

United States District Court
For the Northern District of California

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IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

APPLERA CORPORATION-APPLIED
BIOSYSTEMS GROUP, a Delaware
corporation,

No. C 07-02845 WHA

Plaintiff,

v.

**ORDER RE SOLEXA’S MOTION
FOR CLARIFICATION AND
RECONSIDERATION OF SUMMARY
JUDGMENT ORDER**

ILLUMINA, INC., a Delaware corporation,
SOLEXA INC., a Delaware corporation,
and STEPHEN C. MACEVICZ, an
individual

Defendants.

_____ /

The Court has received Solexa’s motion for clarification and for leave to file a motion seeking reconsideration of the Court’s order dated August 22, 2008 (Dkt. 232), and Applied’s response thereto. As an initial matter, the Court only intended its order granting in part and denying in part Applied’s motion for summary judgment of non-infringement to apply to Applied’s two-base encoding devices — *not* its prototype one-base version. The Court reserves the issue of infringement on all asserted patents with respect to the one-base system for trial.

Next, Solexa requests reconsideration of the Court’s ruling that it waived its doctrine of equivalents infringement contention as to the ’341 and ’597 patents. That motion is denied. To start, Solexa has not even attempted to justify its motion pursuant to Civil Local Rule 7-9(b), which provides that the party moving for reconsideration must show:

- (1) That at the time of the motion for leave, a material difference in fact or law exists from that which was presented to the Court before entry of the interlocutory order for which

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reconsideration is sought. The party also must show that in the exercise of reasonable diligence the party applying for reconsideration did not know such fact or law at the time of the interlocutory order; or

(2) The emergence of new material facts or a change of law occurring after the time of such order; or


(3) A manifest failure by the Court to consider material facts or dispositive legal arguments which were presented to the Court before such interlocutory order.

None of these requirements were discussed by Solexa. For that reason alone, the motion should be denied.

In addition, the fact remains that Solexa made no argument even remotely relating to the doctrine of equivalents in its briefing. Solexa does not dispute this. Instead, Solexa argues that Applied did not put Solexa on notice that the doctrine of equivalents was an issue on the motion. In their words, “[t]here was simply no substance to which Solexa had to respond” (Br. 6). This is far from the truth. Applied’s moving papers should have put Solexa well on notice that equivalency was an issue. For over a page, Applied argued that Solexa was precluded from arguing for infringement based on equivalency. Solexa gave no response. Nor did it raise any direct infringement argument based on equivalency. Accordingly, Solexa’s motion for leave to file a motion seeking reconsideration is **DENIED**.

IT IS SO ORDERED.

Dated: September 2, 2008.



WILLIAM ALSUP
UNITED STATES DISTRICT JUDGE