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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
WACO DIVISION

NEONODE SMARTPHONE, LLC) Docket No. WA 20-CA-505 ADA
)
vs.) Waco, Texas
)
APPLE, INC.) October 23, 2020

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
WACO DIVISION

NEONODE SMARTPHONE, LLC) Docket No. WA 20-CA-507 ADA
)
vs.) Waco, Texas
)
SAMSUNG ELECTRONICS CO.,)
LTD., SAMSUNG ELECTRONICS)
AMERICA, INC.) October 23, 2020

TRANSCRIPT OF TELEPHONIC CONFERENCE
BEFORE THE HONORABLE ALAN D. ALBRIGHT

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13:29:54 1 THE COURT: Good afternoon. It's Alan Albright.
13:30:00 2 Ms. Miles, would you call the case, please.
13:30:02 3 THE CLERK: Sure.
13:30:03 4 Telephonic scheduling conference in Civil Action
13:30:05 5 6:20-CV-505, styled, Neonode Smartphone, LLC vs. Apple,
13:30:10 6 Incorporated; and Case No. 6:20-CV-507, styled, Neonode
13:30:17 7 Smartphone, LLC vs. Samsung Electronics Company, Limited
13:30:20 8 and Samsung Electronics America, Incorporated.
13:30:25 9 THE COURT: Welcome, everyone.
13:30:26 10 If I could hear announcements from counsel,
13:30:27 11 please, starting with the plaintiff.
13:30:31 12 MR. CHERRY: Your Honor, this is Craig Cherry
13:30:33 13 with Haley & Olson on behalf of plaintiff, and Philip
13:30:35 14 Graves of the Hagens Berman law firm. And Mr. Graves will
13:30:39 15 be speaking on behalf on all points this afternoon, your
13:30:43 16 Honor.
13:30:43 17 THE COURT: Welcome. Thank you.
13:30:49 18 MR. GRAVES: Good afternoon, your Honor.
13:30:50 19 This is Philip Graves on behalf of plaintiffs.
13:30:53 20 THE COURT: And for defendant?
13:30:58 21 MS. CHEN: Good afternoon, your Honor --
13:30:59 22 MR. GUARAGNA: John Guaragna --
13:31:02 23 MS. CHEN: Hi, John.
13:31:03 24 This is Betty Chen of Fish & Richardson on behalf
13:31:07 25 of Apple.

13:31:08 1 THE COURT: Okay. And are there any issues we
13:31:10 2 need to take up?

13:31:13 3 MR. GUARAGNA: Your Honor, John Guaragna, just in
13:31:15 4 case I was cut off there, for Samsung Defendants.

13:31:18 5 THE COURT: Okay.

13:31:23 6 MR. GUARAGNA: At least from the defendants, your
13:31:25 7 Honor, we do have a couple of issues we'd like to take up
13:31:27 8 with respect to some pre-Markman items.

13:31:30 9 THE COURT: Okay.

13:31:33 10 MR. GUARAGNA: And speaking for Samsung, your
13:31:35 11 Honor, there are a couple of areas of third-party
13:31:40 12 discovery that we'd like leave to commence prior to the
13:31:44 13 Markman hearing. And I'm going to address one of those
13:31:47 14 issues, and I think Ms. Chen's going to address another
13:31:49 15 one.

13:31:50 16 With respect to the first issue, your Honor, we
13:31:53 17 believe that there are material prior art references
13:32:00 18 located with Sony, and we would like leave to commence
13:32:04 19 that third-party discovery of Sony to identify and
13:32:10 20 hopefully obtain the evidence with respect to those
13:32:14 21 third-party products that we think are going to be
13:32:18 22 important pieces of prior art in this case. We'd like to
13:32:20 23 commence that discovery as soon as possible.

13:32:24 24 We're hopeful but, unfortunately, we think there
13:32:26 25 may be a need to seek some of the discovery from Sony

13:32:31 1 overseas. And as your Honor obviously has experience,
13:32:36 2 that can take some time and will take likely even longer
13:32:39 3 during the pandemic. So with your Honor's permission,
13:32:43 4 we'd like to commence that discovery of Sony. Hopefully
13:32:45 5 we won't need to go through the Hague and go overseas, but
13:32:47 6 it looks like that is probably the case; but we'll avoid
13:32:51 7 it if we can.

13:32:53 8 But, in essence, we'd just like to get those
13:32:56 9 documents, no deposition. Just simply documents and get
13:32:59 10 that perhaps started now so we'll have it because it will
13:33:01 11 matter in the litigation.

13:33:03 12 THE COURT: Yeah. Let me tell you what I'm
13:33:05 13 trying -- and, Mr. Guaragna, as part of my committee, this
13:33:09 14 is an issue I think we're going to try and address on a
13:33:12 15 more permanent basis because it's coming up a good bit,
13:33:15 16 especially worse with the COVID situation and the
13:33:20 17 inability to travel.

13:33:22 18 So I am absolutely fine with you commencing
13:33:26 19 anything that is going to make the case go more smoothly.
13:33:32 20 If you are subpoenaing things for -- I'm not sure exactly
13:33:37 21 what format you're using to try and obtain what it is
13:33:41 22 you're trying to obtain from Sony, the only thing I would
13:33:44 23 suggest that you do is, make sure that the plaintiffs are
13:33:52 24 given a chance to -- if there's something they also need
13:33:55 25 from Sony or anyone else you're going to be sending a

13:33:59 1 request to, that they be able to cross-subpoena -- or if
13:34:03 2 they choose to. They can do whatever they want. But
13:34:07 3 we've got a couple of cases recently where one side was
13:34:10 4 concerned because the other side had subpoenaed some
13:34:14 5 things, but not everything.

13:34:15 6 So I'm actually fine for you to do that. Also,
13:34:19 7 just at a more macro level that may or may not apply to
13:34:24 8 what y'all are doing here, I think what I'm going to start
13:34:27 9 doing is -- and encouraging, actually. And, of course,
13:34:31 10 with lawyers of y'all's caliber, I probably don't need to
13:34:35 11 encourage, that you're probably going to do it without
13:34:37 12 that.

13:34:37 13 But, you know, anything that you can do in terms
13:34:41 14 of either documents, possible art, or inventors for sure
13:34:48 15 that are foreign, I'm going to allow those efforts to take
13:34:53 16 place immediately in terms of trying to get them arranged.
13:35:00 17 But I don't think I'm going to allow the discovery, for
13:35:04 18 example, the deposition to take place until, you know,
13:35:09 19 after the Markman.

13:35:10 20 But anything that a party wants to do to
13:35:16 21 accelerate the process of getting discovery done once the
13:35:19 22 Markman has taken place, I'm probably going to be okay
13:35:22 23 with.

13:35:25 24 MR. GUARAGNA: Thank you, your Honor.

13:35:27 25 I think to your point about collaboratively

13:35:33 1 approaching this, I think the parties have already agreed
13:35:35 2 to coordinate discovery in this case generally. And so,
13:35:38 3 we would certainly welcome an opportunity to make it as
13:35:42 4 easy as possible on Sony. And to the extent the plaintiff
13:35:44 5 has any issues it intends to seek doing that in
13:35:48 6 conjunction or doing that collaboratively, I think, is
13:35:51 7 certainly fine with us and makes a lot of sense. So we
13:35:53 8 appreciate that, your Honor.

13:35:56 9 We will -- we do intend to issue subpoenas.
13:35:59 10 Hopefully we can issue them just to the U.S. entity and
13:36:05 11 obtain any information we need. If we don't, we will move
13:36:07 12 forward with the overseas efforts. And we will hold off
13:36:10 13 on any depositions until after the Markman hearing, as
13:36:13 14 your Honor has indicated.

13:36:13 15 THE COURT: Now, of course, if -- and that -- and
13:36:16 16 by the way, that is sort of a generic concern. If you
13:36:21 17 were to find out, for some reason, that you needed to take
13:36:26 18 some -- actually take some kind of discovery because it
13:36:31 19 might not still exist, you know, if there's a person that
13:36:34 20 might no longer be with Sony, for example, or I guess
13:36:41 21 worse situation. But if there's any need to take
13:36:42 22 discovery because there's no -- it may not be available
13:36:44 23 after the Markman, just, you know, try and work that out
13:36:48 24 yourselves. But if you can't, certainly bring it to my
13:36:50 25 attention, and on a micro level, I'm happy to deal with

13:36:54 1 any issues you all have of whether or not to allow
13:36:57 2 discovery. But I will probably always err on the side of
13:37:01 3 making sure that the discovery is able to be taken.

13:37:04 4 But for the generic discovery that, Mr. Guaragna,
13:37:08 5 you're talking about, hopefully my plan works. If you
13:37:12 6 find, by the way, that there is some problem that's kind
13:37:17 7 of baked in that I'm just missing, please let me know
13:37:22 8 because, as I think everyone on the call knows, my goal is
13:37:26 9 to make this as user or lawyer-friendly as possible, and
13:37:32 10 if something I'm not allowing you to do or allowing you to
13:37:37 11 do, or we need to do it some other way that's more
13:37:39 12 efficient for you all, that is my ultimate goal.

13:37:43 13 So that was Mr. Guaragna. Does Ms. Chen need to
13:37:51 14 take up anything for her client?

13:37:53 15 MS. CHEN: Yes. Thank you, your Honor.

13:37:54 16 So I think here, we have the exact situation that
13:37:59 17 you're talking about where it is a unique situation, and
13:38:03 18 we would ask to take discovery and depositions before
13:38:07 19 Markman for certain foreign entities and the foreign
13:38:13 20 inventor.

13:38:13 21 And so, if I can give you some of the facts so
13:38:15 22 you understand the situation here, we have an entity
13:38:20 23 called Neonode, Inc., and that entity was original
13:38:25 24 assignee of the patents when they were issued. Neonode,
13:38:29 25 Inc. is located in Sweden, and it still has profit-sharing

13:38:33 1 rights with monetization of these patents. So Neonode has
13:38:37 2 at least six foreign subsidiaries and various joint
13:38:42 3 ventures. They range from places in Japan and South
13:38:45 4 Korea, Taiwan and Sweden.

13:38:47 5 And from looking at the public documents so, for
13:38:50 6 example, Neonode, Inc.'s 10-K, it looks like some of these
13:38:54 7 entities have rights to develop and license touchscreen
13:38:58 8 technologies. But to be honest, it's just a hodgepodge of
13:39:01 9 foreign entities, and we can't figure out who does what
13:39:04 10 from just looking at the public documents.

13:39:05 11 And so, what we had is this multiple layer of
13:39:11 12 entity -- foreign entity discovery. We have to first
13:39:14 13 conduct the discovery to figure out which entities are --
13:39:18 14 have which rights. And then, we have the second layer of
13:39:21 15 foreign discovery to obtain licensing assignment and
13:39:29 16 conception, valuation documents. And so, if we were to
13:39:31 17 start in April on the depositions, I just don't think we
13:39:36 18 have enough time within a seven-month period of discovery.

13:39:40 19 So for the entities, we would ask to take the
13:39:43 20 depositions and collect documents in advance. So
13:39:49 21 separately, we also have --

13:39:51 22 THE COURT: Let me --

13:39:53 23 MS. CHEN: -- the coinventor -- okay.

13:39:54 24 THE COURT: Let me hear if there's any objection
13:39:56 25 to that from the plaintiff.

13:40:02 1 MR. GRAVES: Yes. Thank you, your Honor.

13:40:03 2 This is Phil Graves.

13:40:05 3 We do object for several reasons. First, it's
13:40:09 4 not accurate to suggest that Neonode, Inc. is a foreign
13:40:15 5 entity. It's actually a Delaware corporation with a place
13:40:19 6 of business in San Jose, California. Second, you know,
13:40:25 7 the ownership -- it's a little unclear what bearing any
13:40:30 8 information concerning ownership or licensing would have
13:40:33 9 on any issues that need to be addressed prior to the
13:40:37 10 Markman.

13:40:38 11 We're fine with Apple commencing the process of
13:40:43 12 obtaining foreign discovery against, you know, whatever
13:40:45 13 foreign Neonode-affiliated entities they think may have
13:40:51 14 discoverable information. But we just don't think it's
13:40:54 15 efficient to conduct depositions and undertake, you know,
13:40:59 16 significant intensive discovery on these issues prior to
13:41:04 17 the Markman.

13:41:05 18 So we do object to this request, but, you know,
13:41:08 19 we're fine commencing the process as Samsung has
13:41:14 20 requested, right, but we just don't think it's efficient.
13:41:17 21 And we don't think it's going to yield anything useful for
13:41:21 22 Apple to be, you know, running all over the world, taking
13:41:23 23 depositions of a bunch of entities that really are
13:41:26 24 unlikely to have any material information or evidence in
13:41:31 25 any event.

13:41:31 1 THE COURT: Well, let me ask this. It sounds to
13:41:37 2 me like maybe the place to jump off on this is to allow
13:41:45 3 Apple to take a 30(b)(6) deposition of the United States
13:41:52 4 entity and we can -- and that person should be prepared to
13:41:57 5 tell us whether or not the information that they're
13:42:03 6 seeking with regard to licensing, and the other
13:42:05 7 assignments, and the other issues is available from
13:42:09 8 someone in the United States or whether or not everyone
13:42:13 9 will have to go to a foreign country to do that.

13:42:19 10 And then, it seems to me, we can make a more
13:42:23 11 informed decision at that point, the extent of dis --
13:42:26 12 whether or not we actually need to do discovery right now
13:42:29 13 or whether or not we just need to allow -- I need to allow
13:42:33 14 the defendant to lay the predicate, as it were, to get the
13:42:39 15 discovery done once the Markman takes place.

13:42:41 16 So, Ms. Chen, is there a downside to that I'm
13:42:47 17 missing?

13:42:48 18 MS. CHEN: I don't see a downside. That works
13:42:50 19 for us.

13:43:00 20 THE COURT: What is the relationship -- and I'm
13:43:02 21 not asking a legal relationship. Just if I were to allow
13:43:05 22 the deposition of that entity to take place, does the
13:43:07 23 plaintiff's counsel have the ability to coordinate that
13:43:12 24 kind of deposition or does -- or are they a pure third
13:43:17 25 party that -- what's the situation there?

13:43:19 1 MR. GRAVES: Yes, your Honor.

13:43:22 2 Neonode, Inc. is a third party. We are not
13:43:25 3 representing -- we are not counsel for Neonode, Inc.

13:43:29 4 THE COURT: Okay. Well, in that case, I'll allow
13:43:33 5 -- I will allow that discovery to take place. I assume
13:43:40 6 that they will cooperate with what I'm asking to be done;
13:43:45 7 if not and if Apple needs to come back to the Court for
13:43:49 8 some kind of order, I'm happy to do that, as well. Just
13:43:51 9 let me know.

13:43:52 10 So does that resolve that issue as far as
13:43:55 11 everyone's concerned?

13:43:58 12 MS. CHEN: From Apple's side, yes, your Honor.

13:44:03 13 MR. GRAVES: Yes, your Honor.

13:44:03 14 THE COURT: Okay. And, Ms. Chen, I interrupted
13:44:05 15 you earlier. What is the next issue?

13:44:09 16 MS. CHEN: Sure.

13:44:10 17 So it's similar in that the sole inventor of the
13:44:14 18 patent, someone named Magnus Goertz, is located in Sweden.

13:44:20 19 THE COURT: Okay.

13:44:21 20 MS. CHEN: And Neonode in this case has claimed a
13:44:25 21 priority date of May 25th, 2000. The first patent in the
13:44:29 22 case was filed on December 10th, 2002. And as far as
13:44:34 23 we've seen so far, Neonode hasn't produced any conception
13:44:38 24 or reduction to practice documents dating back to the May
13:44:42 25 25th, 2000 date. We've asked Neonode to confirm that it's

13:44:47 1 produced all conception, reduction to practice documents,
13:44:50 2 and it says it has, but Mr. Goertz might have more.

13:44:55 3 So here, you know, again, we feel like we're put
13:44:59 4 in a distinct disadvantage by not being able to conduct
13:45:04 5 discovery of Mr. Goertz before the Markman, and we'd ask
13:45:08 6 to be able to take a deposition of him and be able to
13:45:12 7 collect documents because we need to prepare invalidity
13:45:16 8 contentions and understand this purported priority date
13:45:20 9 that goes back to 2000.

13:45:22 10 THE COURT: Well, I'm not sure if the plaintiffs
13:45:26 11 have given you that date and they've acted in good faith,
13:45:29 12 in other words, if you have a lawyer on their side who is
13:45:33 13 -- who has represented to you what that date is, it seems
13:45:38 14 to me that you do your invalidity contentions based on
13:45:40 15 that, and if it turns out that in -- there wasn't a
13:45:44 16 good-faith basis for that to be made, then you can raise
13:45:47 17 that with me again.

13:45:48 18 Here's the only reason I say that is basically,
13:45:54 19 you know, I think you should get -- you're going to get
13:45:57 20 one opportunity to speak through deposition to the
13:46:02 21 inventor. And so, you know, if you -- if I were to allow
13:46:06 22 you to take the deposition of the inventor now, that would
13:46:10 23 be your -- you know, your one opportunity. And that may
13:46:13 24 be fine with you, and if it is -- and it sounds to me like
13:46:19 25 you'll probably be doing it by Zoom, then I'm open to

13:46:22 1 hearing that, as well.

13:46:24 2 But with the understanding that this would be the
13:46:30 3 only deposition that would be allowed of the inventor,
13:46:32 4 what would -- what would your preference be?

13:46:37 5 MS. CHEN: Well, with that understanding, that
13:46:38 6 what I would ask for is for the May 25th, 2000 date to be
13:46:48 7 -- to be stricken, quite honestly, because we don't have
13:46:50 8 any of the documents, any documents at all from the
13:46:52 9 plaintiff to support that date.

13:46:55 10 And they've said that they've provided us with
13:46:57 11 all documents, but I believe the document that goes back
13:47:00 12 the farthest is May 2001. And so, without any documents
13:47:05 13 that support that early date, then it's really hard for us
13:47:10 14 to be able to prepare our case and our defense with a date
13:47:13 15 that has no support.

13:47:16 16 THE COURT: Well, how about -- how about this.
13:47:21 17 My recollection was that -- my recollection is that it was
13:47:28 18 a legitimate 30(b)(6) topic to -- a legitimate 30(b)(6)
13:47:37 19 topic for someone to ask for that they -- the plaintiff
13:47:41 20 produce someone who would testify and bind the company
13:47:44 21 with respect to the date of conception. What if I allowed
13:47:48 22 you to have a deposition of a 30(b)(6) witness -- I can't
13:47:53 23 imagine it would take longer than an hour -- of the
13:47:56 24 plaintiff who you would then have a 30(b)(6)
13:48:00 25 representative who would be telling you what they believe

13:48:03 1 the date of conception to be, and we would go from there.

13:48:07 2 MS. CHEN: That works for us. Thank you, your
13:48:09 3 Honor.

13:48:09 4 MR. GRAVES: Your Honor, might I respond?

13:48:12 5 THE COURT: Yes, sir.

13:48:13 6 MR. GRAVES: So the -- so, first of all, the date
13:48:18 7 that we've provided in our disclosure of preliminary
13:48:22 8 infringement contentions and priority date does have a
13:48:25 9 good-faith basis. We have informed defense counsel that
13:48:31 10 the plaintiff here, Neonode Smartphone, has produced all
13:48:36 11 materials in its possession, custody or control that
13:48:40 12 evidence conception or reduction to practice. That has
13:48:45 13 been done.

13:48:45 14 But Neonode Smartphone does not control the
13:48:52 15 inventor, Mr. Goertz. So we've also informed defense
13:48:56 16 counsel, Mr. Goertz may have additional materials that
13:49:03 17 bear on conception or reduction to practice and obviously
13:49:06 18 has information along those lines. But again, since
13:49:11 19 Neonode Smartphone does not control Mr. Goertz and can't
13:49:16 20 necessarily obtain information from him, complete or
13:49:22 21 otherwise, that would enable it to respond to an inquiry
13:49:25 22 at a 30(b)(6) deposition, you know, it doesn't appear to
13:49:30 23 me that that would be, you know, the most effective way to
13:49:35 24 get at these issues. I mean, we're --

13:49:39 25 THE COURT: Well, don't you have -- you just said

13:49:43 1 you had provided to defendants a good-faith basis. And my
13:49:48 2 sense of what you would be saying, if I were in your
13:49:51 3 shoes, is that we've given them the best date we have, but
13:49:56 4 it could very well be that they get -- that when the
13:50:01 5 inventor talks, it could be an even earlier date because
13:50:04 6 he might be able to say -- to have additional information.

13:50:07 7 Is that what you're saying?

13:50:09 8 MR. GRAVES: That's certainly one aspect of what
13:50:13 9 I'm saying. Yes, your Honor.

13:50:15 10 THE COURT: Well, in that case, you know, it
13:50:21 11 seems to me that we probably ought to allow the defendant
13:50:25 12 to take a deposition, if they could get one arranged, with
13:50:28 13 the inventor to find out what he's going to say about the
13:50:33 14 invention date. Because if the only thing the plaintiff
13:50:36 15 is able to do is give a good-faith effort and I'm forcing
13:50:42 16 the defendants to give invalidity contentions, it seems to
13:50:48 17 me that they ought to have the benefit of that information
13:50:49 18 from the inventor.

13:50:51 19 And by the way, I understand what you're saying
13:50:53 20 about the 30(b)(6) and I wouldn't want someone -- I
13:50:57 21 wouldn't want to force you to have a 30(b)(6) from a
13:50:59 22 witness who, you know, really would feel uncomfortable
13:51:03 23 because he doesn't have any better information than what
13:51:06 24 y'all have.

13:51:06 25 So what is your proposal for a solution to this

13:51:10 1 before I tell you what mine is?

13:51:16 2 MR. GRAVES: Well, your Honor, so -- you know,
13:51:19 3 it's plaintiff's perspective that, you know, that
13:51:25 4 testimony regarding the conception and reduction to
13:51:27 5 practice doesn't really bear on the issues to be addressed
13:51:30 6 at claim construction. The claim construction should just
13:51:33 7 go forward, construing the claims based on the intrinsic
13:51:37 8 and whatever extrinsic evidence bears on those issues.

13:51:42 9 But with respect to, you know, the issue of a
13:51:45 10 30(b)(6) versus a declaration or a deposition, rather, of
13:51:48 11 Mr. Goertz, you know, it would be our position that a
13:51:51 12 30(b)(6) would be fundamentally unfair to the plaintiffs
13:51:57 13 due to constraints on the plaintiff's ability to obtain
13:52:01 14 complete information regarding the evidence --

13:52:04 15 THE COURT: Well, let me interrupt you because
13:52:06 16 maybe I wasn't clear.

13:52:07 17 I'm not going to make -- I get that. I'm not
13:52:10 18 going to make you do a 30(b)(6). So I'm trying to figure
13:52:12 19 out -- I'm trying to figure out what an alternate method
13:52:15 20 is because I do think that -- I do think that the
13:52:23 21 defendants ought to have a reliable date. And if you've
13:52:29 22 given them a date, but you can't provide them in good
13:52:34 23 faith -- I'm going to assume it is. But if you can't
13:52:36 24 provide to them any information -- unless you have and you
13:52:42 25 could tell me if you have -- that backs that date up, then

13:52:46 1 it seems to me that the person -- only person that really
13:52:50 2 has that information is the inventor, and we might need to
13:52:53 3 have him -- if he will make himself available, we might
13:52:57 4 need to have him deposed.

13:53:00 5 MR. GRAVES: And, your Honor, we or plaintiff
13:53:02 6 would not oppose, you know, efforts to obtain a deposition
13:53:08 7 of Mr. Goertz, of course, as long as, you know, all
13:53:12 8 parties are provided an opportunity to ask some questions
13:53:19 9 at that deposition.

13:53:20 10 THE COURT: Well, I think that's -- you know,
13:53:23 11 maybe I've been off the bench too long, but that's my
13:53:26 12 recollection of how these things work. So -- unless they
13:53:31 13 changed the rules and I missed it. So yes. If we're
13:53:35 14 going to go the deposition route, yes, everyone would get
13:53:40 15 to ask questions.

13:53:44 16 So it sounds to me like we have a suggestion from
13:53:48 17 the defendant and no opposition from the plaintiff. And
13:53:52 18 so, that being said, I'm not sure exactly, Ms. Chen, how
13:53:56 19 you go about arranging this deposition of the inventor,
13:54:01 20 but I will tell you that, as far as I'm concerned, you are
13:54:04 21 free to do so.

13:54:06 22 MS. CHEN: Thank you, your Honor.

13:54:07 23 One clarification. So with that, are we still
13:54:12 24 limited to just the one deposition of the inventor?

13:54:16 25 THE COURT: You know, number one, I'm not sure

13:54:18 1 that you'll be able to persuade this guy to give you one,
13:54:21 2 to begin with. And so, what I would suggest you do is
13:54:29 3 make this a full deposition of him, since he's -- unless
13:54:34 4 -- let me start over.

13:54:35 5 If you could get in agreement that you think you
13:54:39 6 could trust and rely on that he would make himself
13:54:43 7 available again -- I'm assuming this will be by Zoom. If
13:54:46 8 you can get an agreement from him that you're sanguine
13:54:50 9 with that he would appear again, then I would limit the
13:54:54 10 deposition to just the issues of -- you're worried about
13:55:00 11 with the date of conception.

13:55:03 12 If you have a legitimate concern that he might
13:55:08 13 not voluntarily appear again, then you are free to ask him
13:55:12 14 whatever questions you can ask, and then, we'll just deal
13:55:15 15 -- I will not say right now that I'm going to prohibit you
13:55:18 16 from taking the deposition. All I'm saying is, you know,
13:55:24 17 you may or may not -- you know, he may or may not agree to
13:55:26 18 do it. But I would allow in this situation another
13:55:28 19 deposition.

13:55:29 20 MS. CHEN: Thank you, your Honor.

13:55:33 21 THE COURT: Any other issues we need to take up?

13:55:37 22 MS. CHEN: Yes, your Honor. Sorry. If I could
13:55:38 23 indulge you with one more issue.

13:55:41 24 So --

13:55:43 25 THE COURT: Okay.

13:55:44 1 MS. CHEN: -- the issue is this. So these
13:55:46 2 patents in the suit are user interface patents. So, for
13:55:50 3 example, one of the patents, the 879 patent, Neonode has
13:55:58 4 accused glide or swipe typing, and the Apple iPhone, the
13:56:01 5 feature's called QuickPath. And what happens is when you
13:56:04 6 open up the keyboard, you can create words by moving your
13:56:07 7 finger across the keyboard without ever lifting your
13:56:11 8 finger up.

13:56:12 9 So that's a feature that Apple developed and
13:56:14 10 created. It's native to the phones when you buy them.
13:56:18 11 Neonode has accused and allegedly charted this. But what
13:56:22 12 Neonode has also done is it's accused ten apps that are
13:56:28 13 entirely created by third parties, and it hasn't charted a
13:56:32 14 single one of them.

13:56:33 15 So all it's done is, it's included one screen
13:56:35 16 shot for one app keyboard, and that's for one single
13:56:40 17 limitation; and then, it just concludes that the program
13:56:44 18 code for all third parties' swipe-typing apps cause the
13:56:48 19 accused devices -- and I'm reading here -- to function in
13:56:50 20 the same manner. And that's really just not enough for us
13:56:54 21 to understand what they're accusing here.

13:56:58 22 Before this call, I downloaded one of the
13:57:03 23 third-party apps that's called FancyKey, and it gives me
13:57:05 24 all these cute-colored keyboards with emojis, but they're
13:57:09 25 twelve keyboards and I can't tell how Neonode would accuse

13:57:13 1 this at all without any charts.

13:57:15 2 So in our meet-and-confer and in the papers that
13:57:17 3 we filed this morning, Neonode's saying that even if it
13:57:21 4 supplements, the charts would all be the exact same for
13:57:25 5 all the various apps. But all the various apps have
13:57:27 6 different keyboards, different user interfaces. And so,
13:57:30 7 if Neonode is saying that even if it supplements, it would
13:57:36 8 still be the same, then we would argue that the
13:57:39 9 supplementation would be futile, and we'd ask to strike
13:57:42 10 the contentions accusing the third-party apps.

13:57:46 11 THE COURT: Well, let me say -- let me address
13:57:49 12 that. It's rare -- it's rare that I ever, in advance, say
13:57:58 13 that I'm going to strike something that hasn't been seen
13:58:02 14 yet. So if the plaintiff has offered to provide you with
13:58:07 15 those infringement contentions and as officers of the
13:58:12 16 court, they are going to rely on them, they can send you
13:58:17 17 those infringement contentions.

13:58:19 18 If we get further down the road in the litigation
13:58:24 19 and, for some reason, you have -- you have -- if you
13:58:26 20 develop some reason to believe those infringement
13:58:29 21 contentions were not done in good faith, then we'll take
13:58:34 22 it up at that point.

13:58:37 23 The point here being this is one where I do agree
13:58:40 24 with the plaintiff, which is, these are, number one,
13:58:43 25 preliminary claim constructions and, number two, they

13:58:47 1 don't have anything really to do with the Markman process.
13:58:53 2 I mean, whether or not something infringes, I know the
13:58:58 3 lawyers like to have it so that they can cobble together
13:59:02 4 issues to be taken up at the Markman so they can come up
13:59:08 5 with possible claim constructions that might or might not
13:59:11 6 get them out of infringement. That's all fine, but that's
13:59:15 7 really not the reason we do Markmans.

13:59:18 8 But if the plaintiff has volunteered to give you
13:59:22 9 infringement contentions for the accused apps, I'm going
13:59:28 10 to let them, and then, we'll see what happens, whether or
13:59:33 11 not they're done in good faith or not. At this time, I'm
13:59:35 12 certainly going to assume that they will be.

13:59:37 13 Is there anything else?

13:59:42 14 MR. GUARAGNA: Not from Samsung, your Honor.

13:59:45 15 MS. CHEN: Not from Apple --

13:59:48 16 MR. GRAVES: Not from --

13:59:48 17 THE COURT: I just had a --

13:59:51 18 MR. GRAVES: Not from the plaintiff.

13:59:51 19 THE COURT: I heard someone give a very loud
13:59:54 20 sigh, so that must mean we're close to being done.

13:59:59 21 So it sounds like we're done. For purposes of
14:00:04 22 the people who I'm currently talking to, I hope you have a
14:00:07 23 wonderful weekend. Be safe out there. I'm going to stay
14:00:10 24 on this call because I think we have another call at 2:00.
14:00:13 25 But everyone who has been involved in this current hearing

14:00:17 1 is welcome to drop off. And I hope I get to see at least
14:00:21 2 some of you in person in the very near future. Take care.

14:00:25 3 MR. GRAVES: Thank you, Judge.

14:00:26 4 MS. CHEN: Thank you, your Honor.

14:00:27 5 MR. GUARAGNA: Thank you, your Honor.

14:00:27 6 (Proceedings concluded.)

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3 UNITED STATES DISTRICT COURT)
4 WESTERN DISTRICT OF TEXAS)

5
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