

UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF VIRGINIA  
ALEXANDRIA DIVISION

COGENT COMMUNICATIONS, INC.,	.	Civil Action No. 1:15cv1632
	.	
Plaintiff,	.	
	.	
vs.	.	Alexandria, Virginia
	.	May 13, 2016
DEUTSCHE TELEKOM AG,	.	10:53 a.m.
	.	
Defendant.	.	
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TRANSCRIPT OF MOTIONS HEARING  
BEFORE THE HONORABLE LEONIE M. BRINKEMA  
UNITED STATES DISTRICT JUDGE

APPEARANCES:

FOR THE PLAINTIFF:	SCOTT D. HELSEL, ESQ. Walton & Adams, P.C. 1925 Isaac Newton Square Suite 250 Reston, VA 20190 and ROBERT M. COOPER, ESQ. JAMES A. KRAEHENBUEHL, ESQ. Boies, Schiller & Flexner LLP 5301 Wisconsin Avenue, N.W. Washington, D.C. 20015
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FOR THE DEFENDANT:	ATTISON L. BARNES, III, ESQ. STEPHEN J. OBERMEIER, ESQ. Wiley Rein LLP 1776 K Street, N.W. Washington, D.C. 20006
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OFFICIAL COURT REPORTER:	ANNELIESE J. THOMSON, RDR, CRR U.S. District Court, Fifth Floor 401 Courthouse Square Alexandria, VA 22314 (703)299-8595
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COMPUTERIZED TRANSCRIPTION OF STENOGRAPHIC NOTES

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P R O C E E D I N G S

THE CLERK: Civil Action 15-1632, Cogent Communications, Inc. v. Deutsche Telekom AG. Would counsel please note their appearances for the record.

MR. HELSEL: Good morning, Your Honor. My name is Scott Helsel. I'm local counsel for Cogent Communications. With me this morning from Boies, Schiller & Flexner is Robert Cooper and James Kraehenbuehl, both of whom have been admitted pro hac vice, and Mr. Cooper will be leading the argument this morning.

THE COURT: All right. Good morning.

MR. COOPER: Good morning.

MR. BARNES: Good morning, Your Honor. Attison Barnes on behalf of the defendant. With me today, as you know, is Steve Obermeier of my firm.

THE COURT: All right. Very good. Well, before us is the defendant's motion to dismiss for failure to state a claim, lack of personal jurisdiction, and also motion to dismiss or to transfer the case for a forum non conveniens. You-all sit down for a second.

I mean, I've looked at this case, and it's an interesting one, but I see -- the reality of this case is you are two business entities -- two legitimate, ongoing business entities that are working together in this Internet world, and you've been working together or your predecessors since at

1 least 1999, and you're still depending on each other to send  
2 your e-mail -- your Internet traffic back and forth, and I  
3 understand that at least in 2007, you got somewhat close, if I  
4 read the papers correctly, to maybe working out this problem  
5 about the, whether or not any fees should be paid to the  
6 defendant for setting up these new connections, and it fell  
7 apart, but it sounds to the Court as though this is a matter  
8 that really should be settled and not litigated.

9 Have you made any efforts to try to work this thing  
10 out since the lawsuit was filed? Who wants to respond?

11 MR. COOPER: Good morning, Your Honor.

12 THE COURT: At the lectern, please.

13 MR. COOPER: Good morning, Your Honor.

14 THE COURT: Good morning.

15 MR. COOPER: Bob Cooper from Boies, Schiller &  
16 Flexner. The direct answer to your question is no, there have  
17 been no settlement discussions since this was filed.

18 Your perception is correct that over the years, there  
19 have been -- in addition to the agreements that are at issue in  
20 the motions and in the complaints, there have been numerous  
21 discussions between businesspeople at the parties to try to  
22 enter yet another new agreement, and thus far, they have not  
23 borne fruit. I believe the last time, if I'm correct, that the  
24 parties spoke would have been fall 2015.

25 THE COURT: Fall of 2015.

1 MR. COOPER: That's my understanding.

2 THE COURT: It didn't work, and then you filed the  
3 lawsuit.

4 MR. COOPER: Correct.

5 THE COURT: Yeah. Well, the problem the plaintiff  
6 has in this case is this case is going to go back to Germany,  
7 or that's where it has to be litigated. I've looked at your --  
8 you've only got two written contracts in this case.

9 The 2003 contract makes it crystal clear in my view,  
10 and that's the -- in fact, I think the 2003 contract is the  
11 only one that gives you any argument to be here in Virginia.  
12 That's the one that references the Ashburn location, and that  
13 contract makes it clear that German law applies to your  
14 business relationship as to this peer-to-peer business, and it  
15 also provides that Bonn is the area for jurisdiction to handle  
16 any disputes. That's the only written contract that anyone has  
17 shown me in this case.

18 These allegedly oral agreements are actually in  
19 violation of the 2003 document. Now, you-all may have been  
20 functioning on informal oral agreements, but the danger with  
21 oral agreements is they become very difficult to enforce in a  
22 court of law.

23 So I think it's a very simple way to resolve the  
24 motions that are here that I'm going to grant the motion to  
25 dismiss because this case does not belong here; it belongs in

1 Germany. It's not a dismissal on the merits, so you can  
2 certainly refile over there.

3 Having done that, I'm also going to suggest to  
4 you-all that if you want to try a shot at trying to settle this  
5 case, I'll be glad to sit down with you or have one of our  
6 magistrate judges here in this courthouse here sit down with  
7 you, but it's a pretty straightforward and simple issue to me  
8 on this record.

9 I mean, I think there are other issues. The statute  
10 of limitations is an interesting issue again because, you know,  
11 this problem, if it is what I understand it to be, you've had  
12 this issue going on since 2007, and you don't file a lawsuit  
13 until 2015 or '16, that's a long time, but you're  
14 businesspeople, and no one likes to go to war. Unfortunately,  
15 when you file a lawsuit, you're kind of going to, you know,  
16 litigation war, and I think it would be much wiser to try to  
17 sit down and work this out.

18 But that's my ruling. Thank you.

19 MR. BARNES: Thank you.

20 MR. COOPER: Thank you, Your Honor.

21 (Which were all the proceedings  
22 had at this time.)

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CERTIFICATE OF THE REPORTER

I certify that the foregoing is a correct transcript of the record of proceedings in the above-entitled matter.

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/s/  
Anneliese J. Thomson