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8 DEMARAY LLC

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 MOTION**  
 ) **FOR LEAVE TO FILE SUR-REPLY TO**  
15 vs. ) **APPLIED MATERIALS' MOTION FOR**  
 ) **PRELIMINARY INJUNCTION**  
16 DEMARAY LLC, )  
 ) **The Honorable Edward J. Davila**  
17 Defendant. )  
 ) **Hearing Date: November 12, 2020**  
18 ) **Hearing Time: 9:00 a.m.**  
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1 Pursuant to Local Rules 7-3(d) and 7-11, Defendant Demaray LLC (“Demaray”)  
2 respectfully moves for leave to file a 10-page sur-reply in order to respond to *seven* new fact  
3 declarations and several new pieces of evidence submitted by Plaintiff Applied Materials, Inc.  
4 (“Applied”) for the very first time in Applied’s reply in support of its motion for preliminary  
5 injunction.<sup>1</sup> Demaray has objected to the new evidence and arguments related thereto. *See* Dkt.  
6 No. 29. But if the Court considers the new matter, fairness dictates that Demaray be afforded an  
7 opportunity to address the new evidence and arguments based thereon.

8 **I. Applied Introduced A Large Amount of Brand New Evidence In Its Reply**

9 In Applied’s motion for preliminary injunction, it attached a single attorney declaration and  
10 ten corresponding exhibits in support of its arguments relating to convenience of the parties. *See*  
11 Dkt. No. 14. In opposition, Demaray responded to the arguments and evidence that Applied timely  
12 raised. *See* Dkt. No. 23.

13 Applied then sought and received a one-week extension of time to file its reply. *See* Dkt.  
14 No. 25. During this time, Applied obtained *four brand new fact declarations*, one from Applied  
15 itself and three from the Intel and Samsung defendants in the earlier-filed cases in Texas. *See* Dkt.  
16 Nos. 26-8, 10, 12, 14. Applied also submitted an employment agreement and an email  
17 communication that Applied could have, but did not, submit with its opening filing. *See* Dkt. Nos.  
18 26-6, 27-02. Compounding the issues with its late disclosures, Applied also filed five days later a  
19 “Corrected” Reply with which it submitted *three additional, brand-new declarations* from other  
20 witnesses at various Samsung entities. *See* Dkt. No. 28-10 through 28-12. All seven of Applied’s  
21 new declarations are from new witnesses who submitted no declaration to Applied’s opening filing  
22 for its motion. Relying on this new evidence, Applied has introduced a variety of new arguments in  
23 its reply brief, including for example:

- 24 • Applied now contends that declaratory judgment subject matter jurisdiction is

25  
26 <sup>1</sup> Demaray asked Applied to agree to the requested sur-reply, but Applied responded  
27 demanding unreasonable limitations. *See* Declaration of C. Maclain Wells ¶¶ 2–4, filed  
28 concurrently.

1 present based upon an email in which Demaray approached Applied to license  
2 certain Demaray patents. Reply at 2-3.

- 3 • Applied now provides new facts regarding the relationship between Applied and its  
4 customers. Reply at 4–5.
- 5 • Applied now contends that Mr. Narasimhan’s employment agreement applies to  
6 patent assignments, despite never informing the Court that these provisions had been  
7 declared unlawful or presenting the Court with said agreement. Reply at 12-13.
- 8 • Applied now provides new facts regarding the activities of the Samsung and Intel  
9 defendants in the earlier-filed Texas cases. Reply at 14-15.

10 There is no good reason for Applied’s late disclosures. The new evidence was in Applied’s  
11 possession and one of the new declarations is from an Applied employee. In addition, Applied  
12 confirmed in its opening papers that it is coordinating with Intel and Samsung. Dkt. No. 14 at 12  
13 n.3. Thus, each piece of evidence offered was either in Applied’s possession or Applied had access  
14 to it at the time of its opening filing.

15 **II. This Court Should Permit Demaray To File A Response To Applied’s Brand New**  
16 **Evidence And Arguments Related Thereto**

17 Parties may not raise new issues or theories in reply memoranda and thereby prevent the  
18 other party from having an opportunity to respond. *See Thompson v. C. I. R.*, 631 F.2d 642, 649 (9th  
19 Cir. 1980). When a court does consider new issues or evidence raised for the first time in a moving  
20 party’s reply brief, the opposing party may address the new issues in a sur-reply. *See Dutta v. State*  
21 *Farm Mut. Auto. Ins. Co.*, 895 F.3d 1166, 1172 (9th Cir. 2018) (“Mitigation of any unfairness,  
22 following objection, may take the form of granting the objecting party leave to file a sur-reply  
23 opposition to the new matter.”); *Provenz v. Miller*, 102 F.3d 1478, 1483 (9th Cir. 1996) (“[W]here  
24 new evidence is presented in a reply to a motion for summary judgment, the district court should  
25 not consider the new evidence without giving the [non-]movant an opportunity to respond.”)  
26 (alteration in original and citation omitted)).

27 Applied controlled the timing and content of its motion and could have included this new  
28 evidence in its original motion, but Applied chose not to do so. Applied offered no explanation for

1 its late disclosures, and Demaray would be “unfairly disadvantaged by [this] new factual matter  
2 included in a reply.” *Dutta*, 895 F.3d at 1172. Thus, permitting Demaray to file its sur-reply affords  
3 Demaray the opportunity to respond to Applied’s improper new arguments. *See True Health*  
4 *Chiropractic Inc v. McKesson Corp.*, 2015 WL 5341592, at \*1 (N.D. Cal. Sept. 12, 2015) (granting  
5 leave to file sur-reply where “Plaintiffs raised argument and evidence for the first time on reply”);  
6 *Arens v. Popcorn, Ind., LLC*, 2014 WL 2737412, at \*1 n.1 (N.D. Cal. June 16, 2014) (granting  
7 motion for leave to file sur-reply in part because reply “presents new evidence that warrants a  
8 response” from nonmovant). Demaray’s sur-reply would not impact the noticed hearing date, and,  
9 depending on the timing of the Court’s permission, briefing could still be completed within the  
10 Court’s request that briefing for motions allow at least 14 days between the final filing and the  
11 hearing date.

### 12 **III. CONCLUSION**

13 For the foregoing reasons, Demaray respectfully requests that the Court grant Demaray  
14 leave to file a 10-page sur-reply.

15  
16 Dated: October 19, 2020

Respectfully submitted,  
IRELL & MANELLA LLP

By: /s/ C. Maclain Wells

C. Maclain Wells  
Attorneys for Defendant DEMARAY LLC

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