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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA, SAN JOSE DIVISION

APPLE INC., a California corporation,

Plaintiff,

vs.

SAMSUNG ELECTRONICS CO., LTD., a Korean business entity; SAMSUNG ELECTRONICS AMERICA, INC., a New York corporation; SAMSUNG TELECOMMUNICATIONS AMERICA, LLC, a Delaware limited liability company,

Defendants.

CASE NO. 11-cv-01846-LHK

SAMSUNG'S OBJECTIONS TO APPLE'S USE OF NON-REBUTTAL EVIDENCE IN APPLE'S REPLY BRIEF

Date: October 13, 2011
Time: 1:30 pm
Place: Courtroom 8, 4th Floor
Judge: Hon. Lucy H. Koh

Apple submitted nine new declarations with its preliminary injunction motion reply — more than half of them from entirely new declarants and much of them containing entirely new, non-rebuttal matter and citing to Apple internal documents produced a full month after Samsung's opposition. Apple's reply arguments also introduce new evidence that contradicts its opening papers and the sworn interrogatory responses it had served before Samsung's opposition brief, and its declarations attach numerous documents that should have been produced long ago. Thus, not only has Apple improperly attempted to introduce numerous new matters in reply, but by failing to produce the discovery contemplated by the Court, Apple has thwarted the purpose of the Court's order and sought to deny Samsung the right to fairly respond. The law is plain: for new matters introduced on reply, a court must either strike the new matter or grant a sur-reply.[1] Samsung requests that the Court strike the new non-rebuttal evidence or allow Samsung a sur-reply. Samsung also requests that the Court allow Samsung to depose Apple's new witnesses.

I. The Court Should Strike Apple's Non-Rebuttal Declarations, Reopen Discovery, and Allow Samsung to File a Sur-Reply

Many of Apple's new declarations concern issues on which Apple bears the initial burden of proof, which Apple was required to present in its moving papers. *Docusign*, 468 F. Supp. 2d at 1307. For example, the declaration of Arthur Rangel, argues that Apple will lose sales to Samsung. Two of Apple's new experts also address irreparable harm. Terry Musika, an accountant, opines that alleged harm to Apple is irreparable (Musika Dec. ¶5), and Sanjay Sood, a professor of business, addresses "the impact of sales of competing products with substantially the same design" on Apple (Sood Dec. ¶9). The Court should also strike the declaration of Tony

[1] *See Provenz v. Miller*, 102 F.3d 1478, 1483 (9th Cir. 1996) (where new evidence is presented in reply to motion for summary judgment, the court should either not consider it or give the non-movant an opportunity to respond)*; Sky Capital Group, LLC v. Rojas*, No. 1:09-cv-83, 2010 WL 779561, at *3 n.3 (D. Idaho Mar. 2, 2010) (evidence submitted in reply in support of preliminary injunction improper where it related to arguments made in opening brief); *Docusign, Inc. v. Sertifi, Inc.*, 468 F. Supp. 2d 1305, 1307 (W.D. Wash. 2006) (striking patentee's new evidence on claim construction and irreparable harm offered in reply in support of motion for preliminary injunction); *Iconix, Inc. v. Tokuda*, 457 F. Supp. 2d 969, 975-76 (N.D. Cal. Sept. 26, 2006) (new evidence offered by plaintiff in reply in support of motion for preliminary injunction improper if defendant not given an opportunity to respond).

Blevins on Apple's manufacturing capacity because Apple never listed Mr. Blevins in its initial disclosures or otherwise disclosed him. A reply brief is not a vehicle to introduce new evidence or proof that was absent or inadequate in the opening papers. *See Provenz*, 102 F.3d at 1483.

The Court should also strike at least those portions of Apple's new declarations that opine on claim construction, an issue Apple should have addressed in its moving papers. Apple's new declaration from Dr. Balakrishnan, among other things, construes the '381 patent, and its declarations from proffered experts Cooper Woodring and Peter Bressler, as well as Apple employee Christopher Stringer, address whether Apple's designs are "functional." Functionality is part of claim construction for design patents precisely because only ornamental, and not functional, features are protected. *See Richardson v. Stanley Works, Inc*., 597 F.3d 1288, 1293-94 (Fed. Cir. 2010). Apple's experts had the responsibility of addressing claim construction in their moving papers when alleging infringement. *See Docusign*, 468 F. Supp. 2d at 1307.

Apple also submitted some declarations, parts of which could plausibly be responsive to Samsung's brief, for example, on the issues of Apple's licensing practices and prior art. Samsung therefore does not move to strike the declarations of Richard Lutton, or the portions of the declarations of Balakrishnan, Bressler, and Woodring that address prior art, but does request leave to file a sur-reply. Further, Samsung seeks leave to depose Bressler (who Apple had not previously disclosed and who has not been deposed) and, if the Court does not grant Samsung's motion to strike, to depose Musika, Sood, Blevins, and Rangel.

II. The Court Should Strike Apple's New, Undisclosed Contentions

Apple's reply brief improperly raises new arguments for the first time that contradict its opening brief and its sworn interrogatory responses. For example, Apple argues in its reply brief that the iPad2 embodies the D'889 patent and that the iPad2's commercial success is evidence that the D'889 patent is not obvious. (*See* Reply at 11.) This new contention was not made in Apple's opening declarations, its opening brief, or any discovery response served before Samsung filed its opposition. Rather, only last week, ***after*** Samsung conducted discovery, worked with its experts, and filed its opposition to Apple's motion for a preliminary injunction — and more than six weeks after the Court's August 8 "Deadline for Samsung's discovery from Apple," did Apple

serve a "supplemental" unverified interrogatory response identifying the iPad2 as embodying the D'889 patent. (Dkt. No. 115.) Indeed, it was not until Samsung challenged the relevance of certain discovery requests given Apple's position that the iPad2 did not embody the D'889 patent that Apple changed its tune, with no explanation of its sudden reversal. New arguments and factual contentions such as this are not properly raised for the first time in reply. *See Lentini v. Cal. Cent. for the Arts, Escondido*, 370 F.3d 837, 843 n.6 (9th Cir. 2004) (declining to consider arguments raised for first time in a reply brief, and collecting cases).

III. The Court Should Strike Apple's New Documents

Apple's newly-introduced evidence was not only presented for the first time in reply, but also contravenes the Court's detailed scheduling order for discovery and briefing on Apple's motion for a preliminary injunction. (Dkt. No. 115.) That order required Apple to provide its discovery responses by August 8, before Samsung's August 22 filing date for its opposition. Apple's new declarations attach documents that are responsive to Samsung's requests for production but were not timely produced. For example, Exhibits A-C to the Rangel declaration contain documents that were not produced to Samsung until September 22, over six weeks after the deadline for Apple to produce documents to Samsung and well after Samsung filed its opposition brief. (Binder Dec. ¶¶5-7; *see also id.* ¶¶8-12.) Apple's belated production of relevant documents prejudices Samsung's full and fair opportunity to test the evidence Apple seeks to use to bar its products from sale in the U.S. Accordingly, this evidence should be stricken. In the alternative, if the Court is inclined to consider Apple's new documents, Samsung should be allowed to take additional depositions and file a sur-reply so that Samsung can adequately respond. *See Provenz*, 102 F.3d at 1483.

Conclusion

For the foregoing reasons, the Court should: (1) strike in their entirety the Musika, Stringer, Blevins, Sood, and Rangel declarations, Apple's contention that the iPad2 practices Apple's patents; and Apple's late produced documents; (2) strike paragraphs identified in Samsung's proposed order from the Balakrishnan, Bressler, and Woodring reply declarations; and (3) allow Samsung to depose Bressler and file a sur-reply.

DATED: October 4, 2011

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