IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

COLLEGENET, INC., a Delaware corporation, Plaintiff, v. APPLYYOURSELF, INC., a Delaware corporation, Defendant.	)	Nos. CV-02-484-HU (LEAD CASE) CV-02-1359-HU OPINION & ORDER

John D. Vandenberg
Michael N. Zachary
Scott E. Davis
KLARQUIST SPARKMAN, LLP
121 S.W. Salmon Street, Suite 1600
Portland, Oregon 97204

Attorneys for Plaintiff

Kathleen C. Bricken
GARVEY SCHUBERT BARER
121 S.W. Morrison Street
Portland, Oregon 97204-3141

J. Michael Jakes
Robert F. Shaffer
FINNEGAN HENDERSON FARABOW GARRETT & DUNNER, LLP
901 New York Avenue, N.W.
Washington, D.C. 20001

Attorneys for Defendant

Christopher J. Lewis
SCHWABE WILLIAMSON & WYATT, PC
1211 S.W. Fifth Avenue
Portland, Oregon 97204

Steven E. Tiller
Leland C. Moore, Jr.
WHITEFORD, TAYLOR & PRESTON, LLP
7 Saint Paul Street
Baltimore, Maryland 21202

Attorneys for ApplicationsOnline, LLC & The Common Application, Inc.

HUBEL, Magistrate Judge:

These consolidated cases involve two patents relating to an on-line application system. Case number CV-02-484-HU concerns plaintiff's patent number 6,345,278 ("the '278 patent"). Case number CV-02-1359-HU concerns plaintiff's patent number 6,460,042 ("the '042 patent").

On October 28, 2008, I granted defendant ApplyYourself's motion for summary judgment on the issue of collateral estoppel (dkt #697). Based on a jury verdict and Judgment in a case pending before Judge Brown, CollegeNET, Inc. v. XAP Corp., No. CV-03-1229-BR (hereinafter "the XAP case" or "Judge Brown's case"), which invalidated several claims of the '042 patent for obviousness, I concluded that the remaining claims of the '042 patent were invalid under the doctrine of collateral estoppel. I adhered to this conclusion upon reconsideration in a February 26, 2009 Order (dkt #712).

Following the entry of the October 28, 2008 summary judgment Opinion & Order, and the February 26, 2009 Order on reconsideration, the parties entered settlement negotiations. In March 2009, the parties reported to the Court that the case had settled. On April 21, 2009, they filed a proposed Consent Decree

(dkt #720).

ApplicationsOnline, LLC and The Common Application (collectively, "AOL"), move to intervene in the case in order to oppose the entry of the parties' proposed Consent Judgment. I deny AOL's motion.[1]

The proposed Consent Decree reads as follows:

> Based on the parties having advised the Court that they have reached a Settlement Agreement, which calls for the entry of this Consent Judgment, and the consent of the parties to entry of the following judgment;
>
> IT IS HEREBY ORDERED that FINAL JUDGMENT is entered as follows:
>
> 1. Paragraphs 1-14 of the judgment of the Court entered in this matter on October 15, 2003, [Dkt. No. 356] are incorporated herein and the Court retains jurisdiction to enforce the terms of the injunction relating to United States Patent No. 6,345,278.
>
> 2. The claims of United States Patent No. 6,460,042 are not invalid and not unenforceable.
>
> 3. All remaining claims and counterclaims asserted herein are dismissed with prejudice, with each party bearing its own costs and attorney's fees.

Proposed Consent Judgment at p. 2.

AOL opposes paragraph 2 of the proposed Consent Decree. It is no secret that AOL seeks to use the October 28, 2008 summary judgment opinion invalidating several claims of the '042 patent, against plaintiff in the separate case plaintiff has brought against AOL and which is pending before Judge Brown. CollegeNET v. ApplicationsOnline, LLC, No. CV-05-1255-BR. AOL argues that the October 28, 2008 summary judgment opinion will have preclusive effect in plaintiff's case against AOL and thus, AOL seeks to

[1] I deny AOL's request for oral argument because I conclude it would not be helpful to the Court.

preserve it. AOL opposes the proposed Consent Decree because in AOL's opinion, it eviscerates the ruling in the October 28, 2008 summary judgment Opinion.

AOL's motion to intervene is premised on its construing the proposed Consent Decree as a motion to vacate under Federal Rule of Civil Procedure 60(b). According to AOL, the relevant law frowns upon vacating the effect of an earlier decision where the sole basis for seeking such relief is the voluntary settlement of the dispute. AOL argues that with the proposed Consent Judgment, plaintiff seeks to vacate, under Rule 60(b), or nullify, the October 28, 2008 summary judgment opinion because the proposed Consent Judgment directly contradicts this Court's findings. AOL contends that entering the Consent Judgment would allow plaintiff to wrongfully rely on the "last in time" rule regarding inconsistent judgments and would unfairly allow plaintiff to create inconsistent judgments by consent.

There are several problems with AOL's arguments. First, the cases AOL relies on regarding the impropriety of vacating a final judgment as a condition of settlement, involve final, appealable judgments and are distinguishable. Second, the "last in time" rule provides that the last judgment in time controls for res judicata purposes. The last Judgment in this case was entered in October 2003 and there is nothing in the proposed Consent Decree that is inconsistent with that Judgment. Additionally, AOL acknowledges its position that a Consent Decree is not an adjudication of the merits and thus, does not create an inconsistent judgment for the purposes of res judicata. AOL Memo. at p. 3 n.3. Thus, even if the October 28, 2008 summary judgment Opinion is viewed as a final

judgment, a view this Court does not share, for the "last in time" rule, AOL itself asserts that the proposed Consent Decree should not be considered an inconsistent final judgment.

Third, I acknowledge that Rule 60(b) applies to orders as well as final judgments. Nonetheless, I do not view the proposed Consent Decree as equivalent to a Rule 60(b) motion to vacate the October 28, 2008 summary judgment Opinion. That opinion was not a final judgment and it was clear that it was not a final resolution of the consolidated cases. See United States v. Lummi Indian Tribe, 235 F.3d 443, 448 (9th Cir. 2000) (holding, in question regarding appellate jurisdiction, that district court's summary judgment order, which left no issues to be resolved, was not final where no final judgment was entered, and the parties continued to litigate after the plaintiff filed an amended pleading); see also Fed. R. Civ. P. 58(a)(1) ("Every judgment and amended judgment must be set forth on a separate document. . . ."); Nat'l Distrib. Agency v. Nationwide Mut. Ins. Co., 117 F.3d 432, 433 (9th Cir. 1997) ("Had the court entered a separate final judgment subsequent to the dismissal order, we would be confident that the court intended no further action in the case"). Given that the October 28, 2008 summary judgment Opinion was subject to continued litigation, and that subsequent litigation and then settlement negotiations were contemplated and occurred, I decline to adopt AOL's position that the proposed Consent Decree can be reasonably considered the equivalent of a Rule 60(b) motion to set aside a final judgment or order.

At a November 6, 2008 telephone hearing, I raised the issue of a final judgment with the parties. I fully expected more

litigation on the issue of the form and content of an amended final judgment. At that hearing, plaintiff asked to delay discussion of an amended final judgment because it planned to seek reconsideration of the October 28, 2008 summary judgment opinion. I allowed plaintiff to file a reconsideration motion which I ruled on in February 2009. Notably thereafter, I also delayed entry of final judgment in February 2009 at the request of the parties to this case to allow them time to negotiate a settlement which was contemplated to potentially include any and all appeal rights of any party in this case, with respect to any ruling by the Court.

The parties in this case then reached such a settlement before AOL moved to intervene. What AOL has, at most, is an "evanescent hope" that the rulings of this Court will ripen into a final judgment which could then be appealed and which AOL hopes will be upheld on appeal. But, the value, if any, of this hope, is found in the basis for my October 28, 2008 summary judgment opinion which is the Judgment entered by Judge Brown, following the jury verdict, in the XAP case. It is on that Judgment that AOL should focus, not on the summary judgment ruling in this case.

AOL has a pending motion to intervene in the XAP case. Without expressing any opinion about the motion to intervene in that case, and without expressing any opinion about the issues the motion raises there, it seems clear to this Court that the issues about which AOL wishes to argue, begin and end with the vitality of the Judgment in the XAP case.

Thus, while AOL's intervention motion here may not be untimely, and the existing parties may not adequately represent AOL's interest at this stage of the litigation in this case, I do

not accept AOL's arguments that AOL has a significant, protectable interest relating to the property or transaction that is the subject of this action, or that the disposition of this action may impair or impede AOL's ability to protect its interest. Thus, I deny the motion to intervene as of right under Rule 24(a). Additionally, I decline to exercise my discretion in favor of permissive intervention under Rule 24(b) .

CONCLUSION

AOL's motion to intervene (#724) is denied.

IT IS SO ORDERED.

Dated this 28th day of May, 2009

/s/ Dennis James Hubel
Dennis James Hubel
United States Magistrate Judge