Pages 1 - 15

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

BEFORE THE HONORABLE WILLIAM H. ALSUP

ALIBABA.COM HONG KONG LIMITED, a Hong Kong corporation, and ALIBABA.COM, INC., a Delaware corporation,	)	
Plaintiffs,	)	
vs.	)	NO. C 10-04457 WHA
P.S. PRODUCTS, IC., an Arkansas corporation, and BILLY PENNINGTON, an individual,	)	
Defendants.	)	San Francisco, California Thursday May 10, 2012 2:08 p.m.

TRANSCRIPT OF PROCEEDINGS

APPEARANCES:

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Reported by: Lydia Zinn, CSR #9223, RPR, CRR
Official Reporter - U. S. District Court

THE COURT: Please be seated. Okay. I need to ask everyone to make their main points, because time is short.

Alibaba versus P.S. Products, Inc. Each side has about ten minutes, at most. So please make your main point.

MR. WOO: Thank you, your Honor. Darryl Woo, Fenwick & West, on behalf of Alibaba.com Hong Kong, Limited, and Alibaba.com, Inc.

I apologize for my voice, your Honor. I woke up this morning with laryngitis.

MR. STEWART: Good morning, your Honor. Chris Stewart, on behalf of Defendants P.S. Products; Mr. Billy Pennington. And this is Mr. Billy Pennington here in the courtroom today.

THE COURT: Welcome, again, Mr. Pennington. Please have a seat.

This is a motion by Defendant. Right?

MR. WOO: It's our motion, your Honor.

THE COURT: Yes.

MR. WOO: Yes.

THE COURT: All right. Please go ahead.

MR. WOO: Thank you, your Honor. We brought this motion after the close of discovery, because there's been no evidence of any direct or indirect infringement.

It's undisputed that our clients -- my clients -- never take possession or title to the accused stun-gun

products. And the idea of that posting -- a lot of third parties to post advertisements for those products that our website does not constitute any kind of direct infringement.

As far as inducements of infringement, there is no affirmative act with specific intent to infringe. There's been no evidence of any intent.

P.S. Products points to our activities at trade shows, but there's no evidence that we do anything to promote products at those trade shows. All we do is promote our website and use of our website for other people to use.

They point to visits to factories. There's no evidence that we visited any of the stun-gun factories that are accused of making the infringing goods. There's been no evidence of any communications with the factories that make the infringing goods.

THE COURT: How does your website make money?

MR. WOO: We make money by getting people to signed up as members of our website, and posting products on their -- on our website.

THE COURT: So is the company and whoever makes these infringing goods -- are they a member?

MR. WOO: There's no evidence that that -- the companies are actually members.

THE COURT: Well, does that mean there's no evidence that's in the record, or no evidence?

You're not answering my question.

MR. WOO: Well, so --

THE COURT: Are they members, or not?

MR. WOO: Well, they could be free members. Yes, they could be free members. They would have to be members to post their goods on the site, but -- but just because they're members doesn't make our clients inducing infringement, because there's no -- you need an affirmative act with specific intent to infringe, which requires that we know about the infringement; we know about -- the fact that they're making infringing goods.

There's no evidence that we have any of that kind of knowledge.

All that PSP points to is our attendance at trade shows where we promote the website use and membership. And they point to factory visits, but none of the factories that we visited were the stun-gun makers. So there's absolutely no evidence of that.

They point -- they articulate some kind of theory of willful blindness, but it's hard to tell from their papers what they're really saying in that regard; but that requires a deliberate action to avoid learning of a specific -- of a fact that -- of infringement. And we -- there's no evidence of that.

If you look at the time line in this case,

your Honor, they give gave us notice of the -- of patents in about January of 2010. We -- at the time they first gave us notice, there was no indication of what they were complaining about, other than the patents.

They didn't give us notice of what links there were, or what -- who was making -- who was allegedly selling the products.

We said,

"Well, use our system."

We have a system whereby we -- that you can complain to us. And we'll take down infringing -- listings of infringing goods.

They sent us back a message saying,

"Please be advised that my client will not be filling out any forms provided by you."

And they gave us two screenshots of products that they alleged to infringe. And they said,

"These are the two -- the two website screenshots of products offered by you that infringe."

So we investigated. We looked into this. We sent notices to the two web -- the two makers of those products.

They didn't respond back. So, in accordance with our IPR policy, we took down those links. And then we never heard

from them again, until they filed the complaint in Arkansas.

So there's -- just to the contrary of the cases that hold liability for secondary infringement, where people know about the infringement, and promote it, there's just the opposite of that here. We asked for the notice of infringement. They gave us two notices. We never found out about any other notices until they filed suit. And so there's nothing to suggest any kind of willful blindness, whatsoever.

And then they filed suit and, through that notice, supplied us with additional allegedly infringing links. We took those down, as well, following our procedures. And then that case got dismissed on jurisdictional grounds --

THE COURT: All right. All right.

MR. WOO: -- et cetera.

THE COURT: Time is short. So tell me this. What is the most analogous and best decision -- not two cases; just one case -- you want to make sure I read before I make a ruling?

MR. WOO: Well, that would be the *Tiffany versus eBay* case, your Honor. In that case, you know, there was -- they -- eBay even knew about the fact that people were selling infringing goods; knock-off, counterfeit goods on their site. They warned against it; and yet there was no liability found, because they had takedown procedures. And they filed --

THE COURT: Was that a Federal Circuit decision?

MR. WOO: It's a Fed. Circuit decision.

MR. MARTON: Second Circuit.

MR. WOO: Second Circuit.

THE COURT: Was that a patent case? Was that some other kind of case?

MR. WOO: That was a trademark case.

There are no patent cases that are analogous here.

THE COURT: All right. Let me hear from the Plaintiff. I'm sorry. I guess it's the Defendants.

Good afternoon, your Honor. Thank you for the Court's time. It's a pleasure to be here today.

Quickly, your Honor, there are material facts in dispute. And, as we know, they are viewed in the light most favorable to my client. They do make money other than members' fees off of products that are sold on their websites. I want to point you to Exhibit 16 to my affidavit.

I would like to point you to Cindy Chao's (phonetic) deposition, page 62, where they specifically state that they received fees off the cost of the total transaction on the website Aliexpress.com. That is an offer to sell; and it is a sale. It is in direct violation of 271(a). My client has the exclusive right to sell these products.

The statute protects two types of people. One is importing, which could be the middleman, could be the distributor, or could be the manufacturer. They import them. They offer to sell. And the sell protects my client against

the person who actually transacts it; who actually make the money.

And they seem to think that because they don't possess the goods, they can't be found liable of patent infringement.

That makes no sense. Websites are a new form of store place. They are a storefront. You do not have to have a street. There are websites from, you know, Amazon, to eBay, to --

THE COURT: Well, tell me. Walk through the -- without embellishment and argumentation, walk through the way the -- for these particular products, how the transaction would have worked on the website.

MR. STEWART: Yes, sir. If -- they listed on Exhibit GG and Exhibit FF to Mr. Pennington's -- to his declaration, they list two products on Aliexpress.com. If you go to Aliexpress.com and you purchase a product, they place any moneys in an escrow service that they own, called "Alipay.com."

THE COURT: "They" being who?

MR. STEWART: Alibaba Hong Kong, Limited.

THE COURT: Who -- so wait. Let's say I'm living in -- I don't know -- Nebraska. And I tune into the website. And there, I see the accused product --

MR. STEWART: Yes, sir.

THE COURT: -- big as day.

Is that the way it's going to look? I mean, it's going to be a picture of the accused product?

MR. STEWART: Yes, sir. And I have two of them here.

THE COURT: Do you have a picture of the website, and what it would look like?

MR. STEWART: Yes, sir.

THE COURT: Show that to me, so I can --

MR. STEWART: Yes, sir.

THE COURT: What I'm trying to understand is the flow of the money. So show me. Show me what the website looks like. Let counsel see it.

(Whereupon a document was tendered to the Court)

THE CLERK: Here, counsel.

THE COURT: Let counsel see it.

MR. STEWART: Oh. I'm sorry.

(Whereupon a document was tendered to the Court).

THE COURT: For the record, what is it I'm looking at?

MR. STEWART: Your Honor, that is Exhibit FF. And it is a screenshot that -- that we printed out as an exhibit to our complaint of the infringing products. It was on August 27th, 2010. It was on Aliexpress.com. It is by the company, Guangzhou Zhi Cheng Industry Company, Limited.

And, your Honor, if you were to go to that website and you were to buy that, they own the escrow service.

THE COURT: It says, "Add to cart."

MR. STEWART: Yes, sir. You add it to cart. That is an offer to sell. And if you purchase that, that money goes into their escrow service. They own it. And they take a 3.09 commission from the transaction and sale of that product.

Then this company, who is the wholesaler and manufacturer -- they will drop ship it directly to you. Drop shipment's done by every major company in the world. They don't have to have a storefront. You can buy it anywhere, and they can send it directly to you.

We didn't know this until we deposed them; until we did our discovery.

In Exhibit 16, they show you that if you purchase a product on Aliexpress.com, you will pay a 3.09 percent on the total cost of the transaction.

Cindy Chung, in her deposition -- which is the senior finance director for Alibaba. We deposed her in Hong Kong. She called that a "commission." Your Honor, a commission is: You make money on a sale.

I mean, I'm a country boy, but a commission is: You sold it, and you're making your percentage.

That -- not only -- that's one. They don't have to sell that. If they just offer it to sell it, they're in violation of 271(a), and we get past summary judgment. And the jury can decide whether or not that's an offer to sell. Let

them -- that is a material --

THE COURT: What does 271 say, again?

MR. STEWART: Statute -- the statute of 271 says that you can -- you can offer it, make an offer to sell. You can sell, except as otherwise provided.

> "Whoever, without authority, makes, uses, offers to sell, or sells any patented invention within the United States or imports into the United States any patented invention during the term of the patent, therefore, infringes the patent."

Your Honor, I will concede that if they did not make a percentage on that -- they did not make a 3.09 percent commission on that, which they admit to in testimony of a deposition and information that they gave us -- we wouldn't have direct infringement. We didn't know that until discovery. I'm not making it up. They gave it to us.

And then when they sell it and somebody buys it --

THE COURT: How can that be? Because Counsel just told me they do not make money on it. The only way they make money is if there's a member. And he said this one was a free member. That's what he told me. And counsel would not misrepresent anything.

MR. STEWART: That's what I would believe, too.

From the discovery we did and we're presenting to

you, by their client's depositions and from the documents that they gave us, that says otherwise. And that is in the record. And that is part of our summary judgment.

THE COURT: This says, "Add to cart."

MR. STEWART: Then it's an offer to sell. That violates the statute. They don't have to buy it; they just have to make an offer to sell it.

THE COURT: All right. You sit down for a second.

This is an offer to sell.

MR. WOO: No, your Honor.

THE COURT: This is an offer to sell, all day along.

What kind of --

What do you mean: This is not?

Add to your cart. And you get 3 percent.

You told me a minute ago you didn't make any money on this.

MR. WOO: There are two websites. The website I was talking about was Alibaba.com.

THE COURT: Why didn't you mention this one?

MR. WOO: Well, it's -- your Honor, I didn't mention that one. I'm sorry. Aliexpress does not --

THE COURT: I depend on you lawyers to be honest with me.

MR. WOO: No, no --

THE COURT: You didn't reveal this. And you're going

to lose this motion on account of this.

MR. WOO: No, your Honor. They don't take title. The transaction --

THE COURT: I don't care about the taking title. Here you are with an infringing good, big as day. You're selling it on the Internet. You want to escape, because you don't take title, even though you're making money on it? You'll get to take this to the Federal Circuit. And maybe you'll win it.

Right here, you're going to lose this motion. And you should not have told me this --

MR. WOO: No.

THE COURT: You should have told me up front that add to the cart --

MR. WOO: Add to the cart is not an offer for sale, your Honor.

THE COURT: When it is in this courtroom, it is --

MR. WOO: It's not posted by our client.

THE COURT: -- unless you have a Federal Circuit case that says it's not.

MR. WOO: *DSU Medicals*, your Honor, says that.

THE COURT: I'm going to look at it.

MR. WOO: *DSU Medicals*. It says in order to induce infringement, you have to have knowledge of the infringing good; that it's infringing.

THE COURT: That's a fact question.

MR. WOO: It's not a fact question, because there's no evidence to the contrary.

THE COURT: They sent all of these messages, saying,

"You're infringing."

They sent you a copy of the patent.

And you sent them a form, saying,

"Fill out the form."

That's like when you call up the company, and you want to get a hold of a live person. They give you the run-around for the next 16 hours on the telephone, and/or send you a form: Fill out the form, and everything will be cool. I --

MR. WOO: They have to tell us at least where to find the infringing good. They finally told us. And then we took it down.

I mean, we don't have any control over the sellers. They post the listings. We have no control over what they post.

THE COURT: It will be for the jury to decide; won't it? That will be for the jury to decide: Whether or not you knew or you didn't know. Maybe you'll win. That's why we have juries.

MR. WOO: There's no evidence that --

THE COURT: Yes, there is evidence. There is

evidence. I've seen it. It's right here: Add it to the cart.

And he sent you letters, and a copy of the patent.

MR. WOO: But there's no way for us to know that that's infringing, your Honor, because they admit that they, themselves, post on the site. They, themselves, authorize other people to sell things on their -- on the website.

So there's no way for us to know whether it's a licensed product, an authorized product that's been sold.

THE COURT: I'm going to -- listen. I'm going to read what you have to say. I'm upset that you weren't honest with me. That's my view, anyway.

MR. WOO: I apologize, your Honor.

THE COURT: I'll excuse you, because you've got laryngitis. I want you to know you're not going to skip something like that by me. This guy may be from Arkansas. He's got as much right to justice in this courtroom as the big law firm in San Francisco.

MR. WOO: I totally understand. It slipped my mind about Aliexpress, but that was in our papers, front and center. We addressed it head on, your Honor. And there's no offer to sell --

THE COURT: All right.

MR. WOO: -- when it's not our posting.

THE COURT: Thank you. It's under submission.

(At 2:26 p.m. the proceedings were adjourned)

CERTIFICATE OF REPORTER

I, LYDIA ZINN, Official Reporter for the United States Court, Northern District of California, hereby certify that the foregoing proceedings in C.10-04457 WHA, Alibaba.com Hong Kong Limited, et al., v. P.S. Products, Inc., et al., were reported by me, a certified shorthand reporter, and were thereafter transcribed under my direction into typewriting; that the foregoing is a full, complete and true record of said proceedings as bound by me at the time of filing.

The validity of the reporter's certification of said transcript may be void upon disassembly and/or removal from the court file.

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/s/ Lydia Zinn, CSR 9223, RPR

Friday, May 11, 2012