IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

APPLERA CORPORATION-APPLIED BIOSYSTEMS GROUP, a Delaware corporation,

Plaintiff,

v.

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

Defendants.
_____/

No. C 07-02845 WHA

ORDER DENYING APPLERA'S MOTION FOR CLARIFICATION

The Court has received Applera's motion for "clarification" of the order granting Solexa's motion to strike. The circumstances leading up to Solexa's motion to strike were detailed in the order (Dkt. 323). As an initial matter, Applera's motion for "clarification" is nothing more than a disguised motion for reconsideration. Putting that aside, no "clarification" is necessary. Applera cannot get around the fact that it expressly rejected the opportunity to submit a supplement to its expert report regarding non-infringing alternatives:

> The Court: What do you want to do? Do you want to? Do you want to just rely on the two-base and — period, and no other things were considered? Or do you want the opportunity for this five-page supplement to fix up and provide foundation for what this expert was going to base his opinion on?
>
> Mr. Doyle (Applied's counsel): We will rely on the two-base, alone, Your Honor. That — this is what this case is about. And, that's what there were doing. They were considering some other things, as Mr. Pai mentioned, but —
>
> The Court: That cannot be mentioned.

Mr. Doyle: Yes, your honor.

Applera now argues that its representations were only made in regards to the '341 and '597 patents. Nothing in the record, besides Applera's own argument, supports this conclusion. The Court in unequivocal terms gave Applera the opportunity to supplement its expert reports with a new five-page submission regarding non-infringing alternatives. Nothing in the Court's offer or in Applera's rejection indicates that it was limited only to the '341 and '597 patents. It should have been clear to Applera that the offer was made in regards to all the patents in suit. In addition, in its opposition to Solexa's motion to strike, Applera did not even raise the argument that its representations were limited to the '341 and '597 patents, instead relying on the argument that Solexa's expert had no sufficient foundation for his damage opinion. After losing the motion, Applera is simply trying to reargue the motion on a different ground. Applera was plainly given its opportunity and gave it up. At this point, if Applera were allowed to supplement its expert reports, prejudice would occur. Applera itself admits that prior to the final pretrial conference neither side had offered any expert report on whether the '119 patent had non-infringing alternatives.

This does not mean, however, that Solexa's damage expert can testify that there *were* no non-infringing alternatives. He is not qualified to so testify and must make clear that his damage opinion is based on that assumption.

Dated: November 13, 2008.

WILLIAM ALSUP
UNITED STATES DISTRICT JUDGE