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

RITZ CAMERA & IMAGE, LLC,) CV-10-2787-JF
)
PLAINTIFF,) SAN JOSE, CALIFORNIA
)
VS.)
) MAY 6, 2011
SANDISK CORPORATION, ET)
AL,)
) PAGES 1-14
DEFENDANT.)

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE JEREMY FOGEL
UNITED STATES DISTRICT JUDGE

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

FOR THE PLAINTIFF: MORGAN DUFFY-SMITH & TIDALGO
BY: COLLEEN DUFFY-SMITH
1960 THE ALAMEDA, STE 220
SAN JOSE, CA 95126

FOR THE DEFENDANT: SKADDEN ARPS, ET AL
BY: DAVID HANSEN
JAMES SCHAEFER
FOUR EMBARCADERO CTR, STE 3800
SAN FRANCISCO, CA 94111

(APPEARANCES CONTINUED ON THE NEXT PAGE)

OFFICIAL COURT REPORTER: SUMMER FISHER, CSR, CRR
CERTIFICATE NUMBER 13185

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FOR THE PLAINTIFF: KELLOG HUBER HANSEN
BY: JOSEPH HALL
1615 M STREET NW, STE 400
WASHINGTON, DC 20036

1 SAN JOSE, CALIFORNIA MAY 6, 2011

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

3 (WHEREUPON, COURT CONVENEED AND THE
4 FOLLOWING PROCEEDINGS WERE HELD:)

5 THE COURT: NEXT MATTER IS RITZ CAMERA &
6 IMAGE VERSUS SANDISK.

7 MR. HALL: GOOD MORNING, YOUR HONOR.

8 JOSEPH HALL FROM KELLOGG HUBER ON BEHALF
9 OF PLAINTIFF, RITZ CAMERA.

10 MS. DUFFY-SMITH: GOOD MORNING,
11 YOUR HONOR.

12 COLLEEN DUFFY-SMITH FROM MORGAN
13 DUFFY-SMITH & TIDALGO, FOR THE PLAINTIFFS.

14 MR. HANSEN: DAVE HANSEN AND JAMES
15 SCHAEFER FOR SANDISK.

16 THE COURT: GOOD MORNING.

17 WELL, I THINK THIS IS A REALLY
18 INTERESTING LEGAL ISSUE. I DON'T THINK IT'S CLEAR,
19 AND I THINK THE RULING THAT THE COURT MADE EARLIER
20 WHILE I THINK IT WAS RIGHT, OBVIOUSLY I THINK IT'S
21 HARDLY ONE WHERE THERE'S LOT OF AUTHORITY ON POINT.

22 I THINK THIS WOULD BENEFIT -- THIS IS THE
23 TYPE OF CASE THAT WOULD BENEFIT FROM INTERLOCUTORY
24 REVIEW. AND IN FACT, IT'S KIND OF AN ALL OR
25 NOTHING -- STANDING ISSUES IS AN ALL OR NOTHING

1 TYPE OF ISSUE HERE.

2 IF RITZ DOESN'T HAVE STANDING, THERE'S
3 REALLY NO CASE. AND IF IT DOES THEN IT'S A
4 SIGNIFICANT CASE.

5 SO MY INCLINATION IS TO GRANT THE RELIEF,
6 BUT LET ME HEAR FROM RITZ ON THAT.

7 MR. HALL: THANK YOU, YOUR HONOR. I
8 MEAN, GETTING TO YOUR HONOR'S POINT, FIRST OF ALL,
9 I DON'T THINK THAT THE STANDING ISSUE HERE -- THIS
10 IS NOT JURISDICTIONAL STANDING, THIS IS STANDING
11 WITH REGARD TO ONE OF PLAINTIFF'S CLAIMS,
12 SPECIFICALLY THE WALKER PROCESS CLAIM.

13 AND AS WE POINTED OUT IN OUR PAPERS THERE
14 ARE OTHER CLAIMS HERE BESIDES THE WALKER PROCESS
15 CLAIM THAT INVOLVE MONOPOLIZATION CLAIMS WITH
16 REGARD TO SETTLEMENTS AND WITH REGARD TO CUSTOMER
17 INTIMIDATION AND THREATS.

18 THE COURT: BUT DOESN'T THE CORE OF IT, I
19 KNOW THAT'S THE WAY YOU'VE PLED IT, BUT DOESN'T THE
20 CORE OF THE CASE REALLY HAVE TO DO WITH PATENT
21 MISUSE?

22 I MEAN, THE SETTLEMENTS ALLEGEDLY WERE
23 EXTORTED THROUGH WAIVING PATENTS AT PEOPLE AND
24 SAYING, WE ARE GOING TO SUE YOU IF YOU DON'T
25 SETTLE. OR THEY WERE SETTLEMENTS OF PATENT

1 INFRINGEMENT CASES, AND EVEN THE CUSTOMER
2 INTIMIDATION THAT'S ALLEGED GOES BACK TO PATENT
3 RIGHTS THAT WERE ALLEGEDLY IMPROPERLY OBTAINED.

4 MR. HALL: YES. BUT AS THE COURTS HAVE
5 HELD EVEN WITH THE VALID PATENTS BUYING OFF
6 COMPETITORS, EVEN IF A VALID PATENT IS INVOLVED,
7 CAN INVOLVE SECTION II SHERMAN ACT CLAIMS, THAT'S
8 ONE OF THE THINGS WE ALLEGE HERE.

9 THAT DOESN'T DEPEND ON THE VALIDITY OF
10 THE PATENTS.

11 THE COURT: HOW DO YOU LITIGATE THIS CASE
12 THOUGH IF A MAJOR PART OF WHAT YOU ARE CLAIMING,
13 EVEN IF IT'S NOT A HUNDRED PERCENT, IT CERTAINLY IS
14 A SIGNIFICANT PART OF WHAT YOU ARE CLAIMING.

15 HOW DO YOU LITIGATE THIS CASE WITHOUT
16 KNOWING WHETHER YOU ARE ABLE TO ASSERT THE PATENT
17 MISUSE CLAIMS?

18 MR. HALL: WELL, I MEAN I THINK IT WOULD
19 PRESENT SOMEWHAT OF AN OBSTACLE, YOUR HONOR. BUT I
20 THINK THAT GOES TO THE FACT THIS SHOULDN'T BE DONE
21 PIECEMEAL.

22 WE HAVE CLAIMS HERE, ONE OF WHICH IS THE
23 WALKER PROCESS CLAIM. I CAN EXPLAIN TO YOUR HONOR
24 WHY I THINK YOUR HONOR'S RULING DOESN'T DEPART MUCH
25 FROM THIS COURT'S PRIOR PRECEDENT IN NETFLIX OR THE

1 SECOND CIRCUITS PRECEDENT IN DDAVP.

2 THE COURT: AS I SAY, I THINK I WAS
3 RIGHT. BUT THE QUESTION IS WHETHER REASONABLE
4 MINDS COULD DIFFER AND WHETHER IT WOULD ADVANCE THE
5 RESOLUTION OF THE LITIGATION TO GET APPELLATE
6 REVIEW.

7 IT'S NOT THAT I'M HAVING DOUBTS ABOUT MY
8 CONCLUSION, AS MUCH AS I THINK THAT IF I'M WRONG
9 YOU COULD SPEND A LOT OF TIME AND MONEY LITIGATING
10 THE CASE THAT IS GOING TO LOOK VERY, VERY DIFFERENT
11 WITHOUT THE WALKER PROCESS CLAIM.

12 MR. HALL: LET ME ADDRESS BOTH POINTS,
13 YOUR HONOR.

14 FIRST OF ALL, I DON'T BELIEVE THE
15 STANDARD IS REASONABLE MINDS COULD DIFFER ON THIS,
16 I BELIEVE IT'S A MUCH HIGHER STANDARD, IT'S THE
17 EXCEEDINGLY RARE CIRCUMSTANCE.

18 HERE THE ONLY CASE THAT DEFENDANTS HAVE
19 CITED, AND THEY HAVEN'T RESPONDED TO THIS POINT IN
20 THEIR REPLY, ALL COME IN THE VERY PECULIAR
21 HATCH-WAXMAN ACT CONTEXT WHERE THERE'S AN
22 ARTIFICIAL INFRINGEMENT SUIT CREATED AND WHERE THE
23 ANTI-TRUST STANDING IS VERY MUCH DEPENDENT UPON AN
24 ARTIFICIAL PATENT INFRINGEMENT CASE THAT'S CREATED
25 BY THE HATCH ACT REGULATORY STRUCTURE, AND THAT'S

1 SUPERIMPOSED UPON THE FDA'S DECISION ABOUT WHETHER
2 OR NOT TO GRANT FURTHER RIGHTS TO USE THE DRUG.

3 THAT ALL MAKES THE ANTI-TRUST INJURY MUCH
4 MORE SPECULATIVE. IN THIS CASE WE ARE MUCH MORE
5 LIKE THE NETFLIX CASE WHERE WE ACTUALLY HAVE
6 PRODUCTS IN A MARKET AND WE CAN EVALUATE VERY
7 TANGIBLY THE EFFECT. I DON'T THINK THAT THERE'S AS
8 MUCH OF A SPLIT HERE IN THE AUTHORITY AS THEY WOULD
9 HAVE YOU BELIEVE.

10 ALL HARD CASES, AND YOU KNOW THIS I THINK
11 MAY BE ONE, BUT THAT DOESN'T NECESSARILY MEAN THAT
12 IT SHOULD BE SUITABLE FOR 1292 REVIEW.

13 THE COURT: RIGHT. THERE'S JUST NOT A
14 LOT OF CASES, PERIOD, THAT ALLEGE THE THEORY THAT
15 RITZ IS ALLEGING.

16 MR. HALL: AGREED, YOUR HONOR.

17 I MEAN I THINK NETFLIX IS ONE. BUT, YOU
18 KNOW, THE OTHER THING IS THE COURT -- DEFENDANTS
19 POINT OUT THAT IT'S CERTAINLY A NOVEL ISSUE, IS A
20 GROUND FOR 1292 CERTIFICATION.

21 THEY CITE TWO CASES, ONE OF WHICH IN RE
22 CALIFORNIA TITLE WAS CERTIFIED. THE NINTH CIRCUIT
23 RECENTLY DENIED THAT PETITION.

24 IT'S NOT SUFFICIENT UNDER NINTH CIRCUIT
25 CASE LAW FOR A CASE TO BE --

1 THE COURT: OKAY. I'M SORRY TO
2 INTERRUPT.

3 WHAT ABOUT THE CASE MANAGEMENT ASPECT,
4 THOUGH? I MEAN, AS YOU SAY, IT'S NOT GOING TO BE
5 THE EASIEST THING IN THE WORLD TO WORK AROUND THE
6 WALKER PROCESS CLAIMS. I MEAN, IF YOU ARE DOING
7 DISCOVERY, IF YOU ARE TAKING DEPOSITIONS THEN YOU
8 ARE OBVIOUSLY GOING TO WANT TO GET INTO ALL OF IT.

9 IF IT TURNS OUT THAT NONE OF THAT WAS
10 PROPER, HOW DO YOU UN RING THE BELL?

11 MR. HALL: WELL, I MEAN, THAT'S TRUE IN
12 EVERY CASE, YOUR HONOR.

13 I MEAN, IT'S VERY POSSIBLE IN ANY ONE
14 PARTICULAR CASE ONE CLAIM MIGHT ULTIMATELY NOT
15 WITHSTAND APPEAL. BUT THAT'S NOT, I THINK,
16 SUFFICIENT BASIS FOR GRANTING 1292. THAT'S NOT THE
17 EXCEEDINGLY RARE CIRCUMSTANCE.

18 WHEN YOU HAVE MULTIPLE CLAIMS HERE SOME
19 OF WHICH DO NOT DEPEND ON THE WALKER PROCESS CLAIM.

20 FURTHERMORE, THIS ISN'T AN ORDINARY
21 ANTI-TRUST CASE. THERE'S A VERY WELL DEVELOPED
22 RECORD HERE THAT WE INTEND TO USE FROM THE STM
23 SANDISK LITIGATION.

24 AND, YOU KNOW, THERE ARE ISSUES COMING UP
25 THAT WE THINK WOULD ALSO INVOLVE THINGS LIKE CLASS

1 CERTIFICATION THAT DEFENDANTS MAY WANT TO AGAIN TRY
2 1292 CERTIFICATION.

3 THAT WOULD RESULT IN EVEN MORE
4 FRACTIONALIZED LITIGATION. WE JUST DON'T THINK
5 THAT'S PROPER AT THIS POINT.

6 THE COURT: OKAY. THANK YOU.

7 LET ME GET A RESPONSE FROM SANDISK.

8 MR. HANSEN: GOOD MORNING, YOUR HONOR.

9 WE AGREE WITH YOUR LEANING ON THE RULING.
10 IT IS -- WE THINK IF IT'S NOT COMPLETELY CASE
11 DISPOSITIVE IT WILL DISPOSE OF PRETTY MUCH
12 EVERYTHING IN THE CASE.

13 AS TO THE CASE MANAGEMENT ASPECT AND THE
14 WELL DEVELOPED RECORD, WE HAVEN'T -- THERE HAS BEEN
15 ONE SET OF DISCOVERY THAT HAS BEEN PROPOUNDED THAT
16 OUR RESPONSES ARE DUE NEXT WEEK, AND LET'S JUST SAY
17 IT SUGGESTS A GOOD REASON THAT THE WALKER PROCESS
18 RULING, IF IN OUR FAVOR, WOULD SAVE EVERYONE A LOT
19 OF TIME AND MONEY OVER THE COURSE OF THE NEXT YEAR.

20 THE COURT: ESSENTIALLY WHAT YOU ARE
21 SAYING IS IF THERE HADN'T BEEN THE STMICRO CASE,
22 AND THE COURT'S -- THIS COURT'S WILLINGNESS TO
23 ALLOW A WALKER PROCESS CLAIM TO PROCEED IN THAT
24 CASE, THAT THIS CASE WOULDN'T EXIST. THIS RITZ
25 CAMERA CASE WOULDN'T EXIST, THAT THERE'S A DIRECT

1 CAUSAL RELATIONSHIP BETWEEN THE TWO. THAT'S WHAT I
2 UNDERSTAND YOU TO BE ARGUING.

3 MR. HANSEN: YEAH. I THINK THAT'S
4 CORRECT.

5 YOU COULD GO BACK AND IT'S POSSIBLE
6 SOMEONE, A DIRECT PURCHASER WOULD FILE IT, BUT I
7 DON'T THINK -- WE HAVEN'T REALLY RUN INTO THAT
8 SITUATION HERE.

9 WE RESPECTFULLY DISAGREE, OBVIOUSLY, WITH
10 THE RULING. BUT THAT SAID, THE FEDERAL CIRCUIT
11 IS -- THE COURT ULTIMATELY WE BELIEVE WILL CHIME IN
12 ON THIS AND THEY HAVEN'T. I DON'T KNOW IF YOU WANT
13 TO ADDRESS THAT ISSUE.

14 THE COURT: WHY WOULDN'T IT BE THE
15 FEDERAL CIRCUIT?

16 MR. HANSEN: IT IS THE FEDERAL CIRCUIT.
17 THERE WAS A DISPUTE IN THE BRIEFS.

18 THE COURT: WELL, IT'S AN ANTI-TRUST
19 CLAIM WHICH WOULD ORDINARILY NOT GO THERE, IT WOULD
20 GO TO THE NINTH CIRCUIT BUT BECAUSE IT INVOLVES
21 PATENT MISUSE, THE DEFAULT WOULD BE THE FEDERAL
22 CIRCUIT.

23 MR. HANSEN: WE AGREE WITH THAT.

24 AND THE SECOND CIRCUIT IN RE DDAVP SETS
25 THAT OUT VERY NICELY.

1 SO WE AGREE WITH YOUR HONOR'S TENTATIVE
2 RULING ON THAT.

3 THE COURT: OKAY. THANK YOU.

4 AND COUNSEL, WE DIDN'T TALK ABOUT WHICH
5 COURT. SO LET ME GIVE YOU A MINUTE OR TWO ON THAT.

6 MR. HALL: THANK YOU, YOUR HONOR.

7 THIS CASE I THINK SHOULD GO TO THE
8 NINTH CIRCUIT AND THE REASON WHY IS THIS IS AN
9 ANTI-TRUST CASE. WE TAKE THE PLEADINGS AS THEY
10 EXIST AND WE ASSUME THAT THE PATENTS WERE SUBJECT
11 TO FRAUDULENT PROCUREMENT.

12 THE QUESTION IS, IS THIS PLAINTIFF THE
13 KIND OF PLAINTIFF THAT THE ANTI-TRUST LAWS ARE
14 MEANT TO PROTECT? THAT'S A QUESTION OF ANTI-TRUST.
15 SIMPLY BECAUSE THERE'S A PATENT IN THE CASE DOESN'T
16 MEAN THAT IT GOES TO THE FEDERAL CIRCUIT.

17 THE CONTROLLING QUESTION HERE IS GOING TO
18 BE ONE OF SHERMAN ACT AND CLAYTON ACT LAW. THAT IS
19 A QUESTION THAT WILL NECESSARILY, EVEN UNDER THE
20 FEDERAL CIRCUIT PRECEDENT, BE DECIDED BY
21 NINTH CIRCUIT PRECEDENT, THEREFORE THE
22 NINTH CIRCUIT IS THE APPROPRIATE FORUM TO DECIDE
23 IT.

24 THE COURT: WHAT ABOUT THE IMPLICATION OF
25 A COURT OTHER THAN THE FEDERAL CIRCUIT DECIDING

1 WHAT THE IMPORT OF PATENT MISUSE IS?

2 MR. HALL: I'M NOT SURE WHY THAT WOULD BE
3 YOUR HONOR, BECAUSE ULTIMATELY THE QUESTION HERE IS
4 WHO HAS STANDING? IS IT A DIRECT PURCHASER OR
5 CONSUMER OR INDIRECT PURCHASER? THAT IS A QUESTION
6 OF THE CONCRETENESS OF THE ANTI-TRUST INDUSTRY.

7 THAT WOULD INVOLVE QUESTIONS UNDER
8 SHERMAN AND CLAYTON ACT, IT DOESN'T INVOLVE
9 QUESTIONS OF PATENT MISUSE.

10 THE COURT: BUT THE INJURY IS ALLEGEDLY
11 CAUSED BY PATENT MISUSE.

12 MR. HALL: THAT MAY VERY WELL BE.

13 BUT THE QUESTION OF WHAT PLAINTIFF IS
14 ABLE TO BRING AN ACTION IS GOING TO BE ONE THAT IS
15 DECIDED UNDER ANTI-TRUST LAW NOT UNDER PATENT LAW.

16 THE COURT: OKAY. ALL RIGHT.

17 MR. HALL: MOREOVER, WE HAVE OTHER CLAIMS
18 HERE AS I POINTED OUT.

19 JURISDICTION IN THE FEDERAL CIRCUIT IS
20 ONLY PROPER IF EACH AND EVERY CLAIM INVOLVES A
21 PATENT. AND OUR ALLEGATIONS GO BEYOND THAT, SOME
22 CLAIMS WOULD NOT INVOLVE A PATENT AT ALL.

23 IN OTHER WORDS, CONTESTING THE VEIL OF
24 THE PATENT BECAUSE EVEN THOUGH THE PATENT IS VALID
25 WE STILL HAVE CLAIMS THAT INVOLVE SETTLEMENTS THAT

1 WE THINK ARE MONOPOLISTIC THRUSTS TO CUSTOMERS.
2 THOSE DO NOT HINGE ON THE VALIDITY OF THE PATENT
3 AND WOULD NOT INVOLVE LITIGATING THE PATENT AND
4 THEREFORE WOULD BE PART OF THE NINTH CIRCUIT.

5 THE COURT: THANK YOU.

6 ARGUMENT HAS BEEN HELPFUL. I WILL GET A
7 DECISION OUT SOON.

8 THANK YOU VERY MUCH.

9 MS. DUFFY-SMITH: YOUR HONOR, IF I MAY.

10 THE COURT: YES.

11 MS. DUFFY-SMITH: MAY 17TH WE HAVE A
12 DISCOVERY CONFERENCE BEFORE JUDGE LLOYD.

13 THE COURT: OKAY. I WILL GIVE YOU SOME
14 TYPE OF HEADS UP BEFORE MAY 17TH.

15 THANK YOU.

16 (WHEREUPON, THE PROCEEDINGS IN THIS
17 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.

SUMMER A. FISHER, CSR, CRR
CERTIFICATE NUMBER 13185