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BLOG

Judge Albright Allows Plains To Use Trespass Analogy but Precludes Theft Arguments, and Other Rulings on Motions *in Limine*

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With trial kicking off this week in *Freshub, Inc. et al. v. Amazon.Com Inc. et al.*, Judge Albright ruled on the parties' motions *in limine*. *See* Order Regarding Motions *In Limine*, 6:21-CV-00511-ADA (June 13, 2020 W.D. Tex.).

The Court granted Freshub's motions to:

- exclude evidence or argument regarding non-infringing alternatives or design-arounds;
- exclude "keyword sales" data—a category of sales data relevant to damages;
- preclude Amazon from presenting its inequitable conduct defense to the jury because it is an equitable defense decided by the court; and
- preclude Amazon from referencing the absence of the three named inventors located outside the United States.

The Court denied Freshub's motions to:

- exclude discussion of Amazon's own patents;
- exclude discussions of Freshub's experts' opinions in other litigations;
- preclude Amazon from referencing Freshub's filing of continuation applications after the Accused Products were released; and
- preclude Amazon from referencing the absence of the one named inventor located in the United States.

The Court granted Amazon's motions to:

- preclude Freshub from referencing "stealing" by defendants;
- preclude Freshub from referencing non-instituted IPRs; and
- exclude Alexa privacy issues or suggestions that Amazon is recording or spying on its customers.

The Court denied Amazon's motions to:

- preclude Freshub from referencing “tresspass” by defendants;
- exclude discussion of the relative size of the parties (the parties may discuss only what is necessary for the hypothetical negotiation and nothing more (e.g., discuss Amazon’s ability to pay for lawyers)); and
- preclude Freshub from referencing the presumption of patent validity.

Many of the motions *in limine* filed in Judge Albright’s Court remain under seal or are heavily redacted. But in a few instances, Judge Albright has granted motions to exclude testimony that does not conform to the Court’s claim construction order. In *VLSI v. Intel*, the Court granted VLSI’s motion to exclude Intel’s evidence or argument that was inconsistent with the Court’s claim constructions or, for terms not construed, inconsistent with their plain and ordinary meaning. *See VLSI Tech. LLC v. Intel Corp*., 6:21-CV-00057-ADA (February 19, 2021, W.D. Tex.). The parties were free to argue what the plain and ordinary meaning of the term was, provided they did not rehash a rejected position. That issue played out in real time in the second case. Intel sought to argue the plain and ordinary meaning based on a statement made in the file wrapper. The Court took recess, reviewed the *Markman* hearing transcripts, and precluded Intel from making these arguments or referencing the file wrapper because (1) Intel had made the same argument at *Markman*, and (2) the Court rejected that argument specifically (as opposed to just rejecting the proposed construction).

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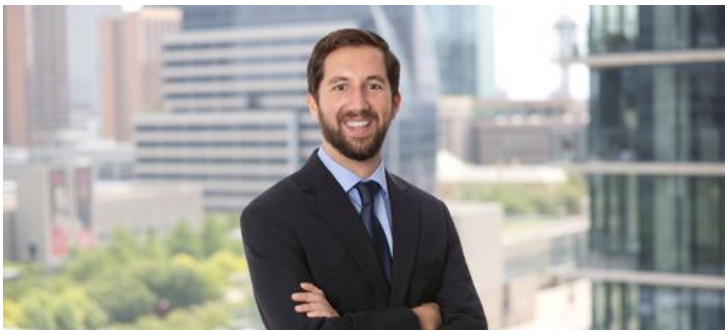

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