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IN THE UNITED STATES DISTRICT COURT  
IN AND FOR THE DISTRICT OF DELAWARE

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AFLUO, LLC, : CIVIL ACTION  
 :  
 Plaintiff, :  
 :  
 vs. :  
 :  
 ADOBE SYSTEMS INC.; AKAMAI :  
 TECHNOLOGIES, INC.; AND :  
 LEVEL 3 COMMUNICATIONS, :  
 LLC, :  
 :  
 Defendants. : NO. 12-1459 (SLR)

- - -

Wilmington, Delaware  
Tuesday, November 5, 2013  
4:21 o'clock, p.m.

- - -

BEFORE: HONORABLE SUE L. ROBINSON, U.S.D.C.J.

- - -

APPEARANCES:

FARNAN LLP  
BY: BRIAN E. FARNAN, ESQ.

-and-

Valerie J. Gunning  
Official Court Reporter

1 APPEARANCES (Continued):

2  
3 SUSMAN GODFREY L.L.P.  
4 BY: BRIAN D. MELTON, ESQ. and  
5 AUDREY CALKINS, ESQ.  
6 (Houston, Texas)

7  
8 Counsel for Plaintiff  
9 Afluo, LLC

10  
11 MORRIS, NICHOLS, ARSHT & TUNNELL LLP  
12 BY: MARY B. GRAHAM, ESQ.

13 -and-

14  
15 CHOATE HALL & STEWART LLP  
16 BY: CARLOS PEREZ-ALBUERNE, ESQ. and  
17 MARGARET E. IVES, ESQ.  
18 (Boston, Massachusetts)

19  
20 Counsel for Defendant.  
21 Akamai Technologies, Inc.

22  
23 POTTER, ANDERSON & CORROON LLP  
24 BY: DAVID E. MOORE, ESQ.

25 -and-

PERKINS COIE, LLP  
BY: JAMES F. VALENTINE, ESQ.  
(Palo Alto, California)

Counsel for Defendants  
Adobe Systems Inc. and  
Level 3 Communications, LLC

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1 MS. GRAHAM: Good afternoon, your Honor. Mary  
2 Graham on behalf of defendant Akamai, and with me today from  
3 Choate Hall are Carlos Perez and Margaret Ives.

4 THE COURT: Fine. Thank you very much.

5 MS. GRAHAM: Thank you.

6 THE COURT: Welcome all.

7 You are here, so I assume there are some things  
8 to discuss. Before we do that, though, I know that you've  
9 got some pending motions that I will get to, the oldest of  
10 which is a motion for leave to file a second Amended

11 Complaint. And the opposition to that seems to be --

12 MR. MELTON: Your Honor, we may have an  
13 agreement that helps you out on this.

14 THE COURT: Well, that would be good, because I  
15 was trying to figure out how much time I needed to spend on  
16 that.

17 MR. MELTON: Yes, your Honor. Brian Melton for  
18 plaintiff, Afluo.

19 And I think we've got an agreement on the motion  
20 to amend, which is Docket 35. There's a motion to dismiss,  
21 Docket 54, and two motions to strike, Docket No. 61 and 62  
22 is the way we have them.

23 And I think we've resolved it, that the  
24 defendants will withdraw their objection for -- to our  
25 motion to amend for our second Amended Complaint.

3

1  
2 P R O C E E D I N G S

3  
4 (Proceedings commenced in the courtroom,  
5 beginning at 4:21 p.m.)

6  
7 THE COURT: Good afternoon, everyone.  
8 (Counsel respond, "Good afternoon, your Honor.")

9 THE COURT: I guess we should start with some  
10 introductions. Mr. Farnan?

11 MR. FARNAN: Good afternoon, your Honor.

12 THE COURT: Good afternoon.

13 MR. FARNAN: Brian Farnan on behalf of the  
14 plaintiff, and with me today is Brian Melton and Audrey  
15 Calkins from Susman Godfrey in Houston, Texas.

16 THE COURT: All right. Thank you very much.

17 MR. FARNAN: Thank you.

18 THE COURT: Ms. Graham? Mr. Moore?

19 MR. MOORE: Good afternoon, your Honor.

20 THE COURT: Good afternoon.

21 MR. MOORE: David Moore from Potter Anderson on  
22 behalf of Adobe and Level 3. With me from Perkins Coie is  
23 Jim Valentine

5

1 THE COURT: All right.

2 MR. MELTON: And Afluo will withdraw its  
3 objections to, is it Akamai's motion to amend its answer and  
4 asserted counterclaim on invalidity, so I believe it moots  
5 the four motions that I listed off. That agreement -- we'll  
6 be filing something with the Court. This agreement was  
7 reached in the last 24 hours.

8 THE COURT: All right.

9 MR. PEREZ-ALBUERNE: Your Honor, I think that's  
10 right. The motion, it is a little bit different posture I  
11 know that is really material. The net of it is, all of the  
12 pending motions regarding the pleadings I think are all  
13 resolved by the agreement. Actually, the motion to strike  
14 our amended counterclaim.

15 THE COURT: All right.

16 MR. PEREZ-ALBUERNE: And I think the only other  
17 pieces that I think we wanted to get on the record was just  
18 a part of this. There's an agreement that Afluo will  
19 stipulate that its Amended Complaint, it has amended to  
20 seek, essentially add some indirect infringement claims.

21 THE COURT: All right.

22 MR. PEREZ-ALBUERNE: And they've agreed to  
23 stipulate that those are being alleged only post filing.

1 resolve them on the record.

2 MR. MELTON: Yes, your Honor. We just didn't  
3 want the Court doing any work while we think we had an  
4 agreement and we'll file it.

5 THE COURT: That's good. I appreciate that.  
6 All right.

7 MR. MELTON: Your Honor, the first thing I  
8 believe we should discuss is the core document production in  
9 the case.

10 Under the Court's default standard order,  
11 Paragraph 4B, the core document production, and, in addition  
12 to that, we've served requests for production.

13 To date, Akamai, defendant Akamai has produced  
14 ten documents totaling 274 pages in the case. Level 3 has  
15 produced nine documents totaling 109 pages in the case. And  
16 like I said, the Court's order is clear. Documents related  
17 to accused products, including, but not limited to,  
18 operation manuals, product literature, schematics and  
19 specification. And like I said, we've served requests for  
20 production. Those were objected to and responded to in  
21 September. And we've gotten ten documents from one  
22 defendant, nine from the other. Adobe has done a little bit  
23 better with 150 documents.

24 But, you know, we think -- and I don't think  
25 they're claiming that they -- well, maybe they are. Maybe

1 products are what's accused.

2 With respect to Level 3, they use Adobe  
3 products, so they have no independent source code. They  
4 don't have access to Adobe source code. They don't modify  
5 that source code. They're in this case because they use  
6 Adobe products.

7 Now, what we did produce is some documents to  
8 substantiate those assertions, to show that there is no  
9 separate Level 3 accused product. In fact, when the core  
10 production deadline came, there had not even been a product  
11 that was listed that was a Level 3 product. So no  
12 production would have been required.

13 But we did try and substantiate exactly what  
14 we're telling them. And we believe they do have enough.  
15 The issues are infringement in this case. But the evidence  
16 most relevant to that is the source code, which has been  
17 produced. And, again, we've also produced some of the  
18 technical documents on behalf of Adobe that demonstrate the  
19 operation of those products.

20 THE COURT: All right. Well --

21 MR. VALENTINE: There was -- excuse me, your  
22 Honor. There was one more. It was a website. It was a  
23 Level 3 website called Level 3 Media Player and we did  
24 produce the HTML code for that, but the real products that  
25 are accused are Adobe, Adobe products.

1 they -- in e-mail, they're claiming that's it. That's all  
2 they have responsive to this Court's standard core document  
3 production order, nine documents and ten documents,  
4 respectively.

5 It puts us in a bind. We're one month away from  
6 the Court-ordered paper discovery deadline. And in response  
7 to 44 requests for production and the Court's order, that's  
8 all we have from two defendants. And now they've asked us  
9 for, well, tell us exactly what you want and so we sent them  
10 a list of examples of other documents we have seen in other  
11 cases that we expect companies like this to have.

12 And we are, you know, a month out, away from the  
13 end of document discovery, and we're supposed to start  
14 depositions, and we don't have any yet, other than these, a  
15 handful of pieces of paper.

16 THE COURT: All right.

17 MR. VALENTINE: Good afternoon, your Honor. Jim  
18 Valentine on behalf of defendants Adobe and Level 3.

19 I think a key thing for the Court to know is  
20 that the products accused in this case are Adobe products,  
21 so Adobe's core technical production we believe is complete  
22 and more than sufficient under the Court's order.

23 We've produced not only core technical

1 THE COURT: All right. Yes, sir?

2 MR. PEREZ-ALBUERNE: I don't know if you'd like  
3 to hear from all of us on this.

4 THE COURT: Well, I do. And we will have a  
5 discussion, so let me get everyone's position first.

6 MR. PEREZ-ALBUERNE: Again, your Honor Carlos  
7 Perez for Akamai.

8 Our position is very similar to Level 3's in the  
9 sense that what this case is about, we think, is about  
10 accusations that Adobe's products meet the claim  
11 limitations. And, in fact, the claim limitations go to the  
12 details of providing particular kind of media stream, and  
13 those are functionalities which, as far as we can tell, and  
14 as far as the infringement contentions we've been served  
15 with indicate are within the Adobe products.

16 And so -- and, again, this is a case which is,  
17 as your Honor knows, is bifurcated. So what's at issue in  
18 this phase of the case is what the patent means, what the  
19 claims mean, what the product does, what it is, and whether  
20 the patent is valid.

21 And so with respect to what the accused product  
22 does, that it is a thing that is claimed to meet the claim  
23 limitations. I think counsel for Level 3 and Adobe put it

1 it is the object being accused for all intents and purposes  
2 that has been produced to the other side.

3 We have produced documents which evidence our  
4 use of the Adobe, which evidence how we use the Adobe  
5 products. That's the, the limited number of documents which  
6 opposing counsel referred to. And we produced those some  
7 time ago.

8 What we hadn't -- I don't want to leave the  
9 Court with the wrong impression, though, which is, we have  
10 not categorically refused to produce additional documents.  
11 We've never done that. What we've said is that we think  
12 we've produced the documents that are the core documents  
13 with respect to our accused activity. That is the use of  
14 the Adobe materials. And if they disagree with us, tell us  
15 where the holes are in that production. Tell us where they  
16 still have questions that are unanswered and we're happy to  
17 go back and look and see if we have documents that would  
18 fill those holes and produce them.

19 And if we end up not having documents that  
20 produce those, that fill those holes, well, then, that's the  
21 state of affairs. And what those documents are, whether  
22 those documents are specifications or whether they're source  
23 code, we need to know what they're looking for.

24 I submit to the Court in a case like this, it is  
25 very unlikely that from the Akamai position, source code

1 And to the extent that opposing counsel refers  
2 to some specific list of the kinds of documents they think  
3 we might have, that list was provided, you know, within the  
4 last week in the run-up to this hearing. And even that list  
5 is just a list of categories, not a list of subject matters  
6 that they think are missing from what we've produced.

7 We're happy to engage in a process, and we think  
8 the right process is that it's a dialogue in the interim  
9 process to do that, but we need a partner to do that with  
10 and we have not had one.

11 THE COURT: All right. Thank you.

12 MR. MELTON: Your Honor, Brian Melton again.

13 You know, this is -- what I've just heard is a  
14 shadowboxing. I'm to guess what they're looking at. The  
15 Court's order couldn't be clearer: Documents relating to  
16 the accused products, including, but not limited to, and it  
17 goes through a list.

18 They're sitting on documents that meet this  
19 definition. I can hear it. They're not refusing to produce  
20 it. They have them. They have them. They know they have  
21 them. And Adobe's counsel is also representing Level 3?

22 MR. VALENTINE: Yes, that's right.

23 MR. MELTON: So when Adobe's counsel is up here  
24 saying, we've produced, he's talking about what Adobe did.  
25 He's not saying Level 3 produced source code. In fact,

1 production will be necessary. We think that, to the extent  
2 they have any questions about our implementation of the  
3 Adobe products, we will be able to produce documents which  
4 describe that at the level of the patents that are  
5 substantially higher than that, things like specifications.

6 But they have not even told us what the  
7 questions are that are left. They have not given us any  
8 indication that they looked at those documents and they  
9 have any specific deficiency in what we've produced. All  
10 we have heard from them essentially is, produce more  
11 documents.

12 And so what we'd like to engage in, and what  
13 we've tried to engage in repeatedly, is a step-by-step  
14 process which gets them the documents they need to describe  
15 our use of the, of the system at the level of the patents,  
16 but does not place on us an undue burden of running around  
17 and collecting every document that has to do with things  
18 like bandwidth and streaming, which are some of their search  
19 terms that have been proposed.

20 So as I'm characterizing it to the Court, the  
21 state of affairs with us is we produced the set of documents  
22 we think are core to the accusations as they apply to us,  
23 and what we've been trying to solicit is exactly where they

1 Level 3 and Akamai are taking the position that they don't  
2 need to unless they've changed it or they haven't.

3 Now, the statute is clear. Infringement is  
4 making, using, selling or offering for sale. If they have  
5 interfaces with the code that they've written, if they have  
6 implementations that they've done, that is making and using  
7 and that should have been produced a long time ago.

8 To say they don't have a partner in this is a  
9 little disingenuous. What I heard was, we think we've  
10 produced -- and I wrote it down -- enough, enough. They  
11 didn't say, we've met the request for production and the  
12 Court's rule. We think we produced enough, and we don't  
13 believe that's the case.

14 They raised source code and I've addressed it.  
15 I think to the extent they have interfaces and  
16 implementation code, we're entitled -- we should --

17 THE COURT: I just had a scheduling conference  
18 where the lawyer said he was "presumptively entitled."

19 MR. MELTON: Right.

20 THE COURT: At least you didn't say  
21 "presumptively entitled." But, yes, that word does raise  
22 the hackles on my neck.

23 MR. MELTON: I take that word back, your Honor.

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