Wireless Recognition Technologies LLC v. A9.com, Inc. et al Doc. 114

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
MARSHALL DIVISION

WIRELESS RECOGNITION TECHNOLOGIES LLC,	§	
Plaintiff,	§	
vs.	§	Civil No. 2:10-CV-00364-DF
A9.COM, INC., AMAZON.COM, INC., GOOGLE INC., NOKIA, INC., and RICOH INNOVATIONS, INC.,	§	
Defendants.	§	

WIRELESS RECOGNITION TECHNOLOGIES LLC,	§	
Plaintiff,	§	
vs.	§	Civil No. 2:10-CV-00365-DF
NOKIA CORPORATION and RICOH COMPANY, LTD.,	§	
Defendants.	§	

WIRELESS RECOGNITION TECHNOLOGIES LLC,	§	
Plaintiff,	§	
vs.	§	Civil No. 2:10-CV-00577-DF
A9.COM, INC., AMAZON.COM, INC., GOOGLE INC., NOKIA, INC., and RICOH INNOVATIONS, INC.,	§	
Defendants.	§	

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WIRELESS RECOGNITION TECHNOLOGIES LLC,	§	
	§	
Plaintiff,	§	
	§	
vs.	§	Civil No. 2:10-CV-00578-DF
	§	
NOKIA CORPORATION and RICOH COMPANY, LTD.,	§	
	§	
Defendants.	§	

DEFENDANTS' SUR-REPLY TO PLAINTIFF WIRELESS RECOGNITION TECHNOLOGIES LLC'S MOTION TO CONSOLIDATE PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE 42(a) AND LOCAL RULE CV-42(b)

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I. INTRODUCTION

Plaintiff WRT[1] filed four cases accusing different products from multiple groups of unrelated defendants of infringing two patents. WRT has moved the Court to consolidate all four cases for all purposes, including trial, and to put the consolidated case on the schedule imposed in the first-filed 364 Action.

Defendants oppose the motion. First, Defendants believe that the Court should decide Defendants' pending motions to transfer the cases to the Northern District of California before deciding consolidation issues because it makes sense for the Court that will ultimately handle the cases to decide how they should be structured. Second, Defendants believe that it is premature to decide now how the cases should be structured for trial because the issues to be tried have not yet been sufficiently developed. If the Court is inclined to consider trial consolidation issues now, Defendants cross-move to sever the cases for trial so that each group of defendants and accused products will be tried separately.[2] Third, Defendants oppose consolidating discovery and claim construction according to the schedule in place in the 364 Action because imposing that schedule would be unfair and unworkable with respect to the later-filed cases. Defendants are willing to negotiate a combined case schedule with a single claim construction hearing, but such a schedule will require some slight modifications to the current schedule in the 364 Action.

In its Reply, WRT does not justify deciding trial consolidation issues now or before ruling on the motions to transfer. Nor does WRT explain how the cases could be consolidated on the first-filed 364 Action's case schedule. WRT's motion should be denied, and the parties should be ordered to propose a schedule that will consolidate discovery and claim construction proceedings.

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[1] Unless otherwise indicated, all terms in this Sur-Reply shall have the meanings defined in Defendants' brief in opposition to WRT's motion to consolidate. (Dkt. No. 102.)

[2] Defendants' cross-motion seeks to structure the cases for trial such that related Defendants and their accused products are tried together, but not with other unrelated Defendants and accused products. (*See*, *e.g.*, Dkt. No. 102 at 11-12.) Concurrently with the filing of this Sur-Reply, Defendants are filing a Reply in support of their cross-motion to sever. The issue of severance or consolidation for trial is addressed in that Reply rather than this Sur-Reply.

II. ARGUMENT

A. The Court Should Decide The Pending Motions To Transfer Before Deciding Consolidation Issues

The Court should decide Defendants' pending motions to transfer before deciding WRT's motion to consolidate so that the Court that will ultimately be responsible for the cases can structure them for discovery, claim construction, dispositive motions, and trial. (Dkt. No. 102 at 6.) WRT urges the Court to consolidate all cases *before* deciding the motions to transfer on the grounds that, if the cases are transferred, the Northern District of California would prefer a single, consolidated case. (Dkt. No. 108 at 3.)

WRT's suggestion that the Northern District of California would prefer a single, consolidated case runs contrary to the practice of the Northern District of California of severing patent cases accusing distinct accused products from unrelated defendants. *See, e.g.*, *Optimum Power Solutions LLC v. Apple Inc., et al.*, 2011 WL 4387905 (N.D. Cal. Sept. 20, 2011) (attached as Ex. D) (dismissing four of five unrelated defendants in a patent case on the grounds of misjoinder); *Ho Keung Tse v. Ebay, Inc., et al.*, No. 3:11-cv-01812-WHA, slip op. at 5 (N.D. Cal. June 2, 2011) (attached as Ex. E) (dismissing three of four unrelated defendants in a patent case on the grounds of misjoinder); *EIT Holdings LLC v. Yelp!, Inc., et al.*, 2011 WL 2192820 (N.D. Cal. May 12, 2011) (attached as Ex. F) (dismissing seven of eight unrelated defendants in a patent case on the grounds of misjoinder); *WiAV Networks, LLC v. 3COM Corp., et al.*, 2010 WL 3895047 (N.D. Cal. Oct. 1, 2010) (attached as Ex. G) (dismissing 39 of 40 mostly unrelated defendants in a patent case that was transferred from the Eastern District of Texas on the grounds of misjoinder); *Finisar Corp. v. Source Photonics, Inc., et al.*, No. C 10-00032 WHA, slip op. at 2 (N.D. Cal. May 5, 2010) (attached as Ex. H) (dismissing three of four unrelated defendants in a patent case on the grounds of misjoinder). WRT admits that the Northern District of California would likely revisit the issue of consolidation if the cases are transferred. (Dkt. No. 109 at 4.) Thus, deciding the motion to consolidate before deciding the motions to transfer would likely be a futile act if the Court grants the motions to transfer. Instead, the Court should first decide the

motions to transfer and should decide the consolidation motion only if it denies the transfer motions.

B. The Court Should Defer Deciding How To Structure The Cases For Trial Until The Issues To Be Tried Are Further Developed

The issue of how the four cases should be structured for trial is premature and should be deferred. There is no reason to address the structure of any trials now because the earliest trial date in any of the actions is December 2, 2013. Defendants have demonstrated how the various issues that may ultimately be tried have not yet been developed and may vary widely depending on future events. (*See, e.g.*, Dkt. No. 102 at 6-8.) Rather than engaging in motion practice now regarding how any trials should be structured, Defendants propose that the Court set a date by which parties should outline for the Court how best to structure the trials. That date should be closer to the first trial date (but no later than at the pre-trial conference) and sufficiently far from the present to allow the claims and defenses to crystallize.

In its Reply, WRT fails to demonstrate how the present record is sufficient to determine how best to structure the cases for trial. WRT instead levels false charges that Defendants are "throw[ing] up red herrings," "feign[ing] their reasonableness," and "wast[ing] additional court resources." (Dkt. No. 108 at 4.) But it is WRT who is wasting the Court's and parties' resources by raising issues that are premature and would likely need to be revisited in any event.

For example, Defendants pointed out that WRT has not yet served infringement contentions for the '474 patent, that the '474 patent is the subject of an *inter partes* reexamination, and that WRT has attempted to amend claims in that reexamination to illustrate that many issues to be tried have not yet been sufficiently developed. (Dkt. No. 102 at 6-8.) In its Reply, WRT labels these facts as "red herrings," but fails to demonstrate that the '474 patent issues are sufficiently developed to structure them now for trial. In fact, on October 14, 2011, the U.S. Patent and Trademark Office issued an office action in which, for a second time, it rejected *all* claims of the '474 patent, including those amended during the reexamination. (Ex. I.) Thus, it remains uncertain whether *any* claims of the '474 patent will survive the

reexamination and if any claims do, what their limitations will be. At a minimum, WRT's statements made during the reexamination will affect the claim construction of the '474 patent. Thus, the '474 patent issues are evolving, and it is simply too early to structure the cases for trial.

Many other issues should be developed further before the Court decides on a trial structure. For example, WRT's infringement theories against the foreign Ricoh and Nokia defendants and their U.S. subsidiaries may be subject to different defenses. The reexamination may also give rise to an intervening rights defense unique to the '474 patent. WRT's damages theories have not yet been presented and are likely to vary widely from one defendant to another and from one accused product to another, in view of the differences among the products and their applications. Finally, claims and defenses in each of the actions may be added, dropped, or revised as the actions progress, and some of the parties may settle. Accordingly, the matters to be tried in the four cases have not yet been developed sufficiently to determine how the trials should be structured.[3]

C. Although Defendants Are Amenable To Consolidating Discovery And Claim Construction, WRT's Proposal To Consolidate All Four Cases On The Current First-Filed Case Schedule Is Unworkable

In the interest of judicial economy, Defendants are amenable to consolidating discovery for all four cases and having the Court conduct a single claim construction hearing on both patents if the date set for claim construction in the first-filed 364 Action is postponed by a few months. WRT should not object to this schedule modification because WRT created the current situation.[4] First, WRT intentionally filed four separate actions as opposed to one action.

[3] Bereft of meritorious counterarguments to Defendants' positions, WRT resorts to mudslinging. For example, WRT accuses Defendants of throwing up "hurdles" because, among other things, the parties did not reach complete agreement on the terms of a protective order and have filed a joint motion to resolve a few issues. (Dkt. No. 108 at 4.) It is illogical and unjust to fault Defendants for the joint motion when Defendants' protective order positions are common and have been accepted numerous times in this District. If WRT was truly concerned over any delay engendered by litigating protective order issues, it could simply have agreed to Defendants' reasonable and common proposals.

[4] After calling Defendants' contention that the schedule needs to be revised "hollow[]" (Dkt. No. 108 at 2), WRT acknowledges that such revision is necessary (*id.* at 3).

Second, WRT compounded the problem by its refusal to serve infringement contentions in the later three cases when it served them in the 364 Action on May 5, 2011. Even though six more months have passed, WRT still has not served any Defendant with infringement contentions for the '474 patent. To now consolidate the later three cases on the schedule imposed in the 364 Action would reward WRT's delay and unfairly squeeze Defendants' case preparation time.

Defendants propose that a consolidated claim construction hearing be held in late 2012 or early 2013 rather than on August 22, 2012, the date currently set in the 364 Action. In light of WRT's six-month delay in serving infringement contentions for the '474 patent, Defendants' request to postpone the claim construction hearing by four or five months is eminently reasonable and needed to provide the Defendants with sufficient time to prepare their cases on both patents. Also, there would be no prejudice to WRT since continuing the claim construction hearing should not jeopardize the first trial setting of December 2, 2013.

III. CONCLUSION

The Court should first decide the pending motions to transfer. If those motions are denied, the Court should deny WRT's consolidation motion and grant Defendants' cross-motion to sever the cases for trial. If the Court wishes to address consolidation for purposes of discovery and claim construction, the Court should order the parties to submit a revised consolidated case schedule that will provide for only a single claim construction hearing on both patents on a date sufficient to preserve the first trial date of December 2, 2013. The Court should also set a case management conference or a briefing schedule for some time after the claim construction hearing but prior to the first trial date to address the division and order of the issues to be tried.

Dated: October 28, 2011

Respectfully submitted,

/s/ Michael C. Smith

Michael C. Smith
michaelsmith@siebman.com
Texas State Bar No. 18650410
SIEBMAN, BURG, PHILLIPS & SMITH, LLP
P.O. Box 1556
Marshall, TX 75671-1556
Telephone: 903.938.8900
Facsimile: 972.767.4620

James F. Valentine (admitted *pro hac vice*)
JValentine@perkinscoie.com
California State Bar No. 149269
Daniel T. Shvodian (admitted *pro hac vice*)
DShvodian@perkinscoie.com
California State Bar No. 184576
PERKINS COIE LLP
3150 Porter Drive
Palo Alto, CA 94304-1212
Telephone: 650.838.4300
Facsimile: 650.838.4350

Attorneys for Defendants and Counterclaimants
A9.COM, INC., AMAZON.COM, INC., and GOOGLE INC.

/s/ Michael C. Smith

Michael C. Smith
michaelsmith@siebman.com
Texas State Bar No. 18650410
SIEBMAN, BURG, PHILLIPS & SMITH, LLP
P.O. Box 1556
Marshall, TX 75671-1556
Telephone: 903.938.8900
Facsimile: 972.767.4620

Robert F. Perry (admitted *pro hac vice*)
Allison H. Altersohn (admitted *pro hac vice*)
Erik J. Dykema (admitted *pro hac vice*)
KING & SPALDING LLP
1185 Avenue of the Americas
New York, NY 10036
Telephone: 212.556.2100
Facsimile: 212.556.2222
E-mail: rperry@kslaw.com
E-mail: aaltersohn@kslaw.com
E-mail: edykema@kslaw.com

Attorneys for Defendant
NOKIA INC. and NOKIA CORPORATION

/s/ Michael E. Jones

Michael E. Jones
Texas State Bar No. 18650410
Allen Franklin Gardner
POTTER MINTON P.C.
110 N. College, Suite 500
P.O. Box 359
Tyler, TX 75710-0359
Telephone: 903.597.8311
Facsimile: 903.593.0846
E-mail: mikejones@potterminton.com
E-mail: allengardner@potterminton.com

Mark D. Rowland (admitted *pro hac vice*)
ROPES & GRAY LLP
1900 University Avenue, 6th Floor
East Palo Alto, CA 94303-2284
Telephone: 650.617.4016
Facsimile: 650.566.4144
Email: mark.rowland@ropesgray.com

Attorneys for Defendant and Counterclaimant
RICOH INNOVATIONS, INC. and RICOH COMPANY, LTD.

CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing document was filed electronically in compliance with Local Rule CV-5(a). As such, this document was served on all counsel who are deemed to have consented to electronic service. Local Rule CV-5(a)(3)(A). Pursuant to Fed. R. Civ. P. 5(d) and Local Rule CV-5(d) and (e), all other counsel of record not deemed to have consented to electronic service were served with a true and correct copy of the foregoing by email, on this 28th day of October, 2011.

/s/ Michael C. Smith
Michael C. Smith