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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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VRINGO, INC., et al.,	:	14-CV-4988 (LAK)
	:	
Plaintiffs,	:	June 15, 2015
	:	
v.	:	500 Pearl Street
	:	New York, New York
ZTE CORP., et al.,	:	
	:	
Defendants.	:	
-----X		:

TRANSCRIPT OF CIVIL CAUSE FOR DISCOVERY CONFERENCE
BEFORE THE HONORABLE FRANK MAAS
UNITED STATES MAGISTRATE JUDGE

APPEARANCES:

For the Plaintiffs:	AMBER WESSELS-YEN, ESQ. MATTHEW DECKER, ESQ. Alston & Bird, LLP 90 Park Avenue New York, New York 10016
For the Defendants:	PAUL STRAUS, ESQ. DAVID JAFFE, ESQ. King & Spalding LLP 1185 Avenue of the Americas New York, New York 10036
	JAY REIZISS, ESQ. McDermott, Will & Emery
Court Transcriber:	SHARI RIEMER, CET-805 TypeWrite Word Processing Service 211 N. Milton Road Saratoga Springs, New York 12866

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1 THE CLERK: Good afternoon. This is Eric, the
2 judge's law clerk. This is a phone conference in Vringo, Inc.
3 v. ZTE Corporation. The conference is being recorded.

4 Counsel, please state your names for the record.

5 MS. WESSELS-YEN: This is Amber Wessels-Yen of
6 Alston & Bird for Vringo. I'm accompanied today by my
7 associates Matthew Decker and we also have a client
8 representative present for this call Jason Charko [Ph.].

9 THE COURT: Good afternoon.

10 MR. STRAUS: This is Paul --

11 THE COURT: Hello.

12 MR. STRAUS: This is Paul Straus of King & Spalding
13 for ZTE and I'm here with David Jaffe also of King & Spalding.

14 MR. REIZISS: And this is Jay Reiziss from
15 McDermott, Will & Emery on behalf of ZTE.

16 THE COURT: Good afternoon everyone. I've read the
17 papers. As I understand it -- well, let me go back one step.
18 Judge Kaplan is away so he referred the discovery issues
19 raised by your papers to me. As I understand it, there are
20 basically two issues, the location of the depositions and
21 whether Mr. Grow [Ph.] should be deposed and if so, when in
22 the scheme of things. Is there anything else that we need to
23 take up today?

24 MS. WESSELS-YEN: Those are the issues, Your Honor.

25 THE COURT: What I'd like to do is hear briefly from

1 each side. As I said, I have read the papers. So I'll start
2 with you, Ms. Wessels-Yen.

3 MS. WESSELS-YEN: Yes, Your Honor. The first point
4 that I would like to make is that Judge Kaplan instructed the
5 parties very clearly that he wanted the parties to come to the
6 court hours, not months after the parties realized there's a
7 problem. The problem here is that we thought two cases that
8 are very closely intertwined, the MDA case and the Fran case.
9 That's why Judge Kaplan consolidated these cases. We have a
10 case where ZTE has been in the Fran case, the plaintiff in the
11 MDA case. Judge Kaplan has already found that they entered
12 into a non disclosure agreement with the New York Choice of
13 Law, an exclusive New York form clause and then blatantly
14 disregarded that contract two months later.

15 Because they have consistently chosen New York it is
16 fair and it is supported by the case, in particular the Dubai
17 Islamic Bank case that they should be required to appear New
18 York. Judge Kaplan's own orders of just the past months have
19 also demonstrated the need for close supervision of ZTE. In
20 those [inaudible] alone he has characterized ZTE's arguments
21 and positions as entirely without merit, frivolous, entirely
22 frivolous, nothing more than gamesmanship, demonstratively and
23 now admittedly false, beyond the bounds of reasonableness and
24 grotesquely over broad. Actually that's last phrase was used
25 in their preliminary injunction and the motion to compel order

1 referring to separate arguments.

2 In an instance like this where we've asked ZTE
3 beginning in April to make its witnesses available in New York
4 and they have yet to provide a single reason why any of the
5 witnesses should be available in New York, we believe that the
6 witnesses should be produced in New York.

7 THE COURT: Well, they say that the plaintiff in only
8 one out of two suits let's split the difference and produce
9 half the witnesses in Hong Kong and half the witnesses in New
10 York as I understand it.

11 MS. WESSELS-YEN: Your Honor, the problem with that
12 position is that the two cases are so closely intertwined that
13 it's not as if half of the witnesses will have solely MDA
14 related knowledge and half of the witnesses will have solely
15 Fran related knowledge. Mr. Grow, for example, we expect to
16 have both MDA and Fran related knowledge and the decision of
17 whether or not to have a particular witness' deposition in
18 Hong Kong will come down to nothing more than ZTE's
19 [inaudible] as to which witnesses it would prefer to protect
20 and to have deposed only in Hong Kong.

21 There is one personal factor I know ZTE has not
22 raised at this point. As ZTE's counsel I believe was aware
23 because I had missed a few meet and confer calls a few weeks
24 ago, I broke my ankle quite badly in May. I now have two
25 plates, 14 screws and a bone graft holding that ankle together

1 and [inaudible] counsel [inaudible] flights in June and July
2 including ironically a long planned vacation to Hong Kong over
3 the 4th of July holiday. I would be happy to submit to this
4 court the medical necessity statement that my surgeon provided
5 for those flight cancellations which they [inaudible] not fly
6 as well as the operative reports and x-rays although I caution
7 are really not for the faint of heart.

8 THE COURT: I'm sympathetic to that but were I
9 inclined to think that ZTE had the better of this argument
10 given the fact that Alston & Bird is a large firm I understand
11 that you no doubt have had the laboring [inaudible] and are
12 the person most familiar with the case and yes, it's a factor
13 I should consider but I'm frankly not sure it's determinative
14 but I appreciate you telling me about it and I'm sorry to hear
15 about it.

16 MS. WESSELS-YEN: Your Honor, I think that we believe
17 that the most determinative factor is the conduct by ZTE so
18 far in this litigation as demonstrated by Judge Kaplan's most
19 recent orders. We believe very strongly that unless ZTE is in
20 the same time zone as this court so that disputes and issues
21 involving privilege, over designation of AEO materials and
22 refusal to answer questions can be easily teed up. This is a
23 recipe for further motions to compel and sanctions motions and
24 motions as to whether or not witnesses should be produced once
25 again. And with only seven weeks remaining in the entire

1 discovery period we believe that the only way to finish the
2 discovery in the limited time allotted to us by Judge Kaplan
3 is to have the witnesses appear in New York.

4 THE COURT: Let me hear from Mr. Straus or one of his
5 colleagues.

6 MR. STRAUS: Thank you, Your Honor. This is Paul
7 Straus. Yes, I guess the first issue is that these are two
8 consolidated cases and as we've said and as Your Honor
9 noticed, ZTE is the plaintiff in the second of these cases and
10 Vringo also has a counterclaim in that case. So that it's not
11 fair to say that either side is the plaintiff as to all the
12 claims that are at issue here and they're consolidated.
13 That's why we proposed as a compromise that five of the ten
14 party depositions take place in New York because the parties
15 were able to reach agreement on ten party depositions.

16 Vringo at this point has noticed six depositions and
17 of those the first is taking place next week and we've already
18 agreed to bring that witness to New York next week. So he
19 will be here for that. And the issue is that they want Your
20 Honor to order that all ZTE's party depositions must take
21 place in New York regardless or without regard to who the
22 witnesses are even and that we've got at least four witnesses
23 whom they've not even identified. They're just not noticed
24 yet and of those we don't -- one may or may not be a 30(b)(6)
25 witness which could conceivably be more than one person.

1 There's no -- so there's no -- in their brief they
2 argue that the presumption that a witness for a plaintiff be
3 deposed in his jurisdiction that just does not apply here and
4 as to Ms. Wessels-Yen's point about disputes, these are two
5 day depositions. The parties have agreed that the depositions
6 will be one day unless there's an interpreter involved in
7 which case there will be two days and these will be the latter
8 all except for one which I think would take place -- which
9 would take place in New York in any event.

10 So all the depositions that we're talking about
11 would be two day depositions. There haven't been any
12 depositions in the case. So it's not clear what -- whether
13 there's really a track record as far as disputes go but the
14 bottom line I think is that if there are disputes we will have
15 an opportunity to raise them and there will be a second day to
16 address any rulings by the court if that becomes an issue.

17 With respect to Mr. Grow, this is an apex
18 deposition. He's the general counsel of ZTE Corporation which
19 is the parent entity and one of the defendants and at best his
20 deposition we would say is premature because no depositions
21 have been taken yet. We think at a minimum other depositions
22 should be taken. The parties have not even scheduled to
23 complete document production yet. All of that should be done
24 before there be a decision as to whether Mr. Grow needs to be
25 deposed. But in no even should Mr. Grow be required to travel

1 to New York for his deposition given his position and his
2 limited knowledge of this compared to other witnesses in the
3 case who are much closer to this, the transaction here.

4 THE COURT: One of the things Vringo says is that he
5 has unique knowledge about dealings both with the Chinese
6 press and with the court because he has some sort of position
7 that [inaudible] to [inaudible] issue here.

8 MR. STRAUS: Yes, Your Honor. I guess there are two
9 things there. One is that I guess first at this stage it's
10 not clear that it's unique knowledge. We just don't know that
11 until there's more development but the other thing is that as
12 far as -- well, one of -- the point that they make about that,
13 the allegation in the complaint, that is something that
14 relates to the MDA case. So in terms of the location really
15 what they point to are the allegations of their own complaint.
16 That's the case in which ZTE is the defendant. All the more
17 reason why he as the general counsel should not need to travel
18 to New York for that deposition but we say that in any event
19 it's not clear that his knowledge is unique and we should at
20 least postpone the decision as to whether he is required to be
21 deposed.

22 MS. WESSELS-YEN: Your Honor, as to Mr. Grow's
23 deposition, not only is Mr. Grow the only person who can
24 testify as to the content of his discussion with the reporter
25 for this Chinese government newspaper, the *People's Daily*, but

1 he also spoke at great length to that reporter as is reflected
2 by his quote in that article about ZTE's own [inaudible]
3 position and explaining why it was necessary for ZTE to take
4 action against Vringo [inaudible] for the regulators to
5 investigate Vringo. We do not believe that this is a classic
6 apex deposition. He is -- we're not talking about an
7 individual who is the CEO or an independent director of the
8 company. We're talking about the person who is ultimately
9 responsible for ZTE's legal strategy and we believe that --

10 THE COURT: You haven't agreed to that [inaudible];
11 correct?

12 MS. WESSELS-YEN: Yes, Your Honor, we agreed as a
13 compromise actually that a different individual should not be
14 noticed unless and until the discovery showed that he had
15 involvement and with regard to Mr. Grow we agreed that if a
16 fulsome discovery, including a search of all of his relevant
17 documents including full discovery responses show that he had
18 no involvement whatsoever that we would agree to drop his
19 deposition. But we do think that his deposition should be
20 calendered and it should be ordered to take place so that we
21 are not in front of this court again in mid July trying to
22 explain why we believe that the evidence shows his deposition
23 is necessary and why ZTE believes that it is not necessary.

24 THE COURT: As I said, I've read the papers. I'm
25 prepared to rule today in particular because I know there are

1 time constraints.

2 I appreciate that there are two lawsuits, one in
3 which ZTE is the plaintiff; the other in which ZTE is the
4 defendant but they really are two sides of the same coin, at
5 least factually if not legally.

6 As to the point that ZTE makes about this not being
7 ripe for a determination because not everybody has been
8 noticed by name, I don't accept that premise because it's not
9 at all uncommon for me to discuss location or sequencing of
10 depositions in cases before anybody has been noticed. It
11 seems to me that's just a matter of efficiency and it's
12 inefficient to wait until specific names have been attached to
13 particular depositions.

14 There is the fact that both suits are in New York
15 and there's a writing that really constrain Vringo if not ZTE
16 to bring its suit in New York but more importantly both sides
17 agreed that New York City should be the forum in the non
18 disclosure agreement and since these are well healed parties
19 on both sides presumably that could have been negotiated had
20 there been any disagreement about New York as a forum.

21 I understand that these are two day depositions but
22 there have been a fair number of disputes thus far and a
23 certain degree of acrimony and the deadline is looming. So my
24 conclusion is that this case is distinguishable from those
25 that say that the defendant's place of business is where the

1 deposition should be held in principle part because of the
2 forum selection clause pursuant to which ZTE agreed to New
3 York as a forum.

4 I'm going to direct that the depositions of ZTE, and
5 I'm leaving for the moment aside Mr. Grow, but I'm going to
6 direct that the depositions take place in New York City but
7 that Vringo and ZTE share the costs of bringing those
8 witnesses, the reasonable costs of bringing those witnesses to
9 New York City.

10 As to Mr. Grow, I'm not sure that the apex doctrine
11 strictly applies. He's not the head of the company although
12 presumably he's an important player in the front office of the
13 company. It does appear that he likely has unique knowledge
14 but Mr. Straus suggested that perhaps there are others who
15 could fill in the blanks and make his deposition unnecessary
16 and it seems to me that the process of depositions should
17 proceed so that that premise can be tested.

18 So I'm going to direct that Mr. Grow be deposed
19 later in the process and depending upon how the depositions
20 are ordered and what topics witnesses can address conceivably
21 even as the last witness. As to the location of his
22 deposition, I'm likely to rule again that it should be in New
23 York but because it's not clear that he will be deposed I'm
24 going to reserve decision as to where he should be deposed.
25 So that's my ruling with respect to those two issues.

1 Is there anything further we need to take up today?

2 MS. WESSELS-YEN: Not from Vringo's standpoint, Your
3 Honor. Thank you.

4 MR. STRAUS: Not for ZTE, Your Honor. Thank you very
5 much.

6 THE COURT: Okay. I believe that Judge Kaplan
7 referred this to me just for this specific discovery dispute.
8 I'm leaving town later this week for a couple of weeks. If
9 issues do come up I guess you'll have to raise it first with
10 Judge Kaplan and he'll decide whether he wishes me to take it
11 up upon my return.

12 MS. WESSELS-YEN: Yes, Your Honor.

13 THE COURT: Have a good day.

14 MS. WESSELS-YEN: Thank you.

15 MR. STRAUS: Thank you, Your Honor.

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1 I certify that the foregoing is a court transcript from
2 an electronic sound recording of the proceedings in the above-
3 entitled matter.

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5 _____
6 Shari Riemer, CET-805

7 Dated: June 16, 2015

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