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Focusing Patent Litigation

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FOCUSING PATENT LITIGATION

BERNARD CHAO*

INTRODUCTION

Patent litigation is often called the “sport of kings.”¹ While that phrase may not be appropriate for all patent disputes, it is an apt description of the high-stakes cases. Attorneys in these lawsuits tend to zealously advocate for their respective sides by asserting every argument that they can legitimately raise. Patentees often assert an excessive number of patent claims and even pile on unnecessary patents. Some of these claims may be well-founded. But so long as they can make a colorable infringement argument, patentees typically include many weaker claims too. Likewise, patent defendants respond with burdensome and duplicative invalidity defenses. The accused infringers may also have sound invalidity defenses based on strong prior art. But typical defendants will assert mountains of far weaker prior art at the same time. Like the patentees, the only limiting principle is whether the defendant can make a colorable argument that is not sanctionable.

Naturally, these cases present a challenge to our already burdened court system. In his address for the 2018 Supreme Court IP review, Judge William Alsup described one technique, the “showdown” procedure, he has used to address these problems and force patent litigants to focus on the core issues of their dispute.² This essay analyzes the showdown procedure and other similar procedures that were used in one of the most heavily litigated set of patent cases in history, *In Re Katz Interactive Call Processing Patent*

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1. Colleen V. Chien, *Of Trolls, Davids, Goliaths, and Kings: Narratives and Evidence in the Litigation of High-Tech Patents*, 87 N.C. L. REV. 1571, 1573 (2009); Douglas J. Kline, *Patent Litigation: The Sport of Kings*, MIT TECH. REV. (Apr. 28, 2004), <http://www.technologyreview.com/business/13562/>.

2. William Alsup, *Huge Numbers of Patent Cases: How One District Judge Manages Them*, 18 CHI.-KENT J. INTELL. PROP. 111, 121–23 (2019).

Litigation. The common thread to these different approaches is that they do not just rely on sanctions. Instead, they are all designed to incentivize the parties to focus on the core issues in dispute and do away with their weaker arguments. Hopefully, this essay will help other courts narrow the issues in the complex patent cases on their docket.

I. OVERLY LITIGIOUS LITIGANTS

Patent cases are complex and notoriously difficult to manage. Several factors contribute to this problem. First, “[p]atent cases present distinctive management challenges.”³ They have unique procedures like sequential infringement and invalidity disclosures, tutorials and claim construction hearings.⁴ Patent cases also often involve technology that is beyond the training of most judges. If we look at the cases Judge Alsup has managed, we see that he presided over cases with technology ranging from biotechnology to computer systems. For example, *Genentech v. Amgen* was a patent lawsuit that focused on a method of using pieces of DNA, known as cloning vehicles or plasmids, to enable bacteria to produce human proteins.⁵ Judge Alsup famously learned to write software for the Java operating system as he presided over *Oracle v. Google*.⁶ But as the complexity of subject matter increases, cases become harder to manage. That is because complexity can make bad arguments look more reasonable.⁷

The large amount in controversy involved in many of these cases only exacerbates this problem. When so much is at stake, parties are willing to expend a great deal of time and money, and their attorneys are not judicious in the arguments they make.⁸ Patent litigators on both sides often advance

3. Peter S. Menell et al., Patent Case Management Judicial Guide 1.1 (3d ed. 2016).

4. A number of courts have special patent rules that employ a combination of some or all of these procedures. See, e.g., N.D. Cal. Patent Local Rules (last revised Jan. 17, 2017), <https://www.cand.uscourts.gov/localrules/patent>.

5. *Genentech, Inc., v. Amgen, Inc.*, No. C 96-03752 WHA, 2000 WL 36731185, at *1 (N.D. Cal. Nov. 3, 2000).

6. *Oracle Am., Inc. v. Google Inc.*, No. C 10-03561 WHA, 2012 WL 3822129 (N.D. Cal. Sept. 4, 2012); See Sarah Jeong, *The Judge’s Code*, THE VERGE, (Oct. 19, 2017) (describing why Judge Alsup learned Java), <https://www.theverge.com/2017/10/19/16503076/oracle-vs-google-judge-william-alsup-interview-waymo-uber>.

7. One study has shown that using nonsense to characterize difficult mathematical concepts actually impressed readers making them think the content was of “higher quality.” See Kimmo Eriksson, *The Nonsense Math Effect*, 7 JUDGEMENT AND DECISION MAKING 746, 748–49 (Nov. 2012).

8. Wayne D. Brazil, *Civil Discovery: Lawyers’ Views of its Effectiveness, Its Problems, and Abuses*, 1980 AM. B. FOUND. RES. J. 787, 790 (1980) [hereinafter Brazil, *Civil Discovery*] (saying that in larger cases, the discovery process “regularly involves evasion, over discovery and huge costs.”).

any colorable argument they can.⁹ Indeed, “there is a consensus that the numbers of asserted claims, claim terms, and prior art references in patent cases are often problematically excessive.”¹⁰

Unlike the parties, the courts do not get additional resources to handle high-stakes patent cases. They must manage these cases with the same resources that they use for less intensely litigated cases. As described in Part II, courts are authorized to sanction parties when they cross the line and make arguments that lack a good-faith basis. But for a variety of reasons sanctions don’t work well for handling the overly zealous patent litigant. In Part III, this essay proceeds to describe a few innovative ways to manage this problem without relying solely on sanction.

II. DETERRING BAD CONDUCT

One way courts try to deter over litigious patent counsel is through sanctions. There are numerous sources for the courts’ authority to sanction parties and/or their attorneys. Probably, the most well-known authority is Federal Rule of Civil Procedure 11.¹¹ At its core, Rule 11 says that when an attorney signs a pleading, motion, or other paper (e.g., responsive discovery), it is certifying that the arguments and factual assertions are well grounded and not made for an improper purpose.¹² A violation of Rule 11 can be penalized by monetary sanctions, typically attorney’s fees.¹³

There is similar statutory authority providing for sanctions in other contexts. For example, Federal Rules of Civil Procedure 26(g) and 37, both

9. See William T. Gallagher, *IP Legal Ethics in the Everyday Practice of Law: An Empirical Perspective on Patent Litigators*, 10 J. MARSHALL REV. INTELL. PROP. L. 309, 320 (2011) (patent litigators described their role as being “zealous” or “aggressive”, which meant “taking the strongest positions in discovery that were possible”); Bryant G. Garth, *Two Worlds of Civil Discovery: From Studies of Cost and Delay to the Markets in Legal Services and Legal Reform*, 39 B.C. L. REV. 597, 604 (1998) (characterizing the tactics in high-stakes litigation as “a strategy of no-holds barred”).

10. See Jason Rantanen, *Model Order Addressing Numerosity of Claims and Prior Art [UPDATED]*, PATENTLY-O (Jan. 26, 2013), <https://patentlyo.com/patent/2013/07/model-order-addressing-numerosity-of-claims-and-prior-art.html>.

11. Fed. R. Civ. P. 11.

12. Specifically, Federal Rule of Civil Procedure 11(b) says that an attorney is certifying that when a document is filed or otherwise submitted, “(1) it is not being presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation; (2) the claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law; (3) the factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery; and (4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on belief or a lack of information.” FED. R. CIV. P. 11(b).

13. FED. R. CIV. P. 11(b).

allow sanctions for inappropriate conduct in connection with discovery matters.¹⁴ Moreover, in patent law, 35 U.S.C. § 285, permits courts to award “reasonable attorney fees to the prevailing party” in so-called “exceptional cases.”¹⁵ The Supreme Court has interpreted an exceptional case to be “one that stands out from others with respect to the substantive strength of a party’s litigating position (considering both the governing law and the facts of the case) or the unreasonable manner in which the case was litigated.”¹⁶ Finally, the Supreme Court has even said that courts have the inherent authority to issue sanctions.¹⁷

However, sanctions are not an effective way of controlling overly aggressive patent attorneys. First, judges rarely sanction attorneys.¹⁸ There are a variety of possible explanations for this reluctance. Judges may not want to punish fellow attorneys.¹⁹ Ironically, judges may also be concerned that sanctions will result in even more work for the courts because of the likely appeals and other satellite litigation that might follow.²⁰ Finally, judges may have insufficient motivation/time to dig into the mess of accusations and counter-accusations that are typically involved in big cases.²¹ Regardless of the cause, patent litigators know that sanctions are rare and are not worried about them.²² In short, Rule 11 and its kin are used too infrequently to be effective deterrents.

14. Federal Rule of Civil Procedure 26 concerns the duty to disclose information during discovery subsection (g)(3) allows the court to impose sanctions for the improper certification of discovery responses. Federal Rule of Civil Procedure 37 also authorizes sanctions for the failure to cooperate in discovery.

15. 35 U.S.C. § 285 (2012).

16. *Octane Fitness, LLC v. ICON Health & Fitness, Inc.*, 134 S. Ct. 1749, 1756 (2014).

17. *Chambers v. NASCO, Inc.*, 111 S. Ct. 2123, 2133 (1991) (holding that statutory sanctions have not displaced the court’s inherent authority to issue sanctions for litigation abuses).

18. Ironically, the current version of Rule 11 was intended to “reduce the reluctance of courts to impose sanctions (citation omitted) by emphasizing the responsibilities of the attorney and reinforcing those obligations by the imposition of sanctions.” See FED. R. CIV. P. 11 advisory committee’s note, *reprinted in* 97 F.R.D. 165, 198 (1983).

19. See Maureen N. Armour, *Rethinking Judicial Discretion: Sanctions and the Conundrum of the Close Case*, 50 SMU L. REV. 493, 515 (1997).

20. Litigation around the imposition of a Rule 11 sanction can be quite extensive. See, e.g., *Qualcomm, Inc. v. Broadcom Corp.*, No. 05-01958, 2007 WL 4351017, at *1 (S.D. Cal. Dec. 11, 2007) (order adopting report and recommendation on the amount of attorneys’ fees and other expenses); *Golden Eagle Distrib. Corp. v. Burroughs Corp.*, 801 F.2d 1531, 1537 (9th Cir. 1986).

21. Brazil, *Civil Discovery*, *supra* note 8, at 873 (discussing the difficulty of managing complex cases with limited judicial resources).

22. Gallagher, *supra* note 9, at 338 (“The threat of discovery sanctions . . . is not a highly significant factor in shaping how patent lawyers conduct themselves in pretrial discovery.”); Brazil, *Civil Discovery*, *supra* note 8, at 825, 866 (some litigators in Brazil’s study argued that it is the relatively minimal risk of sanctions that lead to litigation abuse).

Second, sanctions only target the most egregious conduct. They are intended to punish litigators for crossing the “line” and making frivolous arguments. But in the application, sanctions are typically only imposed on the most flagrant violators.²³ Patent litigators are aware of these limitations. As a result, they intentionally go up to the line but do not cross it.²⁴

That is why judges need different kinds of tools to deter attorneys from repeatedly making arguments that have little chance of success but are colorable. Judge Alsup’s showdown procedure falls into this category, which is designed to focus parties on the key issues in a case. The following section breaks down both Judge Alsup’s showdown procedure and other techniques used *In Re Katz Interactive Call Processing Patent Litigation*.²⁵

III. FOCUSING PATENT LITIGATION

A. Judge Alsup’s Showdown Procedure

In an effort to reduce the burdens that complex patent cases impose on courts, Judge Alsup has experimented with a case management technique that he calls the “showdown” procedure. He first used this procedure in *Comcast Cable Communications, LLC v. OpenTV, Inc.*²⁶ That case involved over one hundred patent claims from thirteen patents.²⁷ The showdown procedure uses the possibility of immediate negative consequences to place pressure on the parties to focus on the most important issues.

Specifically, Judge Alsup ordered the patentee to pick the strongest individual patent claim.²⁸ At the same time, he ordered the accused infringer to pick what he believed was the weakest asserted claim.²⁹ He then told the parties that they would file summary judgment motions on these two

23. Judith L. Maute, *Sporting Theory of Justice: Taming Adversary Zeal with A Logical Sanctions Doctrine*, 20 CONN. L. REV. 7, 26 (1987) (“Although federal courts had authority to sanction misconduct before the 1983 amendments, they typically exercised this power sparingly, and only to punish serious misconduct.”).

24. Gallagher, *supra* note 9, at 325 (patent litigators in this study took “positions that push the envelope of the ethics rules, but do not cross them . . .”).

25. 821 F. Supp. 2d 1135 (C.D. Cal. 2011) (The author served as a Special Master in this case. Unlike typical Special Masters, the author did not issue his own rulings, which could then be appealed to the district court judge. Instead, the author essentially worked as Judge Klausner’s law clerk, albeit one that was dedicated to only one case and paid by the parties).

26. No. C 16-06180 WHA, 2017 U.S. Dist. LEXIS 123604 at *3–4 (N.D. Cal. Aug. 4, 2017).

27. *Comcast Cable Commc’ns., LLC v. OpenTV, Inc.*, No. C 16-06180 WHA (N.D. Cal. Mar. 13, 2007) (Case Management Order Re Pilot Summary Judgment Motions).

28. *Id.*

29. *Id.*

claims.³⁰ If the patentee prevailed, Judge Alsup would quickly entertain a motion for an injunction against the accused infringer.³¹ If the defendant prevailed, Judge Alsup would consider sanctioning the patentee.³²

As it turned out, the showdown procedure did narrow the number of claims in *Comcast v. OpenTV*. Once the accused infringer picked the weakest claim, the patentee dropped it before the accused infringer was scheduled to file a summary judgment motion.³³ The accused infringer then chose another “weakest” patent claim from the remaining claims at issue. The patentee then dropped that claim too. This pattern repeated itself until the patentee had dropped an entire patent from the case.³⁴

In the end, the accused infringer agreed to focus solely on the strongest claim the plaintiff selected. The parties filed summary judgment motions, and Judge Alsup ruled that there was no infringement. In his view, the decision was so “clear” that it might be exceptional and he called for briefing on sanctions.³⁵ Soon thereafter, the case settled.³⁶ But this example only illustrates one possible outcome.

The showdown procedure accomplishes two goals. First, it focuses everyone’s attention on the core issue. The procedure asks the patentee to pick the strongest claim, which is likely the most important claim. If the patentee cannot prevail on its strongest patent claim, it is unlikely that it will be able to prevail on its weaker claims. Alternatively, if the patentee prevails on one claim in a patent, the patent is infringed. There is typically no need to consider other claims.

At the same time, asking the accused infringer to pick the weakest patent claim is intended to rid the case of the less important claims. The procedure places pressure on the patentee to narrow the case. If the patentee is asserting both strong and weak claims, the patentee will likely drop the weak claims as OpenTV did. Otherwise, the patentee is risking a sanctions motion based on the patentee’s weakest arguments.

The showdown procedure achieves a second important goal. The procedure effectively shifts the important issues forward in time. Studies on

30. *Id.*

31. *Id.*

32. *Id.*

33. Alsup, *supra* note 2, at 123.

34. *Id.*

35. *Id.*

36. *Id.*

litigators have established that defendants often seek a delay.³⁷ Delay can serve two purposes. First, a delay is associated with higher litigation costs, and those costs can often grind less well-funded plaintiffs down thereby forcing them to settle at lower amounts.³⁸ Second, delay sometimes results in more revenue for an accused infringer.³⁹ In other words, the defendant can make money from infringement while the lawsuit is pending. The showdown procedure reduces, and in some cases, may eliminate, the defendant's ability to delay. If the patentee prevails on its strongest patent claim, the showdown procedure allows Judge Alsup to quickly move the case forward to an injunction hearing or even a damages trial on just one claim. This places great pressure on the accused infringer to settle.⁴⁰

In sum, Judge Alsup's showdown procedure works for essentially two reasons. It forces the parties to focus on the core issues of the case, and if summary judgment is granted on either of the two claims, it places immediate pressure on the losing party to settle. That is not to suggest that this procedure will always be successful. It is quite possible that both the strongest and weakest claims survive summary judgment. If that happens, the case will remain substantially intact. But at least the court will know that the parties are not taking unduly weak positions.

B. *In re Katz Interactive Call Processing*

Judge Alsup is not the only district judge to use unconventional case management techniques to manage complex patent cases. Several years

37. See Wayne D. Brazil, *Views from the Front Lines: Observations by Chicago Lawyers about the System of Civil Discovery*, 5 AM. B. FOUND. RES. J. 219, 228–29 (1980) [hereinafter Brazil, *Views from the Front Lines*] (explaining many reasons why defendants seek delay); Garth, *supra* note 9, at 605 (“the evidence confirms dissatisfaction, delay and expense associated with these [high stakes, high conflict] cases.”).

38. See Colleen V. Chien, *Holding Up and Holding Out*, 21 MICH. TELECOMM. & TECH. L. REV. 1, 25–26 (2014) (describing how disproportionate litigation costs can exceed the value of the case and allow defendant to “hold-out”); Brazil, *Civil Discovery*, *supra* note 8, at 856–57 (explaining how attorneys used discovery to burden opponents); Brazil, *Views from the Front Lines*, *supra* note 37, at 229 (noting that some defense counsel believe that delay can make it more likely that opponents will be “pressured by changed financial circumstances or loss of psychological staying power to accept a smaller settlement . . .”).

39. See Brazil, *Views from the Front Lines*, *supra* note 37, at 228 (in Brazil's study some attorneys “pointed out that clients who perceive an opportunity to postpone payment of a probable obligation for four or five years will often have strong incentives to do so.”).

40. After the Supreme Court's ruling in *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388 (2006), Colleen V. Chien and Mark A. Lemley found that patent assertion entities “flocked” to the International Trade Commission (“ITC”) because of the ability to get an almost automatic exclusion order. See Colleen V. Chien & Mark A. Lemley, *Patent Holdup, The ITC and The Public Interest*, 98 CORN. L. REV. 1, 26–27 (2012). This finding suggests that these patentees value an injunction over money damages.

earlier, Judge Gary Klausner employed somewhat different techniques in *In Re Katz Interactive Call Processing Patent Litigation*.⁴¹ *In re Katz* was a group of approximately twenty-six patents cases involving as many as one-hundred-sixty-five different defendants. The plaintiff, Ronald A Katz Technology Licensing L.P. (“Katz”) asserted thirty-one patents from two different families of patents. While the cases were initially filed in the Eastern District of Texas and the District of Delaware, they were consolidated for pretrial proceedings before Judge Klausner in the Central District of California.⁴² Because of the huge number of patents and parties involved, *In re Katz* is really an outlier.⁴³ Nonetheless, it is useful to examine some of the case management procedures used in that multi-district litigation to help other courts as they manage complex patent cases. Like Judge Alsup’s showdown procedure, the goal of the orders in *In re Katz* was to incentivize the parties to focus on core issue and eliminate excessive litigation. We discuss two of the most significant orders here.

1. Soft Claim Limits

With so many patents and so many claims within these patents, the different defendants understandably moved to limit the number of claims that Katz could assert. Even the patentee seemed to understand that there was some limit on the number of claims he could feasibly assert, and it offered to initially limit the number of asserted claims to fifty per defendant group. In the end, Judge Klausner set two sets of tighter limits. The court issued an order: 1) limiting the number of total claims the patentee could bring against all defendants in the multidistrict litigation, and 2) limiting the number of claims it could assert against specific defendant groups.⁴⁴

The court based the overall limit on the number of distinct patent specifications involved in the multidistrict litigation. Even though there were twenty-five interactive call processing patents, many of the patents were related and had essentially the same specification (i.e., description of the patented technology). The court identified eight distinct specifications and

41. 821 F. Supp. 2d 1135 (C.D. Cal. 2011) (As noted previously, the author served as a Special Master in this case.).

42. For a more detailed discussion of how complex cases are managed through multidistrict litigations, see generally Paul M Janicke, *The Judicial Panel on Multidistrict Litigation: Now a Strengthened Traffic Cop for Patent Venue*, 32 REV. LITIG. 497 (2013).

43. John R. Allison, Mark A. Lemley & Joshua Walker, *Extreme Value or Trolls on Top? The Characteristics of the Most-Litigated Patents*, 158 U. PENN. L. REV. 1, 26 (2009) (discussing how Katz patents and lawsuits play an “outsized role” in an analysis of the patent landscape).

44. *In Re Katz Interactive Call Processing Patent Litig.*, No. 07-ML-1816-RGK (FFMx) (C.D. Cal. Aug. 31, 2007) (Minute Order on Defendant Ahold USA, Inc. et al. Motion to Limit Claims and Defendant T-Mobile’s Motion to Limit Claims).

concluded that eight claims per specification should be sufficient. Thus, Katz was permitted to select a total of sixty-four claims against all the defendants. At the same time, the court limited the number of claims the patentee could assert against each defendant group. The initial limit was forty claims per defendant group, and after discovery the patentee had to further narrow the number of claims to sixteen per defendant group.

Importantly, these limits were “soft” limits. During the briefing, the patentee raised legitimate due process concerns. The question was whether the court would be arbitrarily taking away the patentee’s right to assert many of the claims beyond the numerical limits? To address this concern, the court expressly invited the patentee to file motions to exceed the claim limits after further discovery. The patentee would have to establish that any newly asserted claim “raises issues of infringement/validity that are not duplicative of currently asserted claims.”⁴⁵

The point of the order was to cull out excessive patent claims that were simply intended to impose costs on the defendants but still, allow the patentee to assert meaningfully distinct claims. To assert a new patent claim, Katz would have to concede that at least one previously selected claim either did not cover particular subject matter or might be vulnerable to particular prior art the defendants identified. These are not easy concessions for a patentee to make. Presumably, the patentee would only ask for a new claim if that new claim was significantly better, or at least meaningfully different than the existing claims.

In the end, Katz never attempted to show that any additional claims were somehow different than the claims it had already selected.⁴⁶ One reasonable interpretation of this choice is that the remaining claims were not meaningfully different. Nevertheless, when the case was eventually appealed, Katz raised due process arguments about the sixty-four claim number limit.⁴⁷ The Federal Circuit rejected this argument focusing on the procedure for adding new claims that the district court outlined.⁴⁸ Because the limits were “soft”, the order limiting the number of patent claims survived the due process challenge.⁴⁹ Consequently, courts today should feel

45. *Id.*

46. *In re Katz Interactive Call Processing Patent Litigation*, 639 F.3d 1303, 1312 (Fed. Cir. 2011) (“Katz made no effort to identify any such [non-duplicative] claims.”).

47. *Id.*

48. *Id.* at 1312 (“it was both efficient and fair to require Katz to identify those unasserted claims that, in Katz’s view, raised separate legal issues from those raised by the asserted claims.”).

49. *Id.* at 1313 (finding no error in the administration of the “claim selection scheme” that the district court adopted).

comfortable employing soft claim limits to focus judicial resources on the more important claims of a patent lawsuit.

2. Earning Court Resources

In *Katz*, the patentee was not the only party raising an excessive number of arguments. The defendants in the multi-district litigation were equally injudicious. The defendants' *second* group summary judgment motion on invalidity illustrates this point.⁵⁰ The court had originally set a thirty-five-page limit on a second joint summary judgment motion on patent invalidity. The defendants complied with the letter, but not the intent of the order by filing a motion that included a two-page table that provided an index to numerous combinations of prior art that supposedly rendered each of the 58 patent claims obvious.⁵¹ "That index reference[d] a 293 page, 1864 paragraph Statement of Uncontroverted Facts and Conclusions of Law. That document in turn reference[d] three separate declarations of 454, 276 and 24 pages respectively."⁵² In essence, the defendants' motion was an index to arguments made in accompanying documents which exceeded 1,000 pages.

Naturally, the patentee moved to strike the motion. It would have been easy for the court to grant the motion. But the court was concerned "that striking defendants' motion would unfairly deny defendants' the ability to raise meritorious defenses in a summary judgment motion."⁵³ At the same time, the court noted that the motion looked "suspiciously like an attempt to overwhelm the plaintiff with arguments that have little chance of actually prevailing."⁵⁴ Consequently, the court fashioned an order that was designed to focus its attention on the defendants' strongest invalidity arguments and weed out weaker defenses.

50. This was not a situation where the court has placed tight constraints on the defendants' ability to argue invalidity. The motion at issue was the second group summary judgment motions on invalidity based on prior art. In addition, individual defendant groups were also allowed to file their own individual summary judgment motions which could include still more invalidity arguments. *See In re Katz Interactive Call Processing Patent Litig.*, No. 07-ML-1816-B-RGK (FFMx) (C.D. Cal. Apr. 14, 2008)(Order re Ex Parte Application for Defendants' Leave to File Second Collective Summary Judgment on Obviousness).

51. *See In re Katz Interactive Call Processing Patent Litig.*, No. 07-ML-1816-B-RGK (FFMx) (C.D. Cal. May 6, 2008) (Order Regarding Motion to Strike All or Part of Defendants' Collective Motion for Summary Judgment and for Additional Time).

52. *Id.*

53. *Id.*

54. *Id.*

The court allowed the defendant to select the ten patent claims with the strongest invalidity defenses.⁵⁵ The court would rule on the portion of the defendants' motion that affected those claims. If the court ended up denying the motion with respect to all ten claims, the remaining portion of defendants' motion for invalidity would be stricken. As the court put it, there was "no point in allowing excessive briefing on the weaker defenses if the defendants cannot prevail on their strongest defenses."⁵⁶ However, if the defendant prevailed on some or all of its defenses, the court would consider additional invalidity arguments on other patent claims. In effect, the order forced the defendant to earn the right to receive more court attention by making meritorious arguments. As it turned out, the defendants lost their motion on all ten claims and the remainder of the invalidity motion was stricken. Presumably, the remaining invalidating argument was weaker and unworthy of additional court attention.

Forcing parties to "earn" judicial resources by filing strong motions is yet another way courts can incentivize parties to focus on the core issues of a patent case. This approach has the added benefit of motivating parties to drop nuisance motions.

CONCLUSION

Patent litigation is complex and expensive. Unfortunately, many patent litigators bring claims and defenses that have little chance of prevailing but yet are not sanctionable. This essay describes several ways to focus the parties' attention on the core issues in a dispute and avoid spending time on arguments that have little chance of succeeding. Since courts cannot use sanctions to curb non-frivolous arguments, they have to use different procedures that incentivize parties to conserve resources. Judge Alsup's showdown procedure, soft claim limits, and case management orders that require litigants to "earn" the right to raise additional arguments all help focus patent litigation in this way. Hopefully, this short survey of these case management procedures will help other courts manage the complex patent cases on their dockets.

55. *Id.*

56. *Id.*