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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
SOUTHERN DIVISION

ACACIA MEDIA TECHNOLOGIES CORPORATION,

Plaintiff,

v.

NEW DESTINY INTERNET GROUP, ET AL.,

Defendants.

AND REFERENCED CONSOLIDATED AND RELATED CASES

Case No. SA CV 02-1040 JW (MLGx)

Consolidated Cases:
SA CV 02-1165-JW (MLGx)
SA CV 03-0218-JW (MLGx)
SA CV 02-1048-JW (MLGx)
SA CV 03-0219-JW (MLGx)
SA CV 03-0308-JW (MLGx)
SA CV 03-0271-JW (MLGx)
SA CV 03-0259-JW (MLGx)
SA CV 02-1063-JW (MLGx)

Related Cases:
SA CV 03-1801 JW (MLGx)
SA CV 03-1803 JW (MLGx)
SA CV 03-1804 JW (MLGx)
SA CV 03-1807 JW (MLGx)

MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO ACACIA'S MOTION FOR AN ORDER CONSOLIDATING RELATED ACTIONS AND FOR CASE MANAGEMENT ORDER

Date: July 7, 2004
Time: 9:30 a.m.
Ctrm: 9C Honorable James Ware

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I. INTRODUCTION

As was true regarding the consolidation of the cases that were at issue in December, 2003, the Defendants represented by the law firm of Fish & Richardson P.C. ("Defendants") agree that all of the cases filed by Acacia in November and December, 2003 should be consolidated with the earlier filed cases for pretrial purposes. Defendants submit that judicial economy will be well served by seeking to conclude these cases through dispositive motions on the issues of infringement and/or the "common issues" of patent ownership, invalidity and unenforceability for inequitable conduct after there is a final claim construction Order and before any trial is had. If any of the cases are not disposed of through motion practice, Defendants join Acacia in requesting a consolidated jury trial on the common issues. Ultimately, if motion practice and trial on the common issues does not end this matter, the parties will need to complete fact and expert discovery and try any remaining case. Of course, the proposed sequenced trials, if they prove necessary, will have some redundancy. For example, the prior art considered in the proposed consolidated trial of the common issues will need to be reconsidered in the individualized trials. On balance, however, this redundancy is more than offset by the efficiency of the consolidated trial of the common issues.

Defendants urge the Court to consider two additional avenues for streamlining this case and minimizing the burden on the Court and the parties. First, that the Court certify the final claim construction Order for interlocutory appeal to the Federal Circuit. As the Court will appreciate having now considered the claim construction arguments of the parties, it is a virtual certainty that an appeal of the Court's claim construction will take place at the conclusion of this litigation. A reversal, even in part, of the Court's claim construction would create a procedural morass and greatly delay final resolution of these disputes. Given the far reaching implications of this case, which impacts the cable and satellite industries and as Acacia proclaims "nearly

every entity distributing video over the internet today," if any claim construction order were appropriate for interlocutory review, this is such an order.

Second, Defendants propose that before the parties engage in any discovery or motion practice on infringement and the common issues—proceedings that should be delayed until the Court issues its final claim construction Order—that the parties be permitted to file motions for summary judgment on a purely legal issue relating to Acacia's contention that the '702 patent is infringed. In short, all the claims of the '702 patent are directed to a "communications system" comprised of a "transmission system" and a "reception system." Acacia acknowledges that none of the Defendants directly infringe any claim of the '702 patent because none of the Defendants' systems include a "reception system." Instead, Acacia seeks to impose liability on Defendants for inducing infringement arguing that Defendants' customers are direct infringers because they *use* the claimed "communication system." Defendants' customers, as is true of anyone who watches a news report or video advertisement or downloads an MP3 song from the Internet, do not use the Defendants' transmission system—which, as claimed, must include such things as a "sequence encoder" and an "identification encoder." The customers simply obtain files from hard drives connected to the Internet. There is no dispute of fact on this issue and resolution does not hinge on the Court's claim construction. Accordingly, this issue could be dealt with immediately after the July 7 hearing while the Court crafts its final claim construction Order. A finding that Acacia cannot, as a matter of law, prove users of the Internet are direct infringers of the '702 patent would more than halve the effort required to resolve these cases.

While the parties appear to be in general agreement on the broad outline for managing these cases, there is considerable disagreement on a number of issues raised by Acacia's consolidation motion. First, Defendants do not share Acacia's belief that a trial on the common issues, if such a trial proves necessary, can or should be binding on "absent class members" (*see* Acacia Br. at 2:17-18, 2:26-3:2, 10:25-26)

because no class has been certified, Acacia's motion for consolidation does not request such certification, and Defendants oppose class certification on the grounds stated in their concurrently filed opposition brief.

Second, Defendants submit that considerable economy will be realized by both the Court and the parties if discovery is bifurcated such that discovery unrelated to infringement and the common issues is stayed until and unless it is determined that dispositive motions and, if necessary, trial on the common issues, do not dispose of all of the consolidated cases. Acacia's position on this issue is unclear, but appears to be that discovery on all issues should be taken even though the issues that will be addressed under the staged proceedings are limited. Plainly, it makes little sense to burden the parties with conducting discovery on issues such as damages, willful infringement, laches, estoppel, misuse, unclean hands, implied license, and the various state law tort claims before a determination of whether a trial on these issues will be necessary.

Third, because Acacia claims that the purpose of consolidation is to eliminate the possibility of "inconsistent rulings and the duplication of effort," (Acacia Br. at 2:19-20, 8:19-20), it is difficult to understand why Acacia proposes to exclude the On Command defendants[1] from the consolidated action. Once again, Acacia seems to confuse its motion for consolidation with its motion for class certification. That the On Command defendants do not fit within Acacia's absurd class definition is of no moment to whether these defendants should be part of the consolidated action. Acacia's suit against the On Command defendants involves the same the '992 and '702 patents at issue in the 15 other cases.[2] Thus, it makes no sense for that case to be

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[1] Defendants On Command Corporation, On Command Video Corporation, and Hotel Digital Network, Inc. are the named defendants in case No. SACV 03-1610 JW (MLGx) and believed to be related entities. They will be referred to in this brief as the "On Command defendants."

[2] While Acacia's suit against the On Command defendants does involve a third related patent, there is considerable overlap between the third patent and the patents in suit, and efficiency would be well served by staying action regarding the third patent at least until the conclusion of the proposed trial on common issues, if such trial proves necessary.

on a separate track with the attendant risk of inconsistent rulings and the certainty of duplicative effort by the Court and the parties.

Fourth, the exclusion of the On Command defendants appears to be nothing more than another attempt by Acacia to make this case about the politically unpopular business that Defendants are in rather than about the patents in suit. Acacia's proposed exclusion of the On Command defendants undoubtedly relates to its proposed caption for the consolidated action—*In re Online Adult Entertainment Patent Litigation*—a caption plainly intended to inflame the prejudices of members of any jury considering this case and which is no more appropriate than captioning this case *In re Acacia's Assertion of Non-infringed, Invalid, and Unenforceable Patents*. Defendants propose the consolidated case be captioned "*In re Acacia Patent Litigation*."

Fifth, Acacia's proposed case management schedule is both presumptuous regarding the amount of time the Court has to consider the substantial issues raised by the parties, and sets a far too aggressive discovery time table. Notably, Acacia's proposed schedule is based on its supposition that discovery has been ongoing for several months. It has not. Instead, the parties have been focused on the claim construction issues, which should ultimately bring this case to an end. Defendants believe that a workable schedule should be discussed with the Court at the July hearing, or if the Court prefers, addressed to Magistrate Goldman as the Court previously directed the parties.[3]

II. FACTS

The Court has now received briefing and heard oral argument on the presently disputed, potentially case dispositive, claim limitations of both the '992 and '702

[3] Defendants do not agree to Acacia's proposal, hidden in its proposed order but not discussed in the body of its brief, to limit the deposition of Acacia's witnesses. That issue and several other prejudicial discovery proposals by Acacia were rejected Defendants long ago during the Rule 26(f) meeting of counsel. This issue, however, would seem more appropriately discussed with Magistrate Goldman if the need arises, should not be part of this Court's Order, and is not addressed further in this brief.

patents. The parties have been ordered to file supplemental briefs by June 11, 2004. The Court advised the parties that it may issue a "tentative" claim construction in the near future, and may request further briefing before issuing a final claim construction Order.

Discovery to date has consisted of the exchange of contentions regarding claim construction by both sides and an exchange of documents relating primarily to prior art. Magistrate Goldman denied Acacia's request that its Senior Vice President responsible for licensing, Mr. Berman, and its Vice President of technology, Mr. Roop, have access to Defendants' confidential information. This Court subsequently denied Acacia's appeal of that Order. All defendants, with the notable exception of the On Command defendants, who were excluded by Acacia, stipulated to a proposed protective order and it was entered by the Court on April 19, 2004.

Because of the dispute over the terms of the Protective Order and because the parties have been focused on claim construction, there has been no exchange of confidential information. While Acacia proposed to seek a discovery schedule from Magistrate Goldman it has not done so. The parties have not discussed a schedule for discovery since April, 2004. In view of Acacia's request for class action certification, uncertainty as to when the Court will issue a final claim construction Order, and Defendants' proposal for certification of the claim construction Order for interlocutory appeal, implementation of a discovery schedule remains premature.

III. ARGUMENT

A. The Court's Final Claim Construction Order Should be Certified for Interlocutory Appeal

The Court has discretion to certify its final claim construction Order to the Federal Circuit for interlocutory review if the Court is "of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation ..." 28 U.S.C. § 1292(b).

Claim construction, is an issue of law. *Markman v. Westview Instruments, Inc.*, 52 F.3d 967, 970-71 (Fed.Cir.1995) (en banc), aff'd, 517 U.S. 370 (1996). As the Court is aware, the parties hotly contest the construction and/or susceptibility to construction of many of the limitations in both the '992 and '702 patents. Given the numerous, complex, and potentially dispositive claim construction issues presented to the Court, it is a virtual certainty that one or both sides will appeal the Court's construction once final judgment is entered in this case. The Federal Circuit reviews claim construction *de novo*. *Id.* at 979. A reversal, even in part, of the Court's claim construction Order after final judgment would likely force the parties to re-brief the contemplated dispositive motions, and potentially retry the common issues trial and the sixteen trials addressing the non-common issues.

Moreover, the impact of the Court's claim construction Order will be very significant. Acacia has requested certification of a class, which Acacia contends includes "thousands" of individuals and entities. That proposed class is absurdly under-inclusive given Acacia's proclamation that "nearly every entity distributing video over the internet today" is using technology covered by Acacia's patents. In fact, Acacia touts the number and diversity of the companies that have chosen to license rather than incur the tremendous cost of patent litigation. *See* Acacia Br. at 4:24-5:2. What Acacia fails to mention are its unsuccessful efforts to license satellite and cable providers of video-on-demand services in addition to every entity providing audio or video information on its Internet website. *See* Miller Decl., Ex. B. Obviously, this case is being closely watched by the entire communications industry and the Court's claim construction Order is anxiously awaited in many circles. A prompt and final resolution of the claim construction issue will allow companies to determine whether the Acacia patents should be of concern, whether they should implement alternative designs, and what those alternative designs should be.[4] *See Symbol Technologies, Inc. v. Lemelson Medical*, 277 F.3d 1361, 1364 (Fed. Cir.

[4] As but one example of the practical impact of any delay in obtaining final resolution of the claim construction issue, is that Acacia is free to continue what has

2002) (granting interlocutory review under 1292(b) and (c) in widely followed case impacting numerous industries).

B. Acacia's Infringement Theory Regarding the '702 Patent Should be Addressed While the Court Finalizes the Claim Construction Order

Ripe for decision by the Court, without the need for discovery and without the need for a final claim construction Order, is Acacia's theory of infringement of the '702 patent. All 42 claims of the '702 patent are directed to a "communication system," which, in turn, includes both a "transmission system" and a "reception system." Claim 1 of the '702 patent is illustrative.

> 1. A communication system comprising:
> a *transmission system* at a first location in data communication with a reception system at a second location, wherein said transmission system comprises
>
> a sequence encoder,
>
> an identification encoder, and
>
> a compressed data library in data communication with said identification encoder,
>
> wherein said identification encoder gives items in said compressed data library
>
> a unique identification code; and
>
> wherein said *reception system* comprises
>
> a transceiver in data communication with said transmission system,
>
> a storage device in data communication with said transceiver,

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been aptly described by the Federal Circuit as the "danse macabre, brandishing a Damoclean threat with a sheathed sword. Guerrilla-like, [Acacia] attempts extra-judicial patent enforcement with scare-the-customer-and-run tactics that infect the competitive environment of the business community with uncertainty and insecurity. *Arrowhead Indus. Water, Inc. v. Ecolochem, Inc.*, 846 F.2d 731, 734-35 (Fed. Cir. 1988). Because the patent law requires a company to take reasonable steps to avoid infringement or risk liability for willful infringement, and because the preferred defense to willful infringement is reliance on the opinion of competent counsel, Acacia blizzard of cease and desist letters has spawned a cottage industry among patent opinion counsel. Opinion counsel are faced with writing opinions on the two patents in suit and the three related patents and their 200 plus claims. Considering the number of different systems a company may have, this is large, complex and expensive task. Acacia knows this and has been using the threat of enhanced damages as a way to "encourage" companies to take licenses. Umbreit Decl., Ex. A.

user playback controls in data communication with said storage device,
a digital compressor in data communication with said storage device, and
a playback device in data communication with said digital decompressor.

Acacia concedes, as it must, that none of the Defendants directly infringe any claim of the '702 patent because none of Defendants' systems include the requisite "reception system." Instead, Acacia contends the Defendants indirectly infringe by inducing their customers to use the claimed communication system, i.e., Defendants' customers are direct infringers.

Section 271(b) provides in relevant part, "whoever actively induces infringement of a patent shall be liable as an infringer." 35 U.S.C. § 271(b) (2000). To establish a claim of induced infringement, Acacia must first prove that its claims are directly infringed by the allegedly induced party. *Jansen v. Rexall Sundown, Inc.*, 342 F.3d 1329, 1334 (Fed. Cir. 2003) quoting *Met-Coil Sys. Corp. v. Korners Unlimited, Inc.*, 803 F.2d 684, 687 (Fed.Cir.1986) ("Absent direct infringement of the patent claims, there can be neither contributory infringement nor inducement of infringement."). This it cannot do.

Acacia explained its theory of infringement during discovery: "[Defendant's] subscribers operate and use a communication system that receives and plays back transmitted video information received from [defendant's] video server via its website..." As to those Defendants who actually transmit video to their customers, there is no factual dispute that the customer uses his or her personal computer to access, retrieve, and play back video data transmitted from an Internet video server operated by or on behalf of the Defendant.[5] Given the absence of a factual dispute, the Court need only resolve the single legal issue of whether a customer who receives

[5] Some of the Defendants operate age verification services or affiliate programs, and do not have servers that transmit video to end users. They either verify the user's age or provide a convenient portal to third party websites that may offer video content. Acacia's claim of infringement as to these companies is tortured, at best. *See* Miller Decl., Ex. D.

a video signal over the Internet is using the claimed transmission system, and specifically whether the customer is using, for example, the claimed "sequence encoder" or "identification encoder" that make up the claimed transmission system. Quite certainly they do not. In fact, there can be no factual dispute and Acacia appears to concede that Defendants' customers cannot access any portion of Defendants' transmission system other than the Internet video server. As such, Acacia is left with the untenable argument that Defendants' customers use the transmission system because they obtain the video created by that system. Such an argument is nonsensical in that it is analogous to suggesting that a person who eats a peanut butter sandwich directly infringes a patent because the peanut butter was made using an infringing peanut butter press. The '702 patent can and should be eliminated from this case by dispositive motion as soon as possible.

C. Consolidated Trial of the Common Issues Should (1) Have No Effect on Parties Other Than Those in the Consolidated Cases and (2) Not Preclude Presentation of Overlapping Evidence Should Individualized Trials Become Necessary

1. The Consolidated Trial of Common Issues Can Bind Only the Consolidated Defendants

Acacia's use of the phrase "Class Issues" to describe the common issues in its consolidation motion is not accidental—it presumes a class will be certified. Defendants' agreement to a separate trial on the common issues in no way should be taken as agreement to Acacia's proposed class certification. More troubling, however, are Acacia's repeated threats "to bring additional actions ... relating to the '992 and '702 patents" if the consolidated action does not bind all "online adult entertainment companies." *See* Acacia Br. at 2:16-3:2. If a class action is not certified, certainly a consolidated action will not be a viable case management tool if Acacia is permitted to continually add new defendants to the mix. This Court, by its Order dated December 12, 2003, memorialized that it gave Acacia until December 9, 2003 to "join additional Defendants to this action"—something Acacia could have done given its claim that all but a few companies refused to license its patents.

Acacia Br. at 1:7-9. Acacia chose, instead, to seek class certification rather than suing additional companies who would, in turn, share the costs of litigation with the existing Defendants. If the Court denies Acacia's certification request, which it should for the reasons presented in Defendants' concurrently filed opposition, Defendants strongly object to delaying this case further to allow Acacia to add new parties.

2. The Consolidated Trial of Common Issues Cannot Preclude Presentation of Necessary Evidence Should Individualized Trials Become Necessary

In agreeing to a consolidated trial on the common issues, should such a trial be necessary, Defendants do not agree that the trier of fact in any subsequent trial(s) on non-common issues should be precluded from considering some of the same evidence presented at the trial on the common issues. For example, in the proposed individualized trials, the trier of fact will need to decide the issue of infringement. In so doing, the trier of fact must consider the prior art. *Fiskars, Inc. v. Hunt Mfg. Co.*, 221 F.3d 1318, 1323 (Fed. Cir. 2000) ("It is an affirmative defense of the accused infringer to allege and to show that it is practicing the prior art.") Similarly, in assessing damages, if any, the trier of fact must obviously have an appreciation of the state of the art before it can assess the value of the patented invention. *Georgia-Pacific Corp. v. U.S. Plywood Corp.*, 318 F.Supp. 1116, 1120 (S.D.N.Y. 1970) (Factor 9—"The utility and advantages of the patent property over the old modes or devices, if any, that had been used for working out similar results."). While there may be some redundancy in the proposed sequenced trial approach to resolving this case, the parties appear to share the belief that this case can be resolved through dispositive motion or the consolidated trial of common issues. As such, the potential inefficiency may only be theoretical and well worth the tradeoff.

D. Discovery Should Be Stayed Until There Is a Final Claim Construction Order and On Issues Unrelated to Infringement and the Common Issues

1. Discovery Should Be Stayed Until There Is a Final Claim Construction Order

To minimize the burden on the Court and the parties inherent in taking discovery on issues which might prove unnecessary, discovery should be stayed until the latter of (1) this Court issuing its final claim construction Order or (2) if the claim construction Order is certified by this Court and an interlocutory appeal accepted by the Federal Circuit, until the Federal Circuit has considered the issue. On the issue of infringement, because the parties are well aware of the general configuration of the accused systems and the methods used, the Court's claim construction would very likely permit the parties to stipulate that various limitations are or are not met by those systems or methods with little or no discovery. Additionally, the Court's construction will permit the parties to focus discovery on specific aspects of those systems and methods rather than on the systems and methods as a whole.

With regard to invalidity, the identification of invalidating prior art will be focused by Defendants knowing what the claims in issue cover. Currently, Defendants are employing the broadest claim construction proposed by Acacia. Moreover, in view of a final claim construction Order, counsel may be able to stipulate that broader claims are invalid because they read on the prior art, thereby permitting the parties to focus on the claims which the parties agree are not anticipated in view of the Court's construction.

Finally, Defendants have argued that several claim limitations are invalid for indefiniteness. If the Court accepts those arguments, claims containing those indefinite limitations will not need to be addressed by the parties.

2. Discovery Should Be Stayed On Issues Unrelated to Infringement and the Common Issues Until After Trial on the Common Issues, If Such Trial Proves Necessary

There is no reason to permit discovery on anything other than infringement and the common issues. As Acacia repeatedly points out, there is inherent efficiency in

addressing the common issues because they "do not involve any of the defendants activities, they only address the '992 and '702 patents, their file histories, and prior art." Acacia Br. at 10:18-20. While this statement is wrong, Defendants agree that much of their activities will not be at issue should the proposed trial of the common issues become necessary (such as Defendants' profits). The only discovery that should be required of Defendants, therefore, relates to the structure and operation of their respective systems.

The burden on the Court and parties that would be created if discovery were permitted on the issues of damages, willful infringement, laches (prosecution, legal, equitable), estoppel, misuse, unclean hands, implied license, and the various state law tort claims is unnecessary, unwarranted, and would only slow the resolution of this case. While Acacia's position on this issues is not clear, even Acacia appears to recognize that bifurcation of discovery is warranted. In its brief, Acacia states that "In Paragraph No. 8 of its Proposed Case Management Order, that all fact discovery relating to the Class Issues shall be commenced in time to be completed by December 6, 2004." (Acacia Br. at 19-21) (emphasis added). The table at page 14 of Acacia's brief is in accord. In contrast, Acacia's position may be that discovery on the common issues should be conducted at a swifter pace than the rest of fact discovery. The proposed order presented by Acacia, at paragraph 9, provides that the parties "may engage in discovery on all issues," and goes on to specifically include the issue of damages.[6] Acacia proposes in its brief that discovery regarding damages be conducted in parallel with adjudication of the common issues. (Acacia Br. at 2:23-24). Defendants strongly oppose such a wasteful process, a process that even Acacia does not try to harmonize with its proposed schedule under which no date is provided for expert discovery on the issue of damages or any other "unique defense."

Given the great likelihood that these cases will be disposed of through motion practice, it makes little sense for the parties to face the heavy burden and delay

[6] Paragraph 8 of Acacia's proposed order relates to the preclusion of intervention and is not relevant to this discussion.

inherent in general fact discovery. Fact discovery should be narrowly tailored to that necessary to resolve the dispositive motions and, if necessary present a trial on the common issues. Should individual trials prove necessary, general discovery can be had at that time. Permitting the parties to focus their efforts on the central dispute—non-infringement, invalidity, and unenforceability based on inequitable conduct will bring this case to an efficient and swifter end.

E. All Sixteen Presently Active Cases Should be Consolidated under the Caption "*In re Acacia Patent Litigation*"

The parties agree that consolidation will prevent inconsistent rulings and duplication of effort in these cases, which have been proceeding for six months to a year. *See* Acacia Br. at 2:19-20, 8:19-20. As such, there is no plausible reason to exclude from the consolidated action the On Command defendants whom Acacia has sued for infringement of both patents at issue in the proposed consolidated action. Acacia is silent as to how that case would be managed if litigated independently of the consolidated action. Certainly, neither Acacia nor the Court would leave it languish, and even more certainly, Defendants would object to that case leading the consolidated action.

While Acacia concedes that it has sued the On Command defendants for infringement of the '992 and '702 patents, it argues that because On Command is not an online adult entertainment company, that it should be excluded from the consolidated case because it does not fall within "Acacia's class definition, which requires the company to operate on the Internet or through online means" Acacia Br. at 5:25-28. Of course, ignoring for the moment its inherent deficiencies, Acacia's class definition is irrelevant to the consolidation issue because no class has been certified. Made equally irrelevant by Acacia's actions is the medium over which a company operates. That the On Command defendants operate over satellite and telephone lines was irrelevant to Acacia when it sued them for infringing the same patents on which it has sued Defendants, and does not become relevant just because

Acacia seeks to use it as a factor in defining a class. Additionally, if Acacia's attempted selection of class members based on the type of content they transmit made any sense, and it does not, the On Command defendants provide adult content to their subscribers.

Ultimately, the simple reason Acacia wants to exclude the On Command defendants from the consolidate action is so that it can urge the Court to caption the consolidated action "*In re Online Adult Entertainment Patent Litigation*," a caption that Acacia fully intends a future jury to hear and be swayed by because the adult entertainment industry is politically unpopular with some portions of the prospective jury pool. There is little reason to debate this issue—there is no need for a prejudicial caption, the patents are content neutral, and the cases upon which Acacia relies for setting a common caption support the use of a generic title for the consolidated action. *Werner v. Quintus Corp.*, 148 F.Supp.2d 965, 966 (N.D. Cal. 2001) (In re Quintus Securities Litigation); *In re Gemstar-TV Guide Int'l Secs. Litig.*, 209 F.R.D. 447, 449 (C.D. Cal. 2002). The consolidated action should be captioned "*In re Acacia Patent Litigation*" and a Master File be created under Case No. SA CV-02-1040.

F. Schedule For Discovery

As discussed above, discovery should not begin until a final claim construction Order is issued by the Court, or if the Court certifies and the Federal Circuit accepts the claim construction Order for interlocutory review until the Federal Circuit issues its ruling. The following timeline defines the date on which a final Order is issued by this Court or the Federal Circuit as day zero and provides a reasonable amount of time for subsequent deadlines:

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Date	Event
Day 0	Final claim construction Order issued by the Court or reviewed by the Federal Circuit.
Day 180	Date by which all fact discovery relating to infringement and the common issues is completed and any discovery motions filed.
Day 240	Date by which all expert discovery relating to the common issues is completed and any discovery motions filed.
Day 300	Date by which any motion for summary judgment of infringement or common issue must be heard.
Day 360	Date by which the Court issues its ruling on motions for summary judgment.
Day 390	Date by which pre-trial conference regarding trial on common issues, if such trial remains necessary, shall be held.
Day 420	Date by which trial on the common issue, if such trial remains necessary, shall begin.
Day 450	Scheduling conference to address discovery schedule and trial schedule should any case remain unresolved.

IV. CONCLUSION

Defendants request that:

1. All presently active cases involving the '992 and '702 patents, including case No. SA CV 03-1610 JW (MLGx) (the case against the On Command defendants), be consolidated for pretrial proceedings;

2. The Court certify its final claim construction Order for interlocutory appeal;

3. Discovery and dispositive motions on infringement, invalidity, patent ownership, and unenforceability based on inequitable conduct, with the exception noted below, be stayed until the latter of (i) Court issues its final claim construction Order or (ii) the Federal Circuit reviews that Order;

4. While the Court fashions its final claim construction Order, the parties be

ordered to brief and argue, on a schedule convenient to the Court and the parties, the issue of whether Defendants can, as a matter of law, induce infringement of any claim of the '702 patent;

5. If the Federal Circuit does not accept the Court's claim construction Order on interlocutory appeal, and after resolution of the induced infringement issue described above, the parties be ordered to brief and argue, on a schedule convenient to the Court and the parties, dispositive motions on any or all of the issues of infringement, invalidity, patent ownership, and unenforceability based on inequitable conduct;

6. If any case is not resolved by dispositive motion, that a jury trial be had on the issues of invalidity, patent ownership, and unenforceability based on inequitable conduct of any patent claims remaining in issue;

7. Discovery, if and when permitted, be limited to the issues of infringement, invalidity, patent ownership, and unenforceability based on inequitable conduct. Discovery regarding issues including but not limited to damages, willful infringement, laches (prosecution, legal, equitable), estoppel, misuse, unclean hands, implied license, and the various state law tort claims be stayed;

8. The consolidated case shall be captioned "*In re Acacia Patent Litigation*" and that a Master File be created under Case No. SA CV-02-1040.

9. The parties be referred to Magistrate Goldman to work out an appropriately limited discovery schedule.

Dated: June 4, 2004

FISH & RICHARDSON P.C.

By: /s/
Todd G. Miller

Attorneys for Defendants AEBN, Inc., Ademia Multimedia, LLC, Audio Communications, Inc., Club Jenna, Inc., Cyber Trend, Inc., Cybernet Ventures, Inc., Game Link, Inc., Global AVS, Inc., Innovative Ideas International, Lightspeed Media Group, Inc., National A-1 Advertising, Inc., New Destiny Internet Group, LLC; and VS Media, Inc.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing **MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO ACACIA'S MOTION FOR AN ORDER CONSOLIDATING RELATED ACTIONS AND FOR CASE MANAGEMENT ORDER** was served on this date upon all counsel of record as follows:

Via United States District Court, Central District of California, Electronic Case Filing Program, by uploading the electronic files for the above listed document.

Roderick G. Dorman
Alan P. Block
Armand F. Ayazi
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Executed at San Diego, California this 4th day of June, 2004.

/s/
JoAnne M. Owens

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