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12 UNITED STATES DISTRICT COURT  
 13 NORTHERN DISTRICT OF CALIFORNIA  
 14 SAN FRANCISCO DIVISION  
 15

16 ELAN MICROELECTRONICS  
 CORPORATION,  
 17  
 Plaintiff,  
 18 v.  
 19 APPLE, INC.,  
 20 Defendant.

Case No. 09-cv-01531 RS (PSG)  
**ELAN MICROELECTRONICS  
 CORPORATION'S OPPOSITION TO  
 APPLE'S ADMINISTRATIVE MOTION  
 FOR LEAVE TO SUBMIT A  
 SURREPLY IN OPPOSITION TO  
 ELAN'S MOTION FOR PARTIAL  
 SUMMARY JUDGMENT OF  
 INFRINGEMENT OF U.S. PATENT  
 5,825,352**  
 Date: July 14, 2011  
 Time: 1:30 p.m.  
 Courtroom 3, 17<sup>TH</sup> Floor  
 Judge: Hon. Richard Seeborg

21 AND RELATED COUNTERCLAIMS  
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1 For the reason set forth below, Elan Microelectronics Inc. (“Elan”) opposes Defendant  
2 Apple Inc.’s (“Apple”) motion for leave to file a Surreply Memorandum In Opposition To Elan’s  
3 Motion For Partial Summary Judgment For The Infringement Of The 5,825,352 Patent (“Apple  
4 Motion for Leave”). Alternatively, if the Court does permit the filing of Apple’s proposed  
5 surreply papers, Elan respectfully requests leave to file a limited response to those papers.  
6

7  
8 **I. Apple Did Not Comply With Any Aspect Of The Local Rule 7-3(d) In Requesting Its  
Motion For Leave To Submit Surreply Objection**

9 Civil Local Rule 7-3(d) only allows supplemental filing when “new evidence has been  
10 submitted in the reply” and “the opposing party may serve and file within *7 days* after the reply is  
11 filed, an Objection to Reply Evidence, which may not exceed *5 pages* of text, stating its objections  
12 to the new evidence, which may *not include further argument* on the motion.” Civ. L.R. 7-3(d)  
13 (emphasis added). Apple did not comply with *any* of the above requirements. Instead, Apple  
14 filed the instant motion for leave and an *11-page* surreply memorandum and points of authority,  
15 adding *additional arguments*, and asked for leave to make those new arguments *three weeks* after  
16 Elan filed its Reply. As such, Apple’s Motion for Leave should be denied in its entirety on this  
17 basis alone. *See Johnson v. Northwest Airlines*, 2010 U.S. Dist. LEXIS 139808, \*7-8 (N.D. Cal.  
18 2010) (denying party’s motion for leave to file surreply since it is essentially seeking to file  
19 another opposition to moving party’s motion, and not for purposes permitted under L.R. 7-3(d)).

20 Further, Apple’s tactic of waiting three weeks, until there is only one week before the  
21 hearing, to put forward its extensive new arguments, appears to be a tactic chosen to leave Elan  
22 little time to object or prepare an adequate response. Accordingly, the Court should deny Apple’s  
23 motion for surreply.

24  
25 **II. Contrary To Apple’s Characterization Elan Did Not Submit Any New Arguments,  
New Opinions Nor New Evidence**

26 Elan’s Reply and evidence submitted in support of the Reply were for purposes of  
27 addressing and responding to the entirely new claim construction arguments raised in Apple’s own  
28 Opposition. Nevertheless, Apple, in its L.R. 7-3(d) administrative motion for leave, without any

1 detailed discussion or legal support, only listed six conclusory bullet points as basis to submit its  
2 surreply brief. *See* Apple Motion for Leave at 2. None of the reasons entitles Apple to file an  
3 additional argumentative Opposition permitted under the Rule.

4 Apple's first bullet point states that Elan's Reply "[r]elies upon a new, twenty-six page  
5 expert declaration containing new opinions based on new evidence never cited in Elan's opening  
6 brief." *See* Apple Motion for Leave at 2. Apple's second point also states that the Reply "[r]elies  
7 upon fifteen new exhibits never cited in Elan's opening brief." *Id.* Those statements are  
8 disingenuous at best. Elan's expert reply declaration and the 15 exhibits submitted in support of  
9 the Reply *responded to* and addressed the arguments raised in Apple's Opposition and Apple  
10 expert's *48-page, 158-paragraph* declaration in support of its Opposition, as Elan is permitted to  
11 do in reply. Contrary to Apple's assertion, no new arguments or opinions were included in this  
12 declaration such that Apple can be permitted to submit an objection pursuant to the L.R. 7-3(d), let  
13 alone a second full argumentative opposition. *See Heil Co. v. Curotto Can Co.*, 2004 U.S. Dist.  
14 LEXIS 23618, \*3 (N.D. Cal. 2004) (denying defendant's request to file a surreply since plaintiff's  
15 reply does not raise new arguments but merely responds to arguments made in defendant's  
16 opposition).

17 Apple's third bullet point then alleges that Elan somehow "[r]equests that the Court revisit  
18 a claim construction issue for the first time in a reply brief on summary judgment based on new  
19 arguments and evidence never presented during the prior claim construction proceedings or even  
20 in Elan's opening summary judgment brief." *See* Apple Motion for Leave at 2. Again, the record  
21 is to the contrary. Elan's Reply merely pointed out that Apple's position in its Opposition would  
22 require the Court to revise constructions already agreed to by the parties, to adopt new and  
23 improper constructions for terms already construed or considered during the claim construction  
24 proceedings. *See* Elan Reply at pages 9 to 14. In response to Apple's previously undisclosed  
25 claim construction issues raised for the first time in its Opposition, Elan presented its responsive  
26 arguments and stated in the Reply that "to the extent Court will entertain" these new claim  
27 construction issues, they may be resolved as a matter of law. *See* Elan Reply at page 14.  
28 Therefore, Elan's Opposition merely addressed Apple's Opposition and its expert's declaration

1 and does not justify Apple filing an additional Opposition.

2 Apple's fourth and fifth bullet points are similarly baseless. Apple states that Elan's Reply  
3 "[c]ontains a variety of new arguments that are factually and legally erroneous" and that it  
4 "repeatedly mischaracterizes Apple's positions" See Apple Motion for Leave at 2. Elan disagrees  
5 that it mischaracterizes Apple's positions or that Elan's Reply brief contains any factually or  
6 legally erroneous statements. Nonetheless, these justifications by Apple to permit its surreply are  
7 not recognized bases under any rules or L.R. 7-3(d)) permitting a party to submit a surreply  
8 memorandum and points of authority. *Johnson v. Northwest Airlines*, 2010 U.S. Dist. LEXIS at  
9 \*7-8 (denying party's motion for leave to file surreply since it is essentially seeking to file another  
10 opposition to moving party's motion). Surreplies are not permitted merely to provide the  
11 responding party another opportunity to argue its opposition, which is exactly what Apple is  
12 attempting here.

13 Finally, in Apple's Motion for Leave it states that on July 5, 2011 "Elan filed another  
14 supplemental expert declaration containing additional opinions, and relying on another new  
15 exhibit" as basis to submit its surreply. See Apple Motion for Leave at 2. Apple is wrong again.  
16 This statement flatly mischaracterized Elan's supplemental declaration filed on July 5, 2011. As  
17 clearly set forth in the July 5, 2011 filings, Elan submitted a short 2-page, 3-paragraph  
18 supplemental declaration and an exhibit to inform the Court and to *correct* and explain an  
19 inadvertent mis-statement made in Elan expert's Reply declaration. See Dkt 323, Supplemental  
20 Declaration of Robert Dezmelyk ISO Elan Reply at ¶¶ 1-2. Nothing in this July 5, 2011 filing  
21 contains any new opinions, arguments or evidence to justify Apple's Motion for Leave.

22 Accordingly, Apple has not set forth any permitted bases or good cause to file a surreply in  
23 its Motion for Leave. This 11-page surreply is nothing but a pretext to get another chance to  
24 submit an Opposition to Elan's underlying summary judgment motion which is not permitted  
25 under any rules. For these reasons, the Court should deny Apple's Motion for Leave to Submit a  
26 Surreply in its entirety.

