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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE

OpenTV, Inc., Nagravision, SA, and Nagra France S.A.S.,

Plaintiffs,

v.

Apple, Inc.,

Defendant.

Case No. 5:15-CV-02008-EJD

DEFENDANT'S REPLY IN SUPPORT OF ITS MOTION TO PRECLUDE RELIANCE ON CERTAIN INVENTION DATES AND TO STRIKE CERTAIN ALLEGATIONS

Judge: Honorable Nathanael Cousins
Hearing Time: 1:00 p.m.
Hearing Date: June 1, 2016
Courtroom: San Jose Courtroom 7

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I. INTRODUCTION

OpenTV's Opposition ("Opp.") interprets the word "priority date" in Patent L.R. 3-1(f) to only include filing dates of patents, not conception dates. That interpretation of Patent L.R. 3-1(f) has been explicitly rejected by this Court in multiple cases. And the distinction OpenTV attempts to draw between the term "conception date" and the term "priority date" implicitly conflicts with the use of those terms in the statutes written by Congress and the interpretation of those statutes by the Federal Circuit. Apple's Motion ("Mot."), in contrast, correctly relies on the *Thought, Inc. v. Oracle Corp.*, No. 12-5601, 2015 U.S. Dist. LEXIS 137113 (N.D. Cal. Oct. 7, 2015), and *Harvatek Corp. v. Cree, Inc.*, No. 14-5353, 2015 U.S. Dist. LEXIS 93388 (N.D. Cal. July 17, 2015), opinions that interpret this Court's Patent Local Rules and apply those rules in nearly identical circumstances. OpenTV's lengthy Opposition buries its short discussion of those cases and fails to offer any meaningful distinctions. Instead, OpenTV relies on an oral ruling by Judge Gilliam in a separate case. To the extent Judge Gilliam's ruling conflicts with *Thought* and *Harvatek*, this Court should adhere to *Thought* and *Harvatek* because they are more persuasive, they explicitly reject OpenTV's arguments, and they involve nearly identical factual circumstances.

Rather than provide a reasoned application of law to facts, OpenTV's motion provides hyperbole, calling Apple's motion "extreme," "unwarranted," and "disingenuous," and alleges that Apple's motion presents a "parade of horribles." OpenTV's hyperbole and refusal to meaningfully address *Thought*, *Harvatek*, and the other cases cited in Apple's motion signals the weakness of OpenTV's position.

In its opening brief, Apple argued OpenTV could not demonstrate diligence at this late hour to support good cause to amend its Patent Local Rule 3-1(f) and 3-2(b) disclosures. In response, OpenTV chose to make no attempt to demonstrate any diligence. Because OpenTV implicitly concedes it cannot demonstrate diligence, Apple's motion should be granted. The conception events in question occurred over ten years ago, and OpenTV has presented no reason why it could not have provided information about those events by the October 15, 2015 deadline.

II. OPENTV DID NOT COMPLY WITH PATENT L.R. 3-1(F) OR 3-2(B)

A. OpenTV's interpretation of Patent L.R. 3-1(f) and 3-2(b) is wrong

1. *Thought* and *Harvatek* interpret Patent L.R. 3-1(f) to require the patentee to disclose alleged conception dates

OpenTV boldly argues that "none of the cases Apple cites requires disclosure of conception dates in response to Patent L.R. 3-1(f)." Opp. at 10:14–:15. To the contrary, Apple's Motion quotes *Thought* and *Harvatek*, which state: "Patent L.R. 3-1(f) particularly requires a patent holder to assert a ***specific date of conception***, not a date range, ..." *Thought*, 2015 U.S. Dist. LEXIS 137113 at *14 (*citing Harvatek*, 2015 U.S. Dist. LEXIS 137113 at *5) (emphasis added). Thus, these cases explicitly require disclosure of conception dates. Mot. at 3:16–:18.

OpenTV makes two thin attempts to distinguish *Thought*. First, OpenTV argues that *Thought* "chose to follow the reasoning in *Harvatek*" because the patentee "had not cited any case to show that *Harvatek* was incorrect." Opp. at 11:3–:11. But *Thought* followed *Harvatek* not based on a lack of precedent to the contrary, but instead based on the purpose of Patent L.R. 3-1(f), as explained in *Harvatek* and expanded upon and endorsed by *Thought*. *See Thought*, 2015 U.S. Dist. LEXIS 137113 at *13–*17. *Thought* explained that the purpose of the rule was to allow the parties to crystallize their theories early in litigation and avoid gamesmanship. *Id*. at *16. The mere fact that Judge Gilliam reached a different conclusion is unpersuasive considering his remarks at oral argument did not address the purpose of Patent L.R. 3-1(f).

OpenTV's second distinction has two parts, and the first does not have any apparent relevance. OpenTV incorrectly argues that the patentee's documents (*i.e.*, evidence) in *Thought* did not or could not ***prove*** the patentee's alleged conception date (*i.e.*, a fact). Opp. at 11:12–:14. That argument reflects a misunderstanding of civil procedure. *Thought* resulted from a pretrial motion to preclude, not a summary judgment motion or bench trial. No facts could have been proven or disproven in *Thought*, and the court had no reason to consider those issues. *See* 2015 U.S. Dist. LEXIS 137113 at *13–*17. In the next part, OpenTV argues that the patentee in *Thought* failed to seek leave to amend, whereas OpenTV claims that it will seek leave to amend eventually, if necessary. Opp. at 11:14–:24. But OpenTV will never seek leave to amend its

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