

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

MONOLITHIC POWER SYSTEMS, INC.,

Plaintiff,

v.

O2 MICRO INTERNATIONAL LIMITED,

Defendant.

No. C 08-04567 CW

ORDER GRANTING
MOTION TO STRIKE
PORTIONS OF THE
EXPERT REPORTS OF
RICHARD A. FLASCK
AND VINCENT E.
O'BRIEN (Docket No.
143) AND GRANTING IN
PART AND DENYING IN
PART O2 MICRO'S
MOTION FOR LEAVE TO
AMEND ITS DISCLOSURE
OF ASSERTED CLAIMS
AND PRELIMINARY
INFRINGEMENT
CONTENTIONS (Docket
No. 146)

O2 MICRO INTERNATIONAL LIMITED,

Counterclaimant,

v.

MONOLITHIC POWER SYSTEMS, INC.;
ASUSTEK COMPUTER INC.; ASUSTEK
COMPUTER INTERNATIONAL AMERICA,

Counterclaim-Defendants.

Plaintiff and Counter-Defendant Monolithic Power Systems, Inc. (MPS) moves to strike portions of the expert reports of Richard A. Flasck and Vincent E. O'Brien. Counterclaim-Defendants ASUSTeK Computer, Inc. and ASUSTeK Computer International America (collectively ASUSTeK) join MPS' motion. Defendant O2 Micro International Limited opposes the motion. In a related motion, O2 Micro moves to amend its disclosure of asserted claims and preliminary infringement contentions to include the alleged infringements discussed in the Flasck and O'Brien reports. MPS and

1 ASUSTeK oppose the motion in part. The motions were decided on the
2 papers. Having considered all of the papers submitted by the
3 parties, the Court GRANTS MPS' Motion to Strike Portions of the
4 Flasck and O'Brien Reports and GRANTS IN PART AND DENIES IN PART O2
5 Micro's Motion to Amend.

6 BACKGROUND

7 On January 28, 2009, O2 Micro filed a counterclaim against MPS
8 for infringement of U.S. Patent No. 7,417,382 (the '382 Patent).
9 Pursuant to Patent Local Rule 3-1, O2 Micro served MPS with its
10 Disclosure of Asserted Claims and Preliminary Infringement
11 Contentions on March 13, 2009. The Preliminary Infringement
12 Contentions alleged that MPS' MP1009, MP1010B, MP1026, MP1038 and
13 MP1048 inverter controllers infringe the '382 Patent.

14 On July 31, 2009, O2 Micro served MPS with the expert report
15 of Richard A. Flasck. In the report, Flasck opined that the MPS
16 products mentioned above infringe the '382 Patent. He also opined
17 that MPS' MP1008, MP10091, MP1015, MP1016, MP1017, MP1018, MP1028,
18 MP1037, MP1060, MP1872 and MP61093 products infringe the '382
19 Patent. O2 Micro did not address these eleven additional products
20 in their Preliminary Infringement Contentions. On August 21, 2009,
21 O2 Micro served MPS with an expert report by Vincent E. O'Brien,
22 which estimated the damages caused by MPS' alleged infringement.
23 The O'Brien Report took into account the eleven additional MPS
24 products discussed in the Flasck Report. The same day, O2 Micro
25 also served a supplement to the Flasck Report, which opined that
26 MPS' MP1061, MP1062, VN800 and VN830 products also infringe the
27 '382 Patent.

28 On September 4, 2009, MPS filed this motion to strike the

1 portions of the Flasck and O'Brien reports that address the
2 additional products not discussed in O2 Micro's Preliminary
3 Infringement Contentions. Later that day, O2 Micro filed a motion
4 to amend its infringement contentions to include the additional
5 eleven MPS products from the original Flasck Report and the four
6 others discussed in the Supplemental Flasck Report. O2 Micro's
7 motion to amend also seeks leave to withdraw O2 Micro's allegations
8 against BenQ Corporation and BenQ America Corp. and its claims of
9 infringement of U.S. Patent Nos. 6,856,519, 6,809,938 and
10 7,120,035.¹ MPS and ASUSTeK did not oppose this portion of the
11 motion.

12 The Court's Case Management Order required the close of claim
13 construction discovery by July 27, 2009, the disclosure of expert
14 witnesses' identities and reports by July 31, 2009, disclosure of
15 expert rebuttal reports by August 14 and the close of fact and
16 expert discovery by August 31.² (Docket No. 60.)

17 DISCUSSION

18 I. O2 Micro's Motion to Amend

19 This district has adopted Patent Local Rules that "require
20 parties to state early in the litigation and with specificity their
21 contentions with respect to infringement and invalidity." O2 Micro
22 Int'l, Ltd. v. Monolithic Power Systems, Inc., 467 F.3d 1355, 1359
23 (Fed. Cir. 2006). Under the Patent Local Rules, the parties'

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25 ¹ Pursuant to stipulation, all claims against BenQ Corporation
26 and BenQ America Corp. were dismissed. (Docket No. 98). The
claims of infringement of the '519, '938 and '035 patents were also
dismissed pursuant to stipulation. (Docket No. 100).

27 ² This Order was amended pursuant to stipulation on August 17,
28 2009. However, the changes only addressed discovery and briefing
regarding O2 Micro's prayer for damages. (Docket Nos. 111, 115.)

1 ability to amend their infringement and invalidity contentions is
2 restricted. Patent Local Rule 3-6 provides that amendment to
3 infringement contentions "may be made only by order of the Court
4 upon a timely showing of good cause." Examples of good cause
5 include

6 (a) a claim construction by the Court different from that
7 proposed by the party seeking amendment; (b) recent
8 discovery of material, prior art despite earlier diligent
9 search; and (c) recent discovery of nonpublic information
about the Accused Instrumentality which was not
discovered, despite diligent efforts, before the service
of the Infringement Contentions.

10 Patent Local R. 3-6. Good cause requires a showing of diligence;
11 the burden is on the party seeking to amend its contentions "to
12 establish diligence rather than on the opposing party to establish
13 a lack of diligence." O2 Micro, 467 F.3d at 1366-67.

14 O2 Micro argues that good cause exists to add the fifteen
15 additional MPS products because it only recently discovered non-
16 public information about them. MPS points out, however, that O2
17 Micro obtained information on the MP1008, MP1015, MP1016, MP1017,
18 MP1018, MP1028, MP1037, MP1060, MP1872, VN800 and VN830 through
19 either its patent litigation in the Eastern District of Texas³ or
20 the 2004 case against MPS in this Court regarding infringement of
21 its U.S. Patent No. 6,396,722. With regard to the MP1061, MP1062,
22 MP10091 and MP61093, MPS asserts that O2 Micro received information
23 on these products through the parallel International Trade
24 Commission proceeding in May and June, 2009. All discovery in the
25 ITC action applies to this proceeding. (Docket No. 60.) O2 Micro

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27 ³ See O2 Micro Int'l Ltd. v. Samsung Elecs. Co., No. 2:04-cv-
00323 TJW (E.D. Tex.); O2 Micro Int'l Ltd. v. Monolithic Power
28 Sys., Inc., No. 2:04-cv-00359 LED (E.D. Tex.); O2 Micro Int'l Ltd.
v. Hon Hai Precision Indus. Co., No. 2:05-cv-00323-CE (E.D. Tex.).

1 did not persuasively argue or provide evidence showing that it did
2 not receive information from these other proceedings.⁴

3 Because O2 Micro was not diligent in seeking leave to amend,
4 the Court does not find good cause for O2 Micro to add these
5 products. O2 Micro had information, often in the form of detailed
6 technical documents, on the MP1008, MP1015, MP1016, MP1017, MP1018,
7 MP1028, MP1037, MP1060, MP1872, VN800 and VN830. Thus, these
8 products could have been included in its March, 2009 Infringement
9 Contentions. O2 Micro asserts that protective orders barred it
10 from using information obtained in prior actions. This argument
11 ignores provisions in the protective orders that allow O2 Micro to
12 seek consent to use the information in this case. See, e.g.,
13 Harkins Decl. in Opp'n to Mot. to Strike, Ex. C at 4. There is no
14 evidence that O2 Micro sought such consent.

15 As for the MP1061, MP1062, MP10091 and MP61093, O2 Micro had
16 information on these products about three months before it filed
17 its current motion. Nevertheless, O2 Micro waited until after
18 discovery closed before seeking leave to accuse them. Indeed, MPS
19 did not have notice that O2 Micro would accuse the MP1061 and
20 MP1062 until O2 Micro served the Supplemental Flasck Report on

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22 ⁴ Concerning the MP1008, MP10091 and MP61093, O2 Micro asserts
23 that MPS "cited no evidence whatsoever to support its allegation
24 that O2 Micro was aware of the products at the time it served its
25 March 13, 2009 infringement contentions." O2 Micro Opp'n to Mot.
26 to Strike at 6. This assertion is partially incorrect. MPS
27 provided evidence showing O2 Micro knew of the MP1008 as early as
28 November 5, 2007. See Kang Dec'l, Opp'n to Mot. for Leave to
Amend, Ex. K. As for the MP10091 and MP61093, MPS provided
evidence showing that O2 Micro received information on these
products in May, 2009 through the ITC proceeding. See Kang Dec'l,
Reply in Support of Mot. to Strike ¶ 5. As discussed below,
although O2 Micro received information about these products after
March, 2009, it does not show it was diligent in seeking leave to
amend its contentions.

1 August 21, three weeks after the deadline for disclosing expert
2 reports had passed. The Court cannot disregard O2 Micro's
3 tardiness, which limited the time MPS had to analyze the additional
4 allegations. O2 Micro does not explain why it did not seek leave
5 to amend sooner, and thus cannot be found to be diligent.

6 II. MPS' Motion to Strike

7 MPS moves to strike the portions of the Flasck and O'Brien
8 reports that address the additional MPS products. MPS asserts that
9 these references are improper because they are not mentioned in the
10 Infringement Contentions. Because the Court denied O2 Micro's
11 motion to amend, it grants this motion to strike.

12 CONCLUSION

13 For the foregoing reasons, the Court GRANTS MPS' Motion to
14 Strike. Within three days of this Order, O2 Micro shall serve
15 versions of the Flasck and O'Brien reports that do not include
16 references to the MP1008, MP1015, MP1016, MP1017, MP1018, MP1028,
17 MP1037, MP1060, MP1061, MP1062, MP1872, MP10091, MP61093, VN800 and
18 VN830 products. The Court GRANTS O2 Micro's Motion for Leave to
19 Amend with regard to withdrawing allegations against BenQ
20 Corporation and BenQ America Corp. and claims of infringement of
21 U.S. Patent Nos. 6,856,519, 6,809,938 and 7,120,035. O2 Micro's
22 request to include fifteen additional MPS products is DENIED. O2
23 Micro shall serve its amended infringement contentions within three
24 days of this Order.

25 IT IS SO ORDERED.

26
27 Dated: 10/16/2009

Claudia Wilken

CLAUDIA WILKEN
United States District Judge