

Philips' Lawyers Avoid Costly Patent Trial

Keats McFarland & Wilson LLP

CA Federal Court Strikes KXD Counterclaims

U.S. Philips Corporation v. KXD Technology, Inc., et al.
Case No. CV 05-8953 ER (PLAx)

The U.S. District Court for the Central District of California ruled in favor of Philips in an action for patent infringement, as they filed suit against defendants KXD Technology, Inc., Astar Electronics, Inc., and Jingyi "James" Luo, among others, for selling and distributing unauthorized DVD players containing Philips' patented technology. On July 27, 2007, the court granted Philips' request to strike the defendants' answers and entered default. In its order, the court took judicial notice of a parallel trademark infringement action filed by Koninklijke Philips Electronics N.V. against KXD in the U.S. District Court for the District of Nevada, in which the Nevada court had ordered the defendants to pay Philips civil contempt sanctions in excess of \$2.6 million. This ruling reinforces the strong rules and procedures that must be followed in preparing for a patent infringement trial.

Explanation of Discovery Violations:
Discovery Violations

Nevada Federal Case Considered in Lawsuit Ruling:
Case Considered in Lawsuit Ruling

KXD Charged with Costly Sanctions for DVD Infringement:
Costly Sanctions for DVD Infringement

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 AS REQUIRED BY FRCP, RULE 77(d).

UNITED STATES DISTRICT COURT
 CENTRAL DISTRICT OF CALIFORNIA

U.S. PHILIPS CORPORATION,

Plaintiff,

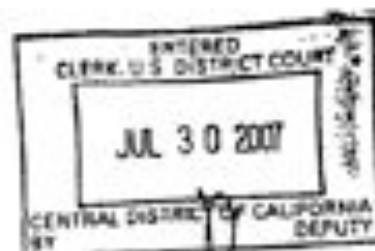
v.

KXD TECHNOLOGY, INC.;
 ASTAR ELECTRONICS, INC.;
 SHENZHEN KAIXINDA
 ELECTRONICS CO., LTD.;
 SHENZHEN KXD MULTIMEDIA
 CO., LTD.; KXD DIGITAL
 ENTERTAINMENT LTD.; and
 JINGYI LUO,

Defendants.

Case No. 2:05-cv-08953-ER-PLAx

**ORDER STRIKING DEFENDANTS'
 ANSWERS AND ENTERING
 DEFAULT**



After considering the parties' responses to the Court's July 2, 2007, Order to show cause why Defendants should not be sanctioned for failure to comply with the Local Rules; Magistrate Judge Paul L. Abrams's July 10, 2007, Report and recommendation that Defendants be sanctioned for discovery violations; and Defendants' defiance of a district court injunction involving the same product in the District of Nevada, the Court has determined that Defendants should be sanctioned by striking their answers and entering their default. As discussed

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1 herein, Defendants have exhibited a pattern of utter disregard for the rules of
2 procedure and discovery, and the Court believes that this sanction is appropriate.

3 **Local Rule Violations**

4 First, Defendants have repeatedly failed to comply with the pretrial
5 deadlines set by the Local Rules for the Central District of California. Although
6 Plaintiff timely filed its Memorandum of Contentions of Law and Fact, its witness
7 list, and its exhibit list (which it filed instead of a joint exhibit list because of
8 Defendants' lack of cooperation) on June 15, 2007, the last day these filings were
9 due, Defendants filed none of these documents on time. Instead, Defendants filed
10 their witness list six days late, on June 21, 2007, without an explanation for its
11 tardiness and without seeking leave to file it late, and they filed their exhibit list
12 even later, on June 29, 2007, again without explanation. Further, Defendants have
13 not yet filed a Memorandum of Contentions of Law and Fact.

14 Defendants have not filed and served an expert report, although they list an
15 expert witness on their witness list. Calling him would be a violation of Local
16 Rule 16, Rule 26(a)(2) of the Federal Rules of Civil Procedure, and the Court's
17 Scheduling Order. The Court even continued the deadline for expert reports on
18 multiple occasions, including in December 2006, January 2007, and April 2007.

19 Defendants failed to meet with Plaintiff at least forty days before the Final
20 Pretrial Conference pursuant to Local Rule 16-2. Plaintiff's counsel approached
21 Defendants' counsel both by letter and in person to attempt to schedule a timely
22 meeting; however, Defendants were unprepared to conduct the required meeting
23 on time. At the hearing on July 16, 2007, Anton N. Handal, counsel for
24 Defendants, acknowledged that Defendants were at fault for failing to meet with
25 Plaintiff.

26 Similarly, the Joint Pretrial Conference Order was due on June 21, 2007, but
27 Defendants failed to cooperate with Plaintiff in assembling this order. While it is
28 Plaintiff's duty to draft the Order, it cannot do so without the cooperation of

1 Defendants. This cooperation was not provided. Accordingly, a Joint Pretrial
2 Conference Order was not timely filed.

3 Further, Defendants have repeatedly disobeyed Local Rule 7-7. Under
4 Local Rule 7-7, "declarations shall contain only factual, evidentiary matter . . ."
5 Defendants have filed numerous declarations that violate this provision, including
6 Mr. Handal's declaration in response to the Court's July 2, 2007, Order, which is
7 filled with argument and hyperbole, alleging for example that Plaintiff has
8 "participated in a concerted effort to sandbag and stonewall the Defendants and
9 their counsel." Such statements are unhelpful to the Court because they are
10 generalized statements and have no evidentiary support. For example, Mr. Handal
11 alleges that "cooperation is a two way street" and that it was not Defendants' fault
12 that they were unable to comply with the required pretrial disclosures and
13 deadlines. However, Mr. Handal alleges no facts in support of his arguments,
14 instead making generalized allegations that Plaintiff is equally responsible. He
15 alleges that Plaintiff produced "the most meaningful documents in this case after
16 the discovery cut off" and that it had been "engag[ing] in several unreasonable
17 acts which were designed to prevent the Defendants from completing their Rule 16
18 obligations in good faith," but he provides no specifics,¹ nor does he indicate why
19 Defendants did not seek relief from the Court to overcome any prejudice resulting
20 from these "unreasonable acts."

21 22 Discovery Violations

23 Next, the Court turns to the report and recommendation issued by
24

25
26 ¹At the July 16, 2007, hearing, Mr. Handal contended it was inappropriate for Plaintiff to
27 file an exhibit list approximately 800 pages long. It is customary for parties to file extensive
28 exhibit lists, but only a handful of exhibits ever surface at trial. Further, had the parties met in
accordance with Local Rule 16-2, the list could have been much shorter because many of the
exhibits cover potentially stipulated facts. Indeed, after the parties finally met and compiled a
joint exhibit list (following the pretrial conference), the exhibit list was reduced to 172 pages.

1 Magistrate Judge Abrams on July 10, 2007. Defendants objected to some of the
2 sanctions recommended by Magistrate Judge Abrams, but they did not object to
3 any of his findings. The Court hereby adopts Magistrate Judge Abrams' report,
4 and it finds his Report to be consistent with the Court's own experience with these
5 Defendants.

6 The Court believes these discovery violations are egregious and have
7 unduly burdened Plaintiff and the Court. For instance, Magistrate Judge Abrams
8 explains that Defendants misrepresented, in their opposition to Plaintiff's *ex parte*
9 application for discovery sanctions, that the appeal of a discovery ruling to this
10 Court would automatically stay the ruling. Not only does Local Rule 72-2.2 make
11 it absolutely clear that it does not,² but in Defendants' appeal of that discovery
12 order, they explicitly told this Court that "unless [such] an order is stayed, a party
13 seeking review of the order is bound by the order unless and until it is reversed or
14 modified." Thus, Defendants apparently knew about this rule, and the Court can
15 only conclude that they lied to Magistrate Judge Abrams. At the hearing on July
16 16, 2007, Mr. Handal told the Court that he subsequently retracted the statement
17 that the ruling would be stayed; however, that does not change the fact that
18 Defendants misrepresented the law to Magistrate Judge Abrams in the first place,
19 even if counsel later retracted it.

20 Further, Defendants did not provide any of the discovery ordered by
21 Magistrate Judge Abrams by June 13, 2007, when it was due. Instead, on June 26,
22 2007, after Plaintiff filed an *ex parte* application for discovery sanctions, they sent
23 Plaintiff a CD containing about 1000 pages of discovery. In their opposition to
24 the Plaintiff's *ex parte* application for discovery sanctions, Defendants said the CD
25 contained copies of "all the documents [plaintiff] is seeking i[n] its discovery
26

27 ²Local Rule 72-2.2 is not ambiguous. It says, "[r]egardless of whether a motion for
28 review has been filed, the Magistrate Judge's ruling remains in effect unless the ruling is stayed
or modified by the Magistrate Judge or the District Judge."

1 motion." However, when ordered by Magistrate Judge Abrams to make that
2 statement under oath, Defendants' counsel could not, instead conceding that the
3 CD represents only "a portion of the document production"

4 Most egregious, however, Magistrate Judge Abrams pointed out and
5 attached to his recommendation examples of documents contained on the CD
6 which were totally illegible, obstructed by what appears to be a lemon on the
7 photocopy machine. He concluded that this aberration reflects Defendants'
8 intention to "deliberately thumb its nose at the Court's Order and thwart the
9 discovery process," and this Court agrees.

10

11 Nevada Case

12 Finally, as the Court stated at the July 16, 2007, hearing, it takes judicial
13 notice pursuant to Rule 201 of the Federal Rules of Evidence of parallel trademark
14 litigation in the District of Nevada, Koninklijke Philips Electronics N.V. v. KXD
15 Technology, et al., Case No. 2:05-cv-01532-RLH-GWF ("Nevada case"). In that
16 case, on January 5, 2006, District Judge Roger L. Hunt issued a Temporary
17 Restraining Order to protect the plaintiff's DVD+ReWritable & Design trademark,
18 which prevented all defendants from *inter alia* manufacturing, importing, or
19 distributing any goods that bear that mark. On March 15, 2006, the Court issued a
20 preliminary injunction, barring the defendants from engaging in the same conduct.
21 However, the identical defendants who are defendants in this case (KXD
22 Technology, Inc.; Astar Electronics, Inc.; Shenzhen KXD Multimedia Co., Ltd.;
23 Shenzhen Kaixinda Electronics Co., Ltd.; KXD Digital Entertainment, Ltd; and
24 Jingyi Luo) violated the District of Nevada's preliminary injunction by continuing
25 to sell enjoined products. Accordingly, on February 12, 2007, Judge Hunt
26 ordered these defendants to pay Plaintiff over \$1.6 million in civil contempt
27 damages and attorneys' fees, to post a \$2 million bond, and further ordered that
28 per diem sanctions would accrue at the rate of \$10,000 per day. Defendants have

1 Defendants have not filed an expert report and concede that they cannot offer any
2 expert testimony in this patent infringement case. Further, the proposed jury
3 instructions Defendants exchanged with Plaintiff were incomplete, a violation of
4 the Court's Standing Order re: jury instructions. For example, Defendants
5 proposed the following instruction for obviousness:

6 "[i]n reaching your conclusion as to whether or not claim [] would have
7 been obvious at the time the claimed invention was made, you should
8 consider any difference or differences between the [identify prior art
9 reference(s)] and the claimed requirements" (all brackets and text in
10 original).

11 Defendants failed to identify either the patent claims or the prior art references in
12 their proposed jury instructions. Finally, in the Amended Final Pretrial
13 Conference Order, Defendants asserted an inequitable conduct defense under 35
14 U.S.C. § 130; however, there is no section 130 in the patent statute.

15 Although monetary and evidentiary sanctions are within the Court's
16 discretion, the Court believes it would be inappropriate to subject Plaintiff or the
17 Government to a costly trial where it appears from the record that Defendants have
18 engaged in a pattern of delay, obfuscation, and obstruction. Further, Defendants
19 have demonstrated a willingness to defy orders of a district court involving the
20 same product in the Nevada case, and the Court believes they would be unlikely to
21 comply with this Court's eventual judgment.

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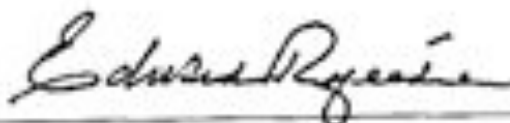
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1 Accordingly, the Court hereby ORDERS that the Answers of Defendants
2 KXD Technology, Inc.; Astar Electronics, Inc.; Jingyi Luo; Shenzhen Kaixinda
3 Electronics Co., Ltd.; Shenzhen KXD Multimedia Co., Ltd.; and KXD Digital
4 Entertainment Ltd. are hereby STRICKEN from the record and DEFAULT shall
5 be entered against each of Defendants.

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7 IT IS SO ORDERED.

8 IT IS FURTHER ORDERED that the Clerk of the Court shall serve, by United
9 States mail or by telefax or by email, copies of this Order on counsel for the
10 parties in this matter.

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12 Dated: July 27, 2007

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14 EDWARD RAFEEDIE
15 Senior United States District Judge
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