

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

HUAWEI TECHNOLOGIES CO., LTD., :
a Chinese corporation, and FUTUREWEI :
TECHNOLOGIES, INC., d/b/a HUAWEI :
TECHNOLOGIES (USA), a Texas corporation, :

Plaintiffs, :

v

: Civil Action

: No. 6974-CS

INTERDIGITAL TECHNOLOGY CORPORATION, :
a Delaware corporation, IPR LICENSING, :
INC., a Delaware corporation, and :
INTERDIGITAL COMMUNICATIONS, LLC, a :
Pennsylvania limited liability company, :

Defendants. :

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Chancery Courtroom No. 12A
New Castle County Courthouse
500 North King Street
Wilmington, Delaware
Wednesday, November 16, 2011
2:02 p.m.

- - -

BEFORE: HON. LEO E. STRINE, JR., Vice Chancellor.

- - -

ORAL ARGUMENT ON DEFENDANTS' MOTION TO STAY OR DISMISS
and RULINGS OF THE COURT

- - -

CHANCERY COURT REPORTERS
New Castle County Courthouse
500 North King Street - Suite 11400
Wilmington, Delaware 19801
(302) 255-0524

1 APPEARANCES:

2 MARTIN S. LESSNER, ESQ.
3 KATHALEEN McCORMICK, ESQ.
4 PAUL J. LOUGHMAN, ESQ.
Young, Conaway, Stargatt & Taylor LLP

5 -and-
6 STANLEY YOUNG, ESQ.
7 ROBERT T. HASLAM, ESQ.
of the California Bar
8 Covington & Burling LLP

9 -and-
10 DAVID W. HALLER, ESQ.
of the New York Bar
11 Covington & Burling LLP
12 for Plaintiffs

13 NEAL C. BELGAM, ESQ.
14 Proctor Heyman LLP
15 -and-

16 MICHAEL B. LEVIN, ESQ.
17 MAURA L. REES, ESQ.
of the California Bar
18 Wilson, Sonsini, Goodrich & Rosati, P.C.
19 -and-

20 BRIAN C. RALSTON, ESQ.
21 Potter, Anderson & Corroon LLP
22 -and-

23 RON E. SHULMAN, ESQ.
of the California Bar
24 Latham & Watkins LLP
for Defendants

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1 THE COURT: I've read the world's --
2 among the world's longest motions to expedite briefs.
3 So let's be focused and to the point.

4 MR. LESSNER: Your Honor, if I may
5 introduce my cocounsel. Stan Young from Covington &
6 Burling, who will make the argument. Also, I think --

7 THE COURT: Yeah. And, again, be
8 thinking two minutes. I mean, really, they're long
9 briefs.

10 MR. LESSNER: Thank you, Your Honor.

11 And -- and Mr. Belgam and I had
12 jointly requested the transcript be put under seal.
13 And we will then put a public version on file within
14 three days of receiving the transcript, if that's
15 acceptable, Your Honor.

16 THE COURT: Okay. I'm just going to
17 tell you right up-front, though, unless you say
18 something that's really a trade secret, don't be
19 trying to seal a transcript in this Court.

20 MR. LESSNER: Understood, Your Honor.

21 MR. BELGAM: Neal Belgam on behalf of
22 the InterDigital defendants. Thank you, Your Honor.

23 This is a case where we really do have
24 a concern about that, Your Honor. We'll meet and

1 confer afterwards to make sure we're not sealing it if
2 it's not necessary.

3 I'd like to introduce Ron Shulman of
4 Latham & Watkins, who is going to be making the
5 argument today. I have also with me -- he's, by the
6 way, lead trial counsel in the District of Delaware
7 and the ITC cases. I also have Michael Levin and
8 Maura Rees from the Wilson Sonsini firm. And Brian
9 Ralston, who you know, is with us today as well.

10 Thank you, Your Honor.

11 THE COURT: Okay.

12 MR. YOUNG: Your Honor, good
13 afternoon. Stanley Young, Covington & Burling for the
14 plaintiffs.

15 I also should say that my colleagues
16 at Covington, Bob Haslam and David Haller, are
17 present.

18 THE COURT: Welcome.

19 MR. YOUNG: And from the Young Conaway
20 firm, Paul Loughman and Katie McCormick.

21 THE COURT: Welcome.

22 MR. YOUNG: Your Honor, I would
23 emphasize five points. One, we are asking for a rate
24 to be set. There have been some other cases,

1 including the Nokia case, that have been cited to
2 you -- and we'll talk about this more in the reply
3 brief that we hope to file on December 1 -- that
4 wasn't done there. This is a different case. It's
5 something that the ITC cannot do and it would be
6 something that would be -- that would resolve a live
7 dispute between the parties now.

8 THE COURT: Why -- why can't a federal
9 district court do it?

10 MR. YOUNG: A federal district court
11 could do that. As explained in the brief that we
12 filed, though, that case is stayed and --

13 THE COURT: Well, no. I mean, does
14 the statute -- if a federal statute requires that the
15 entire action be stayed, including contract claims,
16 then you have an entire -- you have another federal
17 policy issue to address in your briefs, that you have
18 not, which is what legitimate role this Court would
19 have in messing up federal policy that would suggest
20 some supremacy clause issues, to me. And I'm a
21 pretty -- I actually am not against having a national
22 government. And to the extent that the stay does not
23 apply, then why aren't you at -- proceeding in the
24 federal district court?

1 MR. YOUNG: Your Honor, we believe
2 that the stay does apply. It applies to even
3 ministerial things, as the Sandisk case and the one
4 other case --

5 THE COURT: Some unpublished -- what
6 in the statute says -- if it's -- if the stay applies,
7 how can you end-run a federal stay in a state court?

8 MR. YOUNG: It's a stay of the federal
9 action. The issues that we are raising here are not
10 federal issues.

11 THE COURT: I didn't say that, that
12 you were -- the issue is if the statute says -- does
13 it say "all claims, counterclaims," anything?

14 MR. YOUNG: It says "the entire
15 action." And the decisions that we have found thus
16 far indicate that that means even ancillary motions
17 relating to the action are also stayed before that
18 court. That court is not able even to issue
19 subpoenas.

20 THE COURT: Well ... Okay.

21 MR. YOUNG: All right. So it's -- the
22 second point I would raise is that here we have a
23 clear violation of what we believe FRAND requires,
24 which is country-specific licenses. Today we --

1 Mr. Lessner provided to the Court --

2 THE COURT: Okay. I'm not -- I have
3 no doubt you're in one of these intergalactic,
4 complicated, everybody claiming stuff -- to own stuff
5 that they don't really know whether they own and
6 everybody -- other people saying that they don't own
7 it and nobody really knows any of it. And I've been
8 through it. I know it. I know that there's a
9 justiciable dispute. This is a motion to expedite.
10 Both of your side's briefs were way too long, way too
11 focused on the merits.

12 So I understand you've got a FRAND
13 dispute. I'm not here to decide that today.

14 MR. YOUNG: All right.

15 THE COURT: I'm talking about when and
16 where. And so I understand -- and I -- I've read --
17 I've -- I've read a bunch of stuff about ETSI in the
18 past. I know the whole thing about declared,
19 essential might be essential, all kinds of great
20 issues under French law. And there's clearly a
21 dispute. So -- and you may well have the better of it
22 on the merits.

23 But the issue today is why would we go
24 fast here? Why isn't it your obligation to deal in

1 the preceding tribunals? If you're really telling me
2 a federal statute says "entire action," how that means
3 you can end-run it to a state court if this is a
4 national policy determination.

5 MR. YOUNG: Well, it's a contract
6 dispute. It's not a national policy determination.

7 THE COURT: Then why don't you --
8 here's the really fine point of jurisprudence I don't
9 get, as someone who clerked for two federal judges
10 within the Third Circuit. If you can proceed here, I
11 don't really understand why you can't proceed there.
12 And if you can proceed there, you'll need to explain
13 why you haven't. And if you can't proceed there
14 because the federal -- the reading of the statute is
15 that it essentially freezes all disputes between the
16 parties to the ITC proceeding until the ITC proceeding
17 is done, then you're asking me to get in a very, very
18 hot cauldron.

19 MR. YOUNG: Well, the statute
20 contemplates -- and the legislative history we
21 submitted discusses this -- that the policy is that
22 simultaneous disputes as to infringement, validity,
23 unenforceability, and equitable conduct, all of those
24 very complicated patent issues should not be

1 proceeding in both the ITC and the District Court at
2 the same time. We are not challenging that policy.
3 We are attempting actually to implement that policy by
4 raising this particular issue, which is a contract
5 issue -- it's not a patent issue. It's not within the
6 exclusive domain of the federal district courts.
7 (Continuing) -- in this Court. And I -- therefore,
8 there's no question of doing an end-run around the
9 federal stay.

10 Your Honor is concerned about --

11 THE COURT: Is the stay optional?

12 MR. YOUNG: The stay is mandatory once
13 it's requested by a respondent.

14 THE COURT: Then your client requested
15 it.

16 MR. YOUNG: Our clients did join in a
17 joint motion --

18 THE COURT: So your clients requested
19 it.

20 MR. YOUNG: Yes.

21 THE COURT: They weren't pulled along
22 as minors without volitional will.

23 MR. YOUNG: There were other
24 defendants in the case.

1 THE COURT: Right. They chose to seek
2 a stay voluntarily; correct?

3 MR. YOUNG: That is correct, as a
4 group.

5 Now, that's -- there are logical
6 reasons for that stay, because of all of the other
7 issues that --

8 THE COURT: I'm sure there are.

9 MR. YOUNG: All right. As to the
10 timing and the reason for the expedition, Your Honor,
11 there is -- and I think the -- the explication of the
12 schedule set forth in the defendants' brief is
13 correct. There is a hearing that is scheduled for
14 June. There is an initial determination that is due
15 no later, from the administrative law judge in the
16 ITC, by October.

17 THE COURT: And you're able to defend
18 against the exclusion order on the grounds that they
19 were required to offer you and did not offer you a
20 FRAND rate; right?

21 MR. YOUNG: We have raised that
22 defense. What the ITC cannot adjudicate is what the
23 rate is. But we have raised that defense, you're
24 correct, Your Honor.

1 THE COURT: The irreparable harm that
2 you argued in your papers was the exclusion order. If
3 you --

4 MR. YOUNG: It's not just the
5 exclusion order. It's also the hearing. The hearing
6 and the adjudication by the administrative law judge
7 on infringement and validity would have a devastating
8 effect on sales and market share, and that would come
9 before the exclusion order if InterDigital were to
10 prevail in the hearing.

11 THE COURT: And if you succeed on your
12 defense, right, the FRAND defense -- you can present
13 that defense; right?

14 MR. YOUNG: Yes. That -- that defense
15 is pled in that dispute. The problem --

16 THE COURT: It's not just pled. I
17 don't want to hear ... I can guarantee you you're not
18 going to persuade me of anything if you change my
19 questions.

20 MR. YOUNG: I apologize, Your Honor.

21 THE COURT: I just want to know a very
22 simple thing. You can present your FRAND defense to
23 the ITC. And if you're successful on that, then
24 they're not going to get any relief against you that

1 would cause you irreparable injury; right?

2 MR. YOUNG: We can defend against an
3 exclusion order by presenting that defense. We can't
4 present the other issues that we're trying to present
5 in this Court.

6 THE COURT: I understand that, but
7 that's a different issue in terms of how -- you know,
8 getting this Court involved in a three-way hoo-ha and
9 certainly in terms of expediting it, because if you
10 can present the defense successfully, there's no
11 exclusion order --

12 MR. YOUNG: Well --

13 THE COURT: -- the ITC thing ends.
14 While there's no exclusion order, you can continue to
15 do what you do. Like all these companies will do,
16 you'll have it out in a big melee once ITC proceedings
17 are done in one forum.

18 MR. YOUNG: Well, Your Honor, one
19 thing we can't do in ITC is to get the ITC judge to
20 adjudicate a rate.

21 THE COURT: I --

22 MR. YOUNG: And we can't -- we can't
23 pay that rate at that time. So if we get to the end
24 of the process in the ITC and there's an exclusion

1 order that's impending, we are not in a position at
2 that time to pay a license rate which would be
3 determined and, therefore, mount a license defense.
4 That's something that we need this Court to do. This
5 Court is the only -- is the tribunal where a license
6 rate can be set. The ITC can't do that.

7 THE COURT: No; federal district court
8 can.

9 MR. YOUNG: It could if it weren't
10 stayed. So there's an essential defense actually that
11 would be available if this Court were to act in the
12 timely fashion that we've requested, which we could
13 not present to the ITC in opposition to an exclusion
14 order. And that's the defense that there's a rate.
15 It's been set. We've paid it. We have a license and,
16 therefore, an exclusion order should not issue.
17 That's something that's not available in the ITC, and
18 it's why we're here.

19 THE COURT: Okay. Let me hear from
20 your friends.

21 MR. YOUNG: Thank you, Your Honor.

22 MR. SHULMAN: Your Honor, my name's
23 Ron Shulman. I'm from Latham & Watkins.

24 There's no reason for expedition here

1 for three reasons. And I want to follow up on
2 something that you asked Mr. Young. And that is, you
3 suggested to him that the relief that they seek here
4 could have been sought in federal district court, and
5 he said no; the action's been stayed. And you asked
6 him questions about the extent of the mandatory stay
7 in federal district court when there's a parallel ITC
8 proceeding. And the answer to that question -- and I
9 think Mr. Young misspoke -- yes, the patent issues,
10 i.e., validity, infringement, enforceability, and
11 equitable conduct, those are mandatorily stayed if
12 someone requests the stay. But the nonpatent issues
13 are not mandatorily stayed. They can be
14 discretionarily stayed if one requests that, but they
15 aren't mandatorily stayed.

16 And when we filed the complaint in the
17 ITC and the District Court action back in July, they
18 waited for 60 days. They could have answered and
19 pressed the claims that they're pressing here in
20 federal district court; and then when either Nokia or
21 GTE, the other two respondents, wanted the mandatory
22 stay of the patent issues, they could have asked the
23 federal district court to say "Fine, stay those, but
24 we'd like to continue with the nonpatent issues."

1 They didn't do that because what they've done here, in
2 effect, they're trying to leapfrog our prior-filed
3 actions, extract the one defense that they like and
4 have it adjudicated here in a parallel action after
5 having stayed an action in which it all could have
6 been tried and could have proceeded. I can't
7 guarantee that the Court would have agreed to proceed,
8 but they didn't even try. They just plucked it out
9 and brought it here. And that's entirely inconsistent
10 with expedition. They waited for 60 days, did
11 nothing, and then waited for another 30 days before
12 they filed this action.

13 Secondarily, not only is it
14 inconsistent with their request to stay the district
15 court action by bringing this one, there will be no
16 irreparable harm. And let me briefly explain why. As
17 Your Honor correctly points out, the only irreparable
18 harm to which they pointed in their papers was the
19 exclusion order. And let me explain why there's
20 nothing unusual or extraordinary about their claims in
21 this action that require expedition and why they won't
22 suffer any irreparable harm.

23 So on September of this year they
24 answered the complaint in the ITC case; and they

1 raised the breach of contract, waiver, and estoppel
2 defenses as affirmative defenses. And all of those
3 are based on InterDigital's alleged breach of its
4 alleged FRAND obligations.

5 Then one month after pleading those
6 defenses, they filed this action which brings us here
7 together today. And in Counts I through IV they
8 recast as affirmative claims for relief the same
9 breach of contract, waiver, and estoppel defenses as
10 to which issues have been joined in the ITC.

11 Now, there's no dispute, Your Honor,
12 between the parties that absent a settlement, these
13 issues, whether they're called defenses or whether
14 they're called affirmative claims, they will be
15 decided in the first-filed ITC case, as Your Honor
16 pointed out. And the ITC will decide whether there's
17 any merit to the contract, estoppel, and waiver
18 defenses.

19 THE COURT: And are the ITC's
20 findings, are they given collateral effect?

21 MR. SHULMAN: On the patent issues,
22 they are not.

23 THE COURT: How about on the --

24 MR. SHULMAN: On nonpatent issues,

1 there is authority that yes, they are given collateral
2 effect.

3 So they won't be harmed by
4 permitting --

5 THE COURT: So, for example, if they
6 succeed on their defense and they show that your
7 client was under an obligation, too, and did not offer
8 a FRAND rate, then that'll be established for purposes
9 of any -- any subsequent litigation?

10 MR. SHULMAN: It's not entirely clear.
11 There is authority that goes both ways on that point,
12 Your Honor. There are courts which have held yes
13 because they are nonpatent issues, and there are
14 courts that have said no. So I can't say
15 affirmatively one way or the other, but there is
16 certainly authority that supports that notion.

17 THE COURT: Okay.

18 MR. SHULMAN: So what will happen if
19 they prevail in one of these affirmative defenses that
20 have been pled over there and that everybody pled in
21 Counts I through IV here? Well, an exclusion order
22 won't issue because they will have prevailed on their
23 contention that we somehow violated our obligations
24 and, therefore, gave up the right to seek an exclusion

1 order. So that's if they prevail. And if we prevail,
2 Your Honor, the ITC will have decided that their
3 defenses are without merit, in which case the defenses
4 are no longer an impediment to the relief that they're
5 seeking in this court; namely, an impediment to an
6 exclusion order.

7 Now, there's also no dispute that the
8 ITC decision will be prompt. Trial is scheduled for
9 June of 2012. The initial decision by order will be
10 made no later than October of next year, and the final
11 determination will issue within 90 days thereafter.
12 So by February of 2013 there will be a decision on
13 Counts I through IV. And so we don't believe that
14 there's any basis for going forward here on those
15 counts, which brings us to the last two counts.

16 There are two remaining claims in this
17 action; namely, Counts V and VI. And let me briefly
18 address each of those and demonstrate why there's no
19 irreparable harm.

20 Count V essentially mirrors Counts
21 I and II. Counts I and II are for breach of contract.
22 One is a third-party beneficiary theory, and another
23 one is straight contract theory. And by Count V they
24 seek a declaratory judgment that we allegedly violated

1 our obligation to offer FRAND licenses. But Count
2 V adds nothing of substance to the case. Indeed, if
3 you look at the pleading that they filed, the
4 exclusive factual predicate for Count V is simply an
5 incorporation by reference of all of the preceding
6 paragraphs in the complaint. There is nothing new
7 added in Count V.

8 Thus, resolution of the issues raised
9 by Count V will necessary occur when the ITC decides
10 the predicate affirmative defenses that have already
11 been pled and placed in issue there.

12 Which leaves us with Count VI, which
13 is the one that Mr. Young was resting most of his
14 argument on. And that's the one where they seek a
15 declaratory judgment as to what constitutes FRAND -- a
16 FRAND rate.

17 THE COURT: Let me -- we don't need to
18 go through all this. Is -- as I said, I read the
19 stack.

20 So you have no objection to
21 essentially addressing the issue in the federal
22 district court. I don't mean agreeing to their
23 schedule. That's something for my federal judicial
24 colleague to consider, obviously, in terms of the

1 timing; but in terms of your position with respect to
2 the stay, if they want to have game on on their --
3 their contract claim, they can do that.

4 MR. SHULMAN: We -- yeah. We
5 certainly think it should not be here. And if it
6 belongs anywhere at this point -- you know, it's
7 already in the ITC at least as to Counts I through V.
8 And if they want to go back to the district court and
9 try and tell them now "We didn't mean it when we said
10 we wanted a stay" and they try and undo the stay,
11 we'll see where the chips fall. But if it belongs
12 anywhere, this Count VI, it doesn't belong here; it
13 belongs in District Court.

14 So I have -- but Your Honor apparently
15 doesn't want to hear about Count VI. So I guess I
16 don't want to address it.

17 THE COURT: I don't remember any
18 particular fascination -- fascinating dialogue about
19 Count VI on either side.

20 MR. SHULMAN: The only point I would
21 make, there is no irreparable harm there, either,
22 regardless of the outcome of the ITC case. And I'm
23 happy to explain, if Your Honor wants to hear, but I'm
24 also happy to sit down. I guess I'll sit down.

1 THE COURT: Mr. Young.

2 MR. YOUNG: Your Honor, an important
3 point that was just discussed by Mr. Shulman is the
4 collateral estoppel issue. They're not willing to
5 commit to being bound by a determination on this issue
6 from the ITC. The consequence of that would be the
7 possibility that there would be multiple litigations
8 over that issue. It's precisely for the reason that
9 this Court can reach a decision that would bind the
10 parties that it would be most efficient for this Court
11 to reach that decision.

12 THE COURT: Well, I mean, that would
13 determine, also, whether this case was finally
14 adjudicated, including the idea that my Supreme Court
15 was going to have to give you a final ruling before
16 the ITC proceedings were concluded; right?

17 MR. YOUNG: Well, there -- I think
18 that would get into the issue of what collateral
19 estoppel is, which is -- would be addressed by the
20 ITC. And that would be our purpose, which is to have
21 the ITC look at a ruling from this Court and -- and
22 find it binding.

23 The other issue with respect to the
24 District Court is -- and it's not clear to me whether

1 Mr. Shulman was saying that he would join or that his
2 clients would join a motion to unstay that federal
3 district court action for the purpose of ruling on
4 this issue. We would be interested in that question.
5 And our understanding of the case law --

6 THE COURT: No. What I'm saying --
7 and this -- I'm very careful with this -- it's
8 different from them saying "We do not take the
9 position, Your Honor, that the stay automatically
10 applies to state law things and the stay is not a bar
11 to Your Honor deciding as a federal district judge how
12 to sequence things in relationship to the ITC
13 proceeding freely and without regard to the federal
14 statute." That's what I'm talking about, not that
15 they would have to go in there and say "Yeah, we agree
16 with your schedule." That's a very different thing.

17 MR. YOUNG: Well, the schedule would
18 be for that court to decide, but --

19 THE COURT: Yes. But what I'm saying
20 is it's different for me to ask your friends on the
21 other side to say "We are not going to raise the
22 statute as a bar" and then -- that's a different
23 concession and a much narrower one than "We are not
24 going to raise the statute as a bar, and we agree to

1 their schedule."

2 MR. YOUNG: Oh, I understand. I
3 wasn't talking about the schedule so much as
4 whether --

5 THE COURT: Oh, no. I mean, I think
6 they're very poorly positioned to argue that the stay
7 applies to your claims given the arguments to me.

8 MR. YOUNG: All right. Thank you,
9 Your Honor.

10 THE COURT: I believe very strongly in
11 comity. I like comedy with e-d-y, but I believe in
12 c-o-m-i-t-y. I believe also in respect towards other
13 tribunals. I also firm firmly that this Court has a
14 long tradition of avoiding train wrecks, of not
15 causing needless expense, and of staying in its lane.
16 I'm not saying that this Court can't be and has not
17 been a proper forum for claims like this to be
18 brought, but I am not going to expedite this case.
19 And I would suggest to the plaintiffs that you are
20 highly unlikely to get anything from me in terms of
21 merits procession of this case until you have gone to
22 the federal district court, after discussing this with
23 your friends, and sought to litigate your claims in
24 the -- in the previously invoked forum.

1 In terms of efficiency, it makes
2 absolutely no apparent sense to me for this Court to
3 do a piece of a larger dispute. Even if I could do
4 it, it wouldn't have the same efficiency effect as a
5 federal judge who is on -- who is likely to get the
6 later patent stuff. I suppose I could do it as some
7 sort of -- you know, just because Chancery does stuff,
8 but that's not a good reason. There has to be a
9 reason in the interest of justice and efficiency to do
10 it.

11 There's no reason why the federal
12 court system cannot act with alacrity if asked to do
13 so. It's obviously a District Court judge's own
14 decision to make about what the equities and
15 exigencies of a matter suggest about the timing of the
16 case. But, honestly, I want to know the answer to
17 that. And to -- for someone to suggest that it can't
18 happen, when it hasn't been tried, isn't persuasive to
19 me.

20 To the extent that it's argued that
21 the federal statute actually has a broader intent,
22 which is that it goes beyond the federal patent claims
23 to encompass essentially all claims that should be --
24 should be raised within the context of a dispute

1 arising out of a common course of events, if that's
2 the actual intent of Congress, then this American, as
3 a judge of a state court of the United States, is
4 duty-bound to give some effect to Congress' decision.

5 And so, you know, to me -- for
6 example, to me, to hear the federal court couldn't go
7 forward because that would violate Congress' intent
8 but that I can, that may embolden some, but, you know,
9 the side that Lincoln and Grant is on, I'm glad they
10 won. And I'm glad we're one nation. And I'm not
11 going to lead a judicial secessionist movement or
12 interposition a nullification movement.

13 I also take seriously that to the
14 extent that this stay action has something to do with
15 our nation's interest in amicable economic relations
16 with other nations, that it would be passing strange
17 for state courts to proceed in a circumstance where
18 Congress asked the federal courts to stay their hand.
19 And these, to me, are serious issues of -- you know,
20 comity is one of the -- one of the words that comes to
21 mind often when one deals in international law cases
22 because of the sensitivities.

23 So I'm not saying that there's no role
24 at all for this tribunal. Maybe there is, but there's

1 going to have to be a lot more clarity about why.

2 And on the basic issue of irreparable
3 injury, honestly, I've heard nothing that suggests
4 that the plaintiff here cannot present fully and
5 fairly its defense before the ITC. Does that mean
6 that what they get out of that -- presenting that
7 defense is everything you want in the world? No.
8 But, you know, few of us get to live like we're on
9 Fantasy Island. The point of irreparable injury is
10 that you're not going to be subject to irreparable
11 injury. It's not that you're going to win the
12 Powerball, live like a Kardashian or Hugh Hefner or
13 whoever you think -- Reggie Bush, whoever you think
14 lives a great life. That's not the point of avoiding
15 irreparable injury. It's to avoid irreparable injury.
16 And if the plaintiff here kicks booty on its defense
17 before the ITC, my sense is it will have a smile on
18 its face, be able to sell its products, and have a
19 fairly strong hand in finishing up the dispute.

20 It's nice that everybody has
21 confidence in me that I could set a FRAND rate that
22 would stick and do that in advance of an ITC
23 proceeding and get our Supreme Court to affirm it. I
24 think it's -- life is going to be a little more

1 complicated, from my experience, in these things. It
2 will turn out that none of your clients exactly know
3 what they own, that no one exactly knows what is
4 essential to the standard, that no one exactly knows
5 what the FRAND rate is; that you will translate
6 issues; that you will have academics that come in and
7 say absolutely totally different things about the same
8 words and argue from culture and context. And that
9 that all has to be made sense of.

10 And I think I'm -- I'm actually proud
11 of this Court. I think we can move faster than most.
12 The idea that we're really going to get out in front
13 of the ITC, I think that's unlikely. But the dust
14 needs to settle here and I need to know.

15 And one of the things I'm -- I think
16 the judges of this Court -- we are approachable. Not
17 everyone in the world out there who -- who wears a
18 robe seems to be thought of as quite as approachable.
19 I've heard serious discussions among lawyers about
20 whether and how and on what day and in what moment and
21 in what forum you could actually ask for a schedule
22 from some courts, whereas in the Court of Chancery, I
23 mean, just call up and say, you know, "I'd like to
24 hear" -- I mean, "I really would like the Chancellor

1 and all the Vice Chancellors together on New Year's
2 Eve, I just would. And so could they just sit in
3 special session because we called up?" No one
4 hesitates to ask. They may not think they get it, but
5 everybody else knows that the next day everybody will
6 smile at them. No fear of, like, executions.

7 So I think one of the things we've
8 been doing around here is, honestly, sometimes people
9 approach us because they feel that they can't approach
10 other courts. Well, I don't believe that's true.
11 People have due process rights. If you need a
12 schedule in litigation, you have to ask. And if I've
13 said anything, maybe I help with the ITC or my federal
14 district court colleagues, for whom I have great
15 respect, in the sense that I, kind of, want you to
16 ask. And if you have to blame it on me and say, you
17 know, frankly, "Before we proceed in another case,
18 Chancellor Strine wants to understand why it is that
19 the first-filed actions can't handle these matters,"
20 which seem to be bound up fairly closely in some, you
21 know, federal policy concerns, both in terms of the
22 stance of intellectual property and also in terms of
23 how we deal with, you know, kind of international
24 comity in terms of the relationship between District

1 Court proceedings and the ITC.

2 So I've probably said too much. It is
3 a lovely day that you traveled through. For the
4 record, because people may not remember, it is a gray,
5 ugly day where the beauty of fall leaves is obscured
6 by fog and mist.

7 And so I appreciate everyone being
8 here. I want you to take the transcript to heart. I
9 want you to think about what it's doing. I don't know
10 that these -- these bunch of awkward briefs really
11 constitute motion to dismiss or stay briefs. It's all
12 bound up in here. I don't think that's particularly
13 useful.

14 What I think you ought to do is use
15 this for whatever learning experience it has been,
16 consider the transcript, talk with each other, think
17 what you do with the District Court. And then to the
18 extent that you need to move forward with motions to
19 dismiss or stay briefing, you do it when the -- when
20 it's clear, knowing that, really, honestly, until I
21 know more about why this case can't move forward in
22 the District Court, if it needs to move forward, that
23 I'm not inclined to move forward. I don't need to
24 shoot in the dark with respect to the mysteries of

1 life. There are plenty of imponderable and
2 interesting mysteries about human creation. This is a
3 mystery that can be solved.

4 MR. SHULMAN: You mean this isn't one
5 of them, Your Honor?

6 THE COURT: No, not to me it isn't.
7 It's a question of whether you can actually proceed in
8 a federal district court in a situation where, as I
9 understand it, the -- the party who would have -- who
10 has been stayed of its affirmative claims is
11 acknowledging that the stay of its affirmative claims
12 would not bar the other party from seeking affirmative
13 relief, but is reserving its right to obviously argue
14 about the timing of that between the ITC and all.
15 That's a mystery, I think, of human -- it's really not
16 that fascinating. People ought to be able to go to
17 our federal district court and get an answer on.

18 And if the federal district court says
19 it's a federal policy matter and you can't do it, I
20 would then be able to take that into account. If what
21 people come back to me -- I've had this before. It
22 would surprise me about our District Court -- that the
23 reason why we need to proceed in Chancery is the
24 threat of irreparable injury because other courts

1 can't move fast, then at least we should crystallize
2 that, if that's real. I mean, I've heard that before
3 about several other courts, federal and state,
4 including courts within Delaware, federal and state.
5 And we tend not to indulge the notion that there's --
6 that the irreparable injury is that other people can't
7 move with expedition, because I know that those courts
8 can. We all, frankly, have to put aside things at
9 times to move with expedition; but people have to set
10 priorities. And, you know, that's why people have to
11 look at these. And I just want to show respect to the
12 other tribunals involved and to the federal policies
13 at stake by actually not intruding without knowing
14 more.

15 So have -- stay as dry as you can.
16 And why don't you report back in a month. You can
17 report back earlier if there's something to be said
18 for it; but I think you ought to take to heart what we
19 talked about, see what progress you can make and see
20 from there. If you're going to brief it up, I think
21 you need to start from scratch and to give me clean
22 briefs that take into account the current status of
23 things.

24 So thanks, everyone.

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MR. SHULMAN: Thank you, Your Honor.

MR. LESSNER: Thank you, Your Honor.

(Court adjourned at 2:39 p.m.)

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CERTIFICATE

I, NEITH D. ECKER, Official Court Reporter for the Court of Chancery of the State of Delaware, do hereby certify that the foregoing pages numbered 3 through 31 contain a true and correct transcription of the proceedings as stenographically reported by me at the hearing in the above cause before the Chancellor of the State of Delaware, on the date therein indicated.

IN WITNESS WHEREOF I have hereunto set my hand at Wilmington, this 17th day of November 2011.

/s/ Neith D. Ecker

Official Court Reporter
of the Chancery Court
State of Delaware

Certificate Number: 113-PS
Expiration: Permanent