

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
BEFORE THE HONORABLE JEFFREY S. WHITE, JUDGE

ROBERT JACOBSEN,)
)
Plaintiff,)
)
v.)
)
MATTHEW KATZER, ET AL.,)
)
Defendants.)
_____)

NO. C 06-1905 JSW

San Francisco, California
Friday, August 29, 2008

TRANSCRIPT OF PROCEEDINGS

APPEARANCES:

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Reported By: BELLE BALL, CSR, RMR, CRR
Official Reporter

1 **FRIDAY, AUGUST 29, 2008**

2 **1:33 P.M.**

3 **P R O C E E D I N G S**

4 **THE CLERK:** Calling Case No. C 06-1905, Robert
5 Jacobsen versus Matthew Katzer.

6 Counsel, please come to the podium and state your
7 appearances.

8 **MS. HALL:** Victoria Hall for Plaintiff, Robert
9 Jacobsen.

10 **THE COURT:** Good afternoon.

11 **MR. JERGER:** Scott Jerger representing Matthew Katzer
12 and Kamind Associates, Incorporated.

13 **THE COURT:** Good afternoon. All right, so I read
14 your joint status conference statement. And there are -- I
15 just want to make sure that there are three majors issues --
16 not three major issues, three major -- three motions that the
17 Court needs to deal with.

18 One is the motion to dismiss, essentially for lack of
19 jurisdiction, is that correct?

20 **MR. JERGER:** That's correct, Your Honor. Third
21 motion to dismiss addresses the three patent declaratory
22 actions. And we filed a motion to dismiss those as moot, based
23 on the fact that we filed a disclaimer of that patent.

24 **THE COURT:** All right. And the second one is the
25 motion, basically a motion to dismiss on the merits, failure to

1 state a claim, is that correct?

2 **MR. JERGER:** Correct. The fourth motion to dismiss
3 has -- I think, seeks to dismiss for failure to state a claim,
4 three causes of action.

5 One, the Digital Millennium Copyright Act claim; two,
6 the breach-of-contract claim, and the -- the third issue there
7 isn't --

8 **THE COURT:** I'm just trying to tee up the motions
9 that are pending. I'm not trying to get into the details.

10 **MR. JERGER:** Yes.

11 **MS. HALL:** The third motion to dismiss is to dismiss
12 DMCA contract, and striking. The fourth motion to dismiss
13 relates to the patent declaratory judgment.

14 **THE COURT:** Right. And then the -- and then the --
15 so I group them together as two motions to dismiss with all the
16 issues that Counsel's mentioning.

17 And then the third motion is the -- the motion for a
18 preliminary -- Plaintiff's motion for preliminary injunction,
19 which is back in play in light of the opinion of the Federal
20 Circuit. Correct?

21 **MR. JERGER:** Correct, Your Honor.

22 **THE COURT:** All right. So, putting aside the
23 question of the -- the surreply that the Plaintiff has filed,
24 are those -- the motions to dismiss, essentially -- well, let
25 me go back.

1 With respect to one of the motions to dismiss,
2 there's no dispute that they're fully briefed and ripe for
3 decision, correct?

4 **MR. JERGER:** That's correct, Your Honor.

5 **THE COURT:** Do you agree with that?

6 **MS. HALL:** Yes.

7 **THE COURT:** That is Motion No. 1. Now, the second
8 motion, there's a dispute about whether it's fully briefed
9 because the Plaintiff filed a surreply, which the Defendant
10 characterizes as a motion to reconsider, correct?

11 **MR. JERGER:** That's correct, Your Honor.

12 **THE COURT:** And you filed the surreply, right?

13 **MS. HALL:** Yes, de- -- Yes.

14 **THE COURT:** So, and then, although there's a dispute
15 about it with respect to the Plaintiff's motion for preliminary
16 injunction, the Federal Circuit had remanded with instructions
17 to deal with issues that the Court felt it didn't need to deal
18 with, at least in the District Court level, correct?

19 **MR. JERGER:** That's correct, Your Honor.

20 **THE COURT:** Do you agree with that?

21 **MS. HALL:** Yes.

22 **THE COURT:** All right. So, here's what I'm going to
23 propose. I'll sort of cut to the chase here.

24 I propose that we have a hearing essentially on
25 December 19th, and I will decide -- I will hear, and

1 thereafter, shortly thereafter, decide all of the pending
2 motions after that hearing. So we will do it, we'll have a
3 Jacobsen versus Katzer day, if you will, or morning, anyway.
4 And again, this is my proposal, and I'm going to hear why I
5 shouldn't do it that way.

6 So, that will be all the motions. And then I would
7 set a briefing schedule with respect to the motion to dismiss,
8 for which -- at least the Defendant claims is not fully
9 briefed, and the Plaintiff claims is fully briefed, have a
10 briefing schedule on that motion, just relating to the --
11 the -- what is called the surreply. Give you an opportunity to
12 respond, give them another opportunity, and then that case will
13 be at issue.

14 And then have a briefing schedule also with respect
15 to the preliminary injunction, so that the parties will file
16 what the Federal Circuit has directed this Court to consider,
17 and then the Court can decide that whole ball of wax.

18 So, as a concept, is there any objection to following
19 that procedure?

20 **MS. HALL:** No. You will issue a briefing schedule?

21 **THE COURT:** I'm about to do that. But, first things
22 first.

23 **MS. HALL:** Yes.

24 **THE COURT:** I'm going to do that right now -- that's
25 going to be the next order of business. But, do you agree with

1 that concept?

2 **MS. HALL:** Yes.

3 **THE COURT:** And do you?

4 **MR. JERGER:** I do agree with that concept. I do have
5 one clarification question.

6 Will that hearing on the 19th be an evidentiary
7 hearing? Or will the preliminary injunction be decided on the
8 declarations that will be submitted during the --

9 **THE COURT:** I would say -- I don't know, but
10 presumptively, it would be on the declarations. I mean, it's a
11 rare -- in this Court and in this Circuit, it's rarely required
12 that you have an evidentiary hearing. I don't know that I've
13 ever had one. Because usually, the parties file their evidence
14 with respect to -- to support or oppose the motion with their
15 briefing papers.

16 So, it's conceivable that based upon the papers
17 filed, I will decide -- you will ask, and I will decide,
18 ultimately, whether we need an evidentiary hearing, and I'll
19 issue an order to that effect.

20 But presumably I will not have an evidentiary
21 hearing, unless there are matters of credibility that cannot be
22 decided through the papers. And I've rarely had one of those.
23 I've never had one occur. And it's not required by the Rules.

24 So, here's what I thought as far as the -- oh, and
25 there's something else I would like to have done, which will

1 not in any way prejudice the parties, but I think it's the best
2 way to get everything together and everything decided, and it
3 also has an effect on the administrative management of this
4 case, is I would like to get a clean -- because there's a
5 dispute about what -- even discussing it in your papers, what
6 motions you're actually briefing and what the Court's going to
7 be deciding, what I would like the parties to do, Defendants
8 vis-a-vis their motions to dismiss, the Plaintiff vis-a-vis his
9 motion for preliminary injunction, is to essentially file a
10 document that withdraws those motions and renotices them for
11 the December 19th date. So that I'll have one clean notice of
12 motion, and I'll have in one place what relief the parties are
13 asking for on which motions.

14 In the case of the Plaintiff, to the -- on the motion
15 for preliminary injunction, it may simply be the finding that
16 I'm being asked to make by the Federal Circuit. In your case,
17 I'll know exactly what your client is asking me to do, on what
18 pleadings.

19 So I want -- and again, this is just a document
20 entitled "Withdrawal of Motion to Dismiss" or "Motions,"
21 properly identified, a motion for preliminary injunction, and
22 renotice of those same motions. So I'll have a clean
23 superseding docket entry. And then I'll decide those motions
24 in December.

25 **MR. JERGER:** And that new docket entry will not

1 contain any of the prior briefing.

2 **THE COURT:** Correct.

3 **MS. HALL:** Okay.

4 **THE COURT:** In other words, whatever briefing I'm
5 giving you now will be -- in other words, this is not an
6 opportunity for both sides to file new motions. Additional --
7 it's an opportunity to clarify essentially the status of what
8 you're asking for.

9 I'm still going to give you a further briefing
10 schedule, but you don't have to go through the exercise of
11 resubmitting briefs that you have already submitted, just
12 because I've directed you to file this renote.

13 And, could -- from the Defendants' standpoint, how
14 long will it take you to do that, file that administrative
15 notice?

16 **MR. JERGER:** We can file that on Monday.

17 **THE COURT:** Well, Monday is a holiday, so there won't
18 be -- I guess you could, on Monday. Does ECF work on Monday?

19 **THE CLERK:** It works 24-7, Your Honor.

20 **MR. JERGER:** I actually won't be in the office, so I
21 would prefer to file it on Tuesday.

22 **THE COURT:** I'll give you a week from today, how's
23 that? I'll give you more time.

24 **MR. JERGER:** That's fine.

25 **THE COURT:** Is that timing acceptable to you?

1 **MS. HALL:** Yes, it is.

2 **THE COURT:** Very well. As far as the briefing
3 schedule is concerned, the -- the first -- I'm going to go
4 along largely with the briefing schedule that the --
5 Plaintiff -- that the Plaintiff has proposed on Page 7, because
6 that gets us to December 19th for the hearing.

7 So, you have the dates that are set out for the
8 Plaintiff's submitting its supplemental memorandum, and the
9 opposition, and the reply. And it says "evidentiary hearing,"
10 but again that's an advised -- it may just be a hearing, it may
11 not be an evidentiary hearing.

12 So, from the Plaintiff's perspective, is that an
13 acceptable schedule?

14 **MS. HALL:** Is November 21st the day after
15 Thanksgiving?

16 **THE COURT:** I will ask Ms. Ottolini.

17 **THE CLERK:** No, it's the Friday -- wait a minute.

18 **THE COURT:** The Friday before?

19 **THE CLERK:** I'm --

20 **THE COURT:** All right.

21 **THE CLERK:** One moment. It's the Friday before.

22 **MS. HALL:** Okay.

23 **THE COURT:** All right. So, is the schedule
24 acceptable?

25 **MS. HALL:** Oh, yes.

1 **THE COURT:** And to the Defendant?

2 **MR. JERGER:** This is acceptable. So the only change
3 from our -- the Defendants' briefing schedule on Page 7 would
4 be that the hearing would occur on December 19th, instead of
5 December 13th?

6 **THE COURT:** Yes, correct, December 19th for the
7 hearing. And then the same thing with respect to the
8 docket number -- I'll call it Docket No. 226, which is the
9 second surreply.

10 And, I'm not going to have any quibbling at this
11 point about what it's called. We'll say the Plaintiff filed a
12 motion which was entitled "Second Surreply," and I will give
13 the Defendants and Kevin Russell the opportunity, as they
14 request, on October 10th to file any memorandum in opposition
15 to it.

16 And again, I don't want to quibble about whether it's
17 a motion for reconsideration. Just respond to it on the
18 merits -- on the legal merits. All right?

19 **MR. JERGER:** Sorry, another quick note of
20 clarification. You mentioned October 10th, and that's in that
21 second briefing schedule on Page 8, so would -- would we be
22 following this separate --

23 **THE COURT:** Yes.

24 **MR. JERGER:** -- schedule? Okay.

25 **THE COURT:** Exactly.

1 **MR. JERGER:** Okay.

2 **THE COURT:** Because it's all -- the method to the
3 Court's madness is it all leads to -- all roads lead to
4 December 19th.

5 Yes, Ms. Hall?

6 **MS. HALL:** Yes. If we were going to withdraw motions
7 and withdraw oppositions, I was going to withdraw that surreply
8 and incorporate it in the new opposition.

9 **THE COURT:** Fine. I don't really care. I don't
10 really care.

11 **MS. HALL:** Okay. So if it's withdrawn, then there's
12 no need to have the briefing schedule for them to respond to
13 it.

14 **THE COURT:** No, no, no. It's only withdrawn as a
15 purely administrative matter. You're going to really
16 complicate things.

17 I want you to think of them as almost two separate
18 exercises -- it's totally administrative -- is to refile --
19 file the amended notice, the superseding notice. And then just
20 do this briefing schedule with respect to the briefs that are
21 now pending.

22 So, in other words, the surreply -- or the second
23 surreply will be deemed -- it is filed, it will be -- the Court
24 will consider it, that's what you wanted me to do, so I'm
25 accepting that for filing.

1 And now we're going to -- so, after accepting that
2 for filing, I'm going to give the other side a chance to
3 respond. And I'll give you the last word on that point.

4 **MS. HALL:** The -- the way I -- this is the way I
5 envisioned it. Perhaps you can correct me if I'm wrong.

6 They would file their motion to dismiss the three
7 declaratory judgments, based on the law that they have. I
8 would file an opposition, which would now include this argument
9 and the surreply, since I'm withdrawing this surreply. And
10 then they would reply, at that point.

11 But I don't see where -- we are not filing a motion
12 for reconsideration for anti-SLAPP, yet.

13 **THE COURT:** All right. Well, what about that? Would
14 that be -- because we're talking about, really, the same
15 documents, just packaged in a different format. Because I'm
16 going to give -- the way it works, I'm giving them the last
17 word anyway, so what Ms. Hall said sounds logical to me.

18 **MR. JERGER:** I guess I'm a little confused. I
19 understood what she would -- I understood her to say she wants
20 us to rebrief --

21 **THE COURT:** No.

22 **MR. JERGER:** -- our motions to dismiss.

23 **THE COURT:** No, no, no, no, no. No.

24 **MR. JERGER:** And I think all we want to do is respond
25 to the second surreply.

1 **MS. HALL:** And they can do that in their reply.

2 **MR. JERGER:** However that happens.

3 **THE COURT:** Wait a minute. Wait, wait. You file
4 your motion, your amended motion, you rely on the existing
5 briefing.

6 **MR. JERGER:** Correct.

7 **THE COURT:** All right. You will then respond. Now,
8 they're going to be the moving party. And that will include
9 whatever arguments you want to make in your surreply.

10 **MS. HALL:** Exactly.

11 **THE COURT:** And then you will then get the last word,
12 because it's your motion.

13 **MR. JERGER:** So October 10th would be --

14 **THE COURT:** She was trying to help you.

15 **MR. JERGER:** Okay.

16 **MS. HALL:** It will save the Court from having to
17 review two sets of briefings.

18 **THE COURT:** Right. So, what I'm going to do is to
19 say, you'll file your papers, and we're going to have to -- we
20 will have to do it right away. You'll have to file your papers
21 next Friday. Because, again, the motion is the same motion
22 that you filed before. All right? So you file that motion,
23 you can incorporate the briefs by reference.

24 You're going to be filing your opposition by October
25 10th.

1 **MS. HALL:** I thought this was -- I thought I would be
2 filing, November 7th.

3 **THE COURT:** That's a different -- that's a
4 different -- you suggested an alternative plan. All right? I
5 was going off of what they proposed, which was to start with
6 the surreply.

7 You proposed, and I think it's a good idea, to have
8 them refile their motion with the same briefing.

9 **MS. HALL:** Yes.

10 **THE COURT:** So if they do that, --

11 **MS. HALL:** It was due October 3rd, based on the
12 schedule on Page 7.

13 **THE COURT:** The -- the -- the schedule on 7 is for
14 the preliminary injunction only.

15 **MS. HALL:** Oh, so we have two sets of dates, then?

16 **THE COURT:** Yes.

17 **MS. HALL:** Okay.

18 **THE COURT:** Two separate dates.

19 **MS. HALL:** Okay, all right. So motions to dismiss
20 will be based on the schedule on Page 8?

21 **THE COURT:** Exactly.

22 **MS. HALL:** All right.

23 **THE COURT:** Did you get that, too, Counsel?

24 **MR. JERGER:** I do, but I just want to clarify. I
25 think I understand it.

1 We will refile our motions to dismiss by next Friday.
2 Plaintiff will file a response on October 10th. We will file
3 our reply on November 7th. And the hearing will be on the same
4 date, December 19th.

5 **THE COURT:** Correct.

6 **MR. JERGER:** Okay.

7 **THE COURT:** And that is acceptable to you, Counsel?

8 **MS. HALL:** Let's see, next Friday is September 4th --

9 **THE CLERK:** 5th.

10 **MS. HALL:** -- 5th, and we oppose on the 10th, and
11 they reply on the 7th.

12 **THE COURT:** All right?

13 **MS. HALL:** Yes.

14 **THE COURT:** All right. Now, from the Court's
15 perspective, that resolves all -- I've tried to distill all the
16 disputes in your papers.

17 You can deal with whatever legal issues continue to
18 exist in the briefing. And I'll just resolve it all after
19 December the 19th.

20 **MS. HALL:** We -- we mentioned in our -- in our
21 section of the joint status conference statement that we were
22 planning on filing a motion for preliminary injunction, based
23 on DMCA. And I think that that motion will be filed next week.

24 **THE COURT:** All right. Well, again, I would like to
25 have that -- in addition to the one that's already pending, a

1 separate motion?

2 **MS. HALL:** Yes.

3 **THE COURT:** Can't that be incorporated into --

4 **MS. HALL:** Oh, yes, of course. I'll do that.

5 **THE COURT:** All right. If you wish to -- in the
6 briefing schedule I've given you, if you want to file a request
7 for additional relief or additional basis, go ahead and do it.

8 My job is to -- my idea is to minimize the briefing,
9 and optimize the use of the Court's time, and decide it all on
10 the 19th. All right?

11 **MS. HALL:** Sounds good.

12 **THE COURT:** All right. Okay, Counsel?

13 **MR. JERGER:** That sounds fine. So if Plaintiff does
14 file an additional motion for another preliminary injunction,
15 we will retain this same briefing schedule on that motion?

16 **THE COURT:** Correct. And I don't want to open up
17 another can of worms here, but by doing it this way, it will
18 resolve the whole issue and the Plaintiff's concern about
19 requiring the Defendant to file an answer. I can't do that
20 until I resolve the motion to dismiss.

21 Then whatever survives of the case after the motion
22 to dismiss and after I deal with the preliminary injunction,
23 then I'll issue appropriate orders with respect to the
24 requirement that the Defendants file an answer. And move this
25 case along.

1 And at that point, be prepared to discuss a possible
2 settlement of the case. All right? Fair enough?

3 **MS. HALL:** Yes.

4 **THE COURT:** All right. Thank you very much, Counsel.

5 **MR. JERGER:** Thank you.

6 **THE COURT:** Appreciate it.

7 (Conclusion of Proceedings)

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CERTIFICATE OF REPORTER

I, BELLE BALL, Official Reporter for the United States Court, Northern District of California, hereby certify that the foregoing proceedings in C 06-1905 JSW, Jacobsen v. Katzer, 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.

_____/S/ Belle Ball_____

Belle Ball, CSR 8785, CRR, RMR

Monday, September 22, 2008