IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
WESTERN DIVISION

COLLEGE PRODUCTS, INC.,

Plaintiff,

vs. No. C23-4002-KEM

INTIRION CORPORATION, TRANSCRIPT OF TELEPHONIC

Defendant. STATUS CONFERENCE

_____/

INTIRION CORPORATION,

Plaintiff,

vs. No. C23-4023-KEM

COLLEGE PRODUCTS., INC.,

Defendant.

_____/

The Status Conference held before the Honorable Kelly K.E. Mahoney, Chief Magistrate Judge of the United States District Court for the Northern District of Iowa, at the Federal Courthouse, 320 Sixth Street, Sioux City, Iowa, May 4, 2023, commencing at 2:03 p.m.

Intirion Corporation Exhibit 2009
College Products, Inc. v. Intirion Corporation
IPR 2023-01041

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APPEARANCES

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For the Defendant Intirion:	R. SCOTT JOHNSON, ESQ. THOMAS M. PATTON, ESQ. CARA S. DONELS, ESQ. Fredrikson & Byron Suite 301 111 East Grand Avenue Des Moines, IA 50309 MICHAEL J. FREY, ESQ. Michael J. Frey, PC Suite 300 701 Pierce Street Sioux City, IA 51101
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(The following transcript was prepared from an audio recording.)

* * * *

THE COURT: Hi. This is Judge Mahoney. We're here in the matter of College Products, Inc., versus Inti -- is it Intirion Corporation, 23-CV-4002, as well as Case Number -- or case Intirion Corporation versus College Products, Inc., Case Number 23-CV-4023. Who do we have on the line on behalf of Intirion? And please let me know if I'm mispronouncing that name.

MR. JOHNSON: Good afternoon, Your Honor. This is Scott Johnson with Fredrikson & Byron. I think you're pronouncing it correctly, Intirion. With me today I have Thomas Patton and Cara Donels as well as Mike Frey from the Mayne law firm.

THE COURT: All right. And, Mr. Johnson, I understand you'll be handling the hearing today?

MR. JOHNSON: Yes. Unfortunately I think you're stuck talking to me today, Judge.

THE COURT: No problem.

And then on behalf of College Products, who do we have on the line?

MR. LLAGOSTERA: Hello, Your Honor. This is Domingo Llagostera. Oh, I'm sorry. Go ahead, Jeana.

MS. GOOSMANN: You bet, Your Honor. This is

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Jeana Goosmann, as well. And Domingo's going to be arguing today.

THE COURT: Very well. So we are here for a status conference about consolidation of these cases. I did receive the parties' e-mail with the bullet points of the issues to be discussed as well as your individual positions or each side's position on them.

From review of that at this point I guess the only questions I have -- well, I have a coup -- few questions. So for College Products, you indicate you do not think that Intirion should be making an argument for personal jurisdiction or argument against having personal jurisdiction over it at this time. Why is that?

MR. LLAGOSTERA: Well -- sorry, Your Honor. This is Domingo Llagostera with Blank Rome. It's nice to meet you. I'm out of Houston.

The reason I -- we made that comment is because the issues in this e-mail were about whether -- which case should be consolidated into which. And I understand that Intirion (interrupted connection) file a motion for lack of personal jurisdiction, and that being the case (interrupted connection) in a brief. I'm not sure if that has any bearing on the consolidation issue. The reason is because they -- they've (interrupted connection) to have their case transferred to this court.

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And we believe that's another reason that personal jurisdiction is proper in this action. We amended our complaint about a week ago, two weeks ago to point that out. So personal jurisdiction is -- is a problem in the first instance, particularly as for amended complaint (interrupted connection) of this Court. But to the extent we're going to go into that, we should probably brief that in a 12(b) motion that they file.

THE COURT: All right. And I guess for Intirion, you mention a couple times that if this case were to be consolidated into the College -- or the action filed here by College Products that it would improperly align the parties putting them in positions inconsistent with the primary purpose of the litigation.

I guess I'm just -- I want to clarify what you mean by that.

MR. JOHNSON: Sure, Your Honor. This is a patent infringement case. Intirion owns four patents that are at issue in both cases. In the Texas case, of course, we filed as the patent owner a patent infringement case against someone who we believe to be an infringer to align with that primary purpose of the litigation, and that was the original subject matter of their declaratory judgment action as well was the patent infringement accusations.

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To align that with the plaintiff and the defendant with the burdens of proof, it just makes sense to have the patent owner as the plaintiff and the accused infringer as the defendant.

At the 11th hour, they filed an amended complaint, and that was actually after our meet and confer on consolidation. And they added in these new claims of unfair competition and defamation in just sort of an attempt to try and remain plaintiff for some reason. We're not sure why they did that. But we think it only makes logical sense to keep the patent owner as the plaintiff, the accused infringer as the defendant. And if they want to add in some counterclaims, they're free to do that in our case.

THE COURT: And you don't think that the counterclaims that they would file or basically the claims in their case they filed here are compulsory counterclaims?

MR. JOHNSON: They may be, Judge. I mean, I'm assuming that they arise out of the same operative facts, if you will, related to our enforcement of our intellectual property. But it doesn't really change the narrative that the patent owner should be the plaintiff in what is otherwise a, you know, multi-patent patent infringement suit.

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THE COURT: And I guess for College Products, why do you need the separate case versus adding these in as counterclaims in the case initially filed by Intirion?

MR. LLAGOSTERA: I'm sorry, Your Honor. It cut out for me for one second there. If you would please repeat that question.

THE COURT: Sure. I guess why could your claims that you filed in the lawsuit you brought here not be included as counterclaims and perhaps -- or should they not be included as counterclaims in the original suit filed in Texas by Intirion?

MR. LLAGOSTERA: Well, they could. (Interrupted connection) compulsory from our perspective because they're not just related to the allegations of patent infringement against College Products' customers. They are related to the defamatory statements that we believe or contend Intirion has been making to College Products' customers like the suggestions of bankruptcy and unsafe products. That's a different issue. And we've included the letters that Intirion has sent to College Products' customers in the complaint. So those are definitely not compulsory I don't think.

THE COURT: Okay.

MR. LLAGOSTERA: But I would like to address what defendant's couns -- or what Intirion's counsel just

said about the proper order in a patent. We -- if the Court would permit me to do that.

THE COURT: Sure. Go ahead.

MR. LLAGOSTERA: So the issue here is whether from our view they filed an infringement action in Waco. They filed (interrupted connection) months ago, and right out of the gate we told them that that was not a proper venue because under the venue statute for patent cases you have to -- the defendant has to have a physical place of business in the jurisdiction. And there was no allegation of a physical place from the jump that we spent over a year fighting about because under the court's rules in Waco, the plaintiff, Intirion, is entitled to jurisdictional discovery.

While that was going on, we discovered that they were sending letters to customers like the one we included in our complaint, and it was clear to us that what was happening was that they were forum shopping to pull us into Texas and putting the screws (interrupted connection) small company operating out of Sioux City. There's only less -- there's less than ten employees. No question we don't have a physical place of business in Texas.

But what happened was during discovery we recognized that it was a very good chance that Intirion was

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(interrupted connection) course around Texas go to the Eastern District or Southern District because they (interrupted connection) for broader discovery the Western District of Texas (interrupted connection) to stop that to make sure that their patent claims were going to be litigated and adjudicated in the proper venue.

The court in the Western District of Texas agreed with us and found their venue arguments irrelevant, unpersuasive, unconvincing was I think what the court used, not a single (interrupted connection) was proper.

And so from our perspective and under the law we cited, there was never a properly filed suit in Waco, so they're not the first to file. And our DJ action takes precedence over that type of forum shopping, and we put some case law in our (interrupted connection) on that. And I'll note all of the cases -- there's not a single case in there where it was initially improper filing. And so we believe that (interrupted connection) plaintiffs (interrupted connection) both in the unfair (interrupted connection) to stay as plaintiff. We just discovered a few months ago the letters to the universities. We're hoping this case would get settled after it was transferred out of Waco. That didn't happen. So the counterclaims of unfair competition

(interrupted connection).

THE COURT: Okay. And just for the record, you were -- you cut out a bit during what you said there. I was able to follow what you were saying, though. I guess why does it matter to you who's the plaintiff?

MR. LLAGOSTERA: Why does it matter? Did I hear you say what does it matter who's the plaintiff, Your Honor?

THE COURT: Yes.

MR. LLAGOSTERA: Because we think we have the affirmative cause of action here. I mean, I understand that they brought a patent infringement claim. But in our view, this really is not something that they're interested or have been interested in really adjudicating (interrupted connection) a DJ action in our other affirmative claims. And we are facing substantial harm in the industry because of the filing in Waco and having drug that out over a year. And so we believe that we should be a plaintiff and recover for all the harm that's been caused to our university relationships.

THE COURT: But can you still recover if you filed counterclaims in a case with Intirion as the -- essentially original case even though it was filed in Texas?

MR. LLAGOSTERA: I believe that -- yes, Your

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Honor. I don't see any reason why we couldn't bring counterclaims of unfair competition and defamation in -- in their case and recover for that. But we -- because of what has happened in the past, we don't think that's the appropriate action and (interrupted connection) in our case and that we really are truly the first to file plaintiffs.

THE COURT: All right. And again, I've looked at the docket from the Western District of Texas case. I read the order denying the motion to dismiss filed by College Products and instead transferring the case here to the Northern District of Iowa. Again, I read your points from the e-mail you submitted earlier.

So at this point it looks like there's going to be a motion to dismiss filed by Intirion for lack of personal jurisdiction in the College Products case. That's the 4002 case filed here originally in this district. I think that's going to have to be litigated, and that will need to be determined by either a district judge or by me if the parties -- you may all consent to the case proceeding before a magistrate judge.

I think in light of that, it makes the most sense to leave the cases separated at this point. It could be done otherwise. But I think that's probably just the most efficient and the most timely way to get it done.

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And then once that is resolved, it doesn't appear the parties disagree that the ca -- they're in agreement the cases should be consolidated. It's just who should be the lead case, which case should be the lead case, and when should that happen.

So in answer to the when, I think it should happen after any motion for lack of personal jurisdiction has been resolved in the College Product case. So that's the 4002 case filed first here in this district. After that I don't know as it really matters as to which case is filed -- or which case is consolidated into the other assuming there still is a case on the College Products matter. Generally this Court will go with the first filed. Obviously there's a wrinkle in this because the first filed was the Intirion case which is the 4023 case in this district originally filed in Texas.

But at the end of the day, I think that was the original case filed, and it would make sense for that to be the lead case even though it was later transferred to this district.

So again, this is informal guidance at the request of the parties on a status conference. So I guess does that answer the questions you have at this point, Mr. Johnson, on behalf of Intirion?

MR. JOHNSON: Yes, Your Honor. I would ask one

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other question --

THE COURT: Sure.

MR. JOHNSON: -- I guess with regard to scheduling -- scheduling conferences I guess or the scheduling order. Can we delay entry of a scheduling order or discussion of a scheduling order until we know which case is really going forward until after resolution of that motion to dismiss?

THE COURT: Yeah. And I guess what is College Products' position on that, Mr. Llagostera?

MR. LLAGOSTERA: I think it makes sense to hold off on a scheduling order until we get the personal jurisdiction issue resolved.

THE COURT: Okay. I'll enter an order then in the College Products case -- that's the 4002 case -- to extend the deadline for filing a proposed scheduling order and discovery plan. That deadline right now is tomorrow. So I will order that that be extended. Obviously you're trying to gauge how long it will take to get a ruling on a motion that has not yet been filed and fully briefed. I'll go ahead and just extend that for 60 days likely at this point, or I'll include it in the order, but I think that probably makes sense to push it down at least that far down the road.

I guess anything -- anything on what I've advised so

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far on guidance from the Court on behalf of College Products at this case -- point?

MR. LLAGOSTERA: Sure, Your Honor, just a point of clarification. On the comments about the Waco court being the first to file and whether it's really the first to file, will we have an opportunity after the personal jurisdiction motion is decided to either reraise this issue or key it up for perhaps some short briefing because I do think we've got kind of an unusual situation here with the case being filed in an improper venue and also want to comment that there was never a offer to transfer that case up until the court was going to dismiss their case for lack of venue. That was a throw-in at the hearing at the very end. So I think it might benefit the Court if we could at least lay some of these things out. It doesn't have to be long.

THE COURT: Yeah. No. I mean, you're free to do that. I -- frankly, I've found in a lot of these cases there's nothing -- there's never anything that isn't long. Briefs tend to be very lengthy, lots of attachments and such. But no, you're free to reraise the issue after issues of personal jurisdiction have been dealt with in the College Products case.

Yeah. What else on behalf of College Products do you think we need to discuss at this point?

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MR. LLAGOSTERA: That's it for us, Your Honor. We'll work with the other side on any further briefing schedule including a page limit to not burden the Court with something that is overburdensome.

THE COURT: Sure. Anything else on behalf of Intirion, Mr. Johnson?

MR. JOHNSON: Yes, Your Honor. The same deadline is approaching in the Intirion -- the transferred case in Texas. I think our deadline is May 13 to file our scheduling order or proposed scheduling order in that matter. Could we get a 60-day extension of that as well, please?

THE COURT: No. I'll go ahead and run those -- I'll do a written order in both cases. It will be the same deadline.

The only other thing I would say to the parties are -- and I know that some counsel -- I don't know as that I've had you appear before me before. So welcome to the Northern District of Iowa if we have not had a case together.

Obviously this is a case -- at least the Intirion case has been pending for some time. You've had a lot of interaction. I can understand the parties' frustrations on both sides as to where you're at and why you're here and how things have gone.

I'll just let you know that at the end of the day I fully expect you're going to work well together to move the case along. To the extent you have pleadings, briefings, and things, I've already noted some contentiousness in those pleadings, just, oh, the way that motions are -- things that have happened have been described and things. And I hope that that doesn't continue. I think that you can make your arguments and make your points without needing to go there.

And so to the extent that that's helpful guidance to you, it's not a requirement, but it's just generally my preference that we don't act in that manner.

So I will do a written order extending the deadlines for proposed scheduling orders and discovery plans in both of these cases. Otherwise there will be a minute entry entered in both cases just what we discussed here today.

And again, this is general guidance. There was no formal motion made, so it's not a formal order. But you requested the guidance, and that's the guidance I have for you at this point. So with that, that will conclude this status conference. Thank you.

(The foregoing hearing was concluded at 2:21 p.m.)

(This concludes the transcript of the audio recording.)

CERTIFICATE

I certify that the foregoing is a correct transcript to the best of my ability from the digital recording of proceedings in the above-entitled matter.

S/Shelly Semmler — 5-22-23

Shelly Semmler, RDR, CRR — Date

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