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

EMG TECHNOLOGY, LLC)
) DOCKET NO. 6:08cv447
-vs-)
)
APPLE INC., ET AL)

EMG TECHNOLOGY, LLC)
) DOCKET NO. 6:09cv367
-vs-)
) Tyler, Texas
) 1:30 p.m.
MICROSOFT CORPORATION, ET AL) February 1, 2010

TRANSCRIPT OF JOINT STATUS CONFERENCE
BEFORE THE HONORABLE LEONARD DAVIS,
UNITED STATES DISTRICT JUDGE

A P P E A R A N C E S

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1 P R O C E E D I N G S

2 THE COURT: Please be seated.

3 All right. Ms. Ferguson, if you will call the case,
4 please.

5 THE CLERK: Court calls Cases No. 6:08cv447, EMG v.
6 Apple, et al; and Case No. 6:09cv367, EMG v. Microsoft, et al.

7 THE COURT: Announcements?

8 MR. AINSWORTH: Charles Ainsworth for the
9 plaintiffs. I'm here with Robert Becker, who will be the
10 speaker today.

11 MR. BECKER: Good afternoon, Your Honor.

12 MR. FINDLAY: Good afternoon, Your Honor, Eric
13 Findlay and Chris Carraway on behalf of Microsoft.

14 MR. GENET: Good afternoon, Your Honor, Russ Genet
15 from Nixon Peabody representing American Airlines, Dell, and
16 Hyatt. And with me is my Local Counsel Dru Montgomery and
17 Jessica Hannah.

18 MR. STEPHENS: Good afternoon, Your Honor. Garland
19 Stephens with Fish & Richardson representing Apple and
20 Southwest Airlines. With me today are my colleagues David
21 Healy and John Lane.

22 MR. YARBROUGH: Trey Yarbrough on behalf of
23 Scottrade, Your Honor.

24 THE COURT: Okay.

25 MR. CLUTTER: Patrick Clutter for Zagat Survey,

1 Potter Minton.

2 THE COURT: Okay.

3 MR. GUARAGNA: John Guaragna for Marriott, Your
4 Honor, ready.

5 MR. DACUS: Your Honor, Deron Dacus and Tony Fenwick
6 on behalf of Comcast. We are ready.

7 THE COURT: Okay.

8 MR. WALKER: Good afternoon, Your Honor. Chad
9 Walker from Fish & Richardson for Priceline and Barnes &
10 Noble, Your Honor. We are ready.

11 THE COURT: Thank you.

12 All right. We are here to try to get this sorted
13 out on the Joint Status Conference. As I understand it --
14 well, who would like to take the lead to explain to me what
15 y'all would like to do, what are any disputes?

16 MR. STEPHENS: Your Honor, I am happy to take a
17 crack at that.

18 THE COURT: Okay.

19 MR. STEPHENS: I am Garland Stephens.

20 THE COURT: Okay.

21 MR. STEPHENS: I represent Southwest Airlines.

22 THE COURT: Okay.

23 MR. STEPHENS: I guess about 14 months ago in
24 November of 2008, the plaintiff EMG sued my client Apple. It
25 was one defendant, Apple. It was one product, the iPhone. It

1 was one patent. In between that time and today, the case has
2 expanded into two very closely related litigations with, I
3 think, a total of 12 defendants now. There have been three
4 others somewhere along the line in there and --

5 THE COURT: Are you talking about in the first case?

6 MR. STEPHENS: Well, when I was speaking there about
7 12 defendants, that is both cases together, Your Honor. I
8 forget the exact number in each case.

9 THE COURT: Has the first case expanded?

10 MR. STEPHENS: The first case has also expanded --

11 THE COURT: Patent-wise or party-wise or both?

12 MR. STEPHENS: Both, Your Honor; additional
13 products, additional patent, additional parties. The most
14 recent parties were added to the Apple case -- I will refer to
15 the first case as the Apple case and the later case as the
16 Microsoft case, if that is all right?

17 THE COURT: All right. Uh-huh.

18 MR. STEPHENS: The most recent parties were added to
19 the Apple case just a few months ago. I think pleadings
20 didn't close until sometime in January, Your Honor.

21 Sometime back in September or October and after the
22 Microsoft case had been filed, plaintiff EMG represented to
23 the Court and to us that it was going to move to have the
24 cases consolidated. That hadn't happened. Our anticipation
25 was that somehow the two cases would be coordinated and

1 eventually put on a common schedule.

2 We got to a point where the existing schedule in the
3 Apple case was no longer workable, and that's when Apple, Your
4 Honor, filed the motion to vacate the deadlines in that case,
5 the Apple case, and for a joint case management conference in
6 the two cases.

7 Now, since that time the parties have discussed that
8 motion, and I think by and large there is not much left in
9 dispute.

10 THE COURT: Okay.

11 MR. STEPHENS: Everybody agrees that the cases
12 should be consolidated for everything up to and perhaps
13 including pretrial activities but not for trial, on the
14 defendants' side. I think the plaintiffs -- I will let them
15 speak for themselves, but they think there should be a single
16 trial as well.

17 THE COURT: All right.

18 MR. STEPHENS: That is pretty much where we stand,
19 Your Honor.

20 THE COURT: Both cases involve one patent or
21 multiple patents?

22 MR. STEPHENS: Two patents.

23 THE COURT: Two patents, okay.

24 MR. STEPHENS: The same patents in both cases.

25 THE COURT: Okay. And is the technology the same in

1 both cases, the accused products?

2 MR. STEPHENS: Well, there is a wide variation in
3 the accused products. Even just for Apple there is a wide
4 range of different kinds of products that are accused. But I
5 think you could fairly divide up --

6 THE COURT: Is the iPad accused?

7 MR. STEPHENS: That's a good question, Your Honor.
8 I have a feeling that they will probably tell you they intend
9 to add it to the case.

10 THE COURT: Well, good because we need about six
11 exemplar copies. No, I am just kidding.

12 MR. STEPHENS: Well, Your Honor, I have been asking
13 for one myself and they keep telling me that I have got to
14 wait.

15 THE COURT: They are hard to come by.

16 MR. STEPHENS: They are indeed. That is pretty much
17 how we got where we are, Your Honor.

18 THE COURT: Plaintiff?

19 MR. BECKER: Can I speak to that, Your Honor?

20 THE COURT: Sure.

21 MR. BECKER: The distinction that I would like to
22 make is that the Apple case has been on file for over a year.
23 Last summer the Court set discovery orders, and the plaintiff
24 produced its infringement charts. There was an order in place
25 that required the defendants to start to produce documents.

1 The defendants -- and I mean primarily here Apple and
2 American -- to produce documents and to also start to search
3 their emails so that we could get the case moving. Those
4 deadlines passed in October and in December. And we haven't
5 had the discovery.

6 And there was no motion made for a protective order.
7 So we have been waiting since October for a very large
8 production of documents, and we have been waiting since
9 December for productions of emails. Now, it is true there are
10 a lot of defendants in the case and that the pleadings have
11 changed somewhat. But Apple has been in there from day one.
12 Apple is by far, at least in the Apple case, the most
13 important defendant in that case in terms of discovery
14 burdens, trial prep --

15 THE COURT: And you would like to move forward with
16 that?

17 MR. BECKER: I would like to move forward. It is
18 true that we could do the case on a shortened schedule with
19 some of the other defendants but not with Apple. We gave them
20 our infringement contentions long ago. They were ordered to
21 produce documents in October. They were ordered to do email
22 searches in December and we don't have any of that.

23 MR. STEPHENS: Your Honor, if I may, that is a
24 pretty major mischaracterization of what happened. I don't
25 think there was anything that we were obligated to produce

1 that we did not produce up until we filed the current motion
2 to vacate. I think the record will show that most of the
3 changes in the schedule for the deadlines came after requests
4 from the plaintiffs.

5 We mediated with the plaintiffs -- that is, Apple
6 mediated with the plaintiffs in December. We specifically
7 waited to depose the inventors in that case at their request
8 until after that mediation. We put off deadlines for initial
9 disclosures. So I don't think there was anything that was due
10 to the plaintiffs from Apple until December sometime.

11 MR. LANE: Right.

12 MR. STEPHENS: That is right at the time we moved to
13 vacate the deadlines. And what we think should happen now is
14 everybody should be on a common schedule. We are not opposed
15 to having Apple on a somewhat earlier schedule. The case has
16 been pending for a while. We have attempted to reach out to
17 them to settle this dispute so we didn't have to bring it in
18 front of Your Honor, this minor difference about whether Apple
19 is going to produce documents before the other defendants,
20 and they refused even to negotiate on that.

21 So what I suggest, Your Honor, is that you put in
22 place a single schedule which has been proposed in the joint
23 report the parties have put before you. If you want to shave
24 a little time off of Apple at the end of that for the close of
25 discovery, we are fine with that; take off a month, 45 days,

1 something like that, that is not a problem.

2 MR. BECKER: One more thing, Your Honor. We are not
3 arguing about the extensions. The dates I am referring to are
4 the agreed extension dates. The reason that Apple gave for
5 noncompliance with the orders is that there was no protective
6 order in place. They haven't moved for a protective order
7 yet. So I don't know what it is that is holding them back
8 from making a production. If a protective order needs to be
9 entered, I think it should be entered; but there is no reason
10 that they need additional time. The reason has been to date
11 that there just was no protective order in place. So as soon
12 as that goes in place, I don't think there is any reason why
13 Apple and American couldn't begin production right away.

14 MR. STEPHENS: Your Honor, if I may, the problem
15 with the protective order, of course, was this revolving door
16 with defendants. And we have had multiple meet-and-confers
17 just in the last week. We have worked actually quite hard
18 right until this weekend to try and have the motion in front
19 of Your Honor before the hearing today. I don't think there
20 will be any problem to have the motion on behalf of all of the
21 defendants for a protective order later this week. As soon as
22 that order is entered, Apple is prepared to make the
23 production of several hundred thousand confidential documents
24 to the plaintiff.

25 THE COURT: So you are prepared to do that within a

1 matter of, what, a week or ten days, you say?

2 MR. STEPHENS: Yes, Your Honor.

3 THE COURT: Would that satisfy plaintiff if they
4 comply -- get those to you where you can go on and get started
5 on their documents?

6 MR. BECKER: Yes, Your Honor.

7 THE COURT: Well then, I don't think we have really
8 got a dispute then, do we? You just need to get a protective
9 order entered, you make production, give us a date that you
10 can do that by -- February 15th?

11 MR. STEPHENS: Your Honor, I would say one week from
12 the entry of the protective order. That really has been the
13 hold-up with the production of the confidential documents.

14 THE COURT: Is that good with you?

15 MR. BECKER: That's fine. Thank you.

16 THE COURT: What about the protective order,
17 anything I need to resolve for y'all on that?

18 MR. BECKER: There are a few issues. One has to do
19 with the subject of reexamination. The defendants have
20 proposed a prosecution bar that also extends to
21 reexamination. I think there has been a number of cases
22 recently from this Court that holds that those orders
23 shouldn't be extended that far, and that is the primary
24 dispute we have with respect to the protective order.

25 THE COURT: I'm sorry, say that again. What is your

1 primary dispute?

2 MR. BECKER: The primary dispute is whether
3 confidential information can be shared with anyone who
4 participates in a reexamination proceeding. Apple has filed
5 requests for reexamination for the patents-in-suit. So
6 effectively they are trying to have the plaintiff hire two
7 sets of counsel and have the two sets of counsel prosecute
8 these very related proceedings without being able to talk with
9 each other. So that is a primary issue.

10 Another issue is they don't want any confidential
11 information to be shown to the client. There is one main
12 person at the client, and they don't want him to see any
13 confidential information.

14 And then we also have a few issues about how we
15 handle the source code.

16 THE COURT: How you handle what?

17 MR. BECKER: The source code.

18 MR. STEPHENS: Your Honor, I think in the course of
19 the meet-and-confers we had just this last week, the second
20 issue that Mr. Becker raised has been resolved, and they
21 agreed not to show confidential information to their client.
22 That is my understanding.

23 THE COURT: Is that correct?

24 MR. BECKER: Okay.

25 MR. STEPHENS: The issue on reexamination, Your

1 Honor, we would like to brief. I think it is somewhat subtle,
2 but it is certainly because the plaintiff has a number of
3 continuation applications based on the patents-in-suit
4 currently pending. We think it would be very inappropriate
5 for them to look at Apple or other defendants' -- the other
6 defendants are on-board with this as well, Your Honor -- their
7 confidential information and then use information about how
8 the products in suit work to tailor their claims in
9 reexamination so that they cover the accused products but
10 distinguish the prior art. That is the fundamental issue.

11 There is also an ethical issue with the Patent
12 Office there is a duty to disclose information material to
13 patentability in the course of reexamination, and we have had
14 the experience in the past where patent owners have said they
15 need to disclose confidential information of our clients to
16 the Patent Office because of that duty. So it puts the
17 counsel who is both trial counsel with access to confidential
18 information and at the same time has this duty to disclose to
19 the Patent Office in an irreconcilable conflict where they are
20 obligated to disclose information that is protected under the
21 protective order to the PTO where it would become public. We
22 would like to brief that for Your Honor, and I think we can
23 have that motion and brief on file in the next few days.

24 THE COURT: Well, what can we do -- I mean, that is
25 an issue I have confronted before. I would be glad to

1 consider it on briefing, but I don't want to hold up
2 everything, the production and the beginning of the case on
3 that. Is there some way -- I don't know where you are right
4 now; but is there some way you can move forward with it?

5 MR. BECKER: Sure, if I can address that. Trial
6 Counsel is not with the counsel that is prosecuting the
7 application. The client has retained different counsel.
8 There really is no issue about continuation applications, and
9 I don't know if that was a misstatement. The real issue is
10 reexaminations. There has been a reexamination request filed,
11 but it hasn't even been granted, and it is not likely to be
12 granted, if at all, for the next two months.

13 So there is no issue right now. No one needs to
14 share confidential information with anybody prosecuting any
15 patent applications right now.

16 THE COURT: Okay. Well, I think the simplest thing
17 would be to go ahead and in your protective order preclude
18 your firm from participation in any reexam, but with the
19 express understanding that on motion for good cause shown I
20 will revisit that issue; and if you can make out a case and we
21 can get thorough briefing on it -- because it doesn't sound
22 like you have even really got an issue of needing to
23 participate at this point in the reexam; is that correct?

24 MR. BECKER: That's correct.

25 THE COURT: But I want to make it clear to

1 defendants and to plaintiff, go ahead and tailor it that way,
2 but it is not going to be without prejudice -- and you can
3 read some of my other decisions -- I will look at it on a
4 case-by-case basis as to whether you have made a strong enough
5 case to allow you to participate in the reexam.

6 MR. BECKER: Thank you.

7 THE COURT: Okay. And you have resolved the part
8 about Mr. Gottfurcht; is that correct?

9 MR. BECKER: Yes.

10 THE COURT: All right. Well, I will consolidate it,
11 I will consolidate it into the newer case with the
12 understanding, and you can write it in as a footnote to your
13 Docket Control Order, that the defendants in the Apple case
14 447 will go ahead and begin discovery within ten days as -- I
15 mean, the production within ten days as indicated.

16 As far as your trial date, I think the plaintiff had
17 suggested July, defendants had suggested August. I don't have
18 August available. I have already got six patent cases on my
19 July 2011 trial docket, which is pretty heavy, so I am going
20 to put it as the first case on my September docket.

21 Let's see, as far as the length of trial at this
22 point for sake of -- let me just say, it will be consolidated
23 through pretrial, and then I will decide on -- based on who is
24 left, the best way to try the case, whether separate trials or
25 consolidating trial or whatever, for the purposes of the

1 Docket Control Order put the trial time down at five days and
2 we will revisit that as we get closer to it as well.

3 Now, are there some discovery disputes as well?

4 MR. BECKER: They were the ones that we already
5 addressed.

6 THE COURT: Well, I have got here that plaintiff
7 wants 15 requests for admission, and defendants want 25. Do I
8 need to rule on those, or can y'all figure those out?

9 MR. AINSWORTH: Your Honor, we filed these late in
10 the evening; but if you want to just rule on them, we don't
11 really need argument. We are not that far apart. It is just
12 one of those deals --

13 THE COURT: I think y'all are grown adults, and you
14 can pretty well figure out how I'm going to rule on them.

15 MR. AINSWORTH: That's fine, Your Honor.

16 THE COURT: But if you need me to, I will. I
17 usually don't get into this level of the case. Good lawyers
18 usually work that out. I know you are all good lawyers, so
19 why don't y'all work that out. If you can't work it out,
20 bring it back to me, and I will decide it.

21 Is there any particular one you are hung up on --

22 MR. STEPHENS: No, Your Honor. I think we probably
23 can work them out.

24 THE COURT: Anything further the Court can help you
25 with?

1 MR. BECKER: Thank you.

2 THE COURT: Y'all have a mediator?

3 MR. BECKER: No.

4 MR. AINSWORTH: Markman date, Your Honor, do we keep
5 the same Markman date?

6 THE COURT: Oh, yes. All right. Markman date will
7 be January 27th, 2011; pretrial conference, August 25, 2011;
8 jury selection on September 6th; trial on September 12.

9 MR. STEPHENS: Your Honor, if I may, I think there
10 may be one other issue that I neglected. Some of the
11 defendants in the Apple case were added much more recently
12 than Apple, so while it is not a problem for Apple to start
13 producing a week after the protective order is done, I'm not
14 sure that the more recently added defendants feel the same
15 way. Maybe we should let them address that.

16 THE COURT: Well, this footnote will apply to Apple.
17 Who else does the plaintiff want it to apply to?

18 MR. BECKER: American.

19 THE COURT: Apple and American. The others will
20 fall on the other schedule with the newer case. Okay?

21 Okay. Anything further? Okay. Now, we were
22 talking about mediator, do you have a mediator?

23 MR. BECKER: Actually, I think we do not. Just for
24 the Court's information, Apple and the plaintiff already had a
25 mediation outside of the --

1 THE COURT: Okay.

2 MR. BECKER: -- the Court's schedule --

3 THE COURT: If you would stand when you address the
4 Court, please. Tell your co-Counsel to stand when he
5 addresses the Court. We are in Texas.

6 MR. AINSWORTH: I don't know that you have actually
7 appointed anybody as mediator in this case. We ad hoc have
8 gotten mediators along the way --

9 THE COURT: Any objection to Judge Faulkner?

10 MR. AINSWORTH: No, Your Honor.

11 THE COURT: He does wonderful work. This sounds
12 like a complex case. I think he would be a good mediator for
13 you. Okay. He will be appointed.

14 MR. BECKER: Thank you.

15 THE COURT: Anything further? All right. Y'all
16 have a good week.

17 (End of proceedings.)

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

/s/ Shea Sloan

February 5, 2010

SHEA SLOAN, CSR, RPR
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