Chandler, Theodore W.

From: Josh Budwin [jbudwin@McKoolSmith.com]
Sent: Saturday, December 11, 2010 12:14 PM
To: Carnaval, Christopher C. - King & Spalding
Cc: Eolas; Eolas Markman
Subject: RE: EOLAS -- Claim Construction Issues
Attachments: 2010 08 19 [168] Order Granting i2's Expedited Mtn to Equalize CC Briefing Page Limit.pdf

Hi Chris -

The Order I referenced from my other case is attached. If the Defendants plan to drop any claims from construction, you must tell us at least a week in advance. The defendants have had months to discuss claim construction issues, so any "problem" is a result of the defendants' own actions/decisions.

As for the remainder of your email, that Eolas will seek pre-suit damages cannot be a surprise. Over the past several months, we've had correspondence and communications with the defendants seeking documents and things and source code going back for the full six year damages period. For example, in Matt Rapapport's Nov. 2 and 3 letters to the defendants--following up on our earlier communications--we requested source code throughout the entire damages period.

We disagree that filing a MSJ related to intervening rights is a proper part of claim construction. Because intervening rights includes factual determinations, we think it is improper to file such a motion prior to the close of fact discovery.

Thank you.

From: Carnaval, Christopher [mailto:ccarnaval@kslaw.com]
Sent: Friday, December 10, 2010 10:55 PM
To: Josh Budwin
Cc: Eolas; Eolas Markman
Subject: RE: EOLAS -- Claim Construction Issues

Josh,

Could you please send us the order you described in your email? If Defendants are able to reach agreement on dropping additional claim terms, we will let you know, but we cannot guarantee that it will be by 12/16. With 21 unrelated Defendants, and disparate products and views on how to best defend this case, it is difficult for Defendants to reach agreements among themselves. This is a problem created by Eolas's decision to sue so many different defendants and accuse so many different products in the same case.

During our call this morning, you said that Eolas would be seeking pre-2009 damages on the amended claims of the '906 patent. This was the first time we'd heard of this. We discussed how that would raise the question of intervening rights, and everyone on the phone appeared to agree that it would make sense to brief intervening rights before the Markman hearing so that Judge Davis and his technical advisor can decide the question of intervening rights along with indefiniteness and claim construction. Our tentative thought was that it would make sense for the defendants to file a motion for summary judgment of intervening rights on 2/4, the same day already in the schedule for the defendants to file a motion for summary judgment of indefiniteness. Under this approach, Eolas's responsive briefs would be due on 2/18, and Defendants' reply briefs would be due on 2/24. On the phone this morning you did not disagree with this approach, but you said you would check with your team. Please let us know if the proposal above for briefing intervening rights is agreeable to Eolas.

Regards,

Chris

Christopher C. Carnaval
King & Spalding