 16. Judge Radar explained that the improvement can be achieved by altering case procedure:

> The parties also benefit from early damages discussions and disclosures because it can provide a realistic evaluation of both Defendant's exposure and Plaintiff's damages calculation and further promote early and effective mediation. . . . With an understanding of the case's true worth, the trial judge would then be poised to identify cases that would benefit from ***tailoring the standard procedures to fit the case*** and its significance. In colloquial terms, the court may adjust timing and procedures . . .

Id. at 15 (emphasis added). Judge Radar added that "settlement, by and large, is essential to the success of the US system of dispute resolution. Without settlements, the system would collapse under its own weight." *Id.* at 20.

The most "realistic valuation of the case" can be had by bifurcating damages and obtaining a verdict that informs the parties and the mediator exactly what is at stake.

Intel tells us that this procedure is unprecedented in patent cases, which is precisely Judge Radar's point - judges must "take the initiative" in adopting procedures like that proposed by STC.UNM to "get a realistic valuation of the case."

Intel does not contest the parties' uncertainty as to the value of this case. Nor does Intel deny that the mandatory mediation will be severely hindered by the lack of any solid information as to the true value of this case.

Avoiding these facts, Intel insists that it is so sure that it will win this case that nothing will be gained by a damage trial. But it actions belie its asserted certainty. A confident suitor would have presented its "robust defenses" to STC.UNM years ago to resolve the matter amicably short of litigation. That is not what happened. For two and a half years prior to filing this lawsuit, STC.UNM tried to engage Intel in licensing talks, but Intel refused to discuss the matter, and it never provided any substantive reason for its refusal. The only action it took was to try to pressure STC.UNM and University of New Mexico Directors and Regents to drop the matter; again, without setting forth any substantive basis. Intel's Answer to the Complaint further belies its present assertions. If Intel were as confident in its defenses as it now asserts, it would not need, or want, to plead virtually every defense known under the patent law, and it would not have relied on a stack of "prior art" technical references that measures three feet high (*See* Main Br. 3-5). As it stands, even now, a year after this case was filed, Intel has not identified its "robust defenses," buried as they are in its exhaustive list of defenses.

Intel's lawyers also contend that Intel's reputation would somehow suffer if a damage verdict were rendered. But they give no suggestion as to how or why this would happen. Intel's reputation and "we won't settle" pleas are undermined by its actions. Last January,

on the eve of a trial with a large semiconductor company, after vigorously denying infringement, Intel settled, paying $1.5 billion for a patent license. This followed a similar settlement, again on the eve of trial after denying infringement, with the University of Wisconsin where Intel agreed to pay an undisclosed amount for a patent license. Ex. F [collected articles].

I. This Court Has the Discretion to Grant the Motion

Intel does not dispute that this Court has the power to bifurcate damages for an early trial, as confirmed by the Tenth Circuit in *Angelo v. Armstrong*. Intel tries to distinguish *Angelo* by asserting (at 3) that the "defendant did not object to the procedure." Of course the defendant did not object, it made the motion. 11 F.3d at 964. Plaintiff objected.

II. A Bifurcated Damage Trial Will Save Time and Money

It cannot be denied that an early determination of damages in this case will arm the parties with an exact knowledge of the dollars at stake. From there, simple arithmetic (multiplying that dollar number by the estimated chance of winning or losing) will provide each of the parties with a well-informed settlement number or range of numbers. Intel's response is that its chance of losing is zero, hence, it will not settle. Of course, that is a typical posture for a defendant – until it settles.

Intel cites two cases said to support its position. Neither is helpful. First, in *Nye v. Ingersoll Rand*, a New Jersey case designated as "not for publication," the entire case was ready for trial. Thus, bifurcating damages made little sense, given that the liability trial would have immediately followed the damage trial. 2011 U.S. Dist. LEXIS 101375, at *8 (D. N.J. Sept. 8, 2011). Additionally, in *Nye*, the party moving for bifurcation had earlier argued against bifurcation, a position reversal that is absent here. *Id.*, at *12-13. The

Court in *Nye* had also found a likely substantial overlap in evidence which is also absent here (discussed below). *Id.*, at *14-15. The second case Intel cites, *Village of Stillwater v. Gen. Elec. Co.*, is a Hudson River pollution case, where the court cited five separate reasons for denying bifurcation, including that "GE's proposal is actually not merely bifurcation but trifurcation." 2010 U.S. Dist. LEXIS 109028, at *13 (N.D.N.Y. Oct. 12, 2010).

Intel states that STC.UNM is asking for a stay of all discovery and motion practice (at 1) —— But STC.UNM is not. In short, an early damage trial would facilitate resolution of this case and could save the parties millions of dollars, save the courts endless hours of effort, and save a jury from a prolonged liability trial.

III. There is No Overlap of the Evidence Regarding Damages and Liability

Intel suggests (at 5-7) that there will be significant overlap in the evidence presented in a damage trial and liability trial. However, it cites only two specifics, and neither supports its claim. First, it contends that a potential damage issue (the "utility and advantages" of the patented invention compared with "the old modes") will overlap with a liability issue ("obviousness" over the "prior art"). Here, that potential damage issue will not be an issue, because the evidence will show that Intel could not have made the accused products without using the patented technology; in making the accused products it simply did not have an option of using "the old modes."[1] Second, Intel contends that

[1] In any event, Intel's argument is specious. Examining the "utility and advance" of the subject invention would not require the detailed comparison of STC.UNM's patent to the "extensive amount of prior art" identified by Intel. *See* Opp. at 6. Rather, this factor requires only examining the benefits which the invention conferred upon the licensee, *i.e.*, the benefit conferred upon Intel for adopting the patented technology. *See, e.g.*, *Standard Mfg. Co. v. United States*, 42 Fed. Cl. 748, 770 (1999).

sales information is relevant to both damages and liability. Here, the sales will likely not be in dispute, as the numbers, which have already been produced by Intel, will likely be stipulated. In short, save for this one undisputed piece of paper, there will not be any overlap.[2]

IV. There Will Not be any Prejudice to Intel

Intel tries to paint a picture of a confused jury. It first argues that, because there are different accused products, there "would be numerous permutations of potential liability." That is not true. All three products are made using the same infringing process. Next, it contends that there will confusion about the date of first infringement, but that will be a straightforward determination based Intel's records, and will most likely be stipulated: "We cannot think of an instance in a patent action where the damage issue . . . cannot be submitted to the jury independently of the others." *Landmark Graphics Corp. v. Seismic Micro Tech., Inc.*, 2006 U.S. Dist. LEXIS 77664, at *4-5 (S.D. Tex. Oct. 25, 2006).

Here, the damage trial will largely come down to the competing views of two damage experts, working from undisputed sales numbers. There is no reason to believe that it will take more than one or two days.

V. Conclusion

The motion to bifurcate damages from liability for an early trial, prior to the mandatory settlement conference, solely on the issue of damages should be granted.

[2] STC.UNM further notes that the 10th Circuit affirmed, in *Angelo*, the use of two separate juries in the reverse bifurcation procedure adopted by the lower court. *Angelo*, 11 F.3d, at 965, n. 6.

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Respectfully submitted,

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CERTIFICATE OF SERVICE: The undersigned certifies that on the 24th day of October, 2011 the foregoing was filed electronically through the CM/ECF system, which caused all parties or counsel to be served by electronic means.

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