

1 IN THE UNITED STATES DISTRICT COURT
2 FOR THE DISTRICT OF COLORADO

3 Case No. 19-cv-00438-CMA-MEH

4 CELLECT, LLC,

5 Plaintiff,

6 vs.

7 SAMSUNG ELECTRONICS CO., LTD., and SAMSUNG ELECTRONICS
8 AMERICA, INC.,

9 Defendants.

10 Proceedings before MICHAEL E. HEGARTY, United
11 States Magistrate Judge, United States District Court for the
12 District of Colorado, commencing at 10:41 a.m., July 30,
13 2019, in the United States Courthouse, Denver, Colorado.

14 WHEREUPON, THE ELECTRONICALLY RECORDED PROCEEDINGS
15 ARE HEREIN TYPOGRAPHICALLY TRANSCRIBED. . .

16 APPEARANCES

17 MARCUS A. COLUCCI, JONATHAN S. CAPLAN, KENNETH E.
18 EICHNER, and LYNN C. HARTFIELD, Attorneys at Law, appearing
19 for the Plaintiff.

20 EVAN M. ROTHSTEIN, KEVIN J. POST and STEVEN PEPE,
21 Attorneys at Law, appearing for the Defendants.

22 DISCOVERY CONFERENCE

PATTERSON TRANSCRIPTION COMPANY
scheduling@pattersontranscription.com

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

2 (Whereupon, the within electronically recorded
3 proceedings are herein transcribed, pursuant to order of
4 counsel.)

5 THE COURT: Case Number 19-cv-438. It's Collect --
6 isn't it, Collect?

7 UNIDENTIFIED SPEAKER: Collect.

8 THE COURT: Okay. -- LLC vs. Samsung Electronics
9 Company, Limited; Samsung Electronics America, Inc.
10 Appearances starting with the plaintiff in court.

11 MS. HARTFIELD: Good morning, Your Honor. Lynn
12 Hartfield and Ken Eichner on behalf of Collect.

13 THE COURT: Thank you. And plaintiff's counsel on
14 the phone.

15 MR. CAPLAN: Good morning, Your Honor. Jonathan
16 Caplan and Marcus Colucci at Kramer Levin.

17 THE COURT: Thank you, good morning. And then
18 defense counsel on the phone.

19 MR. POST: Good morning, Your Honor. This is Kevin
20 Post of Ropes & Gray. With me is Steven Pepe from Ropes &
21 Gray.

22 THE COURT: Okay.

23 MR. ROTHSTEIN: Good morning, Your Honor. It's
24 Evan Rothstein from Arnold & Porter as well.

25 THE COURT: Very good. Who wants to take the lead,

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1 please.

2 MR. CAPLAN: Your Honor, if I can, it's Jonathan
3 Caplan at Kramer Levin.

4 THE COURT: Thank you.

5 MR. CAPLAN: Okay. So, Your Honor, I think if it's
6 okay with Your Honor, I would just like to start with just a
7 brief overview or a little background just in terms of the
8 role of claims in a case like this, you know, in terms of
9 giving Your Honor just a little bit of background.

10 We talked a little bit about this before at the
11 scheduling conference, but, you know, as this Court I'm sure
12 is aware, you know, each of the patents in this case has, you
13 know, a standard form and the latter part of the patent or
14 the numbered paragraphs which are the claims. That's what's
15 legally enforceable, that's what we will be ultimately trying
16 in this case, a subset of those claims.

17 And each of those claims are the result of a
18 negotiation with the patent office where you -- Collect
19 obtain different combinations or different variations of
20 their invention, and as a result, they got multiple patents.

21 And so at this point, you know, each of those
22 claims has terms, which to the extent the parties don't --
23 you know, can't agree on the meaning of some of the terms,
24 and there are different terms used in different patents to
25 describe the different aspects of the invention, then the

1 Court will ultimately make a claim construction ruling on
2 those terms and that is the law of the case, then that will
3 inform a lot of the process going forward.

4 So kind of one of the things I just wanted to put
5 out there, you know, at the outset, is that, you know,
6 Collect obtained a fairly large patent portfolio, not the
7 biggest one, but a sizable portfolio. It does have 457
8 claims. Each of those claims is directed to a different
9 aspect of their invention, they're not all identical. There
10 is some overlap of terms, as we mentioned in the prior
11 hearing and in the papers, but they are different. And so
12 there is only a subset of those that are going to go forward
13 at this stage of the case.

14 Collect's view is that there are a number of the
15 claims that are infringed and ultimately the best ones to
16 present to the jury are going to be affected by some of the
17 discovery that we get because right now we're working with
18 public information. We'll get some additional discovery
19 during the case, and also claim construction ruling that
20 comes out, which will tell us what some of the terms that are
21 disputed mean, and I think at that point we'll have a better
22 sense of which are the best claims to select to be presented
23 to the jury.

24 So as I said when we were before you the last time,
25 Your Honor, there is no really no disagreement between the

1 parties, that we're going to go from where we currently are
2 with the number of claims to a smaller number to be presented
3 to the jury at trial, but that's -- you know, we're not at
4 trial yet.

5 So just with that background, on the current
6 disagreement, I think, you know, I would put it that there is
7 just an imbalance in the approach at this point; that
8 essentially Samsung is asking Collect to unilaterally, you
9 know, abandon a number of claims, some 86 percent of their
10 claims at this juncture where they're really not, you know,
11 doing any kind of meaningful reduction on the prior art that
12 they can assert against the patents and the invalidity
13 allegations that they can make.

14 And so, for example, Your Honor, that we're
15 talking -- we've asked for reduction or we proposed reduction
16 of at least 60 percent of our claims and then we would do
17 another, we would drop it by half again after claim
18 construction. And we're willing to work on that number a
19 little bit, but not where to Samsung is.

20 But on their approach, they're recommending that
21 they get 80 references to assert against the patents, and
22 those references can be combined. And without getting into,
23 you know, a lot of lower level patent issues, normally you
24 would make an allegation as a defendant that a claim is
25 either anticipated -- in other words, it's shown in a

1 particular reference -- or it's obvious in light of
2 combination of references. So you can imagine with 80
3 references to work with, that's a lot of different
4 combinations and, in fact, it far outweighs the number of
5 claims that are asserted, even under our proposal.

6 So one of the main problems I see right now is that
7 there is just an imbalance. We propose a slightly higher
8 number of claims to assert and we also recommend that there
9 be a lower number of invalidity theories that be allowed at
10 this point.

11 So instead of going with the number of references,
12 which they propose, we suggested that the number of
13 invalidity arguments that can be made be limited, because
14 when you just have references in the case, there is almost an
15 unlimited number of combinations that can be made. So we
16 think that imbalance needs to be adjusted.

17 Like I said, we're still open to negotiating a
18 little bit, but not to give up so much of our portfolio when
19 we don't have claim construction, we don't have discovery,
20 and there is really no meaningful reduction of the defenses
21 that they're going to present with respect to the prior art.

22 And again, as far as the jury presentation issue
23 goes, by the time we get for trial, the number of claims will
24 be reduced to an appropriate number, but Collect believes it
25 should have the ability to work on a subset of its patents

1 now to winnow that down to the ones that are best in light of
2 the claim construction rulings that are coming down the line.

3 And lastly, there was some points made about other
4 districts having patent rules with particular limits. Those
5 other districts have a whole host of rules for patent cases,
6 but frankly, I think that's a bit of a red herring because
7 this is really no agreement or disagreement with that
8 approach. Collect is comfortable with that approach, it's
9 just the numbers of where we go from a subset of the claims
10 now to an appropriate number for trial.

11 So I think our approach is consistent with other
12 districts, but it should be tailored for this case, which has
13 a larger portfolio, but again, we're willing to narrow it
14 down.

15 THE COURT: Is anybody old enough to know what the
16 term SALT negotiations refers to?

17 MR. CAPLAN: Yes, Your Honor. I can only speak for
18 myself.

19 THE COURT: That's what I feel like I'm doing here.
20 Do you know, Ken?

21 MR. EICHNER: (Inaudible).

22 THE COURT: Strategics Arm Limitation Treaty. It's
23 what basically stopped America and Russia from proliferating
24 nuclear weapons. It had some limitations and it had the
25 ability to monitor and confirm that you're destroying weapons

1 and you're limiting your weapons. So everybody wanted as
2 many weapons as they -- even though they could destroy the
3 world 20 times over, we decided we only needed to destroy the
4 world five times over. So that reminds me of this a little
5 bit.

6 Okay, who is going to speak for the defense?

7 MR. POST: Thank you, Your Honor. This is Kevin
8 Post from Ropes & Gray. A few things that I would like to
9 highlight in response. One thing that counsel noted was
10 the -- the fact that there are multiple inventions or aspects
11 of the inventions covered by the disparate claim. That's not
12 unique to this case and, in fact, the Maximo (ph) case that
13 we cited out of Delaware, I believe, as well as the Katz (ph)
14 case, those were circumstances where this precise issue was
15 addressed and the Court found that that was not a sufficient
16 reason not to imply limits. In fact, Katz went from I think
17 1975 claims down to 64. Maximo, as a point of comparison,
18 was one where the Court went from 95 down to 30.

19 So, you know, that -- as far as the size of
20 Collect's portfolio should influence the number we think is
21 not one that should cause such a high number at the starting
22 point of this litigation.

23 Another case I think that's worth pointing Your
24 Honor to is the Medtronics mini med case. This is a case out
25 of the Central District of California where really these same

1 arguments were made. There -- I believe there were 255
2 claims that were available at the outset, and the Court
3 viewed it to be an inefficient process that required the
4 parties to go through the infringement and invalidity and
5 noninfringement contention process with that number of
6 claims, knowing full well that the parties would cut them
7 down throughout the case and eventually for trial, which
8 is -- I think the point of agreement here is that there will
9 be cut, and that I think the number we talked about during
10 the hearing was that, you know, likely no more than ten
11 claims would even be tried. But if you have the parties go
12 through the process here is not efficient. It's inconsistent
13 with Rule 1, a just, speedy and inexpensive resolution.

14 As far as the need for discovery, Collect's own
15 complaint highlights that there is ample information out
16 there. They prepared and submitted 650 pages of claim charts
17 based on public information. The claims are admittedly
18 substantially overlapping, so we do not believe that
19 requiring or allowing 182 claims to proceed at this point is
20 necessary to protect any rights of Collect.

21 And, of course, to the extent something is
22 discovered later and good cause exists to supplement or
23 substitute claims, that is something the Courts have
24 recognized is available. Interestingly in many of those
25 cases no such substitution was ever made, but we would -- we

1 would be open to that again should good cause be shown.

2 The other point I would like to respond to on the
3 imbalance point that Mr. Caplan raised, we certainly disagree
4 that there is an imbalance in Samsung's favor. Certainly the
5 proposal that Collect has made is a substantial imbalance
6 against us, but I would highlight that in the cases we've
7 cited where prior art references were also at issue, in every
8 case, the number of references exceeds the number of claims,
9 so Memory Integrity (ph), 15 claims asserted, 35 references.
10 In the Straight Path (ph) case, 10 claims, 20 references.
11 Thought, Inc. (ph), 32 claims down to 16, 50 references down
12 to 25.

13 So in every case -- and again, that's consistent
14 with the model order in Texas. You know, Courts have
15 uniformly recognized the need for more references than
16 claims.

17 And I would like to point out that counsel
18 suggested that the 80 references that we would -- we propose
19 Samsung be limited to could be combined in some
20 extraordinarily high number of ways. That was never our
21 proposal. And what all these cases use is a structure where
22 if a party identifies a reference that is anticipatory -- in
23 other words, every aspect of the asserted claim is found in
24 one reference -- that counts as a reference. And if the
25 defendant creates a combination so they skew references or

1 more than two references and combined them to identify all of
2 the -- all of the asserted claim elements, that counts as a
3 reference. So it's not that you have some set of references
4 and then can do -- I forget the combination principle for
5 mathematics, but it's -- it's not that calculation. It is 80
6 theories down to 40 theories down to 20 theories.

7 So what we believe the cases show us is that in
8 many of these decisions the Court recognizes the unmanageable
9 number of claims at issue, and those are numbers that are
10 significantly lower than the 182 that Collect proposes here.
11 We believe that that would be unmanageable process to have
12 the parties and the Court go through and believe that
13 Samsung's proposal balances everyone's interest at this
14 stage, allows for a streamlined process of narrowing to get
15 to the point where the trial claims will emerge essentially
16 and be available for the parties to proceed at that stage.

17 THE COURT: I have one --

18 MR. POST: Your Honor -- I'm sorry.

19 THE COURT: I was just going to throw out, so fully
20 acknowledging that this was not an area of law that I
21 practiced as an attorney, and given the historical makeup of
22 our district and how we assign cases, magistrate judges have
23 not typically had a lot of patent cases to deal with. I
24 mean, I've had maybe 30 or 40 that I've had to spend a lot of
25 time on. But let me throw out something that's naive and

1 probably you guys will tell me why it's impossible.

2 So you're playing a card game and you can have 16
3 cards in your hand at any given moment, but if another card
4 is laid on the table that's nicer than the card you have in
5 your hand, you can ditch one of the cards in your hand and
6 pick up a card from the table and put it in your hand, right?
7 You're all familiar with that concept?

8 So why don't we limit at any given moment the
9 number of claims and references, but build in the ability to
10 trade out so that we have a manageable number the whole time
11 along, but if during the case, you determine that there is --
12 that there is something, a different claim you want to assert
13 so you drop a claim that you think is not necessary and you
14 pick up one that you want to use, could some kind of process
15 like that be workable?

16 MR. CAPLAN: Your Honor, it's John Caplan for
17 Collect. So the answer to your questions, I think something
18 like that could be workable, Your Honor. You know, I just
19 wanted to say -- I'm not going to respond to everything
20 Mr. Post said, but, you know, there were kind of two things
21 that are a little bit different, at least from what we
22 understood.

23 One is that the option of -- actually, your
24 proposal of being able to substitute claims was -- in fact,
25 some of the case law Mr. Post cites to actually baked into

1 those rules where they started limiting the number of
2 asserted claims and references that give the parties the
3 ability down the road to substitute. Whether it happened or
4 not, you would have to look to that, but that was something
5 that was bit in, so that's something that's different than
6 what we were talking about up until now.

7 And then if we're just talking about 80 theories,
8 invalidity theories across all the patents to start and gets
9 down as opposed to references, that's also a different thing
10 because (inaudible). And as I made reference to, if we're
11 talking about 80 references and all sorts of permutations,
12 it's exactly the sorts of volume problems that Samsung
13 concerned about.

14 So I think the answer to your question, Your Honor,
15 is that, you know, that's something where I think we would be
16 open to that.

17 The other thing I indicated is that we've always
18 said that the reductions meant that we would do more than
19 whatever that amount was, so we offered 60 percent. It was
20 up to -- up to 182. I don't think we're going to chart 182
21 patents, but what we objected to was being forced to kind of
22 winnow the portfolio at this moment, kind of so early in the
23 case, and for reasons I said before, wanted to have the
24 ability to kind of do that with better information, you know,
25 and get things tailored for the jury. But, you know, we're

1 not going to chart 182 patents. I can't tell you what the
2 exact number is, but we had even talked informally with
3 Samsung about trying to come up with a lower number, but we
4 just couldn't get agreement.

5 So in addition to your idea, I think the concept of
6 the starting to a lower number, you know, is something that
7 we're open to as well.

8 THE COURT: Well, that's -- that's how I see the
9 world. I mean, if you choose a number we would set, and
10 that's what you litigate at the moment, but you selectively
11 trade out at some later point, and if it necessitates a
12 little bit of additional discovery or, you know, maybe
13 some -- whatever, a couple of interrogatories, to me that
14 would be so much better.

15 I don't know how I could resolve this other than
16 arbitrary, other than choosing an arbitrary number, because
17 it would take days of hearings and you to put on proof of
18 what should be in the case right now for me to decide whether
19 that's a strong enough argument to adopt.

20 So I'm just throwing a dart at a dart board unless
21 we choose some mechanism that would allow a set number for
22 the moment that's litigated with the ability without
23 prejudice to -- to trade those out, always maintaining an
24 approximate set number.

25 Honestly, that's a thought that I just had on my

1 own, I didn't see it in the cases, but it just makes sense to
2 me, because your first set would be your best guess at the
3 moment on your strongest claims and then for Samsung its
4 strongest defenses; but then, you know, discovery or further
5 thought may lead you to the belief that there is a couple of
6 different claims you want to make and there are several that
7 you don't have to make.

8 Ultimately, obviously, you are only entitled to
9 recover whatever damages you're entitled to recover, however
10 many theories you have to get to that point, so it probably
11 won't impact the ultimate outcome in the event that liability
12 is found. But, you know, I'm charged with making this
13 manageable and I defy some judge to come in and say they know
14 how to do that absent just taking a number, choosing one side
15 or the other or a hybrid of your positions. And I don't want
16 do that because it's not intelligent, it's just arbitrary.

17 So someone give me some guidance on how to get to a
18 spot that actually makes sense and not just choose a number
19 and then you guys have to live with some number that some
20 magistrate judge in Denver told you you had to abide by.

21 MR. POST: Your Honor, this is Kevin Post. I think
22 just to respond on the point about your card example. I
23 think that there is some aspect of that that you see in the
24 cases by which -- and by which I mean -- and Katz is probably
25 the best example where you have an extraordinarily high

1 number of claims, 1975 that the Court limited down to 64. I
2 think that's one way the Court went through and analyzed and
3 described how a good cause was shown to substitute that there
4 be for due process reasons that ability.

5 And it has been recognized in other cases,
6 Mr. Caplan is correct, there are some of these orders,
7 expressly it lays out that if good cause is shown that
8 another claim that was previously unelected presents a new
9 and unique infringement or invalidity theory, that a good
10 cause a shown, a party be allowed to amend or supplement.
11 And we do think that that -- that, you know, feels somewhat
12 consistent with what you're describing and that you have a
13 set number and can change that.

14 Again, we think that it would need to be based on
15 good cause. Otherwise, you have the problem that if there is
16 constant substitution, I think it actually creates, you know,
17 the negative situation from what you're trying to do here
18 because then things are constantly shifting. And what a
19 party believed it had as a certainty for claim construction,
20 for example, now changes because a new claim is introduced
21 that provides a new dispute and the parties have to redo that
22 process. We don't think that that would be efficient by any
23 means.

24 So that's why we had proposed was, you know, this
25 sort of funneling method of reducing down the largest set of

1 claims at the outset down to a smaller number. As the
2 parties go through the process of claim construction, expert
3 discovery and prepare for trial, you know, that that's the
4 best way to allow the parties to get to -- get from an
5 unmanageable number at the beginning to a manageable number
6 at the end.

7 You know, it was the Federal Circuit in Katz that
8 said that that process of narrowing to 64 there and
9 substituting with good cause was appropriate, that that
10 wasn't an arbitrary process by which to go through to manage
11 cases like this.

12 We think that that 64 starting point, in part of
13 because of Katz, and also as a multiple of the model rule
14 process in East Texas that was presented, that we do think
15 that that's a reasonable number. It's, in fact, the highest
16 number of limits that we found is this 64. Many of the
17 cases, the cases again we cited, were in the 30s or lower,
18 down to 10.

19 So no case is -- no two cases are going to be
20 exactly the same, we certainly acknowledge that, but we think
21 that the proposal that Samsung has made here is generous in
22 that it's higher than most other cases. It's at the highest
23 number, with Katz again at 1975 down to 64. It's tied to the
24 model rule, model order promulgated by the (inaudible)
25 report.

1 So we think that that -- a concern about this being
2 having an arbitrary dart throwing exercise, that that's not
3 actually the case, that we -- that the proposal is ordered,
4 it's structured, it's tied to events within the case that
5 provides the parties with that certainty, and if good cause
6 exists and substitution would need to be made, then that --
7 you know, that party could move.

8 THE COURT: Mr. Caplan.

9 MR. CAPLAN: Your Honor --

10 THE COURT: Hold on, let me ask you a question,
11 Mr. Caplan. If -- if we went by Samsung's proposal, but your
12 32 at the Markman stage is not limited to the 64, but could
13 include claims that weren't in the original 64, with some
14 showing of good cause, I mean, it would be a minimal, in my
15 opinion, showing of good cause, what do you think about that?

16 MR. CAPLAN: You know, I think, Your Honor, your
17 point, you hit the nail on the head in terms of, you know, at
18 that point, depending on what happens, what the rulings are,
19 what the discovery slows at that point, if we want to make
20 changes, is it sounds like what Mr. Post is putting out there
21 is going to be a very high bar. We're just going to be back
22 in front of you arguing whether or not it's a significant
23 enough difference to make a change at that point, but under
24 the standard you articulated, Your Honor, that's something
25 that, you know, I think would be acceptable.

1 Because again, we're really not arguing about a
2 different process, we're really talking about a starting
3 point. And, you know, the Eastern District of Texas for a
4 long time had a lot of patent cases, the venue rules were
5 changed, they don't have as many as they used to. There was
6 a whole system set up down there. We're talking about one
7 part of the rule in a whole -- in a court system that really
8 focused on having a lot of these cases, so we're focused on
9 one thing, but we're not even willing disagreeing on again
10 the process, it's just the starting point.

11 And so, Your Honor, your proposal would be
12 acceptable, if we do 64 and 32, but we have flexibility kind
13 of given what comes up. Or, you know, we could start at a
14 higher number and just kind of -- we could just pick an
15 arbitrary number but just like gives us enough room within
16 the portfolio at this juncture to make an informed choice of
17 start cutting it down, because the patents are presumed to be
18 valid. It is Collect's portfolio. I believe these claims
19 are infringed, and to have Samsung really just say, well, we
20 think it's going to be too much and to knock out, you know,
21 up to 90 percent of our portfolio today seems like the wrong
22 result.

23 So we're happy to negotiate little bit further or
24 the proposal that you're putting out there would be fine as
25 well.

1 THE COURT: Well, so my opinion at the moment is
2 that I -- I know smart lawyers when I hear them and you guys
3 are smart. You'll be able to figure it out. I don't think
4 this would be unworkable. I think with a relaxed standard of
5 cause so that at any one time you're at least focused on a
6 clump of claims on the other side, a clump of references that
7 you know and can work with. I doubt that changing out four
8 or five would cause a lot of disruption or undue expense.

9 So that would be my preference is to adopt
10 Samsung's numbers, but also with the provision that the 32,
11 the universe of the 32, is not limited to the 64 and the
12 universe of the 16 may not be limited to the 32.

13 I think once you get down closer to the close of
14 discovery, the standard of cause is going to increase the
15 burden on showing cause, because as we get closer to the end,
16 and then you try to substitute in, there might be a little
17 higher showing of good cause that's necessary, but to me that
18 sounds like a way that I can -- I can work with.

19 You want to make any more comments, Mr. Post?

20 MR. POST: Thank you, Your Honor.

21 My only concern with what you described is that
22 the -- the parties don't go through a process by which there
23 is a substitution. I can see the possibility of a claim
24 being substantive, perhaps, instead of dependent claims, so
25 ones that have independent limitations, plus some additional

1 limitations, that those be substituted. And that causes
2 perhaps a new element that wasn't present in the other
3 earlier asserted claims now have to be found in a prior art.

4 And so what we want to avoid is a circumstance
5 where contentions are shifting around and causing effective
6 redos, which is why we proposed the good cause standard that
7 the other Courts have used, we found here as well, is that if
8 something truly was unknown to Collect, that they make that
9 motion, if good cause is shown, they make a substitution, we
10 would presumably, if need be, move for good cause to
11 supplement contentions as to those new claims if necessary.

12 But that would at least avoid the circumstance
13 where there are shifts amongst the contentions that -- what
14 we really want to avoid the circumstance where the parties
15 have to go back, ask the Court for new claim construction,
16 you know, supplement contention, and certainly that the
17 inefficiency of that and the potential prejudice increases as
18 the case gets further, closer to trial, but even at the
19 outset, you know, there are extensive work, as I'm sure Your
20 Honor knows, going into invalidity contentions, prior art
21 searching and a claim construction process.

22 So we do think that that good cause standard is one
23 that's appropriate and should be applied here in the context
24 of the (inaudible).

25 THE COURT: Yeah. So the way I would describe it,

1 if you ever -- if anybody ever practiced some kind of
2 constitutional law, is at least if I think there is a
3 rational basis, not just arbitrary, but a rational basis for
4 the change, and they can articulate a rational basis, that me
5 I think would be enough.

6 So anyway, that's how I'm viewing it. I'm not
7 asking you to waive any arguments at all, though, Mr. Post.
8 I mean, if you think that there was not a rational basis or
9 there was something other than a legitimate reason why a
10 substitution is being made, your argument is preserved. And
11 we can actually set this up on a periodic status conference
12 in order to determine whether the plaintiff or defense is
13 going to, you know, make some substitutions and we can go
14 through those, if you would like to do that.

15 I don't know how long -- I don't remember how long
16 we've set up for the initial contention stage and then when
17 the Markman hearing is. How far are we out from that? What
18 are the deadlines?

19 MR. CAPLAN: I think the -- Your Honor, it's John
20 Caplan. I think the initial infringement contentions are
21 triggered off of a ruling on the motion to dismiss, I
22 believe.

23 THE COURT: Okay. So we're away out.

24 MR. CAPLAN: I think it's 28 days.

25 THE COURT: And that's just being briefed right

1 now, right?

2 MR. CAPLAN: Yeah, that has been briefed, Your
3 Honor.

4 THE COURT: Oh, is it fully briefed?

5 MR. CAPLAN: Yes, I believe so.

6 THE COURT: So it was briefed as of July 2. Yeah,
7 and that's my motion anyway, so I'm kind of in charge of when
8 that goes out.

9 I could imagine maybe about somewhere by the end of
10 August we should -- I will attempt to have a ruling out on
11 that, but, of course, as you know, it's a recommendation
12 unfortunately, which gives everybody another round of briefs
13 to object. So I think it's -- it's built on Judge Arguello's
14 decision, right?

15 MR. POST: That's correct, Your Honor.

16 THE COURT: Which, you know, it could be -- let's
17 say I did the decision by the end of August, your objections
18 are due 14 days, mid-September, she's pretty quick. I would
19 say that she would have a ruling out by mid-to-late October.
20 So that's probably pretty close to an estimate on timing,
21 but, yeah, I think that's what I would like to do.

22 Anyone else want to be heard with regard to the
23 claims and references issue?

24 MR. CAPLAN: Your Honor, just briefly, it's John
25 Caplan again. Just on Mr. Post's comments about, you know,

1 if claims are substituted later in the process, I don't want
2 to make too much of going back. If there are supplemental
3 claim construction issues, you know, the parties -- there are
4 a lot of comments, concepts that are in a number of the
5 claims; that we're really talking about different
6 combinations of features. So I think it's going to be
7 very -- I think the parties can work out some of it
8 themselves, and if they can't, I think they would be very
9 focused issues.

10 So I don't think it's fair to kind of present it as
11 (inaudible) horrible, that if a change is made and if Collect
12 decides that they need to change claims from the original set
13 to something different, that all of a sudden you've kind of
14 pulled the plug and the dam empties. I don't think that's
15 going to be the case at all.

16 THE COURT: Now, that's what I was referencing, I
17 think I can handle that in some kind of systematic basis.

18 MR. CAPLAN: But what we don't want to do is kind
19 of set ourselves up to have a fight where there is a whole
20 two months of briefing on every claim that we want to change,
21 so we do appreciate Your Honor's standard in terms of
22 changing.

23 THE COURT: Well, also if you -- if you do come
24 across a matter that needs to be briefed, I'm very open to
25 expedited briefing and very sensitive to timing issues for

1 the parties. I don't want this kind of case to be still
2 going two and a half or three years from now, so just
3 remember that you can ask for expedited consideration,
4 expedited briefing, even an expedited hearing and we'll make
5 ourselves available as justice requires, okay.

6 MR. CAPLAN: Okay. Thank you, Your Honor.

7 MR. POST: Thank you, Your Honor. Your Honor, this
8 is Kevin Post. Thank you for explaining your thinking. I
9 think one -- I think this is for Mr. Caplan's comment. We
10 don't anticipate there being, and hopefully there won't be a
11 need for that type of briefing, but certainly we would be
12 happy to do that on an expedited basis when the parties have
13 certainty.

14 You know, one thing, if it does appear based on the
15 early contentions that there may be some of those shifts, one
16 thing that we may want to discuss with Collect is whether
17 there is sort of a cut-off date, if there are substitutions
18 that by some date in the case the parties agree no -- no new
19 claim would be added, because that really is the genesis of
20 our concern, that late in the case there is a surprised new
21 claim that's added, the parties would debate whether there is
22 a rational basis for good cause.

23 THE COURT: Well, understood. And frankly,
24 although this is a patent case, we have to deal with all the
25 time in a normal civil case, the potential introduction of a

1 new claim toward the end of case because plaintiff sees
2 something, wants to add a new substantive theory of recovery,
3 and that's just something we deal with, you know, when it
4 arise.

5 I think as far as a cut-off date, why don't we see
6 what experience shows as we go through the case, and then
7 again, if there is something that's happening that worries
8 you, what my procedures require is that we do this kind of
9 conference first so that we see if we can resolve it
10 informally, but if it's something that merits briefing, then
11 we turn to briefing. Does that sound all right?

12 MR. POST: Thank you.

13 MR. CAPLAN: That's fine with us, Your Honor.

14 THE COURT: Okay, all right, very good. So we'll
15 be working on that recommendation and you know where to find
16 us. Anything further from the plaintiff?

17 MR. CAPLAN: Nothing further, Your Honor.

18 THE COURT: Okay. From the defense?

19 MR. POST: Nothing further, Your Honor, thank you.

20 THE COURT: All right, thank you, you guys. You
21 all take care.

22 (Whereupon, the within hearing was then in
23 conclusion at 11:17 a.m.)
24
25

I certify that the foregoing is a correct transcript to the best of my ability to hear and understand the audio recording and based on the quality of the audio recording from the above-entitled matter.

August 28, 2019

Date