

1 IN THE UNITED STATES DISTRICT COURT
2 FOR THE EASTERN DISTRICT OF TEXAS
3 PLANO DIVISION

3 EMG TECHNOLOGY, LLC § CAUSE 6:08CV447
4 §
4 VS. § DECEMBER 16, 2009
5 §
5 APPLE, INC. § (Assigned Judge Leonard Davis)

6 HOTLINE TELEPHONIC CONFERENCE
7 BEFORE THE HONORABLE DON BUSH
8 UNITED STATES MAGISTRATE JUDGE

8 APPEARANCES:

9 FOR APPLE, INC.: BY: Mr. Garland T. Stephens
10 Mr. John R. Lane
11 FISH & RICHARDSON, PC-HOUSTON
12 1221 McKinney Street, Suite 2800
13 Houston, TX 77010
14 (713)652-0115
15 (713)652-0109 Fax

16 FOR EMG TECHNOLOGY: BY: Mr. Robert D. Becker
17 Mr. Shawn G. Hansen
18 MANATT PHELPS & PHILLIPS, LLP
19 1001 Page Mill Road, Bldg. 2
20 Palo Alto, CA 04304
21 (650)812-1300
22 (650)213-0260 Fax

23 FOR EMG TECHNOLOGY: BY: Mr. Charles Ainsworth
24 Mr. Robert M. Parker
25 Mr. Robert Christopher Bunt
26 PARKER BUNT & AINSWORTH
27 100 E. Ferguson, Suite 1114
28 Tyler, TX 75702
29 (903)531-3535
30 (903)533-9687 Fax

31 FOR AMERICAN AIRLINES: BY: Mr. Russell J. Genet
32 NIXON PEABODY LLP - CHICAGO
33 300 S. Riverside Plaza, 16th Floor
34 Chicago, IL 60606
35 (312)425-8516
36 (312)425-3909 Fax

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1 THE COURT: Okay. I've got Mr. Stephens for
2 Apple. Who else is there?

3 MR. BECKER: And Robert Becker from Manatt,
4 Phelps & Phillips for the witness, Mr. Gottfurcht.

5 THE COURT: Robert Becker for the witness.
6 What's the witness' name?

7 MR. BECKER: Grant Gottfurcht.

8 THE COURT: How do you spell that last name,
9 please?

10 MR. BECKER: G-O-T-T-F-U-R-C-H-T.

11 MR. AINSWORTH: Judge Bush, you have Charles
12 Ainsworth, Chris Bunt and Robert Parker on the line for EMG,
13 the plaintiff.

14 THE COURT: For the plaintiff?

15 MR. AINSWORTH: Yes, sir.

16 THE COURT: Judge Parker, Mr. Ainsworth?

17 MR. AINSWORTH: And Chris Bunt.

18 THE COURT: Well, all three of you are not going
19 to talk, are you?

20 UNIDENTIFIED SPEAKER: We're here.

21 UNIDENTIFIED SPEAKER: No, sir.

22 THE COURT: All right. Who's going to talk?

23 MR. PARKER: We might, Judge, if you let us.

24 MR. HANSEN: And then also on the line, this is
25 Shawn Hansen with Manatt, Phelps & Phillips also representing

1 the plaintiff EMG.

2 MR. GENET: And this is Russ Genet. It's
3 G-E-N-E-T. I'm here at the deposition representing one of the
4 other defendants, American Airlines.

5 MR. LANE: We also have John Lane, Fish &
6 Richardson, representing Apple, and Jeff Ritcher, in-house
7 counsel for the deposition.

8 THE COURT: Okay. Well, I think that will be
9 enough.

10 All right. Now, let me just go over some
11 guidelines. First of all, I'm having this recorded or -- you
12 all have a court reporter in there?

13 UNIDENTIFIED SPEAKER: We do.

14 THE COURT: Okay. Very well. Well, the court
15 reporter is taking this all down, this --

16 UNIDENTIFIED SPEAKER: Well, she's not, Your
17 Honor, because we thought she might need to read back some of
18 the record. But if you'd like, we can have her transcribe the
19 call.

20 THE COURT: Are we recording it?

21 Okay. Well, we're recording it, so that's fine.
22 I don't think I'll have to have anybody read back the record.

23 Okay. So the EMG Technology versus Apple, et
24 al., hotline call, Case No. 68-cv-447, another patent
25 discovery dispute.

1 So who wants to -- who's upset about what's
2 going on here?

3 MR. STEPHENS: Your Honor, this is Garland
4 Stephens for Apple. We're the ones that set up the call, so I
5 can explain the circumstances.

6 THE COURT: All right.

7 MR. STEPHENS: We've been deposing the inventors
8 on the EMG patent for the last two days. Yesterday it was
9 Elliott Gottfurcht and today it's his son, Grant Gottfurcht.

10 And the plaintiffs have taken a very unusual and
11 extremely aggressive position on privilege, and that is
12 essentially that the inventors cannot testify to their
13 understanding of the patents at all without --

14 THE COURT: Wait a minute. Wait. The inventor
15 cannot testify to their understanding? You mean his
16 understanding?

17 MR. STEPHENS: Yes. I'm sorry. The inventors'
18 understanding.

19 THE COURT: Okay. Yeah. I wouldn't think you
20 could testify to Judge Parker's understanding.

21 MR. STEPHENS: Yes. I did not mean Judge
22 Parker.

23 THE COURT: Okay. All right. Go ahead.

24 MR. STEPHENS: So both Misters Gottfurcht have
25 said that they cannot testify to their understanding, for

1 example, the figures of the patent or the language of the
2 claims of the patent or the descriptions and the
3 specifications of the patent without revealing attorney-client
4 privileged information. And, therefore, have declined to
5 answer, I would say, probably hundreds of questions directed
6 to the patent in the lawsuit.

7 They've also declined to answer on the same
8 grounds any questions about whether or not they have
9 implemented the invention in the patent in suit and also
10 whether or not a particular website that they operate
11 practices the claims of the patent in the lawsuit. That's the
12 primary issue and that is the issue which has wasted many
13 hours of deposition time in the last two days.

14 THE COURT: Well, in my experience with all you
15 patent lawyers is you all waste too much time.

16 MR. STEPHENS: I have a feeling that our clients
17 might agree with you, Your Honor.

18 THE COURT: All right. Well, I don't think --
19 my position among the patent bars is pretty well known. I
20 think most of this stuff is out of hand.

21 Okay. Now --

22 MR. STEPHENS: But there is one other issue,
23 Your Honor. I can either address it after Mr. Becker
24 addresses the first issue or I can tell you about it now.

25 THE COURT: You've given me three issues now,

1 Mr. Stephens, not just one. What's the fourth issue?

2 MR. STEPHENS: Okay. The other issue is a
3 assertion of a privilege not to answer questions about the
4 dollar resources available for the plaintiffs.

5 They have raised the issue that they have been
6 unable to implement the invention of the patent in suit
7 because they didn't have enough resources to do it. I asked
8 Mr. Gottfurcht --

9 THE COURT: Okay. Wait a minute. Now, the
10 inventors are not the plaintiffs, correct?

11 MR. STEPHENS: They own -- they own the company,
12 EMG, as I understand it.

13 THE COURT: Well, I mean, how is it owned?

14 MR. STEPHENS: It is -- well, they should speak
15 to that, Your Honor, but it is --

16 THE COURT: Well, wait a minute. Look, I think
17 that's the first thing you'd want to know before you -- how do
18 you know -- I mean, is it like -- is it an LLC, is it a
19 partnership, is it a Texas corporation? When you say they own
20 it, what do you mean?

21 MR. STEPHENS: Well, Your Honor, Mr. Gottfurcht
22 did testify yesterday that he controls the corporation. But,
23 again, I'm -- rather than characterize the record, I'd like
24 them to tell you how it's -- how it's run.

25 THE COURT: Well --

1 MR. STEPHENS: Let me add --

2 THE COURT: How is it relevant?

3 MR. STEPHENS: I'm sorry?

4 THE COURT: How is the last issue as to the --
5 their monetary net worth, how is that relevant to anything in
6 this case?

7 MR. STEPHENS: It's relevant, Your Honor,
8 because they have claimed that they could not implement the
9 invention, despite having about 10 years to do it, because
10 they didn't have the resources to do so.

11 THE COURT: Well, okay. And why is it
12 important? What issue in the case involves implementation?

13 MR. STEPHENS: Well, the issue, for example, is
14 whether or not they were irreparably harmed by any conduct of
15 Apple in this case. They had many years to bring their
16 invention into the world in a physical device or a website
17 before Apple ever introduced any of the products that are
18 accused of infringement in this case.

19 Apparently, they didn't do that, and one of the
20 rationales for not doing it is that they didn't have enough
21 money to do it. There's evidence in the record that
22 Mr. Gottfurcht is extremely wealthy and, therefore, could have
23 done so, but they're refusing to answer any questions about
24 that.

25 THE COURT: Well, how big is this company?

1 MR. STEPHENS: Well, it was formed just a few
2 weeks before the suit was filed, so I don't think it's very
3 big. It offices in Mr. Gottfurcht's home. Other than that,
4 they have a few documents in Tyler, Texas, and I don't think
5 they have any other physical presence anywhere.

6 THE COURT: All right. Now, let me hear from
7 the -- now, who's going to be speaking on behalf of the
8 inventor?

9 I always go back to one of the cases we had here
10 several years ago. I was reading the deposition of an
11 inventor and they asked the inventor what the patent meant,
12 and his response is, explicative, "I don't know. Some lawyer
13 wrote it," so -- anyway, I think that's frequently what
14 happens in these cases.

15 MR. STEPHENS: Well, Your Honor, let me just add
16 one piece; and that is, I am okay with the assertions of
17 privilege. My concern is that since I've never seen anyone
18 assert a privilege in such a broad way, that sometime between
19 now and trial, they're going to waive that privilege and
20 decide to testify -- have the inventors testify about the
21 meaning of the patents. And that would be grossly unfair
22 because they've refused to answer any of my many questions on
23 that topic.

24 THE COURT: All right. Well, has Judge Davis or
25 Judge Love conducted the claim construction hearing yet?

1 MR. STEPHENS: No, Your Honor.

2 THE COURT: Okay. All right.

3 MR. STEPHENS: But this case has -- this case
4 has been pending for more than a year. It was filed last
5 November.

6 UNIDENTIFIED SPEAKER: Yeah.

7 THE COURT: Okay.

8 MR. PARKER: Your Honor, this is Robert Parker.
9 I would like to speak to the last issue, the net worth issue,
10 if the Court decides to take that up.

11 THE COURT: All right. Let's take up that one
12 last -- I mean, first since I've already heard from
13 Mr. Stephens. What is it, Judge Parker, that you want to add?

14 MR. PARKER: This -- the resources -- this is a
15 limited liability partnership as I understand it. Mr. Grant
16 Gottfurcht is not a partner, but there is a trust that is a
17 partner.

18 They're posing questions to him concerning his
19 net worth and what assets he has. Our objection relates to,
20 number one, relevancy, and number two, a right of privacy
21 concerning his personal finances.

22 It's a little different, Judge, than the
23 privilege typically deal with, but it's treated essentially
24 the same. A person can be compelled to answer those type
25 questions, but only where there's a compelling public interest

1 involved, which I don't see in this case or in a case like
2 this. And that's the basis for our objection.

3 THE COURT: Well, what Mr. Stephens is saying
4 the public interest is that this is a patent that they are
5 saying that they will suffer irreparable harm if the
6 injunction is not granted, and I think that would be within
7 the public interest. And I'm not sure that -- I'm not sure
8 that his net worth necessarily has to come out on the table.

9 I'm going to direct this: The plaintiff can ask
10 Mr. Gottfurcht -- I hope I said that right, I apologize if I
11 didn't -- why didn't he put his own money into the company.
12 And he can say, A, I didn't think that was necessary. B, I'm
13 not going to expose my money in a new venture. C, I don't
14 have the money.

15 And if he says, I don't have the money, you got
16 arguments to the contrary, then you can certainly impeach him
17 at trial, I guess, or impeach him with other evidence. But
18 Mr. Stephens can ask him why he didn't invest his own money,
19 but I'm not going to have him getting into net worth and all
20 that. I don't think that's really relevant.

21 And, I mean, that certainly will come out at
22 trial that this man has an interest, the trust is -- the
23 company is owned by a trust of which he's a -- I guess a
24 beneficiary of the trust as such, maybe even a settler of the
25 trust. You can make those arguments all day long,

1 Mr. Stephens, I guess, on the injunction issue. But you --

2 MR. STEPHENS: But, Your Honor, if I may.

3 THE COURT: Yeah.

4 MR. STEPHENS: They also refuse to answer any
5 questions about the assets that the trust, which Judge Parker
6 says is a member of the company, on exactly the same ground.
7 And I don't see how I can impeach Mr. Gottfurcht's claim that
8 he didn't have enough money to develop the application if I
9 can't ask him how much money he did have.

10 THE COURT: Well, has he said he didn't have
11 enough money?

12 MR. STEPHENS: Yes, he did.

13 THE COURT: He personally did not have enough
14 money?

15 MR. STEPHENS: Well, he owned -- he has either
16 owned a direct interest in or controlled the patent since they
17 issued. And it's that period, Your Honor, leading up until
18 the time that the plaintiff was formed just a month or so
19 before the lawsuit was filed that we're talking about, because
20 that's the period where they had, essentially, an entire
21 decade to develop the invention and failed to do so.

22 MR. BECKER: Your Honor, this is Robert Becker
23 for these witnesses. I'd like to address a few of these
24 points.

25 I don't think that the witnesses have made these

1 assertions at all. They have talked about funding of the LLC,
2 they have talked about and were ready and willing to talk
3 about the income of the LLC and the operations of the LLC.
4 The questions that they refused to answer were point blank,
5 what is your net worth?

6 THE COURT: Okay. Well, they're not going to
7 have to answer that question.

8 MR. STEPHENS: Your Honor, what about the trust?
9 I also asked how much -- what assets are contained in the
10 trust, and they refused to answer those questions on the same
11 ground.

12 THE COURT: I don't think it's relevant. I
13 mean, it's just -- it's a limited liability corporation. I
14 mean, you can argue all day long that, hey, folks, this
15 company was just formed a couple of days before this suit was
16 filed. He's not -- he doesn't even have an office in a mobile
17 home anywhere, he's just living out of his house.

18 And you can call him all kinds of names you
19 want, but I don't think that -- what the worth of the trust is
20 is really relevant to anything.

21 Mr. Stephens, there's -- you know, there's a lot
22 of ways you can handle that argument. You can -- you can make
23 those jurors believe that this company is no more than a -- I
24 guess, what do you all call them out there in deep east Texas,
25 trails? You can make that argument all day long. You don't

1 need to know his financial worth. And if he didn't --

2 MR. STEPHENS: Okay, Your Honor.

3 THE COURT: If he didn't want to put his own
4 money, you can ask him that. Why don't you put your own money
5 or assets into the development of this patent? He can tell
6 you why he didn't. That's a fair question. You can make that
7 argument all day long, so --

8 MR. STEPHENS: Understood, Your Honor.

9 THE COURT: Okay. So what next problem do we
10 have to overcome?

11 MR. BECKER: So, Your Honor, this is Robert
12 Becker again for the witnesses. The other objections were
13 relating to instructions not to answer or just the witness not
14 answering based on attorney-client privilege.

15 Certainly we think that the assertion of
16 privilege is appropriate. This is a rather unusual case where
17 the two witnesses that are being deposed or have been deposed
18 the last two days are not experts in the field. They're
19 rather unsophisticated when it comes to the technology and
20 certainly unsophisticated with respect to the patents, so
21 they're --

22 THE COURT: What did they do, just stumble into
23 this?

24 MR. BECKER: No, they had -- that's a very good
25 question. They had help. They came up with and conceived of

1 various inventions and then went out to experts in the field
2 to help them develop those inventions and sought attorneys to
3 help them capture the inventions on paper and filed and
4 prosecute patent application.

5 The particular witness that's here today,
6 there's been no -- nothing established that he's even read
7 these patents before in his entire life. And the questions
8 that are being asked of him are, what do the claims mean,
9 which we --

10 THE COURT: Okay. Wait a minute. Wait a
11 minute. You're going to make that argument to the jury that
12 this man is -- the company's prosecuting these patents, but
13 the fella who owns the -- I guess does he still hold the
14 patents or does the company hold the patents?

15 MR. BECKER: The LLC company holds the patents.

16 THE COURT: Okay. He assigned them?

17 MR. BECKER: Yes.

18 THE COURT: Okay. He assigned the -- now, you
19 keep saying LLP. LLC, isn't it?

20 MR. BECKER: It's an LLC.

21 THE COURT: C?

22 MR. BECKER: Like in Charlie.

23 THE COURT: Charlie. Okay. Lima, Lima,
24 Charlie. All right. Well --

25 MR. BECKER: All right. So to finish that

1 thought, Your Honor, that -- what the problem is, is that for
2 the most part, any understanding that he has, which is very
3 limited is based on the advice that he got from his attorney.

4 He has answered questions. It's inaccurate to
5 say he won't answer any questions. He's gone over some
6 figures. He's told about how he came up with the invention,
7 those sorts of things.

8 But the questions on claim meaning, for example,
9 which I think are inappropriate under Local Rule 2-5 right
10 now, and on what the meaning of the patent is, the document
11 that he didn't write and only knows about based on legal
12 advice, he's saying that he doesn't have anything to respond
13 other than to divulge his attorney's advice on the subject.

14 THE COURT: Well, I think that Mr. Stephens can
15 ask him what his understanding of how the patent is practiced.
16 If he says, I have no clue other than what some attorney's
17 told me, then he can tell you that and then he can tell that
18 to the jury.

19 MR. STEPHENS: Your Honor, that's exactly what's
20 happened. This is Garland Stephens. And I'm okay with that,
21 as long as they're going to be stuck with that. What I don't
22 want and what I'm very fearful will happen is that this story
23 is going to change between now and trial.

24 THE COURT: You guys worry about too many things
25 that never happen, so, you know --

1 MR. STEPHENS: And these are the inventors, Your
2 Honor, saying that they don't understand the patents except
3 the -- what the lawyers told them about.

4 THE COURT: I think that -- I think that's a
5 wonderful argument for you, Mr. Stephens. Well, you got his
6 response. He doesn't -- he doesn't understand other than what
7 some lawyer has told him, and he --

8 MR. STEPHENS: Okay. All right. I'm just --
9 I'm just concerned that --

10 THE COURT: Well, if you -- if you get an
11 alternative answer sometime from him, and he's testified under
12 oath, I guess you can refer to the U.S. Attorney's Office for
13 perjury, can't you?

14 MR. STEPHENS: That's a good point, Your Honor.

15 THE COURT: Well, I mean, I don't take perjury
16 very lightly in any kind of a setting. So he's told you, I
17 guess what you're saying is, that he doesn't understand other
18 than what some lawyer's told him. So you can't go any further
19 than that.

20 I mean, I think there could be some -- you know,
21 this is kind of a gray area where lawyers sit around and write
22 the patents and then try to claim some sort of a privilege
23 when they're putting the patents at issue. I think there's a
24 lot of areas and grounds for labor there. But at this
25 preliminary juncture he's told you what he knows about it,

1 which evidently is nothing, which personally I don't think
2 will sell very well to a jury, but --

3 MR. STEPHENS: Well, your Honor, what do I do
4 if --

5 THE COURT: I don't know. I'm not here to give
6 you advice. I stopped --

7 MR. STEPHENS: Okay.

8 THE COURT: I stopped practicing law seven years
9 ago, and it's a misdemeanor for me to practice law, so -- and,
10 you know, there are many days where I think I made the wrong
11 decision, but for right now I'm stuck with it, so -- anyway, I
12 can't give you advice, because I'm not getting paid \$650 an
13 hour either. So where do we go from here? What's the next
14 problem we have?

15 MR. STEPHENS: Well, I think that's the only
16 problem, Your Honor. I just, once again, would ask you to
17 tell the plaintiffs that if they're going to take this
18 position on the deposition --

19 THE COURT: I'm not telling anybody anything. I
20 have made my ruling, and he's testified under oath, and I
21 don't think there's anything else I can say about it. I take
22 testifying under oath a very serious and solemn
23 responsibility.

24 All right. Now, somebody said also there's
25 questions about whether the patent's been implemented and does

1 the web -- does some website practice the patent? What's that
2 all about?

3 MR. STEPHENS: Okay, Your Honor. They're very
4 closely related. They've also taken the position that they
5 cannot -- the inventors, that is, cannot testify about whether
6 they have ever implemented their invention, because to do so
7 would reveal attorney-client privilege.

8 And further, they've taken the position that
9 they can't testify about whether they believe Apple infringes
10 because to do so would violate attorney-client privilege.

11 THE COURT: Well, I think you can ask him --
12 here's the way we used to do it, and I -- maybe I'm
13 digressing -- give a little advice.

14 Outside anything your lawyers may have told you,
15 do you have any personal knowledge that there's infringement?
16 If he says no, then he's answered your question. Then it
17 throws on the lawyers.

18 MR. STEPHENS: And, of course, I've done that,
19 Your Honor, and that's been the answer, that they have no
20 understanding other than what the lawyers have told them.

21 THE COURT: All right. Well, that's, you
22 know -- that's great.

23 MR. STEPHENS: I don't know how they brought the
24 lawsuit, but --

25 THE COURT: Well, you know, you can argue that

1 all day long. I guess you all haven't filed your motions yet.
2 You can argue that in front of a jury. But it's nothing but
3 an attorney-driven lawsuit, and we have the testimony to
4 support it. I'm sure you've never been guilty of that on the
5 other side either, have you?

6 MR. STEPHENS: Well, Your Honor, I mostly do
7 defense work, so that's an easy one for me.

8 THE COURT: Okay. All right. Well -- and then
9 that would go along with -- and some website? Now, what is
10 the -- which website are we talking about?

11 MR. STEPHENS: This is a website that the
12 company EMG operated that they have variously taken the
13 position does not implement all the elements of any claim, and
14 that's in their 3-1 pleading. And then at other times have
15 said that it does reflect the elements of the claims.

16 But then the inventors when asked -- and these
17 are the people who are responsible for building and operating
18 the website. When they were asked about whether or not it
19 practices the claims of the patents, they said they can't
20 testify on that without revealing attorney-client privilege,
21 because the only understanding they have about whether the
22 website reflects or practices the elements of the claims they
23 got from their lawyers.

24 THE COURT: Okay. Well, did you ask him if
25 there's any nonlawyer in the whole world that could offer an

1 opinion as to whether or not the patents implemented by -- or
2 practiced on the website, did you ask him that question?

3 MR. STEPHENS: I did not ask them whether there
4 was anybody in the whole world. I did ask them whether they
5 had anything they could say they didn't hear from a lawyer,
6 and they said no.

7 THE COURT: Well, you might ask them if somebody
8 else other than a lawyer knows what's going on here, and he
9 might be able to tell you.

10 MR. PARKER: Judge, you're getting close to
11 committing a misdemeanor.

12 THE COURT: We're just trying to short circuit
13 all this inquiry.

14 Well, I tell you, Judge Parker, this really goes
15 back to my being a professor of trial tactics at SMU. I'm a
16 visiting professor and direct the program there. So I'm
17 really now in my professorial mode, not in my judicial mode.
18 So if you'll excuse me for that, I won't say anymore.

19 Okay. I think that satisfies --

20 MR. STEPHENS: Yes. Thank you very much, Your
21 Honor. We appreciate it.

22 THE COURT: All right.

23 UNIDENTIFIED SPEAKER: Thank you.

24 THE COURT: You all take care. Have a good day.

25 UNIDENTIFIED SPEAKER: Thank you, Your Honor.

1 I certify that the foregoing is a correct transcript from the
2 record of proceedings in the above-entitled matter.

3

4 /s/

5 LISA A. TRASLAVINA-KERR, CSR

January 21, 2010

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