

## 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,	:	
	:	
vs.	:	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  
Monday, June 11, 2012  
10:00 a.m.

- - -

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

- - -

ORAL ARGUMENT  
PLAINTIFFS' MOTION TO EXPEDITE AND  
DEFENDANTS' MOTION TO DISMISS OR STAY  
AND THE COURT'S RULING

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CHANCERY COURT REPORTERS  
500 North King Street  
Wilmington, Delaware 19801  
(302) 255-0521

## 1 APPEARANCES:

2 MARTIN S. LESSNER, ESQ.  
3 ADAM W. POFF, ESQ.  
4 ELISABETH S. BRADLEY, ESQ.  
5 Young, Conaway, Stargatt & Taylor LLP  
6 -and-  
7 STANLEY YOUNG, ESQ.  
8 of the California Bar  
9 Covington & Burling LLP  
10 for Plaintiffs

11 NEAL C. BELGAM, ESQ.  
12 Proctor Heyman LLP  
13 -and-  
14 RON E. SHULMAN, ESQ.  
15 of the California Bar  
16 MICHAEL DAVID, ESQ.  
17 of the District of Columbia Bar  
18 Latham & Watkins LLP  
19 for Defendants

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1 MR. LESSNER: Good morning,  
2 Your Honor.

3 THE COURT: Good morning, Mr. Lessner.

4 MR. LESSNER: We come here today --  
5 thank you, Your Honor -- for the renewed motion for  
6 expedited proceedings on behalf of plaintiffs. At  
7 counsel table I have Stanley Young from Covington &  
8 Burling.

9 MR. YOUNG: Good morning, Your Honor.

10 THE COURT: Good morning.

11 MR. LESSNER: And Adam Poff and  
12 Elisabeth Bradley from Young Conaway.

13 MR. POFF: Good morning, Your Honor.

14 MR. LESSNER: Mr. Young will be making  
15 the argument this morning.

16 THE COURT: Thank you.

17 MR. BELGAM: Good afternoon,  
18 Your Honor. Neal Belgam for the defendants. I have  
19 with me Ron Shulman and Michael David from Latham.

20 MR. SHULMAN: Good morning,  
21 Your Honor.

22 MR. DAVID: Good morning, Your Honor.

23 THE COURT: You may proceed,  
24 Mr. Young.

1 MR. YOUNG: Thank you, Your Honor.  
2 I'd like to start with an update on the status of the  
3 ITC action. There have been a couple schedule changes  
4 since the last time we were before you in November.  
5 The hearing in the case before the administrative law  
6 judge is now set for late October and early  
7 November 2012 with an initial determination by the  
8 administrative law judge due at the end of  
9 February 2013.

10 The target date for the investigation  
11 and the roughly expected date for any exclusion order,  
12 if it were to be issued, would be June 28, 2013.

13 That leaves plenty of time in our view  
14 for this Court to do what we would like it to do,  
15 which is to set a FRAND rate, which is a remedy that  
16 cannot be set in the ITC, as I think all the parties  
17 have acknowledged. And under the Conoco decision that  
18 we cited to you, we believe that a McWane stay in this  
19 case would not be appropriate and would work to the  
20 irreparable harm of Huawei.

21 One of the rationales for the McWane  
22 stay would be that the prior Court's adjudication of  
23 the issues would be efficient. In this case, as  
24 Your Honor discussed with Mr. Shulman last time, it's

1 unclear that any determination on the FRAND issues in  
2 the ITC action would be binding in any future  
3 litigation.

4           We would like a FRAND rate to be set  
5 and a determination of the FRAND-related issues that  
6 are the subject of our complaint to be determined in a  
7 tribunal where both parties will be bound in a  
8 subsequent litigation, and we believe that this  
9 tribunal is the proper place for that.

10           There would be irreparable harm in the  
11 absence of that adjudication if the ITC were to grant  
12 an exclusion order. And for that I would cite a very  
13 recent decision by a Federal District Court in the  
14 State of Washington in a case between Microsoft and  
15 Motorola involving very similar FRAND issues and  
16 involving the issue of whether an injunction is  
17 appropriate in a case involving standard essential  
18 patents.

19           In that case, in a decision that was  
20 issued on May 14, 2012, which reaffirmed a TRO that  
21 was granted the previous month, the Washington State  
22 Court issued a preliminary injunction barring Motorola  
23 from enforcing a German injunction on patents that  
24 were alleged to be essential to some standards, the

1 standards that were at issue there.

2           And in that decision, the Washington  
3 State Court weighed the evidence from Microsoft  
4 relating to the harm that would result from a ban on  
5 sales in Germany. And it as a result found that there  
6 was irreparable harm and issued the injunction that  
7 Microsoft sought.

8           The same I think is true here, when  
9 you look at the irreparable harm that would be  
10 inflicted upon Huawei by an exclusion order as  
11 described in the Chou and Phan declaration that we  
12 submitted to Your Honor. And we think that all those  
13 things warrant the setting of a schedule that would  
14 result in a FRAND license rate determination by this  
15 Court sometime before the conclusion of the ITC  
16 proceeding.

17           And with that, Your Honor, we'll stand  
18 on our papers. If you have questions, I'd be  
19 delighted to answer them.

20           THE COURT: Thank you, Mr. Young.

21           MR. YOUNG: Thank you, Your Honor.

22           Actually, Mr. Lessner kindly reminds  
23 me I do have copies of the Microsoft versus Motorola  
24 preliminary injunction decision of May 14. If you

1 would like to have a copy of it I'd be delighted --

2 THE COURT: No. Thank you.

3 MR. YOUNG: Thank you.

4 MR. SHULMAN: Thank you, Your Honor.

5 Ron Shulman from Latham & Watkins for Interdigital.

6 Let me begin by addressing the  
7 question of irreparable harm, which is at the core of  
8 their plea for expedition. As they acknowledge in  
9 their papers, Your Honor, they have to demonstrate  
10 that they will be irreparably harmed in the absence of  
11 expedited proceedings in this case in order to get  
12 expedited proceedings.

13 And there is some highly relevant  
14 history on this issue, as Your Honor is aware.  
15 They're not writing on a clean slate with respect to  
16 irreparable harm. And when they first filed this  
17 motion last fall, they argued, Your Honor, that it  
18 they would be irreparably harmed if proceedings on  
19 their FRAND claims were not expedited. And Your Honor  
20 had a different view of the matter.

21 I'm probably treading on thin ice here  
22 by referring to Your Honor's prior decisions, but at  
23 Page 60 of the transcript from last November,  
24 Your Honor noted that, "On the basic issue of

1 irreparable injury, honestly, I have heard nothing  
2 that suggests that the plaintiff here cannot present  
3 fully and fairly its defenses before the ITC."

4           And we submit that Your Honor was  
5 correct for the following reasons: If the ITC  
6 sustains Huawei's defense that Interdigital breached  
7 its FRAND obligations by failing to make FRAND offers  
8 to Huawei, then no exclusion order will issue, and the  
9 exclusion order is the only potential irreparable harm  
10 that they point to. That's it. So if they win on  
11 their defenses in the ITC, there is no irreparable  
12 harm.

13           Conversely, Your Honor, if the ITC  
14 rules that we made prior offers to Huawei which  
15 discharged our FRAND obligations, then their FRAND  
16 defense will have failed, we would be legally entitled  
17 to an exclusion order, and once again, there would be  
18 no irreparable harm.

19           Having failed to convince Your Honor  
20 that they would be irreparably harmed, they tried  
21 again before Judge Andrews, but once again, the result  
22 was no different. Just like Your Honor, Judge Andrews  
23 pointed to the proceedings in the ITC, and he reasoned  
24 that if the ITC concludes that Interdigital breached



1 its FRAND obligations, there will be no exclusion  
2 order, and thus, there will be no irreparable harm.

3           Conversely, if the ITC concludes that  
4 Interdigital complied with its FRAND obligations by  
5 previously having made a FRAND offer to Huawei, then  
6 Huawei would properly be subject to an exclusion  
7 order, and once again, no irreparable harm.

8           So given the history on the  
9 irreparable harm issue, what if anything new do they  
10 have to say today? He didn't actually get into the  
11 issue of irreparable harm other than to refer to it,  
12 but the papers they filed provide the answer to that  
13 question; and the answer is they don't provide  
14 anything new. They're simply repeating the same  
15 arguments in their papers that Your Honor and Judge  
16 Andrews have already rejected. Those arguments don't  
17 gain any more vitality by being repeated for a third  
18 time here today.

19           There simply is no irreparable harm  
20 regardless of the outcome of the ITC. If we win,  
21 there is no irreparable harm. If they win, there is  
22 no irreparable harm. That's what Judge Andrews  
23 recognized, and that's what your implicitly recognized  
24 when you said, honestly, you don't see how the ITC

1 won't provide them with the relief that they need.

2           Now, I also want to point out one  
3 thing about the timing on the proceedings here because  
4 the timing of certain events and the history of the  
5 six months that they've been pursuing or eight months,  
6 now, that they've been pursuing this expedited process  
7 demonstrates in our opinion that their actions have  
8 been wholly inconsistent with the professed need for  
9 expedition. And let me briefly explain why,

10 Your Honor.

11           First, in July of 2011, merely a year  
12 ago, we filed suit against them, and we did so both in  
13 the District Court and in the ITC, asserting identical  
14 causes of action.

15           And the FRAND claims that they want to  
16 proceed on in this Court expeditiously are compulsory  
17 counterclaims in the District Court. They're  
18 compulsory counterclaims. But they didn't pursue  
19 those compulsory claims in the District Court at all,  
20 much less with expedition. Instead, for the first two  
21 months after we filed suit, they sat on their hands  
22 and did nothing in the District Court. They didn't  
23 answer. They didn't file any counterclaims. And then  
24 finally in late September of last year, they woke up,

1 they came to life, but what did they do? They stayed  
2 the case. They deliberately stayed the case. So  
3 that's the first thing that happened, Your Honor.

4           And we submit that their failure to  
5 pursue their FRAND claims in District Court when they  
6 had the right and the opportunity to do so is wholly  
7 inconsistent with the professed need stated later for  
8 expedition.

9           Then in late September when they  
10 stayed the District Court action, Your Honor, they  
11 also answered the ITC complaint. But unlike in  
12 District Court where they chose not to pursue these  
13 claims and the answer filed in the ITC, they raised  
14 the very same issues that are going to be adjudicated  
15 in this case if this case were to go forward. So they  
16 chose that tribunal as the tribunal in which they  
17 wanted to raise those claims.

18           Third, after issue was joined in the  
19 ITC on the FRAND issues in late September, they waited  
20 yet a whole 'nother month before filing this lawsuit;  
21 and that delay is inconsistent with the expedition  
22 they now seek.

23           Then after Your Honor denied the  
24 motion last November, they waited another few weeks

1 before seeking the same relief from Judge Andrews, but  
2 more importantly, Your Honor, when they went to Judge  
3 Andrews, they didn't seek any acceleration of the  
4 briefing schedule or of the hearing date on the motion  
5 before the District Court. Instead, they were content  
6 to have the District Court briefing proceed at the  
7 leisurely pace. We spent six and a half weeks  
8 briefing the motion. They didn't try and accelerate  
9 that.

10                   And then they didn't ask for an  
11 accelerated hearing. They were content for the  
12 hearing date to be set for March 2nd, which was three  
13 months after they filed their motion.

14                   And finally, Your Honor, after Judge  
15 Andrews denied their motion on March 2nd, they waited  
16 three weeks before returning to this Court with their  
17 renewed motion. And that delay, the three weeks, in  
18 and of itself normally wouldn't be that great a deal,  
19 but it is a big deal here because this renewed motion  
20 doesn't say anything new. It wouldn't take any time  
21 to file this motion. It could have been written in  
22 two days. They waited three weeks before filing it.

23                   So in sum, we submit that their  
24 actions in pursuing the claims both before this Court

1 and before Judge Andrews are inconsistent with the  
2 supposed need for expedition.

3           Now, let me turn briefly to the Conoco  
4 case, which they relied on today. And the Conoco case  
5 is not applicable here. There, it was a situation  
6 where the prior administrative proceeding would have  
7 no impact on the result to be obtained in the Chancery  
8 case. And that's not the case here.

9           Here, they point out that the ITC  
10 can't set the FRAND rate, and that's true. They  
11 cannot set the FRAND rate. We admit that. But it  
12 doesn't matter, for the reasons that I've already  
13 explained. No FRAND rate will have to be set if they  
14 prevail in the ITC because there is no irreparable  
15 harm, which is the only reason they want the FRAND  
16 rate set. And if we win, they're not entitled to  
17 complain about the fact that there is an exclusion  
18 order because they will have been -- their defense,  
19 their FRAND defense, will have been ruled upon and  
20 found to be wanting. So the ITC case will have a  
21 direct impact here.

22           Let me just briefly address our motion  
23 to dismiss or stay. So far, I have addressed most of  
24 my comments to their expedition request. The McWane

1 factors here, we submit, militate in favor of a  
2 dismissal or a stay, and I'm happy to address which  
3 one of those two we prefer, but either one would  
4 suffice.

5           The first factor is whether there is a  
6 prior pending action involving the same parties and  
7 the same issues. Plainly, there is. There are two  
8 prior pending actions involving the same parties: The  
9 ITC and the District Court. And with respect to the  
10 overlap of issues, the Courts have examined whether  
11 the ultimate legal issues to be litigated will be  
12 determined in the first-filed action, and have held  
13 repeatedly that McWane only requires a showing of  
14 substantial or functional identity of issues that  
15 arise out of a common nucleus of operative facts. And  
16 that's the QVT case.

17           And here, as I've already explained,  
18 that showing is easily satisfied. Their claim in this  
19 case centers on their argument that we failed to  
20 comply with our FRAND obligations; and that issue will  
21 be fully adjudicated in both the ITC case or in the  
22 District Court, if that should spring to life after  
23 the ITC case is over.

24           And the next McWane factor is whether

1 prompt justice can be provided in the earlier-filed  
2 actions. And there is no dispute about this factor  
3 either, Your Honor. They admit on Page 2 of their  
4 opening brief that the ITC case, like all ITC  
5 investigations, is proceeding on an accelerated  
6 schedule, and in their words "is moving quickly."  
7 Indeed, trial commences in exactly four months from  
8 now. October 18th, I believe, is the trial date.

9           Now let's consider the District Court  
10 case. The only reason that that case is not  
11 proceeding at pace is that after they chose to stay  
12 that action, and they were unable to convince Judge  
13 Andrews not to discretionarily stay the FRAND claims,  
14 that's why it's not proceeding. And it's noteworthy  
15 that their arguments against the stay that Judge  
16 Andrews found are unpersuasive are the very same  
17 arguments that they're advancing here. No different.  
18 They're precisely the same.

19           Now, I'm not suggesting to Your Honor  
20 in any way that you're bound by what Judge Andrews  
21 did, but Your Honor indicated at our last hearing that  
22 you believe quite strongly in comity; and after full  
23 briefing and a two-hour-long hearing before Judge  
24 Andrews, he concluded that it would be more efficient

1 for the FRAND claims to be heard after the ITC case  
2 was over. And we submit that as a matter of comity,  
3 his stay decision with regard to this discretionary  
4 issue of timing should be given close and careful  
5 consideration by Your Honor.

6 And finally, Your Honor, there is one  
7 further basis for dismissing or staying the case;  
8 namely, that their claim for setting a FRAND rate is  
9 not ripe. And I'm happy to address that or rest on  
10 the papers. If Your Honor wants to hear about it, I  
11 can certainly expound upon that a bit more. But it  
12 plainly is not ripe for two brief reasons.

13 And that is, number one, that they  
14 haven't committed to pay the FRAND rate, and they've  
15 assiduously avoided committing to pay any FRAND rate  
16 that Your Honor might adjudicate or that Judge Andrews  
17 might adjudicate. Indeed, when he asked them straight  
18 up when they were before the District Court whether  
19 they would pay, they'd say, "Well, we might pay if you  
20 award us the rate that we want." Not "award us a  
21 rate," but "award us the rate that we want." That's  
22 not a promise to pay at all.

23 And second, there are predicate  
24 issues, factual issues, that need to be determined



1 before you can ever get to the FRAND rate. And that  
2 is the issues of validity. Are the patents valid?  
3 They won't stipulate to that. Are they infringed?  
4 They won't stipulate to that. And are they essential  
5 within the meaning of the ETSI policy? And they won't  
6 stipulate to that either. Until that's adjudicated  
7 and decided upon, you can't rule on the FRAND rate.

8                   So with that, Your Honor, unless you  
9 have some questions, I will conclude my remarks.

10                   THE COURT: Thank you.

11                   MR. YOUNG: Your Honor, a brief moment  
12 of rebuttal?

13                   THE COURT: Sure.

14                   MR. YOUNG: Thank you.

15                   With respect to the procedural  
16 recitation that Mr. Shulman has made, I should note  
17 that the case in the District Court was originally  
18 assigned to a judge in the Eastern District of  
19 Pennsylvania, and it only came to Judge Andrews after  
20 our motion was filed. And I think some of the timing  
21 that has been described by Mr. Shulman is attributable  
22 to the fact that we didn't know whether it would stay  
23 with the judge in the Eastern District of  
24 Pennsylvania, and it didn't come to Judge Andrews

1 until subsequently.

2           As Your Honor has likely read, Judge  
3 Andrews issued a written order in which he referred in  
4 his Footnote 1, and this is Exhibit B of our opening  
5 papers on this motion, to the leverage that would be  
6 given to Interdigital in the event of an exclusion  
7 order issued by the ITC.

8           And I want to address the harm issue  
9 that Mr. Shulman just addressed. He seems to think  
10 that if we lose that case, then there is no harm  
11 because our claims on the merits will have been  
12 decided adversely to us. What he ignores is the  
13 unfair advantage and the gun-to-the-head leverage that  
14 would be provided to Interdigital in a case involving  
15 a patent which Interdigital -- or patents which  
16 Interdigital has pledged to license on fair,  
17 reasonable and nondiscriminatory terms.

18           It is our view and the view of many  
19 others that such leverage is unwarranted and improper,  
20 and the only way to eliminate that unfair leverage  
21 would be to have a FRAND license rate which could be  
22 paid in the event that an exclusion order were to be  
23 recommended in the ITC case.

24           As Mr. Shulman has just acknowledged,

1 the ITC cannot provide that remedy. Only a court can  
2 provide that remedy and have it be binding. And  
3 that's why we came here. That's why, at Your Honor's  
4 instruction, we went to the District Court. The  
5 District Court decided adversely to us, but that  
6 doesn't I think eliminate the need on our part for a  
7 judicial determination.

8                   Now, the District Court faced a number  
9 of issues. It faced infringement claims and validity  
10 claims and other claims which were subject to the  
11 mandatory stay and which would have remained with  
12 Judge Andrews even if he had decided to take up our  
13 motion.

14                   THE COURT: You asked for the  
15 mandatory stay to be invoked, did you not?

16                   MR. YOUNG: Yes, we did.

17                   THE COURT: You didn't have to.

18                   MR. YOUNG: No. That is true. But it  
19 is a --

20                   THE COURT: So you chose. It's  
21 really -- the Celtics could have beaten the Heat if  
22 they got to call a time-out on Bosh, Wade and LeBron  
23 playing offense and the only one who got to play  
24 offense was the Celtics.

1           The first-filed action was stayed at  
2 your client's request; right?

3           MR. YOUNG: Yes, along with the other  
4 defendants in the case, you're correct.

5           THE COURT: And along with -- did you  
6 seek to carve yourself out?

7           MR. YOUNG: The request for stay was  
8 made as to the whole case; you're right, Your Honor.

9           THE COURT: I'm saying your client --  
10 When people say "along with others," that's a way of  
11 distancing themselves from their own position. Your  
12 client chose to seek to invoke the mandatory stay;  
13 correct?

14           MR. YOUNG: Yes, that is correct.  
15 You're right. However, that doesn't eliminate all the  
16 other reasons for this particular issue being  
17 appropriate for a judicial determination.

18           And the fact that Judge Andrews, in  
19 fact, recognized that the consequences to the  
20 defendants, that is, Huawei, of an erroneous  
21 evaluation of the ITC litigation may be more drastic  
22 than the consequences to the plaintiff and, therefore,  
23 give the plaintiffs some bargaining leverage over the  
24 defendants I believe is important. Now, Judge Andrews

1 came to a different decision as to whether he should  
2 evaluate this issue separately. And we are  
3 requesting, Your Honor, here, to make a different  
4 evaluation of that fact.

5           There is one additional fact that I  
6 would bring to Your Honor's attention, and it will  
7 really be for Your Honor to decide whether it cuts in  
8 favor or against my position in this case.

9           I mentioned the Microsoft versus  
10 Motorola decision. There is an ITC proceeding as  
11 between Microsoft and Motorola. And the judge in that  
12 case, the administrative law judge in the ITC,  
13 actually recommended in favor of an exclusion order.  
14 And he rejected the FRAND defenses that Microsoft made  
15 in that case, we believe wrongly.

16           What has happened since then is that  
17 there have been review proceedings in the commission  
18 over whether to affirm the administrative law judge's  
19 decision.

20           During the course of that, various  
21 parties have submitted public interest statements with  
22 respect to the issue of whether injunctions and  
23 exclusion orders should be available in the case of  
24 standard essential patents.

1           One of the parties submitting -- one  
2 of the entities submitting a public interest statement  
3 has been the United States Federal Trade Commission,  
4 which last week submitted to the International Trade  
5 Commission a statement that says in a case involving  
6 standard essential patents, the issuance and the  
7 seeking of an exclusion order or other injunctive  
8 relief raises serious competitive concerns.

9           And it's those same issues that  
10 motivate us in seeking the relief that we are seeking  
11 here. A remedy in the form of a license rate that can  
12 be paid to avert an exclusion order would be  
13 consistent with what the District Court in Washington  
14 did and with what the FTC is advocating now, and ought  
15 to be our remedy here.

16           The Conoco case, as described by  
17 Mr. Shulman -- and I would agree with his  
18 characterization in the sense that the prior action in  
19 that case could not affect what was at stake in the  
20 Chancery Court action. That's precisely the point  
21 that we're making here. The ITC action cannot set a  
22 rate. Only this Court can set that rate.

23           THE COURT: No, that's not true. The  
24 U.S. District Court can set the rate.

1 MR. YOUNG: That is correct. And we  
2 did go to Judge Andrews, and he declined to do that.

3 THE COURT: The fact that he declined  
4 to do it doesn't mean that he cannot do it. He  
5 declined to do it at this time.

6 MR. YOUNG: Your Honor is correct.  
7 What I was trying to distinguish was between a court,  
8 whether it be the District Court or Your Honor's  
9 court, on the one hand, which can --

10 THE COURT: The first-filed court --  
11 the first-filed action that you moved to stay, the  
12 judge in that court, who is a federal judge -- which,  
13 with all the federal policies you keep raising about  
14 the FTC and their concerns about whether their  
15 exercise of their power under federal statutes, that  
16 ought to contemplate when the FTC -- when they're  
17 doing something, that patent actions will be stayed,  
18 it sounds like a very federal debate.

19 As I understand it, there is this  
20 concern, Oh, if we issue an exclusionary order, that  
21 could hurt the party before us. But there is a patent  
22 action where everybody could get game-on about  
23 everything where the party that faces the exclusion  
24 order has the option of having it stayed. Right?

1           You could have decided -- your client  
2 could have said, "Okay. We get it, Interdigital. We  
3 get that we had a fight. Let's all have it game-on in  
4 the U.S. District Court for the District of Delaware.  
5 You bring on your patents claims, seek to enjoin us.  
6 We'll bring on our FRAND defense."

7           MR. YOUNG: The FRAND defenses are  
8 contract issues.

9           THE COURT: They are. And because I  
10 like French food, I'm uniquely situated to decide it?

11          MR. YOUNG: Interdigital is a Delaware  
12 entity --

13          THE COURT: You know, Interdigital is  
14 a Delaware entity which means in cases between itself  
15 and its stockholders, the internal affairs cases, that  
16 its investors rely upon the laws of Delaware to govern  
17 their relationship with their managers.

18          Your client did not file this for  
19 convenience; right?

20          MR. YOUNG: Well --

21          THE COURT: Your client is not located  
22 in Delaware in any way, shape or form; right?

23          MR. YOUNG: That's correct. We filed  
24 here because --



1 THE COURT: And Delaware law is not at  
2 all at issue in this case, is it? Except to the  
3 extent that there are procedural issues like McWane?  
4 When I get to the substantive standard of whether a  
5 FRAND obligation is owed to your client, the extent of  
6 that FRAND obligation, and what a FRAND rate would be,  
7 not one of those issues would be governed by Delaware  
8 law; right?

9 MR. YOUNG: There is French law.  
10 There is --

11 THE COURT: So the answer would be not  
12 one of them would be governed by Delaware law; right?

13 MR. YOUNG: I would have to really  
14 look at that issue to make sure --

15 THE COURT: Is there some reason --

16 MR. YOUNG: I can't name one at the  
17 moment, but --

18 THE COURT: -- why the French look to  
19 Delaware in some particular ways for these things?

20 MR. YOUNG: No, I'm not aware of that,  
21 Your Honor, but there needs to be a court somewhere,  
22 and this is the court where it's appropriate based on  
23 Interdigital's incorporation. And I understand what  
24 you're saying about the Federal Court. Obviously,

1 this --

2 THE COURT: All this is is a different  
3 court. This is just your court of your picking;  
4 right? I mean, to the extent you were talking about a  
5 court geographically in Delaware, you were already  
6 well situated to proceed.

7 MR. YOUNG: There are many reasons, as  
8 we've described earlier about the other issues in the  
9 case, for the District Court not to have been a better  
10 forum. We decided that this would be a better forum  
11 for this particular action and this set of issues.  
12 And we believe the Court is very well able and very  
13 well-equipped to deal with these issues, and we would  
14 ask that the Court do so.

15 Thank you very much, Your Honor.

16 THE COURT: I believe I'm in a  
17 position to address both issues that are on the table.  
18 There's essentially two motions before me: A motion  
19 to expedite and a motion to stay or dismiss under  
20 McWane. I'm going to deal first with the plaintiffs'  
21 motion to expedite and then I'll address the motion to  
22 stay or dismiss.

23 There is an overarching theme here,  
24 which is, you know, there has to be some weight given

1 to common sense, efficiency, cost, and the avoidance  
2 of unnecessary duplication and, frankly, unfair  
3 seeking of multiple chances to address the same issue  
4 from different tribunals given in this context.

5 To grant a motion to expedite, there  
6 has to be a sufficiently colorable claim and a  
7 sufficient possibility of a threatened irreparable  
8 injury. There is no irreparable injury in my view  
9 that's presented here. None.

10 What I'm basically being asked to  
11 determine is that the ITC does not provide in its  
12 consideration of a party's FRAND defense -- it's  
13 basically inadequate. It just doesn't cut it. Well,  
14 I don't buy that.

15 The irreparable injury that is  
16 threatened is the exclusion of the plaintiffs'  
17 products from the United States market. There is an  
18 empowered federal body that determines whether to  
19 grant an exclusion order or not. I've just heard from  
20 the moving party that that agency is sensitive to the  
21 importance of that authority and that it not be used  
22 lightly.

23 Frankly, the moving party here can  
24 present its defense. I have no doubt it will get a

1 full and fair opportunity. I am not on grounds of  
2 comity -- frankly, I'm not on grounds because there's  
3 been no showing made by the moving party that the ITC  
4 doesn't take these things seriously. From the record,  
5 it appears there is going to be extensive, extensive  
6 discovery, all of which is leading to a very prompt  
7 hearing in October about a complicated issue. An  
8 issue that, frankly, has been on the table and the  
9 moving party has known about for some years.

10 So I think in terms of irreparable  
11 injury, the first layer of why there is not  
12 irreparable injury is that the ITC can consider the  
13 defense; and if it finds the defense to be a good one,  
14 then there will be no exclusion and no irreparable  
15 injury.

16 There is a second layer here, which is  
17 that there is a first-filed action in the United  
18 States District Court for the District of Delaware,  
19 the court system that has the exclusive jurisdiction  
20 by dint of federal policy to consider patent claims.

21 The moving party here would have the  
22 opportunity even if there is an exclusionary order to  
23 then move to expedite, renew its motion to expedite,  
24 before Judge Andrews, and to say, "We're being

1 excluded. This is a matter of federal policy,  
2 economic policy. A federal regulatory agency is  
3 excluding us. We need you to accelerate, Good Federal  
4 Judge" -- Judge Andrews is a person I've known for a  
5 long time. He's a hard-working, intelligent,  
6 committed public servant.

7           If there is a matter of federal  
8 policy, the moving party can proceed in the  
9 first-filed judicial action where there is a body that  
10 can set a FRAND rate. The U.S. District Court for the  
11 District of Delaware can indisputably set the FRAND  
12 rate.

13           I had not known that when a party's  
14 only ability to present a defense is in a Federal  
15 Court that that is, frankly, grounds for irreparable  
16 injury. I don't believe that, and I'm not going to  
17 base a motion to expedite on the proposition that when  
18 a party has a full and fair opportunity to litigate  
19 before a Federal Court, that because it might not  
20 persuade the Federal Court of the schedule that it  
21 prefers or it doesn't like the Federal Court, that  
22 that's irreparable injury.

23           We've had, frankly, arguments in this  
24 courthouse sometimes that, "Oh, well, I have a defense

1 in another State Court in the same building, but they  
2 don't move fast enough." We don't find that that's  
3 not an adequate remedy at law. And I have enough  
4 regard -- I clerked for Federal Court. I have a high  
5 regard for Federal Courts. I am not going to base my  
6 ruling on that.

7 I also think, frankly, the moving  
8 party who is moving to expedite comes, frankly, not in  
9 the most gracious posture. It was sued in a court of  
10 proper jurisdiction over issues that are important to  
11 the defendant in this case, issues that are  
12 intertwined with the FRAND rate, issues like "You're  
13 infringing our patent." Actually, I should say  
14 "patents," because there are multiple patents at  
15 issue.

16 The moving party here chose its  
17 choice. It chose to say, "There's a federal statute  
18 that allows us to get this action stayed while the ITC  
19 action goes forward." You don't have to invoke it.  
20 You get the choice to. The moving party chose to do  
21 it. So it stopped the patent holder in its tracks.  
22 Now, I get that. You get to do that.

23 To then run over to Chancery and file  
24 an action and say, "We wish to play offense, we wish

1 to play a game where the only team that gets to play  
2 offense is us, and the other team can't play offense  
3 against us, so if they steal the ball, they can't go  
4 to the hoop" -- this is a court of equity. Those  
5 choices, those tactical choices, are perfectly  
6 legitimate, but they have consequences.

7           If the moving party had desired to  
8 have everything decided quickly, then it needs to own  
9 that. And the most logical way to do that is say  
10 let's bring all these issues on. They do intertwine.  
11 I do have some experience with this. And frankly, I  
12 don't think anybody knows what, ultimately,  
13 intellectual property is owned by anyone in these  
14 technology fields. I'm convinced that nobody in the  
15 patent bar knows what they're talking about. They  
16 either -- they know what they're talking about, but  
17 they speak a language other than English or that I,  
18 frankly, don't speak. I'm just dumb.

19           Because what people tend to do, like  
20 the moving party here is, "Well, you've got to give me  
21 a FRAND rate. You have to offer it to me. Now, I'm  
22 not saying that you own anything that I should be  
23 paying you for, and I'm not conceding that what you  
24 own is essential to any standard, and I'm not

1 conceding that your patent is valid, but you've got to  
2 tell me whether it's 15 bucks per unit, 16 bucks,  
3 whatever it is. I'm not saying that when the Court  
4 determines that, I'm going to pay that."

5           You know, and the patent holders have  
6 their own issues, but they all get -- you know, these  
7 are intertwined. And there is absolutely no doubt in  
8 my view that to the extent that they can be handled in  
9 one tribunal, so that that tribunal can consider all  
10 the related issues, then that is optimal from an  
11 efficiency standpoint and optimal for society.

12           And Congress has determined that with  
13 regard to the patent issues, there is only one court  
14 system that can determine them. And when that court  
15 system is available to handle the FRAND defense, then  
16 it ought to do the whole kit and caboodle.

17           And frankly, in terms of the moving  
18 party's alacrity, it sought to stay the first-filed  
19 action, so it wanted to go slow then. It came to me,  
20 took its shot at just playing offense while it froze  
21 the other team from playing offense. Didn't work.  
22 Got sent back. It took its time. Took its time  
23 coming back here. Now it wants me to hurry up and  
24 jump a fast-moving train when there are two federal



1 entities that can act on these matters, one which is  
2 prepared to consider the FRAND defense and the other  
3 which chose in its discretion not to.

4           That's just something that the moving  
5 party lost. It may regret that. It can go to the  
6 Third Circuit. I clerked for the United States Court  
7 of Appeals for the Third Circuit. You can seek  
8 discretionary appeals. I don't know if this would  
9 warrant it. But to the extent that somebody wishes to  
10 second-guess Judge Andrew, they better be somebody who  
11 sits on the United States Court of Appeals for the  
12 Third Circuit, not somebody who sits on the Delaware  
13 Court of Chancery.

14           So in my view, there is no irreparable  
15 injury here, and so the motion to expedite is denied.

16           The McWane motion is going to be  
17 granted. McWane, I think everybody understands what  
18 it's about, but it's a venerable case from 1970, and  
19 says when there is a prior action pending elsewhere  
20 and a Court capable of doing prompt and complete  
21 justice involving the same parties and the same  
22 issues, this Court has the discretion to stay or  
23 dismiss.

24           Here, there is a first-filed action in

1 the United States District Court of Delaware, which is  
2 the Court with sole jurisdiction in this country over  
3 patent infringement claims. Not the District of  
4 Delaware but the United States Federal Courts.

5 The plaintiff in this case chose to  
6 stay that action for its own reasons. And that's an  
7 action in which the plaintiff in this case, where it's  
8 a defendant, has had to raise its FRAND defense as a  
9 compulsory counterclaim.

10 The District Court has already found,  
11 frankly, that its own action and the ITC thing overlap  
12 98 percent. The reality is there is a direct linkage  
13 between the FRAND rate that the plaintiff here seeks  
14 and the patent claims of the defendants. There are  
15 factual efficiencies to be had in discovery. There  
16 are defenses that people will make that, you know, the  
17 patent issues will relate to the FRAND issues and vice  
18 versa. The parties -- there is an identity of  
19 interest and a substantial similarity of parties that,  
20 frankly, undeniably meets the test of McWane. And  
21 when claims are compulsory counterclaims, that has  
22 historically been one of the strongest circumstances  
23 for the exercise of discretion under McWane.

24 And I don't keep things around just to

1 keep them around. I'm not one of those judges.  
2 Frankly, there is a tendency under McWane for  
3 everybody to stay things. You know why people stay  
4 them rather than dismiss them? I'm going to reveal a  
5 secret. Judges are risk averse. So they think if  
6 they stay something, they will not get reversed,  
7 whereas if they dismiss it, it's a greater  
8 consequences.

9 I'm going to dismiss without  
10 prejudice. If there is something at the end of all  
11 the District Court cases and the ITC where there is  
12 something that's left hanging, I will consider a  
13 complaint in the future, but I see no reason to stay  
14 this because my view of it is there is a properly  
15 filed first action in the United States District Court  
16 for the District of Delaware.

17 It makes absolutely no sense when  
18 there is a proper tribunal available for this Court to  
19 cherry-pick issues out and do small parts of a  
20 dispute. That is highly inefficient. It results in  
21 inefficiencies in evidence production and witness  
22 production. It results in the possibility for this  
23 Court to trip over very firm jurisdictional lines that  
24 the Federal Courts have drawn in the patent area when

1 the Federal District Court has none of those  
2 inhibitions.

3           And I'm going to make another note  
4 about the nature of the plaintiff here. The plaintiff  
5 is not a Delaware corporation. It has no identifiable  
6 assets in Delaware. It has no witnesses in Delaware.  
7 There is nothing efficient about -- it's not like the  
8 headquarters is down the street, therefore, in terms  
9 of handling the case, it has a convenience factor.  
10 There is no convenience factor here for the plaintiff  
11 of being in the State of Delaware.

12           As a result, I can't give that any  
13 weight in *McWane*, where I'm sitting around going, "Oh,  
14 I understand that there are CEOs here. The person  
15 from the U.S. marketer is here or wants to be here for  
16 that." No. Nothing negative against them, but there  
17 is no prejudice, especially when, even in terms of the  
18 geographic factor, the reality is unless you want to  
19 be sort of closer to the river on King Street, you  
20 have all the joys of being in Delaware at the Boggs  
21 Federal Building.

22           Then there is another really important  
23 factor, which is there isn't anything about this case  
24 where the plaintiffs seeking to bring something that's

1 sort of uniquely within the expertise of this Court or  
2 our State Court system. This isn't a situation where,  
3 frankly, there was a joint venture agreement between  
4 the two parties, and they specifically chose Delaware  
5 contract law, and they specifically invoked a Chancery  
6 dispute resolution clause, knowing that there would be  
7 specific performance in Chancery under Delaware law,  
8 and you'd have the ability, as our Supreme Court has  
9 shown time and again, to get expedited appellate  
10 review from them.

11           This is a case that will primarily  
12 evolve under a French law, European trade standard,  
13 with potentially other international standards, none  
14 of which are Delaware. I love French food. I think  
15 Platini was one of the most elegant footballers of all  
16 time. Zidane. There are all kinds of cool things  
17 about France. I never hesitated to eat french fries.  
18 I never called them freedom fries. I still remember  
19 Lafayette who helped us when we needed him. I have no  
20 special insights that Judge Andrews or anyone else  
21 doesn't have into French law; and all I would be doing  
22 is, frankly, proliferating forums. That's McWane is  
23 all about. This is actually a core kind of example of  
24 when McWane should be used.

1           And I appreciate what Mr. Young said  
2 about the intricacy of some of the federal dynamics  
3 that are going on. That's actually not a reason for  
4 State Courts to intrude. It may be a powerful reason  
5 for Congress, the ITC, and the Federal Courts to  
6 consider how they handle things like exclusion orders,  
7 injunctions in patent cases, the relationship of  
8 treaties, technology treaties, that set obligations  
9 like FRAND obligations.

10           I think there is probably much, given  
11 some of the prior experiences I've had in this area,  
12 there is probably much that could be done to improve  
13 things. I don't happen to be of the camp, though,  
14 that getting into others' business on a very selective  
15 basis is really the way that you get sound reform.

16           I don't wish to disrespect my good  
17 colleagues in Washington state who apparently stepped  
18 in at the instance of one of their leading citizens,  
19 unless I miss my guess about the case, who the  
20 plaintiff was in that case, but this is a situation  
21 where there's been a dispute between the two parties  
22 for some years. The party that wishes me to jump  
23 ahead of two proceedings, frankly, has not acted with  
24 great alacrity.

1           It made its tactical decisions, which  
2 I respect, but its tactical decisions actually slowed  
3 down its ability to press its claims in the proper  
4 first-filed forum. That was its own choice. And to  
5 the extent my federal colleague took note of that --  
6 and he's pretty smart; he probably did -- and he'd  
7 say, "Ah, they wanted the mandatory stay of pretty  
8 much everything else. Now they want to pick out their  
9 issues and go forward. I'm just not 'hep' with that.  
10 And I think that the ITC will fairly consider their  
11 defense. And, frankly, after all the fallout from the  
12 ITC has hit the ground, I can make a determination on  
13 how to go forward with all the issues," that sounds  
14 like a fairly sensible judgment.

15           That's not a license, then, to come  
16 into other tribunals and say, "Let's try again." Nor  
17 is, again, the discretionary decision of the judge  
18 handling the first-filed action to not move forward  
19 somehow a reason under *McWane* not to apply *McWane*.

20           Remember what *McWane* says: A Court  
21 capable of doing prompt and complete justice. That is  
22 the key. Not a Court that says, "I'm going to give  
23 the party that wishes to proceed in the second-filed  
24 action everything it wants." *McWane* can't work that

1 way, where the party that files a second-filed action,  
2 every time the first-filed judge doesn't rule its way,  
3 can go back to the second-filed judge and say, "See,  
4 we wanted this schedule and he gave us that schedule.  
5 He could have considered our defense, but he chose in  
6 his well-reasoned discretion not to." That's not the  
7 basis for McWane. It's whether there is a Court  
8 capable of doing prompt and complete justice.

9 I have absolutely no reason to believe  
10 that the United States District Court for the District  
11 of Delaware is not capable of doing complete justice.  
12 Other courts in this nation other than the Court of  
13 Chancery can and do expedite cases.

14 I know there is no court in the  
15 country where people feel more welcome to ask for  
16 expedition than here. You can call us up, you can  
17 write it on a napkin, you can walk by us in Libby's  
18 and have drawn it with your eggs and bacon on the  
19 plate, whereas in a Federal Court, you may have to  
20 read the chamber-specific rules about angle of  
21 approach and all that kind of stuff. But the reality  
22 is Federal Courts routinely handle expedited matters.  
23 They can. One chose not to here.

24 And I remind the moving party, one



1 chose not to here in a situation where the moving  
2 party invoked its own statutory right to stay the  
3 parts of the case against it that it didn't like. And  
4 that party remains able to present its defense before  
5 the ITC, remains able even if it loses to the ITC to  
6 go back to Judge Andrews and to ask for expedition and  
7 to say that it needs to accelerate a determination of  
8 its FRAND defense because of the existence of an  
9 exclusion order. And Judge Andrews will be able to  
10 take into account the seasoned -- the then-current  
11 facts.

12           So for all those reasons, this case is  
13 dismissed under McWane without prejudice to refile a  
14 complaint at the end of all the pending proceedings if  
15 there is something that wasn't adjudicated. The  
16 parties can work together and submit within two days a  
17 conforming order that refers to the reasons cited on  
18 the record.

19           And if you don't like it, you can seek  
20 review from my betters, but I'm not going to stay the  
21 case to simply have it pending around in the docket  
22 with me having to ask you for status reports  
23 periodically. All the reasons that motivate McWane  
24 suggest that you shouldn't do that because, again,

1 we're talking about efficiency here and we're talking  
2 about economy of effort not only for the parties but  
3 for the judicial system as a whole.

4                   So thank you for your focused  
5 arguments, and good luck with your French law dispute.  
6 Perhaps you can watch the rerun of Don Draper's wife  
7 singing "Zou Bisou Bisou."

8                   See you.

9                   (Court adjourned at 11:05 a.m.)

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CERTIFICATE

I, JEANNE CAHILL, Official Court Reporter for the Court of Chancery of the State of Delaware, do hereby certify that the foregoing pages numbered 3 through 42 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 this 11th day of June, 2012.

/s/ Jeanne Cahill

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Official Court Reporter  
of the Chancery Court  
State of Delaware

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