

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

APPLE, INC., ) CV-11-1846-LHK  
)  
PLAINTIFF, )  
) SAN JOSE, CALIFORNIA  
VS. )  
)  
SAMSUNG ELECTRONICS CO., ) MAY 2, 2012  
LTD, ET AL, )  
)  
DEFENDANT. ) PAGES 1-28

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TRANSCRIPT OF PROCEEDINGS  
BEFORE THE HONORABLE LUCY H. KOH  
UNITED STATES DISTRICT JUDGE

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

FOR THE PLAINTIFF: MORRISON & FOERSTER  
BY: HAROLD MCELHINNY  
ALISON TUCHER  
RICHARD HUNG  
425 MARKET STREET  
SAN FRANCISCO, CA 94105

FOR THE DEFENDANT: QUINN EMANUEL  
BY: CHARLES VERHOEVEN  
50 CALIFORNIA STREET, 22ND FL  
SAN FRANCISCO, CA 94111

(APPEARANCES CONTINUED ON THE NEXT PAGE)

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

FOR THE DEFENDANT: QUINN EMANUEL  
BY: VICTORIA MAROULIS  
KEVIN JOHNSON  
555 TWIN DOLPHIN DRIVE, 5TH FL  
REDWOOD SHORES, CA 94065

1 SAN JOSE, CALIFORNIA MAY 2, 2012

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

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

5 THE CLERK: CALLING CASE NUMBER  
6 C-11-1846-LHK. APPLE, INC., VERSUS SAMSUNG  
7 ELECTRONICS COMPANY LIMITED, ET AL.

8 MR. MCELHINNY: GOOD AFTERNOON,  
9 YOUR HONOR.

10 HAROLD MCELHINNY, RICH HUNG AND  
11 ALISON TUCHER ON BEHALF OF APPLE PLAINTIFFS.

12 MR. VERHOEVEN: GOOD AFTERNOON,  
13 YOUR HONOR.

14 CHARLES VERHOEVEN. WITH ME IS MY PARTNER  
15 KEVIN JOHNSON AND VICTORIA MAROULIS ON BEHALF OF  
16 DEFENDANTS.

17 MR. JOHNSON: GOOD AFTERNOON, YOUR HONOR.

18 THE COURT: OKAY. GOOD AFTERNOON.

19 ALL RIGHT. WELL, THE NARROWING WAS NOT  
20 GOOD ENOUGH SO I'M THINKING ABOUT CONTINUING THIS  
21 TRIAL TO FALL. WE COULD DO IT 2013.

22 BUT IT'S SIMPLY NOT GOING TO BE POSSIBLE  
23 FOR ONE JURY TO DO 7 -- 16 UTILITY PATENTS, SIX  
24 DESIGN PATENTS, FIVE TRADE DRESSES, SIX TRADEMARKS,  
25 AN ANTI-TRUST CASE AND ABOUT 37 ACCUSED DEVICES.

1 I THINK THAT'S CRUEL AND UNUSUAL  
2 PUNISHMENT TO A JURY AND SO I'M NOT WILLING TO DO  
3 IT.

4 SO I CAN EITHER JUST VACATE THE TRIAL  
5 DATE AND WE CAN JUST HAVE A CONFERENCE, I CAN SET A  
6 STATUS CONFERENCE FOR LATER AT THE END OF THE  
7 SUMMER. I CAN VACATE THE SUMMARY JUDGEMENT  
8 DEADLINES AS WELL. WHAT WOULD YOU LIKE TO DO?

9 MR. VERHOEVEN: YOU WOULD LIKE --

10 THE COURT: I MEANT NARROW AND THIS IS  
11 NOT WHAT I GOT. SO I AM NOT IN THE MOOD TO  
12 CONTINUE THIS. SO WE DON'T HAVE TO HAVE A TRIAL IN  
13 JULY.

14 MR. MCELHINNY: I CAN EXPLAIN TO YOU WHY  
15 WE THOUGHT WE HAD MET WHAT YOUR HONOR WANTED.

16 THE COURT: WELL, THAT'S FINE, BUT IT  
17 DIDN'T, SO I'M VACATING THIS TRIAL DATE.

18 MR. MCELHINNY: BUT THEN WHAT I WOULD  
19 APPRECIATE INSTEAD IS SOME GUIDANCE ABOUT WHAT  
20 YOUR HONOR HAS IN MIND ABOUT WHAT WOULD LET US GO  
21 TO TRIAL AND THEN ON FRIDAY WE WILL MEET THAT.

22 I TOLD YOU CLEARLY THE LAST TIME I WAS  
23 HERE KEEPING THE TRIAL DATE IS OUR MOST IMPORTANT  
24 THING. I'M NOT GOING TO WASTE YOUR TIME NOW  
25 TRYING -- OR I WILL -- WHY WE THOUGHT THIS DID IT.

1                   BUT IF IT DOESN'T, WE WILL MEET WHATEVER  
2                   YOUR HONOR HAS IN MIND. WE HAVE TO DO THAT.

3                   THE COURT: I'VE HEARD REPEATEDLY HOW  
4                   MANY DECADES OF EXPERIENCE EVERYONE HAS. YOU TELL  
5                   ME YOU THINK A JURY WILL TAKE AND UNDERSTAND A CASE  
6                   WITH 37 ACCUSED PRODUCTS WITH 16 UTILITY PATENTS,  
7                   SIX DESIGN PATENTS, FIVE TRADE DRESS, SIX  
8                   TRADEMARK, AN ANTI-TRUST CASE?

9                   YOU TELL ME. DO YOU THINK A JURY IS  
10                  GOING TO BE ABLE TO UNDERSTAND THAT, BE ABLE TO  
11                  COMPREHEND THAT, GIVE FAIR AND JUST RULINGS ON ALL  
12                  OF THOSE?

13                 MR. MCELHINNY: THE ANSWER TO THAT  
14                 QUESTION IS I THINK IT CAN BE DONE. I THINK IT  
15                 WOULD BE BETTER TO BREAK IT INTO PARTS, BUT I HAVE  
16                 NOT BEEN ABLE TO CONVINCE YOUR HONOR TO DO THAT.

17                 BUT AT LEAST IN OUR CASE --

18                 THE COURT: PARTS MEANING WHAT? FOUR  
19                 TRIALS?

20                 MR. MCELHINNY: WHAT WE HAD IN MIND WAS  
21                 TWO TRIALS. BUT YOU COULD DO IT IN THREE.

22                 THE COURT: WELL, YOU ARE GOING TO HAVE  
23                 TO FIND ANOTHER JUDGE THEN BECAUSE I'M NOT GOING TO  
24                 DO THAT. IT'S NOT HAPPENING IN THIS COURTROOM.

25                 SO YOU ARE FREE TO SUE IN ANOTHER VENUE

1 AND GET FIVE OR SIX TRIALS AND GET ALL ACCUSED  
2 DEVICES AND PATENTS YOU WANT BUT IT'S NOT HAPPENING  
3 HERE.

4 MR. MCELHINNY: I UNDERSTAND THAT,  
5 YOUR HONOR.

6 BUT THE ANSWER TO YOUR QUESTION AT LEAST  
7 ON OUR CASE, WE'VE GOT OUR CASE AND WE HAVE THE  
8 CROSS COMPLAINT. AND IN OUR CASE THE VAST MAJORITY  
9 OF WHAT WE ARE TALKING ABOUT HAS TO DO WITH  
10 DESIGNS. THE VAST MAJORITY AND THE FACT THAT THERE  
11 ARE A LARGE NUMBER OF ACCUSED DEVICES IS BECAUSE  
12 THE PHONES KEEP COMING OUT.

13 IF I COULD START -- LET ME TELL YOU AT  
14 LEAST WHAT WE ARE TRYING TO ACCOMPLISH. WHICH IS  
15 WE ARE DRIVEN IN THIS CASE BY REMEDIES.

16 IN OTHER WORDS, WE BROUGHT THIS CASE TO  
17 GET INJUNCTIVE RELIEF TO TAKE ALL THE ACCUSED  
18 DEVICES OFF THE MARKET. IN THE MEANTIME WE HAVE  
19 SUFFERED DAMAGES IN THE MULTIPLE OF BILLIONS OF  
20 DOLLARS.

21 THE COURT: YOU HAVE SEVEN UTILITY  
22 PATENTS THAT YOU ARE ASSERTING. SAMSUNG IS  
23 ASSERTING NINE. HOW WOULD ANY JURY BE ABLE TO DEAL  
24 WITH THAT MUCH?

25 MR. MCELHINNY: AT LEAST -- AGAIN,

1 SPEAKING FROM OUR CASE, THE ANSWER TO THAT IS I  
2 THINK THE REAL QUESTION IS HOW MANY CLAIMS THEY'RE  
3 BEING ASKED TO APPLY.

4 AND ON THE UTILITY PATENTS, WITH NOW ONE  
5 EXCEPTION, THEY ARE ALL GRAPHIC INTERFACE PATENTS.  
6 THEY ARE PATENTS THAT GO TO THE RUBBER BANDING  
7 EFFECT. THEY ARE PATENTS THAT GO TO THE SWEEP.

8 TO ME AT LEAST, THE CONCEPTUAL VISION I  
9 HAVE OF THIS CASE IS ONE OF LOOK AND FEEL. IT IS  
10 HOW ALL OF THE ACCUSED DEVICES LOOK AND FEEL  
11 EXACTLY LIKE THE IPHONE AND THE IPAD.

12 AND WHEN YOU ASKED YOURSELF WHY THEY DO  
13 THAT, IT BREAKS DOWN INTO QUITE UNDERSTANDABLE  
14 ELEMENTS WHICH IS THE DESIGN OF THE DEVICE AND HOW  
15 IT OPERATES AS THE USER LOOKS AT IT

16 THE COURT: ALL RIGHT.

17 WELL, I'M NOT HEARING THE ANSWER TO MY  
18 QUESTION.

19 DO YOU WANT ME TO JUST VACATE IT AND WE  
20 CAN SET THE FIRST TRIAL FOR 2013, SECOND TRIAL FOR  
21 2014, THIRD TRIAL FOR 2015? I CAN DO IT THAT WAY.

22 BUT IF YOU ARE GOING TO TRIAL IN JULY  
23 THIS IS NOT GOING TO BE ACCEPTABLE AND SAME FOR  
24 SAMSUNG.

25 SO EITHER I NEED FURTHER NARROWING OF

1 THIS CASE, AND I WANT SPECIFICALLY WHICH CLAIMS YOU  
2 ARE GOING TO BE ASSERTING, OR I'M GOING TO VACATE  
3 THE TRIAL. WE DON'T HAVE TO GO TO TRIAL IN JULY.  
4 I DON'T THINK THIS CASE IS READY FOR TRIAL IN JULY  
5 IF YOU WANT TO GO FORWARD WITH THIS MUCH. I DON'T  
6 THINK IT'S POSSIBLE

7 MR. MCELHINNY: THE ANSWER IS I WOULD  
8 LIKE TO TAKE THE SECOND OPTION.

9 THE COURT: OKAY. SO WHEN ARE YOU GOING  
10 TO DO THAT? I WANTED THIS TO BE THE DATE.

11 MR. MCELHINNY: I UNDERSTAND.

12 I'M NOT GOING TO ASK FOR BEYOND FRIDAY TO  
13 GET IT TO YOU. BUT I DON'T THINK YOU ARE GOING TO  
14 GIVE ME MANY MORE CHANCES BEYOND FRIDAY, SO I WOULD  
15 LIKE SOME GUIDANCE.

16 TO BE CLEAR, WHEN YOUR HONOR IS LOOKING  
17 AT THE ENTIRE CASE WHICH IS APPROPRIATE, SO YOU ARE  
18 LOOKING AT NINE SAMSUNG PATENTS AND A 136 CLAIMS  
19 THERE, SAMSUNG HAS NO INTEREST IN REDUCING THE  
20 COMPLEXITY.

21 YOU ASKED US TO REDUCE MOTIONS, THEY  
22 INCREASED THEM. THEY HAVE NO INTEREST IN HOLDING  
23 THE TRIAL DATE. SO THE LEVERAGE OF THE TRIAL DATE  
24 WORKS ONLY AGAINST MY CLIENT. AND AS I'VE TOLD  
25 YOU, WE WILL DO WHATEVER WE NEED TO DO TO HOLD THE



1 TRIAL DATE.

2 AND TO THE EXTENT IF YOU HAVE A BALLPARK  
3 IN MIND ABOUT WHAT WE NEED TO COME BACK WITH I  
4 WOULD APPRECIATE THAT GUIDANCE BECAUSE I DON'T WANT  
5 TO MISS IT AGAIN.

6 THE COURT: WELL, AS FAR AS ANY -- IT  
7 DEPENDS ON WHAT COMBINATION YOU ARE GOING TO DO.  
8 BUT I WOULD THINK ON A UTILITY PATENT, AT MOST --  
9 WELL, I WOULD LIMIT IT, I GUESS, TO EVEN CLAIM  
10 TERMS. I THINK THREE OR FOUR IS PROBABLY THE MOST  
11 THAT CAN BE DONE, AT THE MOST.

12 37 ACCUSED PRODUCTS? THAT'S TOO MANY.

13 MR. MCELHINNY: MAY I JUST BE HEARD --

14 THE COURT: AT THIS POINT I'M NOT GOING  
15 TO GIVE YOU EXACT LIMITS. I SUSPECT IF I DO THAT  
16 THEN ON APPEAL YOU'RE BOTH GOING TO ARGUE THAT I  
17 VIOLATED YOUR DUE PROCESS RIGHTS IN NOT LETTING YOU  
18 BRING YOUR CASE.

19 BUT IT NEEDS TO BE VERY MANAGEABLE FOR A  
20 JURY TO UNDERSTAND. AND I THINK WHAT YOU BOTH  
21 SIDES HAVE PRESENTED IS NOT THERE.

22 SO IF IT REMAINS LIKE THIS SCOPE THEN I'M  
23 JUST GOING TO VACATE IT.

24 MR. MCELHINNY: I AM HEARING YOU LOUDLY  
25 AND CLEARLY.

1 THE COURT: YEAH.

2 SO THEN TELL ME WHEN BOTH SIDES -- AND I  
3 DON'T WANT JUST YOUR LISTING OF WE'LL DISMISS, YOU  
4 KNOW, I WANT IT TO BE MORE IN THE AFFIRMATIVE. WE  
5 ARE PLANNING GO TO TRIAL ON CLAIM 2 OF PATENT  
6 WHATEVER. I WANT IT TO BE VERY SPECIFIC, VERSUS,  
7 THIS IS WHAT WE ARE WILLING TO DISMISS.

8 I WANT TO KNOW WHAT EXACTLY YOU WANT TO  
9 PRESENT TO THE JURY AND HAVE THE JURY DECIDE.

10 SO ARE YOU GOING TO MEET AND CONFER  
11 TOMORROW? I MEAN, AT FIRST I THOUGHT WELL MAYBE  
12 YOU WANT TO DO SOME NARROWING AFTER SUMMARY  
13 JUDGEMENT, BUT APPLE IS NOT EVEN FILING ANY SUMMARY  
14 JUDGEMENT MOTIONS. SO THERE'S NOT REALLY ANY MORE  
15 GUIDANCE YOU ARE WAITING ON FROM THE COURT TO  
16 NARROW YOUR CASE.

17 SAMSUNG IS GOING TO GO ON SOME INVALIDITY  
18 SUMMARY JUDGEMENT, MAYBE THAT MIGHT NARROW THE CASE  
19 AND FUNCTIONALITY OF THE TRADE DRESS TRADEMARK, BUT  
20 I DON'T SEE ANY MORE NARROWING FROM APPLE'S  
21 PERSPECTIVE.

22 MR. MCELHINNY: WELL, I THINK IT FULLY  
23 WORKS THE OPPOSITE WAY, YOUR HONOR.

24 WE WOULD NARROW THE RESPONSE IF THEY --  
25 IF YOUR HONOR ALLOWED THEM TO FILE SUMMARY

1 JUDGEMENT MOTIONS, THEN OBVIOUSLY WE WOULD NARROW  
2 IN RESPONSE TO WHATEVER HAPPENED ON THEIR SUMMARY  
3 JUDGEMENT MOTIONS.

4 THE FACT THAT WE ARE NOT FILING ANY  
5 DOESN'T -- WE ARE NOT FILING AFFIRMATIVE ONES, BUT  
6 IN ORDER TO REDUCE THE PAPERWORK WE ARE NOT  
7 CHALLENGING THE SAMSUNG PATENTS, WE WILL BE  
8 PREPARED TO DO THAT AT TRIAL.

9 THE COURT: WELL, I'M -- I WOULD LIKE TO  
10 SET ANOTHER DATE THEN FOR YOU ALL TO MEET AND  
11 CONFER. AND I DON'T WANT THESE, WE CALL THEM AT  
12 9:00 AND THEY DIDN'T RESPOND TO 8:30, THIS BACK AND  
13 FORTH. I WOULD JUST LIKE THE DISCUSSION TO BE HEAD  
14 TO NARROW THIS CASE FURTHER IF YOU WANT A TRIAL  
15 THIS SUMMER.

16 AND IF YOU DON'T WANT A TRIAL THIS SUMMER  
17 THEN THAT'S FINE. I'M PERFECTLY FINE WITH HAVING  
18 THIS CASE KEEP CHURNING FOR A COUPLE OF YEARS YOU  
19 CAN GET MORE DISCOVERY YOU CAN DESIGNATE MORE  
20 EXPERTS YOU CAN PRODUCE MORE EXPERT REPORTS.

21 BUT IF YOU WANT TO GO TO TRIAL I NEED TO  
22 SEE FURTHER NARROWING. SO ARE YOU GOING TO DO THAT  
23 BY FRIDAY?

24 MR. MCELHINNY: ACTUALLY, NOW I WOULD  
25 LIKE TO MOVE IT TO MONDAY, YOUR HONOR, IF YOU ARE

1 GOING TO WANT THE SPECIFIC CLAIMS.

2 THE COURT: THAT'S FINE.

3 MR. MCELHINNY: MAY I ASK JUST A  
4 CLARIFICATION? WHEN YOU SAY THREE CLAIM TERMS, ARE  
5 YOU TALKING ABOUT SPECIFIC CLAIMS?

6 THE COURT: WELL, I GUESS THAT'S WHY I'M  
7 NOT INCLINED TO SAY IN THE ABSTRACT EXACTLY HOW  
8 MANY CLAIMS BECAUSE IF YOU'RE ASKING FOR THE JURY  
9 TO CONSTRUE SEVEN TERMS OUT OF ONE CLAIM, THEN  
10 THAT'S DIFFERENT.

11 LET ME SEE, INSTEAD OF PUTTING THE ONUS  
12 ON ME TO DEFINE YOUR CASE, MAKE YOUR PROPOSAL OF A  
13 MUCH MORE NARROWED CASE THAT A JURY CAN ABSORB AND  
14 UNDERSTAND AND FAIRLY ADJUDICATE AND THEN WE CAN  
15 TALK FURTHER.

16 MR. MCELHINNY: THANK YOU, YOUR HONOR.

17 THE COURT: I NEED TO KNOW WHAT CLAIMS  
18 YOU ARE ASSERTING AND WHAT TERMS WITHIN THAT CLAIM  
19 THE JURY WILL NEED -- WILL BE THE MOST IN DISPUTE.

20 MR. MCELHINNY: THANK YOU, YOUR HONOR.

21 THE COURT: OKAY.

22 MR. MCELHINNY: IF I COULD JUST REPEAT  
23 ONCE MORE, I KNOW YOUR HONOR KNOWS THIS.

24 WE ARE THE ONLY PARTY THAT WANTS TO GO TO  
25 TRIAL THIS SUMMER. SAMSUNG HAS NO INTEREST IN

1 GOING TO TRIAL THIS SUMMER. THEY HAVE BEEN TELLING  
2 YOU THAT SINCE THE FIRST TIME WE HAD A CASE  
3 MANAGEMENT CONFERENCE.

4 SO THIS LEVERAGE WORKS ON US AND WE WILL  
5 DO EVERYTHING WE CAN TO KEEP THE TRIAL DATE BUT IT  
6 DOESN'T WORK ON BOTH PARTIES.

7 THE COURT: WELL, IF SAMSUNG IS  
8 UNREASONABLE IN LIMITING ITS CASE THEN I MIGHT JUST  
9 MAKE MY OWN DECISION ABOUT WHICH OF ITS TERMS ARE  
10 GOING TO TRIAL AND WHICH OF ITS CLAIMS ARE GOING TO  
11 TRIAL, SO I HOPE IT DOESN'T GET TO THAT.

12 MR. VERHOEVEN: YES, YOUR HONOR.

13 WE ARE HOPING FOR A MUCH NARROWER CASE  
14 AND WE HAVE INDICATED TO YOUR HONOR THAT WE WILL  
15 REDUCE THE NUMBER OF PATENTS WE HAVE ASSERTED.

16 AND IF WE CAN GET TOGETHER WITH THEM FOR  
17 REDUCTION IN PARODY, I WILL REPRESENT TO YOU THAT  
18 WE WILL BE WILLING TO REDUCE OUR CASE.

19 THE PROBLEM IS WE WOULD BE SUBSTANTIALLY  
20 PREJUDICED IF THEY ARE GOING ON 30 PLUS IPA SETS  
21 AND WE REDUCE DOWN TO TWO, AS YOUR HONOR I'M SURE  
22 CAN APPRECIATE, SO IT'S SORT OF A NEGOTIATION.

23 AND YOUR HONOR, AS I RECALL IN THE LAST  
24 HEARING VERY CLEARLY SET -- INDICATED THAT THE  
25 TRIAL DATE WAS DEPENDENT UPON REDUCTION AND WE ARE

1 PERFECTLY WILLING TO DO THAT BUT IT HAS TO BE  
2 BILATERAL.

3 THE COURT: WELL, I THINK IT HAS TO BE  
4 BILATERAL JUST BECAUSE I DON'T THINK A JURY WILL BE  
5 ABLE TO REALLY COMPREHEND AND GIVE YOU A FAIR  
6 DECISION AND ABSORB ALL THE INFORMATION YOU ARE  
7 PROVIDING.

8 MR. VERHOEVEN: YES, YOUR HONOR.

9 THE COURT: SO I WANT THAT FILED BY  
10 MAY 7TH.

11 NOW ASSUMING THIS IS GOING FORWARD WHICH  
12 I HAVEN'T MADE A DECISION AT THIS POINT, NOW APPLE  
13 HAS FILED A MOTION FOR ADVERSE INFERENCE JURY  
14 INSTRUCTIONS DUE TO SAMSUNG'S SPOILIATION OF  
15 EVIDENCE, IS THEIR MOTION.

16 I THINK THAT THAT IS MORE APPROPRIATELY  
17 DECIDED BY JUDGE GREWAL. I'VE QUICKLY REVIEWED  
18 THIS AND HE IS MORE FAMILIAR WITH WHAT E-MAILS MAY  
19 OR MAY NOT HAVE BEEN RETAINED AND WHETHER IT WAS OR  
20 WAS NOT IN COMPLIANCE WITH HIS ORDERS

21 MR. MCELHINNY: MAY I BE HEARD BRIEFLY ON  
22 THAT?

23 THE COURT: YES.

24 MR. MCELHINNY: THE REASON WE FILED IT  
25 WITH YOU, TWO REASONS.

1           ONE BECAUSE WE WERE ASKING FOR A JURY  
2       INSTRUCTION.

3           BUT TWO, ALSO IN THE PREVIOUS SANCTIONS  
4       MOTION THAT JUDGE GREWAL ISSUED HE ACTUALLY  
5       MENTIONED IN THERE THAT HE WAS VERY UNCOMFORTABLE  
6       WITH GETTING INTO YOUR JURISDICTION IN TERMS OF  
7       ADVERSE INFERENCES AND THINGS THAT WOULD AFFECT THE  
8       TRIAL.

9           SO WE WILL GO WHEREVER YOU WANT US TO GO,  
10      BUT IF YOU ARE GOING TO MAKE A REFERENCE WE WOULD  
11      ASK YOU TO MAKE IT CLEAR TO JUDGE GREWAL THAT HE  
12      HAS THE AUTHORITY, YOU'VE GIVEN HIM THE AUTHORITY  
13      TO DO THIS.

14          THE COURT: I'VE SPOKEN WITH HIM AND HE  
15      SAID HE INCLUDED THAT, NOT TO STEP ON MY TOES, BUT  
16      FOR CERTAIN ISSUES IF HE HAS THE INSTITUTIONAL  
17      KNOWLEDGE OF HAVING BEEN WITH YOU ALL THROUGH ALL  
18      OF THESE DISCOVERY MOTIONS, THEN I THINK IT MAKES  
19      THE MOST SENSE FOR THAT TO GO TO HIM.

20          NOW I'M PLANNING AND WILL GO THROUGH THIS  
21      ASSUMING THE TRIAL STAYS ON TRACK, ON KEEPING ALL  
22      THE DAUBERT MOTIONS ALL THE MOTIONS IN LIMINE,  
23      SUMMARY JUDGEMENT, AND WE CAN TALK ABOUT ANY  
24      FURTHER CLAIM CONSTRUCTION FOR THE DESIGN PATENTS.

25          BUT FROM MY REVIEW OF THIS MOTION, AND I

1 HAVE SPOKEN WITH HIM AND AS LONG AS I GIVE A CLEAR  
2 REFERRAL, HE IS FINE --

3 MR. MCELHINNY: GREAT. THEN WE ARE TOO,  
4 YOUR HONOR.

5 THE COURT: -- WITH TAKING THIS.

6 OKAY. SO THE MOTION FOR ADVERSE  
7 INFERENCE JURY INSTRUCTION WILL GO TO JUDGE GREWAL,  
8 AND I'VE ALREADY SPOKEN WITH HIM.

9 IN ADDITION, I UNDERSTAND BOTH SIDES WANT  
10 TO FILE A MOTION TO STRIKE FOR LATE DISCLOSED  
11 DISCOVERY/THEORIES.

12 IF IT'S CONCERNING WHETHER DISCOVERY IS  
13 TIMELY PRODUCED OR NOT, IT SHOULD GO TO  
14 JUDGE GREWAL SINCE HE'S HEARD ALL THE DISCOVERY  
15 MOTIONS IN THIS CASE.

16 AND I HAVE SPOKEN WITH HIM AND HE'S MORE  
17 THAN HAPPY TO TAKE THOSE. I ASSUME THERE'S GOING  
18 TO BE JUST ONE PER SIDE, I'M ONLY GOING TO ALLOW  
19 ONE PER SIDE.

20 MR. MCELHINNY: THAT'S ALL WE WANT,  
21 YOUR HONOR.

22 THE COURT: SO THOSE WILL GO BEFORE  
23 JUDGE GREWAL AS WELL.

24 ONE EACH. HE SAID FOLLOW THE LOCAL RULES  
25 IN TERMS OF LENGTH OF BRIEFING.



1           ON THE DAUBERT MOTIONS EACH SIDE WILL  
2       HAVE 25 PAGES FOR BOTH OPENING AND OPPOSITION AND  
3       15 PAGE REPLY.

4           FOR MOTIONS IN LIMINE THE MAXIMUM WILL BE  
5       TEN MOTIONS PER SIDE AND YOU WILL HAVE 30 PAGES FOR  
6       MOTIONS AND OPPOSITIONS. NO REPLIES.

7           WITH REGARD TO THE DESIGN PATENT CLAIM  
8       CONSTRUCTION ISSUE, I'M NOT CLEAR ON WHAT IT IS  
9       THAT NEEDS TO BE CONSTRUED. I CAN EITHER SET AN  
10      ABBREVIATED SHORTENED BRIEFING SCHEDULE FOR THIS  
11      AND HAVE THIS HEARD ON THE PRETRIAL CONFERENCE,  
12      THAT'S MY INCLINATION, 15 PAGES OPENING, 15 PAGES  
13      OPPOSITION, 5 PAGE REPLY, BUT I JUST WASN'T CLEAR  
14      ON WHAT IT IS YOU ARE SAYING NEEDS CONSTRUCTION.

15           DO YOU HAVE ANY MORE ON THAT ISSUE?

16           MR. VERHOEVEN: YES, YOUR HONOR.

17           I WILL GIVE YOU THE MORE. BUT ON THE  
18      SCHEDULING, I WAS ACTUALLY THINKING PERHAPS WE  
19      COULD SCHEDULE IT FOR THE SAME TIME AS THE SUMMARY  
20      JUDGEMENT HEARING THAT'S ALREADY GOING TO BE ON  
21      YOUR CALENDAR I THINK, YOUR HONOR, JUNE 21ST. I  
22      DON'T KNOW IF THAT WORKS FOR YOUR HONOR OR NOT.

23           AND TO ANSWER THE QUESTION, UNDER THE  
24      CASE LAW -- THERE'S NOT A LOT OF CASE LAW ON DESIGN  
25      PATENTS AS YOUR HONOR KNOWS, BUT UNDER EGYPTIAN

1        GODDESS IT'S CLEAR CONSTRUCTION ISSUES FOR DESIGN  
2        PATENTS AS WELL AS UTILITY PATENTS ARE A MATTER OF  
3        LAW FOR THE JUDGE AND NOT FOR THE JURY.

4                THE COURT:    WHAT ARE THE SPECIFIC DESIGN  
5        FEATURES THAT YOU WANT TO CONSTRUE?

6                MR. VERHOEVEN:    WELL, THE MOST IMPORTANT  
7        ASPECT IS DISTINGUISHING BETWEEN FEATURES OF THE  
8        CLAIMED DESIGN THAT ARE ORNAMENTAL AS OPPOSED TO  
9        THOSE THAT ARE FUNCTIONAL WHICH IS REFERRED TO IN  
10       EGYPTIAN GODDESS AND IN THE RICHARDSON CASE,  
11       YOUR HONOR.

12               THE COURT:    YEAH, NO.

13               I'M NOT ASKING ABOUT THE LAW, I'M ASKING  
14       WHAT ARE THE SPECIFIC FEATURES THAT YOU'RE  
15       REQUESTING BE CONSTRUED?

16               MR. VERHOEVEN:    WHAT WE WOULD DO IS WE  
17       WOULD ASK FOR YOUR HONOR'S RULES AS A MATTER OF LAW  
18       AS TO WHICH FEATURES ARE FUNCTIONAL, AND I'M NOT  
19       PREPARED TO GIVE YOU A LIST OF THOSE RIGHT NOW,  
20       YOUR HONOR.

21               BUT BEFORE IT GOES TO THE JURY FOR THE  
22       JURY TO ASSESS INFRINGEMENT OR VALIDITY WE BELIEVE  
23       IT WOULD BE APPROPRIATE FOR THE COURT TO ADDRESS  
24       THOSE ISSUES SO THAT THE JURY HAS GUIDANCE ON THAT.

25               OTHERWISE, WE ARE GOING TO BE -- THEY ARE

1 GOING TO HAVE NO GUIDANCE AND WE ARE GOING TO HAVE  
2 A SITUATION WHERE PEOPLE ARE GOING TO BE -- FOR  
3 EXAMPLE, IN THE EXPERT REPORTS AND EXPERT DISCOVERY  
4 THAT WAS RECENTLY TAKEN, IT IS OUR BELIEF THAT THE  
5 MULTIPLE EXPERTS THAT APPLE HAS DISCLOSED HAVE  
6 BASICALLY PUNTED ON THIS ISSUE OF JUST SAYING, HEY  
7 IT LOOKS THE SAME, AND THEY HAVEN'T ADDRESSED WHICH  
8 ASPECTS ARE FUNCTIONAL OR NOT.

9 JUST AS IN UTILITY PATENTS WHERE YOU NEED  
10 TO HAVE CONSTRUCTION OF THE CLAIMS IN ORDER TO  
11 PROVIDE GUIDANCE TO THE JURY AS TO THE METES AND  
12 BOUNDS OF THE PROPERTY RIGHT. SIMILARLY, IN THE  
13 DESIGN PATENTS, ALTHOUGH GRANTED THEY ARE DIFFERENT  
14 THAN UTILITY PATENTS, THE JURY STILL NEEDS GUIDANCE  
15 FROM THE COURT AS TO WHAT ARE THE PURELY FUNCTIONAL  
16 ASPECTS, SUCH AS YOUR HONOR, A ROUNDED RECTANGLE  
17 GEOMETRIC SHAPE, IS IT FUNCTIONAL OR IS IT NOT?

18 THE COURT: I'M SORRY, LET ME INTERRUPT  
19 YOU.

20 MR. VERHOEVEN: YES, YOUR HONOR.

21 THE COURT: WILL THE FEDERAL CIRCUIT  
22 PRELIMINARY INJUNCTION RULING GIVE US ANY GUIDANCE  
23 ON THIS?

24 MR. VERHOEVEN: IT MAY VERY WELL.

25 THE COURT: OKAY. DO WE HAVE A SENSE OF

1       WHEN THAT'S -- THEY INDICATE WHEN THEY MIGHT ISSUE  
2       A RULING?

3               MR. MCELHINNY:   NOT AT ALL, YOUR HONOR.

4               MR. VERHOEVEN:   I THINK IT COULD BE ANY  
5       DAY, YOUR HONOR.

6               THE COURT:    OKAY.   ALL RIGHT.

7               WELL, THIS IS WHAT I'M GOING TO PROPOSE.  
8       A 15 PAGE OPENING BRIEF DUE JUNE 12TH.   A 15 PAGE  
9       RESPONSE DUE JUNE 26TH.   A 5 PAGE REPLY DUE  
10      JULY 30TH, AND I WILL HEAR THIS ON JULY 18TH AT THE  
11      PRETRIAL CONFERENCE.

12              MR. VERHOEVEN:   IS THERE ANY CHANCE,  
13      YOUR HONOR, GIVEN THERE ARE SEVEN DIFFERENT DESIGN  
14      PATENTS THAT WE COULD HAVE 20 PAGES IN OUR OPENING  
15      BRIEF?

16              THE COURT:    I'M JUST CONCERNED THAT I'M  
17      NOT SURE I WILL HAVE THE BANDWIDTH AT YOUR PRETRIAL  
18      CONFERENCE TO RULE ON THE HUNDREDS OF PAGES OF  
19      MOTIONS IN LIMINE, THAT'S MY CONCERN.

20              NOW THE DAUBERT WILL BE DECIDED, THE  
21      DAUBERT MOTIONS WILL BE DECIDED WITH THE SUMMARY  
22      JUDGEMENTS ON JUNE 21ST.

23              MR. VERHOEVEN:   ONE SUGGESTION I HAVE IF  
24      I MAY BE HEARD, YOUR HONOR.

25              THE COURT:    YES, SIR, PLEASE.

1 MR. VERHOEVEN: PERHAPS IT WOULD MAKE  
2 SENSE TO FILE THE PAPERS ON CLAIM CONSTRUCTION WITH  
3 THE HOPE THAT THERE'S A RULING TO GIVE THE COURT  
4 GUIDANCE OR TO THE EXTENT THERE IS GUIDANCE BEFORE  
5 JUNE 21ST.

6 BUT IF THERE'S NOT THEN WE COULD  
7 RESCHEDULE THAT. I'M JUST A LITTLE CONCERNED  
8 ABOUT, I'M NOT SURE IF I HEARD YOU SAY YOU WERE  
9 THINKING ABOUT SCHEDULING IT FOR THE PRETRIAL  
10 CONFERENCE.

11 I'M CONCERNED THAT'S SO CLOSE TO TRIAL IT  
12 WOULD BE MORE HELPFUL FOR US AT LEAST IF FOR TRIAL  
13 PREPARATION PURPOSES A RULING SOONER THAN THAT.

14 THE COURT: WELL, I'M NOT EVEN SURE  
15 CONSTRUCTION IS NECESSARY.

16 MR. MCELHINNY: TO BE CLEAR, I HAVE BEEN  
17 QUIET. OUR POSITION IS THIS MAY WORK FOR THE  
18 COURT, BUT THAT EGYPTIAN GODDESS MADE IT CLEAR THAT  
19 CLAIM CONSTRUCTION OF DESIGN PATENTS IS NO LONGER  
20 FAVORED.

21 IT'S ONE OF THE CHANGES THE CASE MADE.  
22 IT MAY NOT BE REVERSIBLE TO DO IT, BUT THE GUIDANCE  
23 TO THE DISTRICT COURTS WAS THAT'S NOT THE WAY TO GO  
24 WITH DESIGN PATENTS.

25 THE COURT: RIGHT.

1 BUT IT DOES SAY THAT IF THERE'S SOME  
2 GUIDANCE WHETHER IT'S A JURY INSTRUCTION OR  
3 SOMETHING, THE COURT SHOULD DO THAT. I AGREE WITH  
4 YOU THAT GENERALLY DESIGN PATENTS SPEAK FOR  
5 THEMSELVES AND THE CIRCUIT IS NOT ENCOURAGING US TO  
6 CONSTRUE THEM.

7 MR. VERHOEVEN: YOUR HONOR, I'M QUOTING  
8 FROM EGYPTIAN GODDESS IT SAYS -- THIS IS 543 F.3D  
9 665 AT PAGE 680.

10 AND IT TALKS ABOUT THE TRIAL COURT CAN  
11 USEFULLY GUIDE THE FINDER OF FACTS BY ADDRESSING A  
12 NUMBER OF OTHER ISSUES THAT BEAR ON THE SCOPE OF  
13 THE CLAIM.

14 THEN IT CALLS OUT SPECIFICALLY --

15 THE COURT: I'VE GOT IT.

16 THOSE INCLUDE SUCH MATTERS AS DESCRIBING  
17 THE ROLE OF PARTICULAR CONVENTIONS AND DESIGN  
18 PATENT DRAFTING SUCH AS THE ROLE OF BROKEN LINES,  
19 ET CETERA.

20 MR. VERHOEVEN: THAT LAST BIT.

21 THE COURT: I HEAR YOU. I HEAR YOU.

22 BUT WITHOUT YOU TELLING ME WHAT IT IS  
23 THAT YOU BELIEVE NEEDS CONSTRUCTION, IT'S DIFFICULT  
24 FOR ME IN THE ABSTRACT TO SAY YES I'M GOING TO  
25 CONSTRUE IT OR NOT.

1 MR. VERHOEVEN: WE'RE GENERALLY --  
2 FOCUSSED ON THE LAST CLAUSE OF THAT SENTENCE WHICH  
3 IS THE DISTINCTION BETWEEN THE ORNAMENTAL AND THE  
4 PURELY FUNCTIONAL.

5 AND I BELIEVE THAT WOULD BE HELPFUL FOR  
6 THE JURY ESPECIALLY IN THIS CASE.

7 BUT IF WE BRIEFED THIS IN ACCORDANCE WITH  
8 APPEARING ON JUNE 21ST AND THEN IF WE COULD MOVE IT  
9 IF THE FEDERAL CIRCUIT HADN'T RULED OR IF THEY DID  
10 WE COULD FILE A SUPPLEMENTAL TWO-PAGE STATEMENT OF  
11 HOW WE THINK THAT ADDRESSES THINGS, I DON'T KNOW IF  
12 THAT WOULD ADDRESS YOUR CONCERNS IN TERMS OF  
13 TIMING, YOUR HONOR.

14 THE COURT: WELL, MY CONCERN IS I HAVE A  
15 WHOLE OTHER PRELIMINARY INJUNCTION MOTION IN THE  
16 SECOND CASE. AND I KNOW HOW MUCH WORK THAT TOOK  
17 THE FIRST TIME AROUND.

18 AND I HAVE OTHER MATTERS AS WELL THAT ARE  
19 SCHEDULED THROUGHOUT JUNE. SO I JUST THINK  
20 CAPACITY WISE, PROBABLY JULY WOULD BE BETTER ON  
21 THAT ISSUE.

22 MR. VERHOEVEN: I UNDERSTAND, YOUR HONOR.

23 THE COURT: I'M EXPECTING THIS PI IS  
24 GOING TO BE QUITE A BIG TASK.

25 MR. VERHOEVEN: I UNDERSTAND, YOUR HONOR.

1 THE COURT: LIKE THE LAST TIME AROUND.

2 SO THAT WOULD BE MY PREFERENCE. I WISH I  
3 COULD EXPEDITE IT FOR YOU BUT I'M THINKING IT JUST  
4 MIGHT NOT BE POSSIBLE TO DO THAT.

5 SO I WOULD LIKE 15 PAGE OPENING  
6 JUNE 12TH, 15 PAGE RESPONSE, JUNE 26TH AND 5 PAGE  
7 REPLY JULY 3RD.

8 AND WHAT I WOULD LIKE TO DO IS AT THIS  
9 POINT I THINK MORE CMC'S ARE BETTER JUST TO KEEP A  
10 TIGHT CONTROL OF THINGS. SO I WOULD LIKE TO HAVE A  
11 CMC WHEN YOU ALL COME IN, I GUESS IT'S DIFFERENT  
12 COUNSEL BUT THE SAME PARTIES, ON JUNE 7TH.

13 MR. VERHOEVEN: YES, YOUR HONOR.

14 THE COURT: WHEN YOU ARE HERE FOR THE PI  
15 THEN WE CAN REFINE SOME OF THESE ISSUES.

16 MR. VERHOEVEN: JUST SO IT'S A LITTLE BIT  
17 OF BACKGROUND, YOUR HONOR, THERE ARE TWO ITC CASES  
18 INVOLVING THE SAME PARTIES, APPLE AND SAMSUNG, THAT  
19 ARE CURRENTLY SCHEDULED FOR TRIAL. IN  
20 FACT, THEY WILL BOTH BE IN TRIAL JUNE 7TH IN  
21 ADDITION TO THE PI HEARING, AND THAT'S WHY WE HAVE  
22 A WHOLE DIFFERENT TEAM HANDLING THE PI AND THE CMC  
23 FOR THE LATER FILED CASE TODAY.

24 THE COURT: OKAY.

25 MR. VERHOEVEN: BECAUSE YOU SHOULD BE



1 DEALING WITH THE PEOPLE THAT YOU WILL BE DEALING  
2 WITH AT THE PI, I ASSUME.

3 SO WE WON'T BE ABLE PHYSICALLY TO BE HERE  
4 ON THE 7TH.

5 THE COURT: OKAY. THAT'S FINE.

6 WE WILL KEEP THEN THE NEXT CMC JUNE 21ST  
7 WHICH IS WHEN WE ARE HAVING THE SUMMARY JUDGEMENT  
8 HEARING. THAT'S FINE.

9 MR. VERHOEVEN: AND YOUR HONOR, I'M  
10 ASSUMING THAT YOU WILL INDICATE QUICKLY TO US  
11 WHETHER THE SUPPOSED NARROWING THAT'S GOING TO  
12 OCCUR IS ACCEPTABLE AND THE DATES ARE STILL ON NEXT  
13 WEEK OR WITHIN -- IS THERE SOME TIME FRAME WE  
14 SHOULD LOOK FOR?

15 THE COURT: WELL, AT THIS POINT WE SHOULD  
16 KEEP JULY 30TH ON YOUR CALENDARS.

17 MR. VERHOEVEN: I'M JUST WONDERING IF WE  
18 SHOULD HAVE A CMC NEXT WEEK OR SOMETHING.

19 THE COURT: WHEN DO YOUR ITC TRIALS  
20 START?

21 MR. VERHOEVEN: THE 30TH OF MAY. WE WILL  
22 HAVE TO LEAVE FOR WASHINGTON THE WEEK BEFORE THAT.

23 THE COURT: OKAY. THE WEEK OF THE 21ST?

24 MR. VERHOEVEN: CORRECT, YOUR HONOR.

25 THE COURT: I KNOW MAY 9TH IS REALLY FULL

1 BUT THAT LOOKS LIKE THAT'S PROBABLY THE ONLY DAY,  
2 RIGHT, THAT THEY COULD COME BACK IN.

3 YOU KNOW, AS MUCH AS I ENJOY SEEING YOU  
4 ALL, I'M NOT GOING TO SCHEDULE A CMC FOR NEXT WEEK.  
5 I WILL LOOK AT WHAT YOU HAVE TO FILE.

6 I WILL SEE YOU THE 21ST OF JUNE. IS  
7 THERE ANYTHING ELSE THAT WE NEED TO DISCUSS? I  
8 THINK THAT WAS IT BASED ON THE CASE MANAGEMENT  
9 STATEMENTS.

10 MR. VERHOEVEN: I HAVE NOTHING ELSE,  
11 YOUR HONOR.

12 MR. MCELHINNY: ON THE SPOILIATION MOTION  
13 YOUR HONOR, YOU WILL REFER THAT TO THE MAGISTRATE  
14 JUDGE AND WE WILL SET A HEARING DATE; IS THAT  
15 RIGHT?

16 THE COURT: YES, I'M REFERRING YOUR RULE  
17 37(C)(1) MOTIONS TO STRIKE FOR UNTIMELY DISCOVERY  
18 AND YOUR MOTION FOR ADVERSE INFERENCE JURY  
19 INSTRUCTION TO JUDGE GREWAL.

20 MR. VERHOEVEN: AND SO YOU KNOW,  
21 YOUR HONOR, WE INTEND TO REQUEST A DIFFERENT DATE  
22 THAN THE 7TH FOR THE SAME REASON THAT THE 7TH  
23 WOULDN'T WORK FOR US FOR A CMC.

24 THE COURT: NOW THAT THESE ARE OFF MY  
25 CALENDAR FOR THE 7TH, YOU WILL HAVE TO SCHEDULE

1 THOSE WITH JUDGE GREWAL WITH MR. RIVERA.

2 IF THE TRIAL DOES GO FORWARD I'M NOT  
3 GOING TO GO TO THE NINTH CIRCUIT JUDICIAL  
4 CONFERENCE. SO THE WEEK OF, WHAT IS THAT,  
5 APRIL 13TH; IS THAT RIGHT?

6 AUGUST 13TH WE WILL BE IN TRIAL THAT FULL  
7 WEEK. AUGUST 13TH THROUGH THE 17TH I'M NOT GOING  
8 TO THE CIRCUIT CONFERENCE. SO THAT WILL BE A  
9 FIVE-DAY TRIAL WEEK.

10 OKAY. WHAT ELSE?

11 MR. VERHOEVEN: I THINK PREVIOUSLY YOU  
12 TOLD US WE WERE LIMITED TO 25 HOURS. IS THAT WHAT  
13 YOU JUST SAID, YOUR HONOR?

14 THE COURT: NO, IT WILL MEAN THAT YOU ALL  
15 WILL END SOONER SO I CAN START MY CRIMINAL TRIALS  
16 SOONER. I HAVE ANOTHER CRIMINAL TRIAL STARTING  
17 AFTER YOU ALL.

18 MR. VERHOEVEN: I HAVE NOTHING FURTHER.

19 MR. MCELHINNY: NOTHING FURTHER IN THIS  
20 CASE, YOUR HONOR.

21 THE COURT: ANYTHING ELSE? ALL RIGHT.

22 THANK YOU.

23 (WHEREUPON, THE PROCEEDINGS IN THIS  
24 MATTER WERE CONCLUDED.)

25

**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/\_\_\_\_\_  
SUMMER A. FISHER, CSR, CRR  
CERTIFICATE NUMBER 13185

DATED: MAY 11, 2012