

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

Civil Action
No. 13-10277-WGY

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BOSE CORPORATION,

Plaintiff,

v.

SDI TECHNOLOGIES, INC.,

Defendant.

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MARKMAN HEARING

BEFORE: The Honorable William G. Young,
District Judge

APPEARANCES:

FISH & RICHARDSON, P.C. (By Mark J. Hebert,
Esq. and Jolynn M. Lussier, Esq.), One Marina Park
Drive, Boston, Massachusetts 02110

- and -

FISH & RICHARDSON, P.C. (By Noah C.
Graubart, Esq.), 1180 Peachtree Street, NE, 21st
Floor, Atlanta, Georgia 30309, on behalf of the
Plaintiff

FOLEY & LARDNER, LLP (By Matthew B. Lowrie,
Esq. and Aaron W. Moore, Esq.), 111 Huntington
Avenue, Boston, Massachusetts 02199, on behalf of
the Defendant

1 Courthouse Way
Boston, Massachusetts

January 15, 2014

1 **THE CLERK:** All rise. The United States District
2 Court is now in session, you may be seated.

3 Now hearing Civil Matter 13-10277, Bose Corporation
4 v. SDI Technologies.

5 **THE COURT:** Good morning. Would counsel identify
6 themselves.

7 **MR. HEBERT:** Good morning, your Honor. Mark Hebert
8 of Fish & Richardson for the plaintiff, Bose.

9 **MS. LUSSIER:** Good morning. Jolynn Lussier also
10 for Bose. And with me here at the table is Noah Graubart
11 from our Atlanta office, and next to him is Maureen Brenner
12 who is an in-house lawyer at Bose Corporation.

13 **MR. LOWRIE:** Matt Lowrie of Foley & Lardner on
14 behalf of the defendant, SDI. With me at counsel table is
15 my partner, Aaron Moore. Also in the courtroom is Marcos
16 Zalta who's the general counsel of SDI.

17 **THE COURT:** Fine. You are all welcome.

18 SDI's filed a motion to stay this matter which
19 seems to me to have some merit. And at a minimum, and I
20 know that Bose hasn't really had a chance to respond, but at
21 a minimum I need some discussion about that, and we'll start
22 by asking SDI some questions here.

23 So, when do we have to get the final answer from
24 the Patent Trademark Appeal Board here?

25 **MR. LOWRIE:** December, your Honor.

1 **THE COURT:** Date? The 3rd?

2 **MR. MOORE:** It would be one -- I'm sorry, your
3 Honor. A year from institution. So they were instituted
4 December 11th and December 13th of last year. The year
5 should be completed December 11th or 13th of this year.

6 **THE COURT:** All right, fine. Unless the director
7 gives them more time?

8 **MR. MOORE:** Correct.

9 **THE COURT:** Okay.

10 **MR. LOWRIE:** Which hasn't happened yet, your Honor.
11 But, I mean, the director has to request it, has to show
12 cause.

13 **THE COURT:** I know. Has it happened in any case,
14 ever?

15 **MR. LOWRIE:** Not yet, your Honor. Although it's a
16 new proceeding.

17 **THE COURT:** I understand it is. Are you willing to
18 put the income from the sales of these allegedly infringing
19 products in escrow?

20 **MR. LOWRIE:** My client is here and I would like to
21 consult. But I would say that, not the revenue because that
22 wouldn't be reflective of the damages, but certainly -- so,
23 Bose in an earlier case had said a reasonable royalty would
24 be actually the same as what Apple charges as a royalty.
25 But that was their argument. I think it's too much. And

1 **MS. LUSSIER:** A twelve hour difference.

2 But one of the things that's important to
3 understand is that the Patent Trial and Appeal Board has
4 instituted Inter Parties Review on certain of the claims
5 that have been asserted in this case, not all of them, at
6 this time.

7 **THE COURT:** Right. I understand. I do understand.

8 **MS. LUSSIER:** So -- right.

9 **THE COURT:** But, again, all I'm trying to be is
10 practical.

11 So, here's what we're, here's what we're going to
12 do. I'll give you a day to talk to them and SDI a day to
13 talk to their people. But I haven't heard that you're hurt
14 if they will make these representations -- I'm not going to
15 insist that they agree with the PTAB's construction, and I
16 do intend to hear that. But if they'll agree to these other
17 terms, they will escrow the profits, not some royalty,
18 they'll escrow the entire profits, and they'll -- I'm not
19 going to extend this if the director takes it into his or
20 her mind to extend it. The case becomes activated the 13th
21 of December, 2014. It's on the March running trial list.
22 We can sort out infringement at that time, and I'll do the
23 construction now to save everyone money.

24 I don't hear you tell me you're hurt.

25 **MR. HEBERT:** There's, there's two, two additional

1 points I would like to make, your Honor.

2 **THE COURT:** Go ahead.

3 **MR. HEBERT:** First is regarding the schedule, it's
4 a little uncertain at this time because what SDI has done is
5 they've filed some brand-new Inter Party Requests. These
6 are requests that they could have filed seven months ago.

7 **THE COURT:** No, I'm --

8 **MR. HEBERT:** And there's a --

9 **THE COURT:** I'm, I'm not going for that. You see,
10 they want something. I'm trying to put appropriate limits
11 on what they want if they get where they say they want to
12 go. But I'm transparent. I'm indicating that I'm likely to
13 go there. And their additional ones, you know, if you're
14 still standing or still standing on some sort of infringed
15 thing that hasn't been taken care of by the board you're
16 going to get your trial. You're going to get your trial in
17 March. But I am trying to avoid a system now that has us
18 doing things twice.

19 **MR. HEBERT:** Yes, I understand.

20 **THE COURT:** The easy way and the way -- I was
21 talking to a professor about this. The easy way, of course,
22 now that we've got this, is for courts to say, oh, that's
23 it, go and do the agency process. Oh, look how efficient it
24 is, it's 18 months, and I don't have to deal with it.

25 The other side of that, which I don't think we're

1 weighing enough, is that the patent keeps running all that
2 time and arguably, because they're not saying they're not
3 going to sell off this stock of what they have, arguably
4 infringement goes on during this time. Now, 18 months isn't
5 bad in terms of a dispute resolution time period for a
6 patent dispute. I can try to match that, but I don't think
7 I can beat it. And I don't know people, I don't know a
8 court session that's faster. That's my balance.

9 **MR. HEBERT:** And just to finish in terms of the
10 schedule, we have a call tomorrow afternoon with the PTAB to
11 discuss the schedule and motions and various events in the
12 case. And what's likely to come up will be this new request
13 that they put in and the potential impact it will have on
14 the schedule.

15 So they say it will be completed in December. I
16 have my doubts about that. If we can hold to December no
17 matter what's going on in the PTAB that would be one thing.

18 **THE COURT:** That's what I'm talking about.

19 **MR. HEBERT:** Okay. But we wouldn't want it to
20 extend --

21 **THE COURT:** No, no. When I'm asking you are you
22 going to be injured, I contemplate administratively closing
23 this case until the 13th of December, 2014, and having the
24 parties then report to me on the next date, the 14th, the
25 status, and setting the case on a running trial list for

1 March 2015. That's as far as I'm going. If inefficiencies
2 are built into that then the parties are going to have to
3 bear the costs of those inefficiencies.

4 Now, it's clear that while I -- we're not
5 interested in whether I respect this process, it's matter of
6 law and I follow it. But the truth is I do respect it. And
7 I have no problem conforming the independent work of this
8 Court to the administrative agency that congress has
9 designated to make these determinations. What I do have a
10 problem with is making patent litigation even slower and
11 more expensive than it is today. And contrary to a number
12 of my colleagues, I don't think the way to do that is simply
13 for the courts to sit on their hands until some
14 administrative agency gets done doing whatever it does. So
15 in that sense you have a very sympathetic judge. But their,
16 their brief grabbed me and I'm trying to be practical.

17 Now, they may not go for this. They're listening,
18 too, to the limitations I have. They may have their own
19 strategic maneuvers and good luck to them. But I don't hear
20 any genuine prejudice, if they would agree. And we're going
21 to know whether they agree before they leave here because
22 they have the decision maker.

23 So --

24 **MR. HEBERT:** The one issue of harm that I would
25 like to raise --

C E R T I F I C A T E

I, Donald E. Womack, Official Court Reporter for
the United States District Court for the District of
Massachusetts, do hereby certify that the foregoing pages
are a true and accurate transcription of my shorthand notes
taken in the aforementioned matter to the best of my skill
and ability.

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