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9 Attorneys for Plaintiff  
Ancora Technologies, Inc.

10  
11 **UNITED STATES DISTRICT COURT**  
12 **CENTRAL DISTRICT OF CALIFORNIA**  
13

14 ANCORA TECHNOLOGIES,  
15 INC.

16 Plaintiffs,

v.

17 TCT MOBILE (US) INC.,  
18 HUIZHOU TCL MOBILE  
COMMUNICATION CO.,  
19 LTD., and SHENZHEN TCL  
CREATIVE CLOUD  
20 TECHNOLOGY CO., LTD.,

21 Defendants.

**Case No. 8:19-cv-02192-GW-ASx**  
**(LEAD CASE)**

Consolidated Case No.:  
Case No. 2:20-cv-01252-GW-ASx

[Hon. George H. Wu]

**SUR-REPLY TO TCL'S MOTION TO  
DISMISS THE FIRST AMENDED  
COMPLAINT**

22  
23 \* RELATED CASE 2:20-cv-01252  
24

1 Plaintiff Ancora Technologies, Inc. (“Ancora”) provides this Sur-Reply to  
2 TCT Mobile (US) Inc., Huizhou TCL Mobile Communication Co., Ltd., and  
3 Shenzhen TCL Creative Cloud Technology Co., Ltd. (collectively “TCL”) Motion  
4 to Dismiss the First Amended Complaint as permitted by this Court’s order. (Dkt.  
5 #41.)

6 Counsel for Ancora and TCL conducted a meet and confer telephonically on  
7 Monday April 13, 2020. ***Based on this conference, the parties believe that all***  
8 ***issues raised in TCL’s motion have been resolved.*** Specifically, as set forth in detail  
9 below, Ancora is willing to file a Second Amended Complaint (“SAC,” Ex. 1) which  
10 addresses all outstanding issues as outlined below. Ancora also provided this SAC  
11 to TCL’s counsel on April 15<sup>th</sup> and there was no indication that the SAC did not fully  
12 address all the outstanding issues.

13 *Whether Ancora is willing to specify in a further amended complaint*  
14 *whether it is accusing (i) Smart phones, (ii) servers, (iii) software,*  
15 *and/or (iv) some combination of (i) through (iii) of being capable of*  
16 *infringing the asserted patent. The Court agrees with TCL that Ancora’s*  
17 *representations in its opposition in this regard are not fully consistent*  
18 *with the allegations made in the FAC as far as what constitutes an*  
19 *“accused product” or instrumentality.*

20 The ‘941 Patent includes method claims and confusion arose regarding the  
21 term “Accused Product” used within the complaint. Any ambiguity regarding  
22 Ancora’s contentions should now be resolved by Ancora’s Preliminary Infringement  
23 Contentions that were served on April 1, 2020. Ancora is further willing to correct

24 SUR-REPLY TO TCL’S MOTION TO DISMISS

1 this issue by submission of a Second Amended Complaint (“SAC”). (*See, e.g., Ex.*  
2 1 at ¶ 32.) Specifically, Ancora’s SAC now alleges an “Accused Process” as the  
3 process used by TCL to update TCL Smartphones. The SAC also alleges how the  
4 Accused Process includes TCL servers to provide TCL software that is installed on  
5 TCL Smartphones which results in infringement of the ‘941 Patent claims.

6 *Whether Ancora is willing to specify (again) in a further amended*  
7 *complaint what conduct listed under 35 U.S.C. § 271(a) it is alleging in*  
8 *this case insofar as infringement (i.e., are Ancora’s actions of “making,*  
9 *using, selling, importing,” etc. the accused instrumentality considered*  
10 *the basis for the alleged infringing conduct?). TCL’s reply casts doubt*  
11 *on what type of conduct Ancora is alleging, based on the statements*  
12 *and representations made in Ancora’s opposition.*

13 Ancora is asserting claims of direct infringement under 35 U.S.C. § 271(a) by  
14 TCL’s use of the Accused Process. Again, Ancora is willing to file the attached  
15 SAC that addresses this issue. (*See, e.g., Ex. 1 at ¶ 26.*)

16 *Whether Ancora is willing to specify in a further amended complaint*  
17 *what theory or theories of infringement (direct, indirect, joint, etc.) it is*  
18 *alleging in this case. The FAC does not explicitly state one way or the*  
19 *other (it does not use the words “direct,” “indirect,” or “joint” at all),*  
20 *and the Court agrees with TCL that some of the language in the FAC*  
21 *tracks, for example, the legal requirements of a joint infringement*  
22 *claim, even though it is not otherwise pled and Ancora’s opposition*  
23 *denies joint infringement is being alleged.*

1 Ancora's direct infringement allegations are against a single infringer, TCL.  
2 Ancora also identified that the legal support for its direct infringement claim stems  
3 from cases such as *SiRF Tech., Inc. v. Int'l Trade Comm'n*, 601 F.3d 1319, 1331  
4 (Fed. Cir. 2010). Ancora is willing to file the attached SAC that clearly identifies  
5 this theory (*See, e.g.*, Ex. 1 at ¶ 42.)

6 As an alternative, Ancora did plead facts to support infringement with TCL  
7 and TCL's customers being responsible for joint infringement as a single entity. The  
8 legal support for this direct infringement claim stems from cases such as *Travel*  
9 *Sentry, Inc. v. Tropp*, 877 F.3d 1370, 1378 (Fed. Cir. 2017). Ancora is willing to  
10 file the attached SAC that clearly identifies this theory. (*See, e.g.*, Ex. 1 at ¶ 44.)  
11 For example, the Accused Process allows TCL the ability to allow customer's the  
12 ability to delay TCL updates on TCL smartphones for a given period.

13 *Whether Ancora would agree to incorporate into a further amended*  
14 *complaint certain information that appears in its opposition, but is not*  
15 *exactly reflected in its FAC. For example, Ancora should explain*  
16 *whether it would agree to amend its complaint to add claim charts or*  
17 *additional information linking the functioning of the accused*  
18 *instrumentalities to the claim limitations, similar to the claim charts*  
19 *and explanation set forth in its opposition. Ancora should also explain*  
20 *whether it would be willing to provide additional information without*  
21 *Court involvement beyond what was provided in its opposition; for*  
22 *instance, whether it would be willing to provide additional allegations*  
23 *regarding the "using an agent" step of Claim 1 of the asserted patent.*

1 As noted above, Ancora already served its Preliminary Infringement  
2 Contentions which includes a detailed 142-page claim chart. Ancora incorporates  
3 these Contentions in its SAC by reference. (*See, e.g.*, Ex. 1 at ¶ 32.) During the  
4 parties meet-and-confer, the parties agreed that this item is likely resolved based on  
5 the preliminary infringement contentions.

6 *Whether, based on its meet and confer with TCL, Ancora believes the*  
7 *parties can resolve their differences regarding the relevant legal*  
8 *authority governing accusations of patent infringement by defendant-*  
9 *owned software being run on a third-party device; specifically, their*  
10 *dispute with respect to Ricoh Co., Ltd. v. Quanta Computer Inc., 550*  
11 *F.3d 1325, 1335 (Fed. Cir. 2008), SiRF Tech., Inc. v. Int’l Trade*  
12 *Comm’n, 601 F.3d 1319, 1331 (Fed. Cir. 2010), and related legal*  
13 *authority. Ancora should also state whether it would be willing to file*  
14 *a further amended complaint based on a resolution of that dispute.*  
15 *Otherwise, Ancora may provide a brief response to TCL’s reply*  
16 *arguments on the issue.*

17 Based on the parties meet and confer, this item is resolved. Specifically, while  
18 there was ambiguity regarding “sale” previously, Ancora clarified that its direct  
19 infringement allegations are based on “use” and not “sale.” Accordingly, Ancora’s  
20 infringement theory aligns with *SiRF*. The allegations in *Richo* were directed to “the  
21 sale or offer for sale of software.” 550 F.3d at 1334. The SAC was amended to refer  
22 only to use of the Accused Process.

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