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UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
IN SEATTLE

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INTERVAL LICENSING, LLC,	)	
	)	
Plaintiff,	)	No. C10-1385
	)	
v.	)	
	)	
AOL, INC.; APPLE, INC.;	)	
eBAY, INC.; FACEBOOK, INC.;	)	
GOOGLE, INC.; NETFLIX,	)	
INC.; OFFICE DEPOT, INC.;	)	
OFFICEMAX, INC.; STAPLES,	)	
INC.; YAHOO! INC.; AND	)	
YOUTUBE, LLC,	)	
	)	
Defendants.	)	

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MOTIONS HEARING

BEFORE THE HONORABLE MARSHA J. PECHMAN

April 25, 2011

1 THE CLERK: This is the matter of Interval  
2 Licensing versus AOL, Inc., Cause Number C10-1385MJP. If  
3 counsel can make your appearance, please.

4 MR. NELSON: Justin Nelson from Susman Godfrey, on  
5 behalf of Interval Licensing. With me is my partner,  
6 Matthew Berry.

7 THE COURT: Good afternoon.

8 MR. WALTERS: Your Honor, Mark Walters, Frommer  
9 Lawrence & Haug, for defendant Yahoo. With me is Matt  
10 Kreeger from Morrison & Foerster, for Yahoo as well.

11 MR. VANDENBERG: Good afternoon, John Vandenberg,  
12 for the defendants eBay, Netflix, Office Depot and  
13 Staples.

14 MR. BERLINER: Good afternoon. Brian Berliner of  
15 O'Melveny & Myers, for Apple.

16 MS. JOST: Good afternoon, your Honor. Shannon  
17 Jost, on behalf of defendants Google and YouTube. I am  
18 joined on the telephone by Kevin McGann.

19 MR. IVEY: Good afternoon, your Honor. Gerald  
20 Ivey on behalf of AOL.

21 MS. STAMESHKIN: Liz Stameshkin from Cooley, for  
22 defendant Facebook.

23 MR. ROLLER: Good afternoon, your Honor. Jerry  
24 Roller of Yarmuth Wilsdon Calfo, also for Apple.

25 THE COURT: Counsel, you wanted to come argue to

1 me about whether or not there has been a proper joinder.  
2 I have read your memorandums, I have read the me-toos, the  
3 responses and replies. I think I am ready to hear you,  
4 and I think I gave you 20 minutes per side to do that.

5 During the course of your argument I want you to  
6 respond to this question: We will assume for the purposes  
7 of argument that I agree with you, and that there is a  
8 misjoinder here. What does that do for us on a practical  
9 level if I could turn around and consolidate you for the  
10 purposes of pretrial? What are you really worried about  
11 here? Is it the pretrial issues or is it the jury issue?

12 MR. KREEGER: Thank you. This is Matthew Kreeger  
13 for Yahoo. I appreciate the chance to argue. Maybe I  
14 will begin with that question, since that is clearly on  
15 the court's mind.

16 Although the court doesn't have, in our view,  
17 flexibility or discretion on the joinder issue, there is a  
18 considerable amount of discretion on the consolidation  
19 question we have raised. We are fully aware of the need  
20 for some consolidation if the case was severed.

21 I believe, as we mentioned in our brief, we certainly  
22 expect there will be a consolidated Markman proceeding, to  
23 be on the same schedule that we are currently on. We  
24 would expect there would be -- the primary defendants  
25 would coordinate and file joint summary judgment motions

1 on invalidity issues that are common. We would also be  
2 prepared to coordinate that position so that, to the  
3 extent possible, witnesses would only be deposed once in  
4 the multiple cases.

5 But when it comes to issues that are not common, such  
6 as non-infringement damages, and other issues that would  
7 have to be tried, we would expect those issues to be  
8 treated separately. There are certainly pretrial aspects  
9 of that, when it comes to the non-infringement summary  
10 judgment motions.

11 The main prejudice, frankly, is at trial. Yahoo  
12 itself has 40-some odd products that are accused of  
13 infringement in this case. Frankly, it is a lot for a  
14 jury to handle in the case against Yahoo.

15 The prospect of Yahoo being forced to defend itself in  
16 a case in front of a jury, involving all of these  
17 defendants with disparate products, some of whom are  
18 direct competitors, where there is no allegation that  
19 those products that are accused of infringement were  
20 developed, marketed or distributed in any kind of  
21 coordinated or joint fashion, that's exactly what this  
22 rule, Rule 20, was designed to protect us from.

23 So that is the prejudice, and that is why we think it  
24 makes practical sense, but still is consistent with the  
25 rules and requirements for joinder.

1 I think when you look at the motion itself, you will  
2 see that large aspects of it are essentially undisputed.  
3 There is no dispute there has to be a common transaction  
4 or occurrence. That's what the rule requires.

5 There is no dispute that in this case Yahoo's products  
6 were separately developed by Yahoo. There is no common  
7 connection with any of the other defendants. This isn't a  
8 case where there is some industry standard that applies  
9 across the defendants. This isn't a case where we  
10 obtained components from some third-party supplier that  
11 has also supplied the other defendants. Everything is  
12 specific to Yahoo.

13 The only purported connection in this case is the fact  
14 that all of these defendants are accused of infringing the  
15 same patents. And that simply is not enough. There are  
16 multiple cases we cited to your Honor on this point that  
17 establish that is not enough.

18 If you look at the plaintiff's argument, I think it is  
19 somewhat telling. Their argument essentially is that the  
20 products are somehow similar or apparently similar, and  
21 that they supposedly infringe in similar ways.

22 But when you look at what the facts are, these are  
23 very different products. We have Staples that sells  
24 office equipment on line. We have AOL, Google and Yahoo  
25 which have multiple products, that include instant

1 messaging, e-mail. We have Apple that has portable  
2 devices. These are very different products.

3 And if you look at what the plaintiff has to say about  
4 that, with respect to the '507 patent, in their opposition  
5 on Page 3, their explanation on supposed similarity is  
6 that all of the defendants operate web pages that display  
7 related content in response to a user choosing to view a  
8 web page associated with a particular product or content.  
9 That's the supposed similarity.

10 But if you compare that to the claims of the '507,  
11 that is really saying nothing more than -- paraphrasing,  
12 "they infringe." There is really no allegation of  
13 similarity that goes beyond an allegation of infringement.  
14 And the cases make it clear that is not enough.

15 And we have cited these cases: The Pergo case, the  
16 Phillips case, the Reid case, several others. Most  
17 recently, in the Northern District of California there was  
18 the YEP case, where the claimant originally sued many  
19 defendants, but ultimately paired it down to twelve laptop  
20 defendants. All of these defendants were manufacturers of  
21 laptop computers. The plaintiff tried to continue with  
22 the case, and the judge ultimately dismissed all but the  
23 first named defendant.

24 In that case, the plaintiff alleged there was an  
25 industry standard promulgated by the IEEE that all of the

1 defendants infringed because they complied with that  
2 standard. And even with that kind of allegation, which  
3 has a lot more substance to the allegation that they are  
4 similarly infringing, even then the judge, applying the  
5 rules, found that they needed to be separate, because  
6 simply similar allegations of infringement does not  
7 satisfy the rule of a common transaction.

8 THE COURT: Assume for purposes of this question  
9 that I agree with you. Do you want to start over with new  
10 pleadings?

11 MR. KREEGER: We are not demanding that, your  
12 Honor. We moved in the alternative to sever or dismiss.  
13 It is really your discretion as to whether it is a  
14 dismissal or a severance. We understand your Honor wants  
15 to get this moving. If severance is what your Honor  
16 wants, we are content with that.

17 THE COURT: And are there any issues that would be  
18 tried commonly?

19 MR. KREEGER: No, we would not propose any common  
20 trial.

21 THE COURT: On any issue whatsoever? Nothing is  
22 the same across any of these cases?

23 MR. KREEGER: Certainly there are issues that are  
24 the same. But our proposal is, your Honor, that there  
25 be -- Well, with respect to pretrial and dispositive

1 motions, sure, there could be common issues presented to  
2 the court. But when it comes to trial, we are asking for  
3 our day in court. That's the reason for this motion.

4 If it means that the plaintiff will have to deal with  
5 both invalidity and infringement in the same trial, we  
6 think that is important. That is an important constraint  
7 on the plaintiff's ability to wiggle on claim  
8 construction. They have to adopt a single construction  
9 that shows both infringement and also shows the claims are  
10 valid.

11 The concern is, if we separate those issues into  
12 separate trials, then that -- there is a potential for  
13 gamesmanship. So we propose that the court keep separate  
14 trials with respect to all issues that are tried.

15 Now, many of these may be resolved by dispositive  
16 motions.

17 THE COURT: There was recently a judge in Texas  
18 who, I think, brought in 24 jurors, divided them into  
19 groups of six, presented the common issues, split them up,  
20 and presented the individual issues for each company. She  
21 was looking for a bellwether. She was doing a bellwether  
22 case.

23 Why wouldn't something like that work here, or do we  
24 even need to have to worry about that now?

25 MR. KREEGER: As we get closer to trial, you know



1 how these cases work, parties settle out, patents go away.  
2 This is the kind of thing one could reasonably consider at  
3 a later stage. I don't have a response from my client  
4 right now about that particular proposal.

5 THE COURT: Assume that I give you severance, what  
6 has to change about the scheduling order that we've got?

7 MR. KREEGER: I don't think that much does. As  
8 respect to common issues, when it comes to -- Certainly  
9 the Markman schedule doesn't need to change, provided,  
10 your Honor, that you don't stay the case. We have  
11 motions --

12 THE COURT: I have read that one, too.

13 MR. KREEGER: Leaving that aside, there is no  
14 reason the Markman scheduling needs to change. The  
15 deadline for dispositive motions presumably would need to  
16 change. Now, the trial dates, you would have multiple  
17 trials that you would have to change. I don't think much  
18 more than that would be required.

19 Some of the discovery limits would operate  
20 differently, because the cases would be different. I  
21 believe your Honor placed overall limits on summary  
22 judgment motions for all of the defendants. When it comes  
23 to non-infringement, that wouldn't be appropriate if the  
24 cases were severed.

25 It wouldn't be a drastic retooling. Certainly the

1 trial aspects would be quite different.

2 THE COURT: What else would you like to tell me?

3 MR. KREEGER: The only thing I wanted to mention,  
4 in case your Honor is unclear from my briefing, there are  
5 two Eastern District of Texas cases, My Mail and Manatech  
6 case, that frankly are outliers. These are cases that  
7 apply a much different approach from the multiple cases we  
8 cited your Honor. We think, frankly, they were wrongly  
9 decided. There was a recent case out of Delaware that  
10 found those to be outliers.

11 I would like to at least draw your Honor's attention  
12 to these. I apologize that it wasn't in our briefing. We  
13 have copies if your Honor would like to have them, or I  
14 could just give you the citation. This is a case out of  
15 the Northern District of Illinois. The case is Rudd  
16 versus Lux Products. The citation is 2011WL, a Westlaw  
17 case, 148052.

18 And other than that, one of the counsel for the other  
19 defendants have raised a separate ground for severance,  
20 the joint and several, an alternative. And I believe he  
21 wanted to address that to your Honor for a brief moment.

22 THE COURT: All right.

23 MR. KREEGER: Thank you.

24 MR. VANDENBERG: John Vandenberg, your Honor, for  
25 four of the defendants.

1           As counsel noted, we briefed an additional ground.  
2           Essentially, that ground is that the first 14 words in  
3           Section (a)(2)(A) of Rule 20 matter. Specifically, what  
4           they require, to join multiple parties as defendants in a  
5           suit, those parties must share liability for causing the  
6           same injury to the plaintiff. They may share liability as  
7           joint liability or several liability or, in rare cases,  
8           alternative liability. But the common point is that it  
9           needs to be a shared liability. And that's an additional  
10          ground.

11          Now, we admit that this point is not made very often  
12          in the cases. We have cited just a handful of cases  
13          making that point. The plaintiff has cited no case that  
14          addresses this point and rejects it.

15          We have here quotes that are in the brief from the  
16          Bravado case, the Arista case and the Guidant case, the  
17          first case being a Michael Jackson copy write trademark  
18          case, where one of the grounds, not the only ground, but  
19          one ground was to grant the severance motion because the  
20          plaintiff did not seek joint or several liability against  
21          the defendants.

22          In Arista, that was one of the file sharing cases, and  
23          the same point was made there, specifically that the  
24          defendants there were accused of causing the same type of  
25          harm, but not the same harm, and, therefore, it did not

1 fit these first 14 words.

2 The third case is not an intellectual property case.  
3 So that is an additional ground.

4 As far as the practical reality, our clients certainly  
5 stand by what Mr. Kreeger spoke to, in terms of the  
6 practical difference.

7 There are other differences. The drafters of Rule 20  
8 and Rule 42 clearly thought that the rules served  
9 different purposes, and it was fine to have both rules in  
10 there. They clearly thought that there should be  
11 restrictions on joining parties in the same action,  
12 perhaps in part because of the flexibility of then  
13 consolidating where it made sense.

14 But these are two separate issues. The first is: Are  
15 they properly joined? And we submit they are not.

16 There are some other practical differences perhaps.  
17 Having a single action versus actions that are severed and  
18 then consolidated for many grounds. One would be  
19 determining the prevailing party as to a single individual  
20 with a multiple action. That is not as clear-cut than if  
21 there are separate actions. It can have an impact on  
22 issues of appeal. If one party -- one of our clients wins  
23 on summary judgment, do they have an immediate appeal?  
24 Issues like that are different. So the drafters of the  
25 rule saw these as different purposes.

1           And we submit -- We would ask the court to grant the  
2 motion to sever, which would certainly result in multiple  
3 docket numbers. And one benefit is the government needs  
4 the money and there will be more filing fees associated.

5           THE COURT: You don't think it might cost more  
6 money to have to process and reset seven different cause  
7 numbers, rather than a single filing? You are about to  
8 take up the major chunk of my clerk's office's time if  
9 that's what you want.

10           MR. VANDENBERG: I don't know the accounting in  
11 terms of the docket numbers, but in terms of the actual  
12 reality of dealing with the court, again, we certainly got  
13 the message, "We want efficiencies." Nothing we are  
14 moving for here would affect the Markman in any way, or  
15 these other motions that counsel have spoken to.

16           The main point is that Rule 20 speaks clearly, the  
17 literal language indicates what the requirements are for  
18 permissible joinder. And when those criteria are not met,  
19 joinder is simply not permissible.

20           And then obviously the next step is Rule 42 and  
21 consolidation. And here we would sit down with plaintiff,  
22 we would hopefully reach full agreement. To the extent we  
23 would not reach full agreement, we would quickly submit  
24 any details to the court.

25           And, of course, some of these consolidation issues,

1 particularly as to the trial, obviously can be delayed  
2 until closer to trial.

3 If you have no further questions, that's all I have,  
4 your Honor.

5 THE COURT: Without a chart it is hard to keep  
6 track of who wants separate trials and who doesn't, and  
7 who is joining in and who isn't. Do all defendants wish  
8 separate trials?

9 MR. VANDENBERG: I believe all defendants have  
10 moved and would want separate trials. The only possible  
11 exception is AOL, but I think they are the first named  
12 party. So as a practical matter, everyone else is moving  
13 to be severed from AOL.

14 MR. IVEY: Your Honor, we do want a separate  
15 trial.

16 THE COURT: And how would you feel if I lined them  
17 all up and we just start trying them one after another,  
18 and everybody waits in serial? A lot of cost to your  
19 clients that way.

20 MR. VANDENBERG: Again, as counsel indicated, it  
21 is unlikely by the time the case gets -- Just looking at  
22 averages, typically, if there are eleven defendants right  
23 now, there probably won't be eleven defendants by the time  
24 we get to trial. Certainly no guarantees.

25 One practical reality is, if we are right on the law

1 here, and Rule 20 -- Plaintiff has taken a shortcut.  
2 Maybe if plaintiff hadn't taken a shortcut and faced  
3 filing eleven suits, they would have filed five suits.  
4 That is one reason -- Looking at the efficiencies from  
5 this vantage point, where they have arguably, we submit,  
6 violated the rule, that isn't necessarily the right way of  
7 looking at it from an efficiency standpoint. Plaintiffs  
8 will be discouraged from bringing these massive cases if  
9 Rule 20 is enforced.

10 There is a Walker Digital Company who has filed  
11 massive suits in Delaware in the last few weeks naming  
12 hundreds and hundreds of defendants. If this rule was  
13 enforced -- In particular we would ask -- We think the  
14 bar would benefit from the court addressing this issue,  
15 which some cases have addressed, the shared liability  
16 issue. If this rule is enforced the way it should be,  
17 maybe not so many of these -- plaintiffs would be picking  
18 more carefully who they were suing, and in the end there  
19 would be fewer resources expended.

20 THE COURT: Isn't there another way? Are you  
21 basically saying that they haven't picked carefully? And  
22 if they haven't, why don't you bring under Rule 11 instead  
23 of asking -- Unless you're surmising they haven't picked  
24 carefully.

25 MR. VANDENBERG: I didn't mean to suggest that

1 Rule 11 was violated, your Honor. I am simply saying that  
2 plaintiffs, if they had to sue separate companies, who are  
3 essentially strangers and did not work in concert, and  
4 they had to file separate suits, perhaps that would  
5 discourage plaintiffs from filing such massive -- going  
6 after massive people at the same time.

7 THE COURT: You don't think Mr. Allen can afford  
8 the filing fees?

9 MR. VANDENBERG: Again, I go back, the government  
10 may need the filing fees more than Mr. Allen. That's  
11 another reason to grant our motion.

12 THE COURT: All right. Thank you.

13 MR. NELSON: Good afternoon, your Honor. Justin  
14 Nelson from Susman Godfrey representing Interval  
15 Licensing.

16 We filed this morning a notice of supplemental  
17 authority. I don't know if the court has gotten it. We  
18 previously gave it, earlier this morning, to the  
19 defendants as well. May I approach with a copy? Thank  
20 you, your Honor.

21 THE COURT: I have been otherwise engaged today.

22 MR. NELSON: To address your Honor's question at  
23 the beginning of the hearing, "What is the practical  
24 effect," the answer is, none. It is the height of  
25 formalism to do this. It is the reason why we have



1 Rule 20 to begin with.

2 What your Honor is looking at is an opinion from the  
3 federal circuit addressing what Mr. Vandenberg called, I  
4 guess, the scourge of multiple defendant patent cases.  
5 That is, it is simply routine to name multiple defendants  
6 in a patent case. This is an order from the federal  
7 circuit involving many of the same defendants that are in  
8 front of this court today, Google, Apple, Staples, Yahoo,  
9 YouTube. Office Depot, I believe, was a defendant below,  
10 but did not join in the mandamus petition.

11 If your Honor turns to the final paragraph on Page 4,  
12 it involves a motion to transfer and a motion to sever.  
13 And it has now become, as part of the mandamus practice in  
14 the federal circuit, relatively routine for defendants who  
15 have a motion to transfer denied to also ask for a motion  
16 to sever. The court separately addressed the motion to  
17 sever. And it denied the motion to sever on the very  
18 grounds that the defendants are urging this court to adopt  
19 here. The federal circuit rejected that.

20 Now, admittedly, this is a non-precedential opinion.  
21 It is recent. It is from the same defendants. And it  
22 discusses the very point about why it is necessary and  
23 flexible for the federal rules to allow multiple  
24 defendants in one patent case.

25 So this is -- The second sentence now, on the last

1 paragraph, "Courts have consistently held that judicial  
2 economy plays a paramount role in trying to maintain an  
3 orderly and effective administration of justice. And  
4 having one trial court decide all these claims, clearly  
5 furthers that objective." He goes on to reject the motion  
6 to sever in the final sentence of that order.

7 Judicial economy here -- We know what is going to  
8 happen, because the defendants have said, even under their  
9 admission, what would happen if there were multiple trials  
10 here.

11 I think for purposes of pretrial everything would look  
12 exactly the same if this court were to sever and then to  
13 reconsolidate under Rule 42. This court clearly has the  
14 power to consolidate under Rule 42, both for pretrial and  
15 for trial purposes.

16 And then the question would be: What would that look  
17 like? I think, as both counsel for the defendants have  
18 stated, that is really premature, because, while no  
19 defendant has settled yet, there are certainly early  
20 settlement talks with all of the defendants. There is no  
21 guarantee for any of that. As this court is well aware,  
22 the parties that will participate in the pretrial  
23 conference might look substantially different than the  
24 parties that are currently in front of this court. And  
25 with a known quantity, we can determine what is the most

1 efficient way to try the case.

2 But from what the defendants have already stated, we  
3 know, for example, in their report on the joint status  
4 report, they stated that they would require seven to ten  
5 days each to try these claims. Multiplied by 11, that is  
6 anywhere from 77 to 110.

7 They also stated that if there were one trial, it  
8 would be anywhere from 20 to 30 days. That is an  
9 85 percent reduction in the number of trial days, the  
10 number of court days, the amount of juror time that has to  
11 deal with this.

12 There are plenty of efficient ways to do it, one of  
13 which the court already has adopted in the scheduling  
14 order, which is to have two separate trials. Many courts  
15 have done that.

16 I am personally in a case that is in the Eastern  
17 District of Texas that is going to trial in a few weeks.  
18 The court initially ordered, similar to what this court  
19 already did, to have one trial on one patent, and then  
20 later trials on the other patents.

21 The parties couldn't agree on what that patent family  
22 was going to be and then switched. So now the court's  
23 order is to try invalidity first, with respect to all  
24 remaining defendants, and then have a couple separate  
25 trials on infringement, still combining some of the

1 defendants.

2 As your Honor also mentioned, there are also ways of  
3 having multiple jurors sit and hear the evidence. The  
4 reality is there is a huge, huge overlap in what the  
5 jurors will hear and what the parties will present. They  
6 are going to want to hear from the inventors. In every  
7 single one of the trials, if there were eleven different  
8 trials, we would have to present the inventor, the  
9 conception story, the invalidity arguments, the experts on  
10 both sides, many of which will be the same for -- in many  
11 cases are the same for validity and/or infringement.

12 Of course, there would also -- Although different in  
13 theory, in terms of what each defendant would like for  
14 damages and infringement, there is substantial overlap in  
15 how it works.

16 The court should not ignore the fact that, although of  
17 course we are looking at the source code now, and the  
18 implementation of the source code, there are going to be  
19 some differences by necessity. But in the overall theory  
20 of the case, by patent family, there is a substantial  
21 amount of overlap. And that is exactly what the federal  
22 circuit just affirmed and said was perfectly acceptable,  
23 to have a motion for severance -- or to deny a motion for  
24 severance in the In Re Google case.

25 To briefly address both of the defendants' substantive

1 arguments on why as a matter of law it is a necessity to  
2 sever right now at this point all of the defendants, both  
3 of them are completely wrong. With respect to  
4 Mr. Vandenberg's argument about there is this third  
5 category of the fact that the defendants all have to be  
6 related for joint and several liability, the cases simply  
7 do not hold that. They are adding a third prong where no  
8 third prong exists.

9 In the Lake Tahoe case from the Ninth Circuit, there  
10 are clearly two prongs. One is same transaction or  
11 occurrence, and number two is common issue of law or fact.  
12 Well, they have conceded, as I think they must, that there  
13 is a common issue of law or fact. So really the only  
14 question is, is there a same transaction or occurrence or  
15 series of transactions or occurrences.

16 But with respect to this new third prong, the Ninth  
17 Circuit does not have that requirement at all. It would  
18 be completely contrary to Ninth Circuit precedent to hold  
19 that there is a third prong here. They are trying to read  
20 into the word "several" something that just does not  
21 exist.

22 The word -- I think Rule 20 speaks to jointly or  
23 severally. As we spoke and wrote about in our motion,  
24 from Black's Law Dictionary, "severally" is defined.  
25 Severally is: "Distinctly. Separately." It even gives

1 the example of "severally liable."

2 They are saying "severally" must mean "joint and  
3 several." It is clear that "severally" means "distinct  
4 and separate." There are separate actions here. Someone  
5 can be liable in the patent context, for example, for  
6 indirect infringement, even though one party is also  
7 liable here. There is no disharmony between what the  
8 Ninth Circuit has said as a matter of law are the two  
9 different prongs. They are not including this third prong  
10 that some of the defendants are insisting on here. So  
11 that's why there shouldn't be a third prong.

12 On why there should not be -- why the court should not  
13 go off on same transaction or occurrence, and hold that in  
14 fact there is a same transaction or occurrence or a series  
15 of transactions or occurrences, we can also look to the  
16 case law there.

17 And, admittedly, the case law is all over the board.  
18 There are cases that the defendants have cited where there  
19 has been a severance to some degree. There is also case  
20 law in our favor, where because of this, and because of  
21 having multiple defendants named in suits, everything is  
22 kept together through trial, is not severed, and was  
23 recently affirmed by the federal circuit.

24 Again, we can point to the case law itself to see what  
25 it says. And the key is "same transaction or occurrence."

1 What the Ninth Circuit has said is that is to be  
2 interpreted flexibly. What the Supreme Court has said in  
3 Gibbs is that joinder is strongly encouraged. And that is  
4 what the Ninth Circuit has done.

5 THE COURT: What difference does it make to you if  
6 I sever and consolidate?

7 MR. NELSON: Your Honor, the practical -- It will  
8 be burdensome to file -- to keep track of seven, eight or  
9 eleven different matters every single time. The practical  
10 reality of it is --

11 Let's just take the example of the protective order.  
12 It took us about two and a half months to negotiate a  
13 protective order that all sides -- all parties could live  
14 with and agree with. To do that, for example, eleven  
15 different times -- And that is just one example, because  
16 they might require, for example -- or want to have a  
17 different protective order.

18 Now, if it is purely formalistic, if the court will  
19 then sever and reconsolidate for all purposes, and the  
20 scheduling order will look exactly the same as it does now  
21 for all purposes, then there would be, of course, no  
22 practical change, except for filing things and everything  
23 else.

24 That is exactly what the rule is designed to prevent,  
25 because Rule 20 does not require that amount of formalism,

1 to then sever and reconsolidate back together.

2 So that's why I think -- Your Honor, it is certainly  
3 true, and certainly we would argue, and I think correctly,  
4 that there would be no difference in terms of what it  
5 would look like if there is a consolidation, a severance,  
6 and then a reconsolidation back together.

7 But that still doesn't answer the question: Is now  
8 the time to do it? I think this court certainly can do  
9 what it did in December -- or January, and deny without  
10 prejudice this motion to sever until we get further along  
11 in the process, and at least see what else is left of the  
12 case before trial, and what is the most efficient way to  
13 try the case.

14 And, again, looking at the Tahoe decision, you can  
15 also look, for example, at what "same transaction or  
16 occurrence" means. And there you look to Rule 13, the  
17 same transaction or occurrence -- many courts have looked  
18 to what same transaction or occurrence means for Rule 13,  
19 because, of course, that is also used in the counterclaim  
20 context.

21 In that context -- "Same transaction or occurrence,"  
22 of course, shouldn't mean anything different in Rule 13  
23 than it does in Rule 20. And in that context, what the  
24 Ninth Circuit has stated is that, again, flexibility is  
25 paramount, that it is to be interpreted broadly, and the



1 same series of transactions is okay. The Tahoe case is  
2 one example of that.

3 When there are multiple developers sued, and the court  
4 said -- actually reversed the district court that had  
5 severed out the parties, and said, no, that was improper,  
6 permissible joinder was okay in that particular situation,  
7 even though it was not the exact same facts, that there  
8 were underlying facts that were the same.

9 The same is true here, there is a patent, the story of  
10 conception is going to be the same here, talking about  
11 when conception happened, about why the patents came into  
12 being. Their counter arguments on validity are all going  
13 to be the same.

14 Certainly in terms of licenses and the damages theory,  
15 there will certainly be substantial overlap between all of  
16 those matters.

17 So for all of those reasons, we think it is supremely  
18 appropriate to keep the matter as it currently is, and at  
19 a minimum not to rule on this matter until we get closer  
20 to trial, and then determine whether severance is  
21 appropriate.

22 There is certainly nothing right now that requires  
23 this court to sever out the cases and then reconsolidate.  
24 It is a matter entirely within this court's discretion  
25 about what is the most efficient and proper way to run the

1 court for matters of judicial economy and efficiency.

2 Unless this court has other questions, I will take a  
3 seat.

4 THE COURT: I don't.

5 MR. NELSON: Thank you, your Honor.

6 MR. KREEGER: Just briefly, your Honor. On this  
7 AOL case that counsel handed you today, the problem is  
8 that sometimes it is opaque --

9 THE COURT: My reading of it is that you can't  
10 tell whether their emphasis is on transfers in the various  
11 districts or not.

12 MR. KREEGER: And that's what it was. Yahoo was  
13 in this case. We both reviewed the transfer order that is  
14 being appealed here. Actually, there is sort of a hint to  
15 it at the bottom of Page 2. The actual argument was  
16 raised alternatively. The defendants argue that if any  
17 defendant served as a barrier to transfer, the district  
18 court should sever the claims against that defendant and  
19 transfer the remainder of the case.

20 There was no argument about Rule 20(a). There was no  
21 argument about same transaction or occurrence. This was a  
22 discretionary transfer and sever motion that was  
23 essentially, transfer the whole case, but if there is one  
24 defendant that has some Texas connection, sever it out,  
25 keep that one there, and transfer the rest to California.

1 And the court said, no, that is not appropriate. There  
2 was no abuse of discretion in keeping it together.

3 That is not what is going on here. We are talking  
4 about Rule 20(a), a requirement. You do have discretion  
5 on consolidation. We acknowledge that. But when it comes  
6 to compliance with the rule, we respectfully submit that  
7 the court does not have discretion, that the rule has a  
8 requirement that the plaintiff has to pass, so they are  
9 the same transaction or occurrence. And they have not met  
10 that.

11 Just briefly about Rule 13. There is no reason for  
12 the court to adopt a Rule 13 standard onto Rule 20. The  
13 Ninth Circuit has spoken about what Rule 20 requires in  
14 the Coughlin case. And there is no reason to apply some  
15 different flexible standard.

16 And the Rule 13 issue about counterclaims raises  
17 different issues. There, you know who the parties are  
18 going to be. The question is simply: Which claims are  
19 going to be presented to the jury?

20 Here, the issue of prejudice is to one defendant who  
21 has to suddenly face a jury and tell its story at the same  
22 time the jury has to contend with the story of other  
23 defendants. This is a completely different context.

24 Unless the court has questions, I will sit down.

25 THE COURT: Thank you.

1 MR. VANDENBERG: Twenty seconds, your Honor?

2 THE COURT: Would you rather argue or hear me rule  
3 in your favor?

4 The severance is wrong here -- The joinder is wrong,  
5 the severance is what we need to do. On the other hand,  
6 we are just going to come right back together under  
7 consolidation, because otherwise it is not a practical way  
8 to run this proceeding.

9 If we sever this out and run it like eleven different  
10 lawsuits, you've got a judge who simply cannot keep up  
11 with that. Although it is very tempting, because if I get  
12 assigned eleven patent cases, I might not have to take  
13 another one for several years.

14 We are just going to consolidate right back. You are  
15 going to run on the same schedule. You are back to meet  
16 and confer to tell me where it is it doesn't fit. You are  
17 still going to have to meet and confer to determine if  
18 there is any coordination that can happen if you are going  
19 to bring on summary judgments.

20 All we are really doing is running our own little mini  
21 MDL, and it is not so mini. Where we gather up suits from  
22 different parts of the country, here we are all in one  
23 spot. So I don't have the basic privilege of working it  
24 up pretrial, and then sending you back home to wherever  
25 you come from. It is all going to be done here.

1           So we are going to have to work together, otherwise  
2 you are not going to get your rulings promptly. That's  
3 one of the things I would really like to do for you.

4           I guess it is a victory for the defense, but I don't  
5 know what practical applications it is going to have. You  
6 are going to file your things under one number. It is  
7 going to be the same number that we've got now.  
8 Otherwise, you will drive the clerk's office crazy. I am  
9 not looking to get more revenues out of Mr. Allen,  
10 although there are some clerk rules that might require  
11 that.

12           We will have to figure it out along the way. One of  
13 the things I will need your advice on is when it is we  
14 have to get ready for trial, because there are lots of  
15 ways we can do that.

16           Odds being what they are, I am thinking there is going  
17 to be fewer of you than eleven when you get around to  
18 trying the case, which on the schedule we are on right  
19 now, we are going to try next year.

20           Does everybody understand that? Have I said anything  
21 that confuses you?

22           MR. NELSON: No, your Honor. One clarification.  
23 The way I understand the court's order, we do not have to  
24 file eleven different complaints right away?

25           THE COURT: I heard from them they didn't care to

1 have eleven different complaints. We are going to operate  
2 off of the consolidated complaint. Apparently, they all  
3 know what your allegations are against each of them. If  
4 somebody comes to me and says, "we don't know," then maybe  
5 you will have to, but right now that is not what I heard.

6 MR. NELSON: Thank you, your Honor.

7 THE COURT: That's where we are, if that satisfies  
8 the rules.

9 MR. KREEGER: One additional clarification point.  
10 I know your Honor hasn't resolved exactly how the trials  
11 will work. Is my understanding correct, you are not  
12 presently ordering a consolidated trial, the severance  
13 includes that concept of separate trials for now?

14 THE COURT: I don't know what it is going to look  
15 like. I am going to tell you, I like to be fairly  
16 creative. It may be that there are some issues that are  
17 presented to a group of jurors, and other people are  
18 separated out for those issues that are separate. But we  
19 won't know that for a long time. I am not likely to put  
20 the plaintiffs through their proof, nor you, eleven  
21 different times. I think there are some things that could  
22 be decided together. And I am hoping for everybody's  
23 cooperation to do that, to think creatively what it is we  
24 want to do.

25 In terms of damages, in terms of whether or not

1 plaintiffs have been harmed through each defendant's  
2 application of this particular patent, those will be  
3 separate issues.

4 MR. KREEGER: Thank you, your Honor.

5 Now, let's talk about whether or not there is going to  
6 be a stay. I have read your motions on those things, and  
7 here is the answer: The stay is denied, but I will  
8 certainly hear you when we find out if the office accepts  
9 any of these patents for review.

10 Maybe we will get lucky and they will accept them into  
11 tracks, and we can go forward on one track and not the  
12 other. Then we would solve some of our scheduling  
13 problems.

14 But it is denied for now, without prejudice, until you  
15 come back and tell me that they have accepted something.  
16 Then we will talk about whether or not we are going to  
17 stop while they examine.

18 But I see no reason not to push forward with  
19 exchanging information. You are going to have to know  
20 that anyway. I am assuming that you are all going to want  
21 to gather that information, whether you present it to the  
22 office or whether you present it to the court. So we are  
23 going to keep on going.

24 Any questions about that?

25 MR. NELSON: No, your Honor.

1 THE COURT: Can I help you with anything else now  
2 that I have you all here?

3 MR. NELSON: No, your Honor. The parties have  
4 been diligent in conferring about a variety of things. We  
5 have tried to be as efficient as possible in trying to  
6 resolve issues without coming to the court's attention.  
7 We expect Mr. Walters and I would continue to engage in  
8 that discussion, along with the other defendants, to try  
9 to minimize any court involvement in the issues.

10 THE COURT: Did I put you on a 90-day reporting  
11 call?

12 MR. KREEGER: I don't think so, your Honor.

13 MR. NELSON: At the first hearing, that was  
14 discussed, but I don't think that is actually in the  
15 scheduling order. Of course, the plaintiffs would have no  
16 objection to that at all.

17 THE COURT: We are going to do that. Every 90  
18 days, you get on the phone, your whips basically put  
19 together an agenda, we talk through any issues that we  
20 have. If nothing -- if nobody has anything to say, I am  
21 not -- there is no reason to meet. But I would like to  
22 hear where you are and what kind of progress you are  
23 making as you go along. You are on a fast schedule. I  
24 want to insure that you stay that way.

25 You will get a date 90 days out. That should put us



1       sometime in July. July 29th, my clerk says.

2               MR. NELSON: I believe we will actually be in  
3 front of you for the Markman hearing.

4               THE COURT: We will be together again, won't we?  
5 Forget that. Let's do it on the day we have the Markman  
6 hearing.

7               Now, have you come to some resolution about how you  
8 are going to educate me on this?

9               MR. NELSON: I think that is one of the issues  
10 that we are discussing. We are certainly at the court's  
11 pleasure about what the court would like, in terms of  
12 whether live witnesses are preferable or tutorials or  
13 anything else. There is something in the court's schedule  
14 about having a day for education. But we are at the  
15 court's pleasure on all of those issues.

16              THE COURT: Did I give you my standard talk about  
17 what this court knows?

18              MR. NELSON: Yes, your Honor.

19              THE COURT: You are the teachers, I am the pupil.  
20 You treat me like I am a smart eighth grader, who has the  
21 brain power to absorb it, but not necessarily the  
22 knowledge. What I know about computers is really minimal.  
23 If you want me to understand these patents, then you have  
24 to start educating me. Otherwise, it is like throwing  
25 darts at the chart. If you want a decent answer, then you

1 have to show me how it is that we get there.

2 Now, if that means that we have live witnesses, if  
3 that means you want to put it on together as a joint  
4 presentation, you want to hire somebody to come in and  
5 educate us all on what is necessary, if you can agree on  
6 who it is to do that, all of those options are open to  
7 you. But that's something for you to decide, the best way  
8 to teach somebody about this. So sit down and figure out  
9 how you teach your eighth grader how this works, and then  
10 package it for me.

11 MR. IVEY: Your Honor, we will be happy to do the  
12 tutorial, but I have to warn the court that the standard  
13 eighth grader, with regard to internet technology these  
14 days, is really the heavyweight of the industry.

15 THE COURT: You are absolutely right. You are all  
16 old enough to substitute this. Pretend that I'm your  
17 mother, and go the other way. Pretend that you have to  
18 explain this to somebody who is not familiar with these  
19 sorts of patents.

20 MR. NELSON: Your Honor, there is one actually  
21 minor issue that I believe the parties are in agreement  
22 on. The defendants have asked plaintiff to agree on a  
23 briefing schedule on a summary judgment motion of  
24 indefiniteness on a couple of the claims terms. That  
25 would add about five pages to each side's respective

1 briefing for the Markman briefing. And then defendants  
2 would get two pages each on each of the two issues, and a  
3 reply. We have no objection to that order. I think we  
4 are in the process of finalizing an agreed motion on that  
5 point. But if the court would entertain something orally,  
6 we would be happy to do it orally. Or if the court would  
7 like to see it by paper, it will be filed within the next  
8 couple of days, if not before.

9 THE COURT: Essentially the bottom line is, you  
10 want to add more pages?

11 MR. KREEGER: The idea is, your Honor, often the  
12 courts -- I don't know if your Honor -- In the course of  
13 claim construction you come to the view that one of the  
14 terms is "indefinite." The question is: What do you do  
15 with that? Some courts then invite a second round of  
16 summary judgment briefing.

17 THE COURT: I am not likely to do that.

18 MR. KREEGER: Our proposal was to give the court a  
19 summary judgment motion, along with the claim construction  
20 briefing. So if you agree with us on this, it has the  
21 potential to save work. If you find these terms  
22 indefinite, then the whole patents go away. That was the  
23 rationale for raising it, along with claim construction.

24 THE COURT: I am all for saving work. I am pretty  
25 much against adding pages.

1 MR. KREEGER: Should we not submit the motion?

2 THE COURT: You would have to convince me that you  
3 need extra pages for this particular issue. To be  
4 perfectly honest, if all eleven parties are going to write  
5 to me, think of the thousands of pages you can come up  
6 with.

7 MR. KREEGER: Your Honor, we might be able to work  
8 out an arrangement where this doesn't have pages, if  
9 that's the court's concern, present it without increasing  
10 the pages.

11 THE COURT: That would be nice.

12 MR. KREEGER: We will go back to that. Anything  
13 else?

14 MR. LETCHINGER: Your Honor, this is John  
15 Letchinger for Officemax on the phone. Sorry to  
16 interrupt. Just with respect to your Honor's comments  
17 about the motion to stay, is there a preferred method you  
18 would like us to use to advise you once we hear back from  
19 the office on the petitions.

20 THE COURT: Well, I have given you your whips to  
21 go through. You tell them, they tell me. Those are the  
22 folks that I talk to. You can decide, you know, what that  
23 means, in terms of renewing your motion to stay.

24 MR. LETCHINGER: Thank you.

25 THE COURT: I am looking for that information as

1 to when they accept them, which ones they accept, before  
2 we are going to stop anything.

3 MR. LETCHINGER: Thank you, your Honor.

4 MR. NELSON: One response to that. As your Honor  
5 is aware, it is common for a request to be granted. And,  
6 of course, we would like to be heard before the court  
7 makes any final decision on whether to stay the cases.

8 THE COURT: You already wrote to me on it. The  
9 only -- I am putting that fact in the mix. Because they  
10 accept them, doesn't mean I am going to stay them. It  
11 means I want to see how many they take, and in what  
12 combinations they take.

13 MR. NELSON: Thank you, your Honor.

14 THE COURT: Don't assume that because they take  
15 them, you are going to get a stay. I just need that  
16 information. I am not going to do anything with this,  
17 because I don't think it is ripe. You show me the goods,  
18 and then I will make the decision.

19 Okay? Have a good evening.

20 (Adjourned)

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**CERTIFICATE**

I, Barry L. Fanning, Official Court Reporter, do hereby certify that the foregoing transcript is true and correct.

S/Barry L. Fanning

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Barry L. Fanning