

The Honorable Ricardo S. Martinez

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

MICROSOFT CORPORATION,)	No. 2:11-cv-00134 RSM
)	
Plaintiff,)	TIVO'S NOTICE OF SUPPLEMENTAL
)	AUTHORITY
v.)	
)	NOTE ON MOTION CALENDAR:
TIVO INC.,)	Friday, March 18, 2011
)	
Defendant.)	

TiVo Inc., hereby submits the following supplemental authority: Transcript of Proceedings on Motion to Stay in Microsoft Corp. v. TiVo, Inc., C-10-00240-LHK (N.D. Cal., April 29, 2011) (attached hereto). The discussion with the Court at least at pages 5-11 is relevant to the issues raised in TiVo's Motion to Stay Pursuant to 28 U.S.C. § 1659 and to Transfer Venue Pursuant to 28 U.S.C. § 1404(a) (Dkt. No. 21), which is currently pending before this Court.

DATED this 18th day of May, 2011.

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Jofrey M. McWilliam, WSBA #28441

IRELL & MANELLA LLP
Morgan Chu (*pro hac vice*)
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TIVO'S NOTICE OF SUPPLEMENTAL AUTHORITY
(No. 2:11-cv-00134 RSM) - 1

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Andrei Iancu (*pro hac vice*)

By /s/ Jofrey M. McWilliam

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1 **CERTIFICATE OF SERVICE**

2 The undersigned attorney certifies that on the 18th day of May, 2011, I electronically
3 filed the foregoing with the Clerk of the Court using the CM/ECF system which will send
4 notification of such filing to the following:

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

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MICROSOFT CORPORATION,) C-10-00240-LHK
)
PLAINTIFF,) APRIL 29, 2011
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V.)
)
TIVO, INC.,) PAGES 1 - 38
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DEFENDANT.)
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THE PROCEEDINGS WERE HELD BEFORE
THE HONORABLE UNITED STATES DISTRICT
JUDGE LUCY H. KOH

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A P P E A R A N C E S:

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FOR THE PLAINTIFF: PERKINS COIE
BY: CHAD S. CAMPBELL
CHRISTOPHER KAO
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OFFICIAL COURT REPORTER: IRENE RODRIGUEZ, CSR, CRR
CERTIFICATE NUMBER 8074

1 SAN JOSE, CALIFORNIA

APRIL 29, 2011

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

14:36:04 3 (WHEREUPON COURT CONVENED AND THE FOLLOWING
14:36:06 4 PROCEEDINGS WERE HELD:)

14:38:05 5 THE CLERK: CALLING CASE NUMBER
14:38:09 6 C-10-00240-LHH, MICROSOFT CORPORATION VERSUS TIVO,
14:38:14 7 INCORPORATED.

14:38:15 8 MR. CAMPBELL: GOOD AFTERNOON, YOUR
14:38:16 9 HONOR. APPEARING FOR PLAINTIFF MICROSOFT MY NAME
14:38:19 10 IS CHAD CAMPBELL FROM THE LAW FIRM OF PERKINS COIE
14:38:23 11 AND WE'RE JOINED BY CHRISTOPHER KAO AND STACY QUAN
14:38:28 12 SENIOR ATTORNEY AT MICROSOFT.

14:38:31 13 MR. CHU: GOOD AFTERNOON, YOUR HONOR. ON
14:38:34 14 BEHALF OF TIVO MORGAN CHU AND AZAR MOUZARI.

14:38:40 15 THE COURT: OKAY. GOOD AFTERNOON TO
14:38:42 16 EVERYONE.

14:38:48 17 OKAY. I JUST HAVE SOME QUESTIONS FOR
14:38:51 18 BOTH SIDES.

14:38:53 19 LET ME START WITH TIVO.

14:38:59 20 WOULD YOU STIPULATE THAT THE P.T.O.'S
14:39:03 21 DECISION WOULD BE BINDING SO THAT THERE WOULD BE
14:39:06 22 SOME ESTOPPEL HERE SIMILAR TO AN EX PARTE REEXAM?

14:39:14 23 MR. CHU: YOUR HONOR, AS THE COURT KNOWS,
14:39:16 24 ALL OF THESE ARE EX PARTE REEXAMINATIONS AND THAT'S
14:39:18 25 THE KIND OF QUESTION I FEEL DUTYBOUND TO CONSULT

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WITH TIVO ABOUT BEFORE ANSWERING ON BEHALF OF TIVO.

THE COURT: OKAY. WELL, YOU UNDERSTAND MY CONCERN IS ARE WE GOING TO BE DOING ALL OF THIS ANYWAY JUST TWO TO THREE YEARS FROM NOW SINCE IT'S -- THERE'S NO ESTOPPEL IN EX PARTE REEXAM?

AND SO IF WE'RE REALLY GOING TO SIMPLIFY THE ISSUES AND SIMPLIFY THE TRIAL, IF WE HAVE TO RELITIGATE ALL OF THE SAME PRIOR ART AND RELITIGATE THE SAME VALIDITY ISSUES THAT YOU'RE GOING TO LITIGATE IN THE REEXAM, I DON'T SEE HOW IT'S GOING TO SIMPLIFY THE ISSUES.

DO YOU WANT TO ADDRESS THAT?

MR. CHU: I THINK IT DEPENDS ON WHAT HAPPENS DURING THE COURSE OF THE REEXAMINATION, YOUR HONOR.

AND IT COULD BE THAT THE CLAIMS ARE CANCELLED, IN WHICH CASE IT WOULD DEFINITELY SIMPLIFY MATTERS BECAUSE THERE WOULD BE NO CLAIMS TO DEAL WITH IT.

IT COULD BE, AS IS OFTEN THE CASE, SOME CLAIMS ARE CANCELLED AND OTHER CLAIMS ARE CHANGED. THAT, TOO, WOULD MAKE A DIFFERENCE WITH RESPECT TO VALIDITY AS WELL AS INFRINGEMENT.

IN OTHER WORDS, IT'S CONCEIVABLE THAT WE COULD HAVE PROCEEDINGS IN THIS CASE ON CERTAIN

14:40:44 1 CLAIMS, HAVE THOSE CLAIMS AMENDED, AND THEN ALL OF
14:40:47 2 THOSE PROCEEDINGS WOULD BE FOREGONE.

14:40:49 3 THE COURT: WHEN DO YOU THINK YOU COULD
14:40:51 4 GET BACK TO ME AS TO WHETHER YOUR CLIENT MIGHT BE
14:40:54 5 WILLING TO STIPULATE TO SOME KIND OF BINDING OR
14:40:58 6 SOME TYPE OF ESTOPPEL SO WE WOULDN'T HAVE TO REPEAT
14:41:03 7 EVERYTHING HERE IF IT ULTIMATELY DOES COME BACK
14:41:08 8 THAT'S DONE IN THE REEXAM?

14:41:12 9 MR. CHU: IF I COULD HAVE 14 DAYS, YOUR
14:41:15 10 HONOR, THAT WOULD BE MOST HELPFUL.

14:41:16 11 THE COURT: OKAY. NOW, 14 DAYS WILL GET
14:41:19 12 US RIGHT UP INTO THE CLAIM CONSTRUCTION AND
14:41:22 13 TUTORIAL I THINK IS THE 16TH OF MAY.

14:41:28 14 MR. CHU: I'LL TRY AND DO IT MORE QUICKLY
14:41:30 15 THAN THAT.

14:41:30 16 MY CONCERN IS THAT I KNOW IN THE
14:41:32 17 IMMEDIATE WEEK I'M GOING TO BE OUT OF TOWN FOR PART
14:41:35 18 OF THE TIME, AND I DON'T KNOW THE LOCATION OF THE
14:41:38 19 PARTICULAR PEOPLE AT TIVO, WHAT THEIR PRESENT
14:41:42 20 SCHEDULE IS.

14:41:43 21 THE COURT: SURE. I THINK THAT WOULD BE
14:41:47 22 HELPFUL IN DECIDING THIS MOTION AND OBVIOUSLY I
14:41:56 23 WOULD LOVE TO GET AN ANSWER SOONER RATHER THAN
14:41:58 24 LATER BECAUSE OBVIOUSLY WE WILL ALL BE PREPARED FOR
14:42:01 25 THE TUTORIAL AT THAT POINT IF YOU WAIT UNTIL THE

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13TH OF MAY.

BECAUSE THE TUTORIAL IS ON THE 16TH,
WHICH IS THE FOLLOWING MONDAY, AND THEN THE HEARING
ITSELF IS THE 17TH, WHICH IS TUESDAY.

MR. CHU: SO I APPRECIATE THE TIMING
ISSUE.

WE'RE ALSO, FIRST OF ALL, IF I'M ABLE TO
GET BACK, IF WE'RE ABLE TO GET BACK TO THE COURT
SOONER, WE WILL DO THAT.

THE COURT: THANK YOU.

MR. CHU: BUT, SECOND, WE'RE ALSO OPEN TO
A VERY SLIGHT DELAY IN THE PROCEEDINGS IF WE JUST
MOVE THEM A WEEK OR SOME OTHER SHORT PERIOD OF TIME
TO A DATE THAT IS CONVENIENT FOR THE COURT AND, OF
COURSE, OPPOSING COUNSEL.

THAT MIGHT BE A WAY TO GO.

THE COURT: LET ME ASK A QUESTION OF
MR. CAMPBELL. UNDERSTANDING THAT THIS IS GLOBAL
WARFARE, WHY DID YOU NEED TO BRING A SUIT IN
I.T.C., WESTERN DISTRICT OF WASHINGTON, HERE IN THE
NORTHERN DISTRICT OF CALIFORNIA, AND THEN AT & T,
YOUR CUSTOMER, ALSO FILES HERE?

I MEAN, IT REALLY DOES LOOK LIKE IT'S
SORT OF ATTRITION OR THAT YOU'RE TRYING TO GET
LEVERAGE PURELY FROM SETTLING TIVO WITH HAVING TO

14:43:23 1 FIGHT A LOT OF FRONTS, A LOT OF WARS IN DIFFERENT
14:43:26 2 JURISDICTIONS.

14:43:27 3 YOU OBVIOUSLY COULD HAVE RAISED THESE
14:43:30 4 PATENTS IN THE TEXAS CASE.

14:43:33 5 GO AHEAD.

14:43:35 6 MR. CAMPBELL: I'M HAPPY TO ADDRESS THAT.
14:43:37 7 THERE'S ACTUALLY TWO PIECES OF IT AND A LITTLE BIT
14:43:39 8 OF CHRONOLOGY THAT I NEED TO INCLUDE TO EXPLAIN
14:43:42 9 WHAT HAPPENED.

14:43:42 10 THE COURT: GO AHEAD, PLEASE.

14:43:44 11 MR. CAMPBELL: BECAUSE THE DECISIONS
14:43:46 12 WEREN'T MADE ALL AT ONE POINT IN TIME.

14:43:48 13 FIRST LET ME ADDRESS THE DIFFERENCE
14:43:50 14 BETWEEN WHAT IS HAPPENING IN THE WESTERN DISTRICT
14:43:53 15 OF WASHINGTON AND HERE.

14:43:55 16 ALL OF THE PATENTS THAT ARE ASSERTED IN
14:43:57 17 THE WESTERN DISTRICT OF WASHINGTON ARE ACTUALLY
14:44:00 18 PART OF THE I.T.C. PROCEEDINGS.

14:44:02 19 SO THERE ARE 11 TOTAL PATENTS IF YOU
14:44:05 20 COUNT THE 7 THAT ARE AT ISSUE HERE, THE 4 THAT ARE
14:44:07 21 AT ISSUE IN THE I.T.C. IN THE WESTERN DISTRICT OF
14:44:10 22 WASHINGTON, 11 TOTAL MICROSOFT PATENTS.

14:44:13 23 THE REQUIREMENTS FOR BRINGING SUIT IN THE
14:44:15 24 I.T.C. ON A PATENT ARE DIFFERENT THAN THEY ARE IN
14:44:18 25 DISTRICT COURT. THERE ARE REQUIREMENTS AND PIECES

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OF PROOF THAT YOU HAVE TO PUT ON IN THE I.T.C. THAT ARE DIFFERENT.

AND THE REASON FOR THE SPLIT BETWEEN THE FOUR THAT ARE IN THE I.T.C. AND THOSE HERE COMES FROM SIMPLY THE ANALYSIS OF THE LEGAL TEAM IN FIGURING OUT, YOU KNOW, THE PATENTS THAT WERE APPROPRIATE FOR THE I.T.C. AND THOSE THAT WERE NOT.

AND WITHOUT GETTING INTO, YOU KNOW, WORK PRODUCT ISSUES AND THE LIKE, THAT IN A NUTSHELL IS WHY NOT ALL OF THE PATENTS ARE ASSERTED IN THE I.T.C.

THERE ARE DIFFERENT REQUIREMENTS. AND WE MADE A DECISION ABOUT WHICH ONES SEEMED TO BE APPROPRIATE TO BRING THERE AND THEY WERE BROUGHT THERE.

QUITE FREQUENTLY --

THE COURT: WHAT DIFFERENT REQUIREMENTS ARE YOU TALKING ABOUT? LIKE DOMESTIC INDUSTRY?

MR. CAMPBELL: YES.

THE COURT: HOW WOULD THAT EVEN BE A MATTER IN THIS CASE?

GO AHEAD. PLEASE, PLEASE EXPLAIN.

MR. CAMPBELL: IN I.T.C. YOU DO NEED TO ESTABLISH DOMESTIC INDUSTRY, THAT'S ONE REQUIREMENT.

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AND THERE ARE OTHER REQUIREMENTS AS WELL.
YOU'RE DEALING WITH INJUNCTIVE RELIEF INSTEAD OF
DAMAGES AND JUST LOOKING AT THE ISSUES FROM A MACRO
LEVEL A DECISION WAS MADE ABOUT WHICH WERE
APPROPRIATE TO BRING IN THE I.T.C. AND WHICH WERE
NOT.

NOW, WITH RESPECT TO THE FILING IN THE
WESTERN DISTRICT OF WASHINGTON, EVERYBODY KNEW,
TIVO KNEW AND MICROSOFT KNEW, EVERYBODY KNEW THAT
WHEN THAT CASE WAS FILED, TIVO WOULD HAVE A
STATUTORY RIGHT TO HAVE THAT CASE STAYED PENDING
THE OUTCOME OF THE I.T.C. ACTION.

SO IT REALLY -- MOST OF THE TIME --

THE COURT: WELL, WHY NOT FILE IT HERE?
ARE YOU TRYING TO GET SOME HOME TURF ADVANTAGE BY
FILING IT IN THE STATE OF WASHINGTON?

MR. CAMPBELL: NO.

THE COURT: YOU HAVE A CASE HERE AND YOU
WERE EARLY ENOUGH THAT I PROBABLY WOULD HAVE
GRANTED YOU LEAVE TO AMEND, YOU KNOW, BASED ON THAT
ANALYSIS OF, YOU KNOW, FUTILITY, PREJUDICE, UNDUE
DELAY, I WOULD HAVE PROBABLY WOULD HAVE LET YOU
BRING IT HERE. SO WHY CREATE A NEW VENUE WHERE
THEY HAVE TO GET LOCAL COUNSEL IN WASHINGTON, THEY
HAVE TO LEARN NEW LOCAL RULES OVER THERE?

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I MEAN, IT IS AN ADDITIONAL BURDEN,
WOULDN'T YOU SAY, TO HAVE TO MAKE THEM HAVE TO
DEFEND THEMSELVES IN A NEW JURISDICTION?

MR. CAMPBELL: THERE ARE A COUPLE OF
PIECES OF HISTORY THAT I NEED TO JUST REMIND US ALL
OF.

THE COURT: PLEASE. OKAY.

MR. CAMPBELL: I KNOW THE COURT PICKED UP
THIS CASE AFTER WE WERE ALREADY STARTED HERE.

THE COURT: SURE.

MR. CAMPBELL: AT THE VERY BEGINNING WHEN
WE FILED IN JANUARY OF 2010 THERE WAS A PERIOD OF
TIME WHEN AT & T AND MICROSOFT WERE SEEKING TO HAVE
THE TEXAS LITIGATION TRANSFERRED HERE TO
CALIFORNIA.

AT & T FILED THEIR PATENT AFFIRMATIVE
CLAIM HERE, MICROSOFT FILED ITS PATENT AFFIRMATIVE
CLAIM HERE, AND THERE WERE A COUPLE OF SCHEDULING
CONFERENCES WHERE TIVO EVEN MADE ALLUSIONS TO THE
NOTION THAT IF THE TRANSFER MOTION WAS GRANTED, IT
WOULD BE A GOOD IDEA TO CONSOLIDATE EVERYTHING
HERE.

THAT ALL HAPPENED, THAT, YOU KNOW,
ULTIMATELY WE DID NOT PREVAIL WITH RESPECT TO THE
MOTION TO TRANSFER AND IT TOOK A FEW MONTHS FOR THE

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BRIEFING TO SORT ITSELF OUT.

ULTIMATELY WE DID NOT PREVAIL, BUT THERE WAS QUITE A BIT OF EXTENDED PERIOD OF TIME WHEN THE HOPE AND EXPECTATION WAS THAT WE WOULD CONSOLIDATE EVERYTHING HERE AND BE ABLE TO HAVE THE CASE PROCEEDING HERE IN TIVO'S BACKYARD, A PLACE WHERE PLAINLY THEY WOULD HAVE NOT HAVE ANY BASIS FOR COMPLAINING ABOUT WHERE WE WERE LITIGATING.

WITH RESPECT TO THE I.T.C. ACTION, OBVIOUSLY WE DID NOT FILE THAT AT THE SAME TIME. IT WAS FILED LATER.

IT IS A SEPARATE CASE. AND IN DECIDING WHERE TO FILE THE DISTRICT COURT PIECE OF THAT, UM, WE SIMPLY MADE THE CALCULATION THAT, YOU KNOW, ALL OF THE INVENTORS, ALL OF THE WITNESSES, ALL OF THE, YOU KNOW, THE DOCUMENTS AND THE EVIDENCE WITH RESPECT TO THAT PATENT ACTIVITY THAT IS AT ISSUE IN THAT CASE ARE IN THE SEATTLE AREA, UP IN THE WESTERN DISTRICT OF WASHINGTON.

TIVO SELLS ITS PRODUCTS IN THE WESTERN DISTRICT OF WASHINGTON. IT HAS SUBSCRIBERS IN THE WESTERN DISTRICT OF WASHINGTON. THERE JUST WASN'T ANYTHING APPROPRIATE ABOUT THAT VENUE AND A LOT OF EFFICIENCIES FOR MICROSOFT AS THE PLAINTIFF TO OBTAIN AND THAT'S WHY THE DECISION WAS MADE TO FILE

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THERE.

THE COURT: SO WHY DID YOU DECIDE TO FILE
HERE IN JANUARY OF 2010?

MR. CAMPBELL: WHEN WE FILED HERE, WE
HOPE AND EXPECTED THAT WE WOULD BE ABLE TO GET THE
TEXAS LITIGATION TRANSFERRED HERE SO THAT
EVERYTHING WOULD BE TOGETHER. AND THAT DID NOT
WORK OUT.

THE COURT: I APPRECIATE HEARING ALL OF
THE HISTORY, BUT THAT STILL IS NOT COMPLETELY
PERSUASIVE AS TO WHY SOME OF THIS ADDITIONAL
LITIGATION JUST WASN'T FILED AS A COUNTERCLAIM IN
TEXAS OR WHY THE WESTERN DISTRICT OF WASHINGTON
CASE JUST WASN'T BROUGHT HERE.

IT, IT -- IT JUST DOES NOT -- IT LOOKS
LIKE IT IS PART OF THE LEVERAGE ANALYSIS TO HAVE SO
MANY SUITS IN SO MANY JURISDICTIONS.

MR. CAMPBELL: IF I COULD JUST ADDRESS
ONE SMALL POINT ABOUT THE DECISION NOT TO FILE IN
THE EASTERN DISTRICT OF TEXAS?

THE COURT: YES.

MR. CAMPBELL: ABOUT THE SAME TIME
ROUGHLY CONTEMPORANEOUSLY, NOT PRECISELY
CONTEMPORANEOUSLY, BUT IN THE SAME SEASON DURING
WHICH THE MOTION TO TRANSFER WAS PENDING, TIVO

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FILED A MOTION TO DISMISS IN THE EASTERN DISTRICT OF TEXAS OUR DECLARATORY JUDGMENT COMPLAINT AND CLAIM OF INTERVENTION. THEY DIDN'T TRY TO SEEK DISMISSAL OF THE WHOLE THING, BUT THEY TRIED TO SEEK DISMISSAL OF PART OF IT.

AND THEIR THEORY WAS THAT IT WAS IMPROPER FOR ANY CLAIMS BY MICROSOFT AS AN INTERVENOR TO BE BROUGHT IN THAT VENUE.

SO WE HAD FILED A DECLARATORY JUDGMENT SEEKING A DECLARATION OF NO DIRECT INFRINGEMENT WHEN TIVO, OR EXCUSE ME, WHEN AT & T USES THE MICROSOFT SOFTWARE IN THE BOXES AND WE SOUGHT A DECLARATION OF INVALIDITY OF THE PATENTS THAT WERE ASSERTED AGAINST AT & T.

TIVO TOOK THE POSITION THAT SOME OF OUR ALLEGATIONS WERE SIMPLY TOO BROAD AND WOULD SWEEP IN POTENTIAL LIABILITY ISSUES OF MICROSOFT UNDER THOSE PATENTS AND THEY ARGUED THAT THAT WAS IMPROPER FOR AN INTERVENOR TO DO TO BROADEN THE LAWSUIT.

THAT IT WOULD BE AN INAPPROPRIATE THING FOR MICROSOFT TO BE INJECTING CLAIMS THAT TIVO MAY OR MAY NOT HAVE AGAINST MICROSOFT INTO THAT CASE.

I'M SURE THAT HAD WE TRIED AS AN INTERVENOR TO ASSERT PATENT COUNTERCLAIMS, YOU

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KNOW, IN THE SAME COMPLAINT AND INTERVENTION, IN OTHER WORDS, AFFIRMATIVE CLAIMS AGAINST TIVO, THAT WE WOULD HAVE HEARD THE SAME THING.

THEY SIMPLY DID NOT WANT THE TEXAS CASE TO BE ABOUT ANYTHING OTHER THAN THEIR CLAIMS, THEIR AFFIRMATIVE CLAIMS FOR RELIEF AGAINST AT & T.

THAT MOTION WAS ULTIMATELY RESOLVED BY A BACK AND FORTH AGREEMENT BETWEEN THE PARTIES.

WE AMENDED OUR PLEADINGS SLIGHTLY TO MAKE IT CLEAR THAT THE ONLY ISSUES THAT MICROSOFT WAS IN THAT CASE WITH RESPECT TO WERE THE, YOU KNOW, THE ISSUES THAT WOULD RELATE TO DIRECT INFRINGEMENT BY AT & T AND THEN INVALIDITY OF THE PATENTS AND NOTHING ELSE.

SO THAT IS ANOTHER HISTORICAL REASON WHY WE END UP, YOU KNOW, IN TWO DIFFERENT PLACES IN LITIGATION WITH THESE PARTIES IN TWO DIFFERENT PLACES.

THE COURT: LET ME ASK THE NEXT QUESTION IS ACTUALLY GOING TO BE FOR BOTH OF YOU OR BOTH SIDES.

I WOULD LIKE TO KNOW WHAT IS MORE LIKELY TO FACILITATE RESOLUTION AND GLOBAL PEACE OF ALL CASES?

AND MY THINKING ON THIS IS THAT PROBABLY

14:53:00 1 GOING FORWARD WOULD HELP THAT AND I WOULD THINK FOR
14:53:04 2 TWO REASONS:

14:53:05 3 NUMBER ONE, GENERALLY IF THERE IS
14:53:11 4 LITIGATION AND COSTS AND PEOPLE ARE FORCED TO TAKE
14:53:15 5 POSITIONS, IT MIGHT FORCE A JUDGMENT OR FORCE AT
14:53:18 6 LEAST A DECISION WHICH MIGHT FACILITATE REACHING A
14:53:25 7 DECISION, WHEREAS IF YOU HAVE SOMETHING SIMMERING
14:53:27 8 ON THE BACK BURNER THAT YOU DON'T HAVE TO PAY
14:53:30 9 ATTENTION TO FOR THE NEXT TWO OR THREE YEARS, I
14:53:33 10 DON'T THINK THAT'S REALLY CONDUCIVE TO FORCING A
14:53:35 11 DECISION AND FORCING SOME TYPE OF A RESOLUTION.

14:53:38 12 MY SECOND THOUGHT IS, AND CORRECT ME IF
14:53:45 13 I'M WRONG, THE PATENTS THAT TIVO IS ASSERTING
14:53:47 14 AGAINST AT & T AND I GUESS MICROSOFT IN TEXAS ARE
14:53:53 15 THE ECHOSTAR PATENTS, RIGHT, THE PATENTS YOU
14:53:57 16 ASSERTED AGAINST ECHOSTAR AND THEY HAVE ALREADY
14:53:59 17 BEEN THROUGH REEXAM TWICE; IS THAT CORRECT?

14:54:03 18 MR. CHU: THERE WAS ONE PATENT ASSERTED
14:54:05 19 AGAINST ECHOSTAR AND THERE WERE SOME PATENTS THAT
14:54:07 20 WERE NOT ASSERTED AGAINST ECHOSTAR.

14:54:11 21 THE COURT: OKAY. BUT THE ONE THAT
14:54:12 22 YOU'RE ASSERTING AGAINST ECHOSTAR HAS BEEN THROUGH
14:54:17 23 REEXAM TWICE; IS THAT CORRECT?

14:54:19 24 MR. CHU: CORRECT.

14:54:19 25 THE COURT: SO IN THE LEVERAGE ANALYSIS,

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14:54:49 13
14:54:53 14
14:54:57 15
14:55:00 16
14:55:03 17
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I ASSUME THAT'S VERY STRONG LEVERAGE FOR TIVO AND ECHOSTAR AND THAT TRIAL IS STILL OCTOBER 8TH OF THIS YEAR?

MR. CHU: I THINK THE JURY SELECTION IS SCHEDULED FOR -- IT IS IN OCTOBER, THE JURY SELECTION SCHEDULE, BUT LET ME ADDRESS THE OVERALL QUESTION THAT THE COURT IS RAISING ON LEVERAGE ANALYSIS.

THE COURT: YES.

MR. CHU: EACH SIDE HAS A TRIAL SCHEDULED THIS FALL.

THERE'S THE OCTOBER TRIAL IN TEXAS AND THERE'S THE NOVEMBER TRIAL IN THE I.T.C.

EACH SIDE, THEREFORE, HAS THE POTENTIAL OF GETTING AN INJUNCTION AGAINST THE OTHER SIDE. THAT WOULD BE TRUE IF THIS CASE IS STAYED AND OBVIOUSLY ALSO TRUE IF THIS CASE IS NOT STAYED.

IT DOESN'T TAKE MUCH TO SEE THAT ON THE OVERALL LEVERAGE ANALYSIS, IT IS THE CLOSENESS OF TRIAL AND THE POTENTIAL FOR INJUNCTIVE RELIEF THAT WOULD MORE LIKELY DRIVE THE PARTIES TO SETTLEMENT. THAT WILL OCCUR LATER THIS YEAR.

ON THE COURT'S QUESTION ABOUT WHETHER OR NOT ALLOWING THIS CASE AND WHETHER OR NOT ALLOWING THIS CASE TO GO FORWARD, WHETHER THAT WILL IMPACT

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14:55:59 9
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SETTLEMENT? I DON'T THINK IT WILL IN A WAY THAT I WOULD CONSIDER TO BE PROPER IN THE LEVERAGE ANALYSIS THAT I JUST DESCRIBED.

IN OTHER WORDS, THE LEVERAGE ANALYSIS THAT I JUST DESCRIBED GIVES APPROPRIATE LITIGATION RISKS FOR BOTH SIDES OF THE OVERALL LITIGATION MATTERS.

ALLOWING THIS CASE TO GO FORWARD WILL HAVE THE IMPACT OF ENORMOUSLY BURDENING TIVO WITH LITIGATION EXPENSES.

AND IF THAT'S A FACTOR THAT DRIVES A SETTLEMENT, HOPEFULLY IT WOULD NOT BE, BUT IF IT IS A FACTOR, I WOULD CONSIDER THAT TO BE AN IMPROPER FACTOR, AN IMPROPER WAITING AS A LEGAL MATTER TO GIVE EXTRA LEVERAGE TO MICROSOFT SOLELY BECAUSE IT IS A DEEP POCKET, IT'S ABLE TO BEAR THE LITIGATION EXPENSES, AND ON A COMPARATIVE BASIS THE LITIGATION EXPENSE FACTOR TRULY DOES PREJUDICE TIVO.

THE COURT: IS THE WESTERN DISTRICT OF WASHINGTON CASE STAYED OR IS THE REQUEST -- I MEAN, IT'S A MANDATORY STAY, SO IS THAT REQUEST STILL PENDING? OR WHAT IS THE STATUS OF THAT?

MR. CAMPBELL: TIVO FILED A MOTION TO HAVE THE CASE STAYED, BUT THEY WANTED TO HAVE IT TRANSFERRED HERE FIRST.

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SO THAT MOTION IS STILL PENDING.

THE COURT: OH, I SEE.

MR. CAMPBELL: MICROSOFT OBVIOUSLY
DOESN'T OPPOSE THE STAY. THEY HAVE A STATUTORY
RIGHT TO THE STAY.

MICROSOFT DOES OPPOSE THE TRANSFER
MOTION.

THE COURT: I SEE. AND SO THE COURT
HASN'T RULED ON THE STAY BECAUSE OF THE TRANSFER.
OKAY.

MR. CAMPBELL: WHEN I CHECKED THIS
MORNING THAT MOTION IS STILL --

THE COURT: OKAY. DO YOU WANT TO ADDRESS
THE SETTLEMENT RESOLUTION QUESTION?

MR. CAMPBELL: I ACTUALLY BELIEVE THE
COURT HAS IT EXACTLY RIGHT.

THE NOTION THAT IF WE SIDELINE THIS CASE
IT WILL CREATE AN ENVIRONMENT IN WHICH SETTLEMENT
TALKS WILL HAPPEN WHERE THEY OTHERWISE WOULD NOT, I
THINK THAT'S MISTAKEN.

THERE IS A LOT OF LITIGATION GOING ON, IT
IS TRUE, BUT THERE'S AN IMPORTANT POINT FROM
MICROSOFT'S PERSPECTIVE THAT I DON'T THINK SHOULD
BE LOST IN THE ANALYSIS.

WE HAVE BEEN AT THIS NOW HERE FOR A LONG

14:57:55 1 TIME HERE IN THIS CASE. AND IT SIMPLY IS NOT TRUE
14:57:57 2 THAT A LOT HAS NOT ALREADY BEEN EXPENDED TO GET
14:58:01 3 READY NOT ONLY FOR THE MARKMAN HEARING THAT IS
14:58:03 4 COMING UP BUT TO DO THE INFRINGEMENT ANALYSIS FOR
14:58:06 5 SEVEN PATENTS, TO GET EXPERTS LINED UP AND TO GET
14:58:09 6 THEM GOING.

14:58:10 7 A LOT OF TIME AND ENERGY AND EXPENSE HAS
14:58:13 8 BEEN EXPENDED BY BOTH SIDES ALREADY.

14:58:15 9 IF WE SUSPEND WHAT IS HAPPENING NOW,
14:58:20 10 SOMETHING -- A FEW THINGS ARE FOR SURE. THERE
14:58:27 11 COULD BE PEOPLE ON THE TRIAL TEAMS WHO KNOW THINGS
14:58:31 12 NOW WHO WILL FORGET THEM AND THEY WILL HAVE TO REDO
14:58:35 13 THEM. THEY MAY LEAVE. WE HAVE FAIRLY LARGE TEAMS
14:58:38 14 ON BOTH SIDES. SO YOU WILL HAVE REPLACEMENT COSTS
14:58:41 15 AT A MINIMUM.

14:58:42 16 THERE COULD BE WITNESSES AND LIKELY WOULD
14:58:44 17 BE WITNESSES GIVEN THE SIZE OF THESE COMPANIES AND
14:58:47 18 THE WAY THAT THE ECONOMY MOVES PARTICULARLY IN THIS
14:58:49 19 AREA IN THE TECHNOLOGY SPACE WHO WILL MOVE ONTO
14:58:52 20 OTHER THINGS AND BECOME PRACTICALLY UNAVAILABLE.

14:58:55 21 SO THE NOTION THAT WE COULD SIMPLY PICK
14:59:00 22 UP WHERE WE LEFT OFF AFTER A REEXAM I THINK IS A
14:59:05 23 FALSE NOTION.

14:59:05 24 AND SO THERE ARE EXPENDITURES THAT HAVE
14:59:09 25 BEEN MADE THAT WILL BECOME VALUELESS TO BOTH SIDES

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IF WE STOP NOW.

THE COURT: BUT WHY ISN'T YOUR I.T.C. HAMMER ABOVE TIVO'S HEAD ENOUGH? WHY DO YOU ALSO NEED THIS IN ADDITION TO TRY AND GET A SETTLEMENT? GO AHEAD.

MR. CAMPBELL: IT REALLY ISN'T A HAMMER IN THE FOLLOWING SENSE: WHAT DIVIDES THE PARTIES TODAY IS A DISAGREEMENT ABOUT TWO THINGS.

NUMBER ONE, WHETHER THE PATENTS THAT EACH SIDE HAS FIT OR APPLY TO THE TECHNOLOGY THAT IS BEING USED BY THE OTHER.

AND, TWO, THE VALUE THAT SHOULD BE ASCRIBED TO THOSE PATENTS.

IF WE SIMPLY SAY THE PATENTS NOW THAT ARE AT ISSUE HERE ARE GOING TO GET STAYED, THEY DROP OUT OF THE VALUE QUESTION AND IT BECOMES THEN ASSYMMETRICAL. WE HAVE SOME PATENTS THAT WE HAVE IDENTIFIED THAT WE THINK TIVO SHOULD PAY ATTENTION TO, AND THEY OUGHT TO CONSIDER IN THE VALUE QUESTION IF THE LITIGATION ON THOSE PATENTS IS SUSPENDED, THEY TEND TO DROP OUT OF THE CALCULATION AND YOU STORE THE CALCULUS.

I DON'T THINK THERE'S ANY TWO WAYS AS A PRACTICAL MATTER ABOUT THAT. IF YOU DO SUSPEND IT, YOU KNOW, IT'S NOT REALLY A QUESTION OF LEVERAGE.

15:00:38 1 IT'S A QUESTION OF, YOU KNOW, HERE'S SOME PROPERTY
15:00:42 2 RIGHTS THAT MICROSOFT HAS THAT TIVO IS USING AND WE
15:00:47 3 OUGHT TO GET TO THE POINT WHERE PEOPLE ARE
15:00:48 4 CONFRONTED WITH THE QUESTIONS THAT YOUR HONOR IS
15:00:51 5 SUGGESTING SHOULD BE CONFRONTED WITH SOONER RATHER
15:00:54 6 THAN LATER AND AT THAT POINT GOOD DECISIONS COULD
15:00:56 7 BE MADE.

15:00:56 8 THE COURT: AND IS THE SAME ACCUSED
15:00:59 9 PRODUCTS IN THE I.T.C. THAT ARE BEING ACCUSED HERE?

15:01:02 10 MR. CAMPBELL: YES, WITH ONE CAVEAT.
15:01:04 11 THERE'S ONE PATENT THAT IS ASSERTED AGAINST SOME
15:01:07 12 OLDER TIVO PRODUCTS, BUT IN THE MAIN, THE CURRENT
15:01:10 13 PRODUCTS THAT TIVO IS SELLING ARE ALSO AT ISSUE
15:01:13 14 HERE.

15:01:15 15 THE COURT: OKAY.

15:01:16 16 MR. CHU: I WANTED TO ADDRESS ONE WORD
15:01:19 17 USED BY OPPOSING COUNSEL, ASYMMETRICAL. IT ALREADY
15:01:24 18 IS ASYMMETRICAL. IT'S ALREADY ASYMMETRICAL BECAUSE
15:01:28 19 WHAT TIVO RISKS IN THE I.T.C. PROCEEDING IS ITS
15:01:32 20 ENTIRE BUSINESS.

15:01:33 21 TIVO'S PRODUCT IS TIVO.

15:01:36 22 WHAT IS AT RISK TO MICROSOFT IS A TINY
15:01:42 23 FRACTION OF A FRACTION OF 1 PERCENT OF MICROSOFT'S
15:01:44 24 BUSINESS.

15:01:49 25 THEY JUST WANT MORE LEVERAGE, MORE

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LEVERAGE BY BURDENING TIVO WITH UNDUE LITIGATION EXPENSES.

THE COURT: I'M GOING TO TAKE THIS ISSUE UNDER SUBMISSION. I WOULD LIKE TO THINK ABOUT IT FURTHER. I WILL OBVIOUSLY ISSUE AN ORDER BEFORE -- WITHIN THE NEXT FEW WEEKS BECAUSE OUR TUTORIAL ON THE CLAIM CONSTRUCTION IS SET FOR THE 16TH AND 17TH OF MAY.

LET ME ASK SOME QUESTIONS. IN YOUR CLAIM CONSTRUCTIONS IT LOOKS LIKE DURING THE BRIEFING BOTH SIDES HAVE ACTUALLY MODIFIED, ADDED ADDITIONAL CONSTRUCTIONS WHERE YOU PREVIOUSLY SAID CLAIM MEANING AND THEN ADDED AN ALTERNATIVE AND THEN TIVO HAS CHANGED SOME INSTRUCTIONS.

WHY DID THAT HAPPEN? DID YOU ALL STIPULATE THAT YOU WOULD BE ABLE TO CHANGE YOUR CONSTRUCTIONS DURING THE BRIEFING?

WHAT IS GOING ON?

MR. CAMPBELL: THERE WAS NO SUCH STIPULATION, YOUR HONOR.

THE COURT: OKAY.

MR. CAMPBELL: SO THE ANSWER TO THAT QUESTION IS NO.

THE COURT: SO WHAT HAPPENED? BOTH SIDES -- BECAUSE I THINK IT'S TRUE FOR MICROSOFT AS

15:03:07 1 WELL, YOU ADDED SOME THINGS.

15:03:10 2 SO WHY IS CLAIM CONSTRUCTION SHIFTING
15:03:13 3 DURING THE BRIEFING?

15:03:16 4 MR. CAMPBELL: I DON'T -- ALTHOUGH IT IS
15:03:22 5 TRUE THAT THEY DID MAKE A SMALL ADJUSTMENT, I
15:03:26 6 BELIEVE THAT BY AND LARGE THE ADJUSTMENTS THAT WERE
15:03:28 7 MADE WERE MADE BY TIVO, AND WE DID REACT TO THE
15:03:32 8 ADJUSTMENTS THAT THEY MADE IN THE BRIEFING TO THE
15:03:34 9 EXTENT THAT WE COULD.

15:03:36 10 MS. MOUZARI: I WOULD JUST LIKE TO ADD
15:03:38 11 THAT TIVO'S ADJUSTMENTS COULD BE JUSTIFIED BECAUSE
15:03:41 12 IT ONLY GETS ONE AND A HALF TERM PER PATENT TO
15:03:46 13 CONSTRUE AND THAT IS VERY LIMITING AND TIVO IS
15:03:48 14 TRYING ITS BEST TO WORK WITHIN THE COURT'S
15:03:51 15 LIMITATION OF THE TEN MOST IMPORTANT TERMS.

15:03:53 16 THERE ARE 49 ASSERTED CLAIMS HERE AND
15:03:57 17 TIVO IS ATTEMPTING TO WORK WITH THE COURT'S
15:04:00 18 LIMITATIONS.

15:04:04 19 THE COURT: WELL, THIS IS -- IF I DON'T
15:04:07 20 GRANT THE STAY AND BECAUSE OF THE TIMING, SINCE
15:04:10 21 WE'RE LITERALLY TWO WEEKS AWAY FROM THE TUTORIAL
15:04:13 22 AND CLAIM CONSTRUCTION, I WANT A TIME LINE OF WHAT
15:04:16 23 YOUR CONSTRUCTION WAS, WHAT YOU CHANGED IT TO, AND
15:04:18 24 WHY.

15:04:19 25 BECAUSE THIS IS A LITTLE BIT UNUSUAL FOR

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IT TO BE MORPHING DURING CLAIM CONSTRUCTION
BRIEFING.

HOW SOON CAN YOU PROVIDE THAT?

MR. CAMPBELL: IF WE COULD HAVE A WEEK,
YOUR HONOR, I THINK THAT WOULD BE ADEQUATE.

THE COURT: MAY 6TH.

MR. CHU: YOUR HONOR, WE'LL LIVE WITH
THAT, BUT WE WANT TO CHECK WITH OUR COLLEAGUES THIS
AFTERNOON AFTER THIS COURT'S SESSION TO MAKE SURE
THAT THE PEOPLE WHO WERE WORKING DIRECTLY ON THE
CLAIM CONSTRUCTION ISSUES ARE IN TOWN AND CAN MEET
THAT DEADLINE.

THE COURT: OKAY.

ALL RIGHT. IF YOU'RE NOT ABLE TO, THEN
YOU'LL HAVE TO SUGGEST A DATE THAT YOU WANT AND
GIVE AN EXPLANATION FOR WHY YOU NEED ADDITIONAL
TIME.

MR. CHU: WE WILL DO THAT, AND WE WILL
ALSO CONSULT WITH OPPOSING COUNSEL ON A MUTUALLY
CONVENIENT DATE.

THE COURT: THAT WOULD BE BEST. OKAY.
THANK YOU.

SO I ASSUME THEN THAT THE JOINT CLAIM
CONSTRUCTION STATEMENT, IS THAT UP TO DATE? DOES
THAT INCLUDE ALL OF THE ADJUSTMENTS OR NOT?

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MR. CAMPBELL: ARE YOU REFERRING TO WHAT
GOT FILED EARLIER THIS WEEK?

THE COURT: YES.

MR. CAMPBELL: YES, THAT I BELIEVE IS THE
NET OF EVERYTHING.

THE COURT: OKAY.

MR. CHU: I AGREE, YOUR HONOR, BUT JUST
AS A REMINDER, THE COURT MAY HAVE THE FOLLOWING IN
MIND BUT JUST IN CASE, THIS IS THE FIRST ROUND OF
CLAIM CONSTRUCTION BECAUSE NOT ALL PATENTS ARE
BEING CONSTRUED IN THIS FIRST DRAFT AND THERE ARE
THE TWO, THERE ARE TWO MICROSOFT PATENTS THAT ARE
NOT APART OF THIS ROUND AND THEN THERE'S THE ONE
TIVO ALSO NOT APART OF THIS ROUND.

THE COURT: I UNDERSTAND THAT.

OKAY. IF WE DO PROCEED ARE YOU GOING TO
HAVE EXPERTS OR WHAT IS YOUR CURRENT PLAN FOR BOTH
THE TUTORIAL AND THE HEARING?

MR. CHU: THE PLAN FOR BOTH SIDES I
BELIEVE, YOUR HONOR, IS TO HAVE NO EXPERTS EITHER
FOR THE TUTORIAL OR FOR THE CLAIM CONSTRUCTION
HEARING.

THE COURT: OKAY.

MR. CAMPBELL: THAT'S CORRECT.

THE COURT: WHAT IS THE DEADLINE TO HEAR

15:06:36 1 BACK FROM THE P.T.O. ABOUT WHETHER THEY'RE GOING
15:06:41 2 TO -- WHETHER OR NOT THEY'RE GOING TO FIND A
15:06:43 3 SUBSTANTIAL QUESTION OF PATENTABILITY ON THE
15:06:45 4 SEVENTH PATENT?

15:06:48 5 MR. CHU: WE'RE EXPECTING THAT IT COULD
15:06:50 6 OCCUR ANY DAY. I DON'T RECALL WHAT THE DEADLINE
15:06:56 7 IS, BUT THE TIMING IS SUCH THAT WHEN SIX OR SEVEN
15:06:58 8 OF THEM HAVE ALREADY BEEN ACTED UPON, WE THINK IT'S
15:07:01 9 GOING TO HAPPEN VERY SHORTLY.

15:07:05 10 MR. CAMPBELL: THERE ISN'T A DEADLINE,
15:07:08 11 BUT WE DO EXPECT IT ANY TIME.

15:07:10 12 THE COURT: OKAY. I'D LIKE TO KNOW MORE
15:07:20 13 IF THIS IS GOING TO PROCEED, AND NOT BE STAYED,
15:07:28 14 WHAT ARE THE -- AND I'M SORRY, I THINK YOU ALREADY
15:07:32 15 FILED WHAT YOU THOUGHT WAS DISPOSITIVE, BUT IT
15:07:34 16 SEEMS LIKE PATENT '314, IS THAT WHERE THE FIGHT IS
15:07:38 17 REALLY AT, THE DECRYPTION AND ENCRYPTION?

15:07:42 18 MR. CAMPBELL: THE '314 PATENT IS
15:07:44 19 CERTAINLY AN IMPORTANT POINT, BUT I WOULDN'T SAY
15:07:48 20 THAT'S SOLELY WHERE THE FIGHT IS.

15:07:49 21 THE COURT: OKAY. WHAT IS THE -- TELL ME
15:07:50 22 THE RANKING. WHAT DO YOU THINK IS THE MOST
15:07:53 23 IMPORTANT PATENT FIGHT?

15:07:54 24 MR. CAMPBELL: I DON'T KNOW IF I HAVE A
15:07:57 25 RANKING THAT I COULD PUT IN ORDER, BUT I WOULD

15:07:58 1 SUGGEST THIS AS A WAY OF VIEWING THE TECHNOLOGY
15:08:03 2 THAT IS BEFORE YOU, SOME OF THE PATENTS RELATE TO
15:08:06 3 GRAPHIC USER INTERFACES THAT GO WITH SET TOP BOXES
15:08:12 4 AND MICROSOFT WAS AN EARLY MOVER IN THAT SPACE.

15:08:16 5 IT TURNS OUT TO BE AN IMPORTANT SPACE
15:08:18 6 THAT WE DEAL WITH ALL OF THE TIME TODAY. BACK WHEN
15:08:22 7 THESE PATENTS WERE DEVELOPED AND THE TECHNOLOGY WAS
15:08:25 8 CREATED, THE WORLD WAS DIFFERENT AND SOME IMPORTANT
15:08:29 9 DECISIONS WERE MADE ABOUT HOW BEST, YOU KNOW, WITH
15:08:32 10 A REMOTE CONTROL IN YOUR HAND, AS OPPOSED TO A
15:08:36 11 MOUSE OR A KEYBOARD RIGHT NEXT TO YOU, HOW FAST YOU
15:08:39 12 COULD SET UP THAT HUMAN TO MACHINE INTERFACE AND
15:08:42 13 KEEP PEOPLE FROM BEING CONFUSED AND GIVE THEM A
15:08:44 14 GOOD EXPERIENCE.

15:08:45 15 YOU KNOW, TIVO OVER THE YEARS HAS MADE
15:08:48 16 QUITE A LOT OF THE TIVO EXPERIENCE AND A GOOD BIT
15:08:56 17 OF THAT TIVO EXPERIENCE IS WHAT YOU'RE LOOKING AT
15:08:58 18 ON YOUR TELEVISION SET AND WHAT YOU'RE LOOKING AT
15:09:01 19 WHEN YOU'RE INTERACTING WITH THE MACHINE.

15:09:02 20 SO WE THINK THOSE GRAPHIC INTERFACE
15:09:05 21 PATENTS ARE IMPORTANT TECHNOLOGY AND TECHNOLOGY
15:09:06 22 THAT TIVO EVEN VALUES IN ITS OWN BUSINESS.

15:09:09 23 THE COURT: AND OF THE FIVE THAT ARE THE
15:09:11 24 SUBJECT OF A POTENTIAL CLAIM CONSTRUCTION HEARING
15:09:14 25 ON MAY 17TH, WHICH ONES ARE THOSE? ARE THEY THE

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'314?

MR. CAMPBELL: THE '314 AND THE '281
WOULD NOT FALL INTO THAT CATEGORY.

THE '444 WOULD NOT FALL INTO THAT
CATEGORY, ALTHOUGH YOU MIGHT BE ABLE TO ARGUE THAT
A LITTLE BIT. THE OTHERS WOULD.

THE COURT: OKAY. SO THAT'S, WHAT, THE
'748 AND THE '803?

MR. CAMPBELL: CORRECT.

THE COURT: AND YOU SAID ONE OF THE
PATENTS GOES TO LEGACY TIVO PRODUCTS, WHICH ONE IS
THAT?

MR. CAMPBELL: THE '444. THAT PATENT
ADDRESSES THE PROBLEMS WHEN YOU'RE USING A SET TOP
BOX AND IT HAS AN INTERNET CONNECTION AND YOUR
CONNECTION IS HOOKED TO YOUR PHONE LINE AND YOU
MIGHT HAVE INCOMING CALL AND A CALL WAITING KIND OF
A SCENARIO.

THE COURT: OKAY. SO YOUR VIEW IS THAT
THE GRAPHICAL USER INTERFACE PATENT '703 AND '804
ARE THE MOST IMPORTANT?

MR. CAMPBELL: I WOULDN'T SAY THAT. I
WOULD SAY THAT THEY ARE IMPORTANT AND THAT THE
STATE CABLE PATENT, THE '314 PATENT DEALING WITH
THE CABLECARDS IS ALSO IMPORTANT.

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AND, YOU KNOW, THE '444 FOR THE TIME PERIOD THAT IT APPLIES, IT WAS A, YOU KNOW, IT WAS A SELLING FEATURE FOR TIVO TO HAVE IN ORDER TO GET TO THE WIDEST POSSIBLE AUDIENCE.

PEOPLE FORGET QUICKLY, I THINK, HOW IMPORTANT THOSE DIAL-UP CONNECTIONS WERE UNTIL FAIRLY RECENTLY.

AOL STILL HAS A MILLION SUBSCRIBERS. SO NOT EVERYBODY HAS A HIGH SPEED CONNECTION.

THE COURT: OKAY. LET ME ASK YOU, IN TERMS OF SEQUENCING, WHAT IS YOUR VIEW AS TO WHICH TERMS YOU'RE GOING TO PRESENT FIRST?

MR. CAMPBELL: THAT IS A VERY GOOD QUESTION. WE HAVE HAD INTERNAL CONVERSATIONS ABOUT THAT AND IF WE -- WE HAVEN'T BOTTOMED OUT ON IT. IF I COULD HAVE A COUPLE OF DAYS WE WOULD BE ABLE TO TELL THE COURT IN ADVANCE WHAT THOSE ARE.

THE COURT: LET'S GET A DATE ON THAT. WHEN CAN YOU? ASSUMING WE'RE GOING FORWARD, WHICH WE MAY NOT, I'LL TRY TO GET YOU A RULING ON THE MOTION FOR STAY AS SOON AS POSSIBLE.

MR. CAMPBELL: WOULD THE MONDAY BEFORE WE BEGIN BE SUFFICIENT?

THE COURT: YOU MEAN MAY 9TH?

MR. CAMPBELL: YES.

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15:12:55 24
15:12:56 25

THE COURT: THAT'S FINE.

MR. CHU AND MS. MOUZARI -- DID I
PRONOUNCE THAT CORRECTLY?

MS. MOUZARI: YES.

THE COURT: IF YOU COULD GET ME AN ANSWER
ON THE ESTOPPEL QUESTION, THAT WOULD BE VERY
HELPFUL BECAUSE I UNDERSTAND YOUR POINT ABOUT SOME
OF THE CLAIMS MIGHT BE CANCELLED OR MODIFIED TO
ELIMINATE SOME ISSUES, BUT THAT WOULD REALLY
SEVERELY MAKE A DIFFERENCE SIGNIFICANTLY TO WHAT WE
HAVE TO DO HERE IF WE DON'T HAVE TO RELITIGATE ALL
OF THE SAME PRIOR ART AND ALL OF THE SAME
INVALIDITY ARGUMENTS THAT THE P.T.O. HAS ALREADY
RULED ON.

I MEAN, IF YOUR POSITION IS THEY'RE THE
EXPERT AND LET THEM DO IT, THEN LET'S LET THEM DO
IT. LET'S NOT HAVE A DO OVER HERE IN DISTRICT
COURT.

IF YOU COULD GET ME A DECISION. I WOULD
LIKE SOMETHING MORE THAN THAT MORE THAN TWO WEEKS
BUT OTHERWISE WE'LL BE GEARED UP FOR CLAIM
CONSTRUCTION, AND I THINK THAT WILL TURN THE TIED
AS FAR AS NOT STAYING THIS CASE.

GO AHEAD.

MR. CHU: IF YOUR HONOR WAS LOOKING MY

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15:13:57 24
15:14:01 25

WAY.

THE COURT: WHOEVER WANTS TO RESPOND TO THAT.

MR. CHU: AS I INDICATED, I WILL TAKE UP THE QUESTION AS QUICKLY AS POSSIBLE AND POSE IT TO TIVO.

THE COURT: THANK YOU.

MR. CHU: I DON'T WANT THE COURT TO THINK, HOWEVER, THAT THAT IS AN EASY QUESTION. I KNOW THE COURT IS VERY FAMILIAR WITH PATENT LITIGATION, PARTICULARLY SINCE EVERY SINGLE ONE OF THE REEXAMINATIONS IS AN EX PARTE PROCEDURE AND AS THE COURT KNOWS, THE POPULAR WISDOM IS THE PATENTEE HAS AN ENORMOUS ADVANTAGE IN EX PARTE PROCEEDINGS.

SO EVEN THOUGH WE DO WANT THE STAY, GIVING UP POTENTIALLY STRONG DEFENSES OF INVALIDITY WILL BE A DIFFICULT QUESTION FOR TIVO TO ANSWER.

THE COURT: AND I UNDERSTAND. IT WOULD BE AN EASIER QUESTION IF THESE WERE INTERPARTY EXAMS AND YOU WOULD HAVE AN OPPORTUNITY TO BE HEARD THROUGHOUT.

LET ME HEAR FROM TIVO AS TO WHAT DO YOU ALL BELIEVE ARE THE MORE SIGNIFICANT PATENTS?

DO YOU ALSO WANT -- WELL, WHY DON'T YOU ADDRESS THAT.

15:14:03 1 MS. MOUZARI: SO WE HAVE ALSO INTERNALLY
15:14:06 2 BEEN LOOKING AT WHICH TERMS ARE MORE IMPORTANT THAN
15:14:11 3 OTHERS, BUT WE WOULD -- WE STILL HAVEN'T COME UP
15:14:15 4 WITH A FORMULATION OF THE EXACT RANKING PER SE.

15:14:18 5 THE COURT: OKAY.

15:14:20 6 MS. MOUZARI: SO IF YOU WANT A FURTHER
15:14:21 7 STATEMENT, WE CAN DO THE SAME THAT MICROSOFT
15:14:24 8 OFFERED TO DO.

15:14:25 9 THE COURT: OKAY. THAT'S FINE.

15:14:28 10 MR. CHU: IF I COULD ADD TO THAT, YOUR
15:14:30 11 HONOR.

15:14:30 12 THE COURT: YES.

15:14:31 13 MR. CHU: LET ME GIVE YOU AN EXAMPLE AND
15:14:33 14 TAKE THE '314 PATENT THAT YOUR HONOR CALLED OUR
15:14:37 15 JOINT ATTENTION TO INITIALLY.

15:14:38 16 AND THAT INVOLVES ENCRYPTION AND
15:14:43 17 DECRYPTION. AND APPARENTLY THE MICROSOFT THEORY IS
15:14:46 18 THAT WHEN YOU HAVE THIS TIVO BOX THAT HAS MANY,
15:14:50 19 MANY, OTHER FUNCTIONS, BUT IT'S ABLE TO WORK WITH A
15:14:53 20 CABLECARD, AND WHEN I SAY CABLE CAR, IT'S ACTUALLY
15:14:58 21 A PROPER NAME WITH CAPITAL C WITH NO SPACE, IT'S
15:15:03 22 THE CARD THAT ONE PUTS INTO A BOX THAT ALLOWS THE
15:15:09 23 DECRYPTION. THIS, OF COURSE, IS CONTROLLED BY THE
15:15:11 24 CABLE COMPANIES.

15:15:12 25 AND THAT'S IMPORTANT FOR THE FUNCTIONING

15:15:15 1 OF THE BOX AS A WHOLE BECAUSE IT DOESN'T HELP TO
15:15:19 2 HAVE 200 CHANNELS COMING DOWN TO THE BOX IF NONE OF
15:15:25 3 THEM CAN BE DECRYPTED.

15:15:26 4 BUT IT'S NOT SOMETHING THAT TIVO DOES.
15:15:30 5 THE TIVO BOX HAS TO BE ABLE TO ACCOMMODATE IT.

15:15:33 6 SO IN A SENSE IT'S IMPORTANT BECAUSE IF
15:15:38 7 THAT CARD IS NOT THERE, THEN THE USER CAN'T GET THE
15:15:42 8 PROGRAMMING, BUT FROM THE STANDPOINT OF TIVO,
15:15:45 9 TIVO'S TECHNOLOGY, TIVO'S BUSINESS, ITS BUSINESS
15:15:50 10 MODEL, IT'S NOT BUILT ON THOSE CABLE CARDS BECAUSE
15:15:53 11 THE CABLE CARDS ARE REALLY THE TECHNOLOGY OF THE
15:15:57 12 CABLE COMPANIES.

15:15:58 13 BUT THAT'S AN EXAMPLE WHERE IT IS
15:16:00 14 IMPORTANT, BUT WE ALSO THINK THAT WE HAVE A PLENTY
15:16:02 15 STRONG ARGUMENT THAT WE DON'T INFRINGE THESE
15:16:05 16 CLAIMS.

15:16:05 17 THE COURT: SO ARE THEY MAKING AN
15:16:07 18 INDIRECT INFRINGEMENT CLAIM ON THAT ON THE '314?
15:16:11 19 WHO IS THE DIRECT INFRINGER, THE USER? THE CABLE
15:16:14 20 COMPANY?

15:16:17 21 MR. CAMPBELL: THERE ARE DIRECT AND
15:16:19 22 INDIRECT INFRINGEMENT CLAIMS ASSERTED AGAINST TIVO
15:16:21 23 ON THE '314 PATENT.

15:16:23 24 WE BELIEVE THAT BY AND LARGE TODAY WHEN
15:16:25 25 SOMEBODY GOES AND BUYS A TIVO SYSTEM TO HOOK UP TO

15:16:28 1 THEIR CABLE SERVICE, THEY'RE USING CABLE CARDS.
15:16:33 2 SO THAT THE NOTION THAT IT'S UNIMPORTANT
15:16:35 3 TO TIVO'S BUSINESS MODEL, I THINK, IS PROBABLY
15:16:41 4 SOMETHING THAT WE WOULD DISAGREE WITH AND WE
15:16:44 5 BELIEVE THE EVIDENCE WILL BEAR THAT OUT THAT MOST
15:16:46 6 OF THE TIME WHEN PEOPLE GO BUY A TIVO BOX AND STICK
15:16:50 7 IT IN THEIR HOME AND WANT TO HAVE CABLE DELIVERED
15:16:52 8 WITH THAT TIVO BOX BEING THE DVR AND THE RECEIVER
15:16:56 9 AND THE ONE BOX THAT YOU HAVE IN ADDITION TO THE
15:17:01 10 T.V., THAT CABLE CARD AND THE ABILITY OF TIVO'S BOX
15:17:05 11 TO WORK WITH THE CABLE CARD ARE INDISPENSABLE.

15:17:08 12 THERE IS A LOT THAT GOES INTO THE CABLE
15:17:10 13 CARD TO BOX TRANSITION. THIS TECHNOLOGY REALLY
15:17:15 14 WHAT ALLOWS TIVO TO PARTICIPATE IN THE ECHO SYSTEM
15:17:23 15 AND ENVIRONMENT THAT ALLOWS IT TO EXIST IN CABLE
15:17:27 16 COMPANIES. WITHOUT THE DECRYPTION CAPABILITIES,
15:17:30 17 ALL OF THE PROTECTION CONTENTS THAT COME DOWN WOULD
15:17:32 18 SIMPLY BE UNAVAILABLE EXCEPT THROUGH MUCH MORE
15:17:35 19 CUMBERSOME AND EXTENSIVE SOLUTIONS.

15:17:39 20 SO IT IS A VERY IMPORTANT PIECE OF
15:17:42 21 TECHNOLOGY. IT'S A PIECE OF TECHNOLOGY THAT TIVO
15:17:45 22 USES TO DESIGN THEIR BOX AND THE ISSUES OF DIRECT
15:17:48 23 AND INDIRECT INFRINGEMENT WILL BOTH BE IN THE CASE.

15:17:52 24 MR. CHU: MY UNDERSTANDING, YOUR HONOR,
15:17:54 25 IS THAT WE DON'T SELL THESE CARDS. THE WAY THEY

15:17:56 1 COME INTO PLAY AS AN EXAMPLE, A CONSUMER AT HOME
15:18:01 2 HAS AN OLDER SET TOP BOX WITH THEIR CABLE COMPANY.
15:18:04 3 THEY DECIDE THAT THEY WANT TO UPGRADE THEIR VIEWING
15:18:08 4 PLEASURE BY BUYING A TIVO BOX. THEY BUY THE TIVO
15:18:12 5 BOX, AND THEY TAKE THAT CABLE CARD OUT OF THEIR OLD
15:18:14 6 BOX AND THEY JUST PUT IT INTO THROUGH A SMALL
15:18:20 7 DOORWAY IN THE TIVO BOX AND NOW THE TIVO BOX CAN
15:18:24 8 ACCEPT THE CABLE SIGNALS.

15:18:29 9 MR. CAMPBELL: WE DON'T THINK THAT TIVO
15:18:31 10 SELLS THE CABLE CARDS. THERE'S NO QUESTION THAT
15:18:33 11 THEY DON'T. THE CABLE COMPANIES DO.

15:18:35 12 BUT IT'S NOT QUITE SO SIMPLE TO TAKE A
15:18:38 13 CABLE CARD OUT OF ONE BOX AND STICK IT IN ANOTHER.
15:18:41 14 YOU NEED A LOT OF CONFIGURATION AND USUALLY THE
15:18:45 15 CABLE COMPANIES ARE SETTING THOSE THINGS UP.

15:18:47 16 THE COURT: WHAT ARE THE ACCUSED PRODUCTS
15:18:49 17 HERE?

15:18:49 18 MR. CAMPBELL: THE ACCUSED PRODUCT ARE
15:18:52 19 TIVO SET TOP BOXES AND THERE ARE ANCILLARY THINGS
15:18:55 20 THAT GO WITH THOSE BOXES THAT ARE PART OF THIS AS
15:18:58 21 WELL.

15:18:58 22 THE COURT: LIKE WHAT?

15:18:59 23 MR. CAMPBELL: THERE IS SOFTWARE THAT
15:19:00 24 COMES WITH THEM. THERE'S SOFTWARE THAT GETS
15:19:03 25 DOWNLOADED. YOU KNOW, WHEN YOU SET UP -- THIS MAY

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BE A LITTLE BIT HELPFUL TO EXPLAIN THE CONTEXT OF
SOME OF THIS.

IF I DIDN'T HAVE A TIVO TODAY, A TIVO BOX
TODAY AND I WANTED TO HAVE TIVO SERVICE, I WOULD
EITHER CONTACT TIVO ON THE WEB OR I WOULD GO TO
BEST BUY AND PURCHASE THE BOX THAT IS ABOUT SO BIG.

AND I WOULD THEN NEED TO MAKE
ARRANGEMENTS WITH THE CABLE COMPANY TO HAVE ONE OF
THEIR TECHNICIANS COME OUT AND INSTALL THE CABLE
CARD IN THE BACK AND CONFIGURE IT AND MAKE SURE
THAT EVERYTHING WAS WORKING CORRECTLY.

I WOULD ALSO HAVE TO PLUG IN TO THE BACK
OF THE TIVO BOX AN ETHERNET OR SOME OTHER
CONNECTION TO ALLOW ME TO BE ON THE INTERNET AND SO
THAT YOU WOULD HAVE A SITUATION WHERE CABLE
CONTENTS COMING INTO THE BOX, THE TIVO BOX IS
COMMUNICATING OVER THE INTERNET WITH TIVO SERVERS
WHERE THEY MAINTAIN LOTS OF DATA AND PROGRAM
INFORMATION AND THE LIKE AND YOU USE YOUR BOX IN
THAT ENVIRONMENT.

THE TIVO BOX HAS AT LEAST, ACCORDING TO
TIVO IN THEIR S.E.C. STATEMENTS AND OTHER
STATEMENTS, YOU REALLY CAN'T HAVE THE FULL
FUNCTIONALITY OF THE TIVO BOX UNLESS YOU'RE HOOKED
UP TO THEIR SERVERS.

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SO THERE ARE SOFTWARE COMPONENTS AND
SERVER COMPONENTS AND THERE'S AN ENVIRONMENT IN
WHICH THESE INFRINGEMENT QUESTIONS WILL BE
ANALYZED.

THE COURT: OKAY.

MR. CHU: YOUR HONOR, I CAN TELL YOU FROM
PERSONAL EXPERIENCE, I HAD A BOX THAT DIED. AFTER
BURYING IT, I GOT A NEW BOX. I TOOK THE OLD CABLE
CARD FROM THE DEAD BOX AND SPLIT IT INTO THE NEW
BOX. THAT WAS IT.

IT TOOK ME FIVE SECONDS.

MR. CAMPBELL: I BELIEVE MR. CHU PROBABLY
HAS GREATER EXPERIENCE IN COMPETENCY WITH TECHNICAL
ISSUES THAN YOUR AVERAGE CONSUMER.

THE COURT: WELL, LET ME -- AND I HAVEN'T
DECIDED THE MOTION TO STAY AND SO I DON'T WANT ALL
OF THESE QUESTIONS TO MAKE YOU THINK THAT I HAVE
MADE UP MY MIND ON THAT QUESTION.

SO I THINK I PREVIOUSLY REQUESTED SOME
TYPE OF PRETUTORIAL PRESENTATION EVEN IF IT'S ONE
OR TWO PAGES GENERALLY THAT WOULD ASSIST THE COURT
IF WE GO FORWARD.

DID WE SET A DATE FOR THAT? I CAN'T
RECALL.

MR. CAMPBELL: YOU DID SET A DATE.

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THE COURT: OKAY.

MR. CAMPBELL: AND IT IS VERY, VERY SOON.

THE COURT: OKAY.

MR. CAMPBELL: BUT I CAN'T REMEMBER
PRECISELY AS I'M STANDING HERE WHAT IT IS.

THE COURT: THAT'S FINE.

OKAY. WELL, I DON'T HAVE ANY OTHER
QUESTIONS.

DOES ANYONE WANT TO SAY ANYTHING NOW
WOULD BE THE TIME, OTHERWISE I'M JUST GOING TO
THANK YOU VERY, VERY MUCH.

MR. CHU: THANK YOU, YOUR HONOR.

THE COURT: THANK YOU.

(WHEREUPON THE PROCEEDINGS IN THIS MATTER
WERE CONCLUDED.)

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CERTIFICATE OF REPORTER

I, THE UNDERSIGNED OFFICIAL COURT
REPORTER OF THE UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF CALIFORNIA, 280 SOUTH
FIRST STREET, SAN JOSE, CALIFORNIA, DO HEREBY
CERTIFY:

THAT THE FOREGOING TRANSCRIPT,
CERTIFICATE INCLUSIVE, CONSTITUTES A TRUE, FULL AND
CORRECT TRANSCRIPT OF MY SHORTHAND NOTES TAKEN AS
SUCH OFFICIAL COURT REPORTER OF THE PROCEEDINGS
HEREINBEFORE ENTITLED AND REDUCED BY COMPUTER-AIDED
TRANSCRIPTION TO THE BEST OF MY ABILITY.

/s/

IRENE RODRIGUEZ, CSR, CRR
CERTIFICATE NUMBER 8074

DATED: MAY 9, 2011