IN THE UNITED STATES DISTRICT COURT

IN AND FOR THE DISTRICT OF DELAWARE

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ENOVA TECHNOLOGY CORPORATION,	:	CIVIL ACTION
Plaintiff,	:	
v.	:	
INITIO CORPORATION, INITIO CORPORATION (California), WESTERN DIGITAL CORPORATION, BUFFALO, INC., and BUFFALO TECHNOLOGY (USA) INC.,	:	
Defendants.	:	NO. 10-04 (LPS)

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Wilmington, Delaware
Wednesday, December 22, 2010
TELEPHONE CONFERENCE

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BEFORE: HONORABLE LEONARD P. STARK, U.S.D.C.J.

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APPEARANCES:

ASHBY & GEDDES, P.A.
BY: TIFFANY GEYER LYDON, ESQ.

and

FENWICK & WEST, LLP
BY: DARRYL M. WOO, ESQ.,
THEIS FINLEV, ESQ., and
PHILLIP HAACK, ESQ.
(San Francisco, California)

Counsel for Enova Technology Corporation

Brian P. Gaffigan
Official Court Reporter

APPEARANCES (Continued):

CONNOLLY BOVE LODGE & HUTZ, LLP
BY: FRANCIS DiGIOVANNI, ESQ.

and

CONNOLLY BOVE LODGE & HUTZ, LLP
BY: SCOTT R. MILLER, ESQ., and
MANUEL C. NELSON, ESQ.
(Los Angeles, California)

Counsel for Initio Corporation, Initio Corporation (California), Western Digital Corporation, Buffalo, Inc., and Buffalo Technology (USA) Inc.

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P R O C E E D I N G S

(REPORTER'S NOTE: The following telephone conference was held in chambers, beginning at 10:33 a.m.)

THE COURT: Good morning, everybody. This is Judge Stark. Who is there, please?

MS. LYDON: Good morning, your Honor. Tiffany Lydon on behalf of the plaintiff. I have on the line with me Darryl Woo, Theis Finlev and Phil Haack and Fenwick & West.

THE COURT: Okay. Good morning.

MR. WOO: Good morning.

MR. DiGIOVANNI: Good morning, your Honor. Frank DiGiovanni of Connolly Bove for the defendants. And

also of Connolly Bove, from our Los Angeles office, Scott Miller and Manuel Nelson.

THE COURT: Okay. And who will be speaking for the defendants?

MR. MILLER: This is Scott Miller. I will be primarily, your Honor.

THE COURT: All right. Is there anybody else that needs to identify themselves?

MR. WOO: No, your Honor. This is Darryl Woo of Fenwick & West. I'll be speaking for the record.

THE COURT: For the record, this is the case of Enova Technology Corporation versus Initio Corporation, et al, Civil Action No. 10-4-LPS, and the purpose of today's call is to discuss scheduling in this matter.

I have reviewed the proposed schedule, and there were only two matters in dispute. Generally, what the parties propose is for the most part okay. Let me give you a little bit of background and then I'll want to hear from each side and then I'll tell you what we're going to do.

The one thing that concerns me is I generally don't enter schedules that have open-ended time frames along the lines of expert testimony is due X number of days after the Court issues its ruling on claim construction. Normally, I make you put an actual date in there.

In this case, if both parties really do prefer

to have it open-ended like that, then what I would do is keep your time frames but I would not schedule the pretrial conference or trial, since I don't know when the Markman opinion will come out.

So option A would be you all tell me just schedule it through the filing of case dispositive motions and then you can keep your open-ended dates. Option B, however, would be if you want to keep your September 2012 trial date, which is a date that I can give you. You would need to agree and put in the order that case dispositive motions are due by April 20th, 2012. And you would have to recognize the possibility that you may be doing expert discovery and even case dispositive motions before we get a final Markman opinion out.

So in the comments that you are about to make, give me an idea, if you know already, whether you would prefer option A or option B and also feel free to address the couple issues that are in dispute between the parties.

With that, let me turn it over to Mr. Woo.

MR. WOO: Thank you, your Honor.

Well, our preference would be to have a date certain or as reasonably certain as possible for trial, so I would prefer that be set at this time. I think the parties can work towards meeting all the other deadlines even if we did not have the Markman results in time for expert

discovery, dispositive motions. That has not been a barrier in the past in this District where parties have done that, none of those procedures with alternative constructions in mind. I don't see that being much of a barrier to us or a disadvantage to us than an open-ended, non-setting of the trial date.

At this point, my client is a lot smaller than the defendants in this case and they are being hurt in the marketplace and they really would need or would like to have the September 2012 trial date as a date certain.

As for the other issues that are open, I think we're mostly in agreement on everything except for the deadline for joinder of parties or amendment, supplementation of the pleadings. And I think the delta there is about two to two and-a-half months, and we propose a slightly later one of April 18, 2011 versus defendants' proposal of February 1, 2011.

The main reason for that on our part is because there are foreign defendants in this case, foreign witnesses, some of whom are located in Japan. And I'm expecting that we will have to go through the lengthier procedures to take that discovery. We may not but there is a little bit of lead time involved if that is required.

I believe the other issue is that we are in agreement that testimony that has to be given through an

interpreter will receive double the usual seven hours time, but the defendants want, in addition to that, to basically double the time for inventor and prosecuting attorney depositions, and we feel that would be excessive and it should be taken up on a case-by-case basis, if at all, if that can't be worked out, because if, for example, an inventor is a non-English speaking witness, already that's two days of deposition. And if we let them automatically have double that, that is four days worth of depositions for a single inventor which I think is very excessive.

And if there are any other issues, I'd be pleased to address them.

THE COURT: I think you covered them all.

Let me hear from Mr. Miller now, please.

MR. MILLER: Good morning, your Honor. Let me address I guess the schedule first.

I think that, obviously, we're interested in efficiency as much as we can and are concerned about what happens with ETS trying to do summary adjudication motions with unresolved claim construction, and the date you put out, the April 20th date, I think would presume, if the other schedule is to remain intact, that we would get a Markman ruling approximately 45 days after the hearing. I don't know what your Honor's schedule is like in terms of how quickly you are able to get those out and, obviously,

you can't prognosticate the future in terms of how long it would take.

We had looked at, from our own scheduling standpoint, that if we had a 60-day window for expectation of receipt of that, we'd have dispositive motions being filed in early May and that would still allow the rest of the schedule to stay pretty much intact.

You know, we are not opposed to having a fixed trial, but we're also not opposed to -- we'd rather have a floating trial date and be more efficient getting things done than have a date that is picked at random in September at this point where we might have very likelihood of increased inefficiencies.

I sympathize with Mr. Wu's point of having a client that is smaller. I would think he would also want to have the greater efficiency of having the knowledge of the claim construction to be able to move forward more directly and completely, that would be the best for all parties in terms of how we're going to present these matters to the Court for determination.

So I think we would prefer to have the efficiency over the artificial date of picking the trial date at this point but understand that if that is where you are going to go, then I guess we would suggest the case dispositive motions be pushed to early May which would give

your Honor approximately a 60-day window. Like May 4th, that Friday, would give your Honor about a 60-day window to issue the claim construction, and the rest the dates would trail consistently as the parties have identified.

With regard to the issue concerning motions to join other parties. The problem with the April date, that if we have a motion to join other parties brought or file a new claim, for example, that motion isn't going to get heard until late -- mid-to-late May at the earliest, and we have claim construction issue identification due in late June, and we're going to end up cramping the schedule, I'm afraid, if we end up with, for example, a whole new patent added.

We know there is a continuation in part that is about to issue that is related to these patents. If the expectation is to bring that in and wait until the end of April to do it, we think that would adversely impact the schedule, and we would prefer to have that resolved in early -- if we are solve the motions in early February, they would get decided in March, we would expect, and that would then still allow us to have the time to investigate this new patent, for example, if that is what is going to come in.

I'm not sure exactly what happens on a motion to amend, for example, under Exergen where we may have to amend after taking discovery to add in additional facts for inequitable conduct. I don't know whether the February 1 or

April 18th date would be a hard cutoff for being able to do that as well or whether this is a time we would have a right to file that amendment and, after that, we would need to show good cause. It wasn't 100 percent clear to me from the court order, but I presume that is what you were thinking, although I don't think it explicitly says that.

With regard to the inventor and attorney issue for the length of the deposition. First off, the extended time for use of interpreter, I don't know if your Honor sat through -- I'm sure you have sat through testimony with an interpreter. You can appreciate the fact that it takes twice as long or sometimes more than twice as long, especially if you have a check interpreter involved to obtain the testimony. So the extension for use of an interpreter is merely something that puts you back on equal footing with a normally English speaking witness.

What we have asked for is that there is one inventor common to both patents, and there is the patent prosecutor who is common to both patents that are in suit today. What we ask is for those particular two persons that we be allowed to have more than one day because of the importance obviously of their testimony.

We don't have a desire or intention to waste time or to hold these people up for extended periods of time, but we do think that it's fair that in the case of

that one inventor who is common to both patents and the patent prosecutor who is common to both patents -- there is a number of other inventors who are only on one patent and those would not be affected by this, but as to those two individuals, we would like to have additional time to be able to cover the subject matter of their testimony because of the importance, obviously, they can bring to this case.

I think that hit all the issues. If you have any other questions or would like to hear anything else, I would be happy to discuss it.

THE COURT: No, I think you covered it all. Mr. Woo, do you have any brief response you would wish to make?

MR. WOO: Not really. I think we outlined our positions. And it seems to me that there is one common inventor to both. You wouldn't to tell the same story of the invention two times. I think, if I am recalling this case correctly, the specification is either common or certainly the development story is the same. So I don't see the real need to have double the number of hours for his deposition.

THE COURT: Okay. Thank you, counsel.

Here is what we're going to do. I'm going to have you all submit to me a revised proposed order by a week from today. And I'm going to tell you some of what is going

to be in it, and you may have to meet and confer with respect to certain other interim dates. And I'll leave that to you all in the first instance.

If you have any disputes, which I don't think you will, but if you do, just put the competing positions in the new proposal as you did this time around.

I am going to go ahead and give you the September trial date that you asked for and have you convert this order into one in which there are fixed dates.

I understand both the plaintiff's desire to get to trial and have a date certain for trial and also the countervailing concern about efficiency, but in this case, to the extent there is any conflict between those two, I side with the desire for a certain trial date. That is, as I understand it and as requested, in the plaintiff's interest but it's also in the Court's interest to have fixed dates on its calender and makes it easier for us to make sure we're keeping track of all the many cases we have and giving each case the attention it needs as it comes along.

As all counsel know, it's not that uncommon in this District for parties to have to do expert discovery and brief case dispositive motions without knowing what the claim construction is going to be. And while I certainly will be having a relatively early Markman hearing, as you request, and will take the Markman issues under advisement

and will get you a Markman ruling as soon as we can, if it turns out that you have to go through expert discovery and case dispositive motions without knowing our claim construction, that does sometimes happen but the fear of that does not outweigh the desire for a trial.

Let me go specifically through your proposal and tell you what I expect to see in the new version next week.

Paragraph 2, with respect to joinder of other parties, I'm going to give you all until the April 18th, 2011 date as requested by the plaintiffs.

All parties, but particularly the plaintiff, should understand while you may have a right to amend the pleadings and join other parties up through April 18th, 2011, if you do something that completely transforms or expands this case, and the defendants say that the schedule that was imposed today, based on what this case is today, is no longer a tenable viable schedule, then I will certainly listen to that argument and may have to give defendants some scheduling relief. But I think there is good cause for giving the April 18th date at this time and hope and believe that will not be taken advantage of in a way that threatens the rest of the schedule.

At paragraph 3a on the limitation on hours for deposition discovery, I agree with the defendants on this one. Each side is going to have the limited number of total

hours overall for deposition testimony. So I don't expect that either side, and particularly defendants, is going to waste any of that time by overdoing it with the prosecuting attorney or the common inventors. But if they find in good faith that they need the full 14 hours for those individuals and they think that is the best use of a portion of their overall deposition time, then they may do so.

My next comments are not until paragraph 3d on disclosure of expert testimony. Again, you are going to convert all of these into actual dates, but I do want you to add in there at paragraph 3d something to the effect of no additional expert reports may be filed without either consent of all parties or leave of the Court.

Then at paragraph 5, where you have papers filed under seal, when you file papers under seal, you should deliver to the clerk an original and two copies of the papers and also add that we expect two courtesy copies of all briefs to be provided regardless of whether of whether the briefs are filed under seal.

At paragraph 8, we're not going to have a status conference so you can cross out paragraph 8.

Now I'm at paragraph 13. The hearing on claim construction will begin at 10:00 a.m. on September 21st, 2011. And that's for the Court to hear argument on claim construction. If either party intends to present evidence

at the claim construction hearing, you will have to give notice of that to the other side and to the Court no later than 20 days before the hearing.

Pretrial conference, paragraph 15, will be on August 20th, 2012.

The proposed final pretrial order will be due on August 10th, 2012. And,

Finally, paragraph 18, we will schedule this matter for a 10-day jury trial beginning on September 10th, 2012; and counsel should plan on each side being allocated 20 hours as opposed to 24 hours to present their case.

I don't want to have any more argument, but I want to make sure I've been heard and I've been clear.

Any questions, Mr. Woo?

MR. WOO: No, your Honor. Thank you very much.

THE COURT: Okay. Mr. Miller?

MR. MILLER: I only have one question. It's not an argument. It's just a point, if I could raise it, your Honor.

THE COURT: Okay.

MR. MILLER: On the scheduling of the pretrial conference. We have had a large gap there by agreement because my daughter is graduating from high school that year, and I was hoping to be able to go off on a two and-a-half to three week trip with her before she gets off to college

and get her off to college, so we had actually built in time for that to occur in August. I don't know whether the Court's calender is such that we could still accommodate that or not.

THE COURT: I'm sure we can. Obviously, I didn't know the reasoning behind that, and generally we'd prefer to have the pretrial conference closer to the trial; but if plaintiff is willing to accommodate that, I certainly am.

I don't know offhand if your July 16th date works for me, but we will put in a date some time in July for you. Would that work?

MR. MILLER: That would be fine with me, if Mr. Woo is still in agreement. Thank you, your Honor.

MR. WOO: Yes, that is fine.

THE COURT: Okay. We'll find a July pretrial date for you.

Is there anything further, Mr. Miller?

MR. MILLER: No, that's it, your Honor.

THE COURT: Okay. Thank you all very much. Good-bye.

(The attorneys respond, "Thank you, your Honor.")