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9 UNITED STATES DISTRICT COURT  
10 NORTHERN DISTRICT OF CALIFORNIA  
11 SAN JOSE DIVISION

13 APPLIED MATERIALS, INC., ) Case No. 5:20-cv-05676-EJD  
 )  
14 Plaintiff, ) **DEMARAY LLC’S OBJECTION TO**  
 ) **APPLIED MATERIALS’ REPLY**  
15 vs. ) **EVIDENCE**  
 )  
16 DEMARAY LLC, ) **The Honorable Edward J. Davila**  
 )  
17 Defendant. ) **Hearing Date: November 12, 2020**  
 ) **Hearing Time: 9:00 a.m.**  
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1 Defendant Demaray LLC (“Demaray”) hereby objects under N.D. Cal. Local Rule 7-  
2 3(d)(1) to new evidence submitted in reply by Plaintiff Applied Materials, Inc.’s (“Applied”) in  
3 support of Applied’s Motion for Preliminary Injunction. Dkt. No. 14 (“Motion”). Applied  
4 improperly waited until submitting its reply and corrected reply (Dkt. Nos. 26 (“Reply”), 28  
5 (“Corrected Reply”)) to submit the vast majority of the evidence on which it now purports to base  
6 its Motion, including all seven fact declarations on which it relies and, as an example, an Applied  
7 employment agreement submitted as support for its meritless licensing/ownership allegations. *See*,  
8 *e.g.*, Dkt. Nos. 26-6, 8, 10, 12, 14. It is well-established in this district that “new evidence cannot  
9 be attached to a reply.” *Lam Research Corp. v. Schunk Semiconductor*, 2014 WL 1995799, at \*2  
10 (N.D. Cal. May 15, 2014) (declining to consider new evidenced attached to reply in support of  
11 motion); *see also Tovar v. U.S. Postal Serv.*, 3 F.3d 1271, 1273 n.3 (9th Cir. 1993) (“To the extent  
12 that the [reply] brief presents new information, it is improper.”). The Court should strike Applied’s  
13 untimely purported evidence.

14 **I. BACKGROUND**

15 On September 1, 2020, Applied filed its Corrected Declaratory Judgement Complaint and  
16 three days later filed its Motion, attaching a single attorney declaration and exhibits A-J that its  
17 cites in support of arguments relating to convenience of the parties. *See* Dkt. Nos. 14-2 through 14-  
18 11; Motion at 17-18. Demaray’s Opposition responded to the arguments and evidence that  
19 Applied’s Motion timely raised.

20 Recognizing that the arguments in its opening brief had been soundly refuted, Applied—the  
21 movant for a preliminary injunction—attempted a near-complete evidentiary redo in its *Reply brief*.  
22 With that Reply, Applied submitted *four brand new fact declarations*, one from Applied itself and  
23 three from the defendants in the earlier-filed cases in Texas, Intel and Samsung. *See, e.g.*, Dkt. Nos.  
24 26-8, 10, 12, 14.<sup>1</sup> Applied also submitted an employment agreement and an email communication  
25 that Applied could have, but did not, submit with its opening filing. *See* Dkt. Nos. 26-6, 27-02. In  
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27 <sup>1</sup> Applied has submitted confidential and non-confidential versions of the declarations and  
28 submitted certain of the declarations again in its Corrected Reply. All copies should be stricken.

1 its opening brief, Applied confirmed that it is coordinating with Intel and Samsung. Dkt. No. 14 at  
2 12, n. 3. Thus, each piece of evidence offered was either in Applied's possession or Applied had  
3 access to it at the time of its opening filing. In case that was not bad enough, on October 14,  
4 Applied filed a "Corrected" Reply with which it submitted *three additional, brand new*  
5 *declarations* from other new witnesses at various Samsung entities. *See, e.g.*, Dkt. No. 28-10  
6 through 28-12.

7 All seven of Applied's reply declarations are from new witnesses who submitted no  
8 declaration attached to Applied's opening filing. Each makes multiple new assertions that Applied  
9 argues support its Motion.

## 10 **II. LEGAL STANDARDS**

11 Under this Court's local rules, "[i]f new evidence has been submitted in the reply, the  
12 opposing party may file and serve an Objection to Reply Evidence...." N.D. Cal. L.R. 7-3(d)(1).  
13 This is because "new evidence cannot be attached to a reply." *Lam Research*, 2014 WL 1995799 at  
14 \*2; *see also Tovar*, 3 F.3d at 1273 n.3. This Court frequently strikes, or otherwise disregards, new  
15 evidence submitted in reply. *Id.*; *see also Tae Youn Shim v. Lawler*, 2019 WL 2996443, at \*7 (N.D.  
16 Cal. July 9, 2019) ("With the reply brief filed in support of their motion for partial summary  
17 judgment, Plaintiffs submitted fifteen exhibits. While two of these exhibits appear to be duplicates  
18 of evidence already in the record, the remainder consist of new evidence that Plaintiffs did not file  
19 with their initial motion. 'It is well accepted that ... [the] submission of new facts in [a] reply brief  
20 is improper.' The Court therefore **STRIKES** these new exhibits." (citations omitted and emphasis  
21 in original)); *Roling v. E\*Trade Secs. LLC*, 860 F.Supp.2d 1035, 1046 (N.D. Cal. 2012) ("As for  
22 the Renga reply declaration, the Court shall not consider the testimony on the date the March 2005  
23 fee increase was posted because Mr. Renga could have, but failed to, provide that testimony in his  
24 initial declaration.").

## 25 **III. OBJECTIONS**

26 Demaray objects to the following untimely material and arguments based thereon, and  
27 respectfully requests that the Court strike them:

- 28 • The Applied employment agreement of Mukundan Narasimhan. Dkt. No. 26-6

1 (“Exhibit N”). This is “new evidence that [Applied] did not file with [its] initial  
2 motion,” and “[i]t is well accepted that ... [the] submission of new facts in [a] reply  
3 brief is improper.” *Tae Youn Shim*, 2019 WL 2996443, at \*7 (striking thirteen  
4 exhibits improperly submitted for the first time in reply).

- 5 • Applied’s communications with Dr. Demaray. Dkt. No. 27-02 (“Exhibit K”). This  
6 email was in Applied’s possession and Applied cites it as support for its new  
7 arguments regarding subject matter jurisdiction—an issue on which it has the burden  
8 and should have addressed in its opening filing. This is improper. *See Tae Youn*  
9 *Shim*, cited *supra*.
- 10 • The Declaration of Keith Miller (Dkt. No. 26-14), an Applied employee, who plainly  
11 could have, but did not, submit a declaration with Applied’s opening submission.  
12 *See Rodgers v. Chevys Rests., LLC*, 2015 WL 909763, at \*5 (N.D. Cal. Feb. 24,  
13 2015) (“[R]aising new facts in a reply brief ... is not permitted”).
- 14 • The Declarations of Ryan Greuter (Dkt. No. 26-8), Do Hyung Kim (Dkt. No. 26-12),  
15 Ross Thompson (Dkt. No. 28-10), Brittany McElmury Dietz (Dkt. No. 28-11), and  
16 Terrence Cross (Dkt. No. 28-12), each of whom are employed at a Samsung entity  
17 with which Applied is coordinating. *See* Dkt. No. 26-8 (¶¶ 8-14), Dkt. No. 26-12  
18 (¶¶ 9-19), Dkt. No. 28-10 (¶ 7), Dkt. No. 28-11 (¶¶ 5-12), and Dkt. No. 28-12 (¶¶ 7-  
19 12). Such declarations could have and, if Applied wanted to rely on them, should  
20 have, been included in Applied’s opening filing. *See Rodgers*, cited *supra*.
- 21 • The Declaration of Thomas Herrgott (Dkt. No. 26-10), an Intel employee, who could  
22 have, but did not, submit a declaration with Applied’s opening submission. This is  
23 improper. *See Rodgers*, cited *supra*.
- 24 • All argument in Applied’s Reply (Dkt. No. 26-4)/Corrected Reply (Dkt. No. 28-0)  
25 citing,<sup>2</sup> or otherwise relying on, the above-listed improper evidence, including at  
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27 <sup>2</sup> All page citations to “Reply” herein correspond to both Applied’s Reply and Corrected  
28 Reply, which Demaray understands to be the same as the redacted version of Applied’s Reply.

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least:

- Reply at 2-3, lines 25-2 and Reply at 14, lines 19-22 (citing Exhibit K);
- Reply at 4, lines 6-14 (citing Declarations of Herrgott, Greuter, Kim);
- Reply at 5, lines 5-10 (citing in part Declaration of Miller);
- Reply at 12, lines 16-22 (citing Exhibit N); and
- Reply at 14-15, lines 25-11 (citing Declarations of Miller, Herrgott, Kim and Greuter).

Dated: October 16, 2020

Respectfully submitted,  
IRELL & MANELLA LLP

By: /s/ C. Maclain Wells

C. Maclain Wells  
Attorneys for Defendant DEMARAY LLC