

March 12, 2022

Honorable Magistrate Judge Nathaniel M. Cousins
United States District Court Northern District of California
San Jose Courthouse, Courtroom 7, 4th Floor
280 South 1st Street, San Jose, CA 95113

Re: *Applied Materials, Inc. v. Demaray LLC*, 20-cv-09341-EJD (N.D. Cal.)

Dear Judge Cousins,

Demaray LLC (“Demaray”) submits this letter to update its proposed schedule (Dkt. 116) and to seek resolution and clarity regarding the Patent Local Rule deadlines in view of Demaray’s Notice of Motion and Motion to Amend Its Answer to Add Affirmative Counterclaims for Infringement. Dkt. 133 (“Motion to Amend”). The parties met and conferred but were unable to resolve their dispute.

No case schedule has been entered in this case, and Judge Davila has referred the case scheduling issue to this Court. Dkt. 87. The Court has ruled that the Patent Local Rules apply and has ordered the parties to submit a proposed case management plan. Dkt. 101.

Accordingly, Demaray had previously submitted two alternative proposed case schedules, including one that accounts for affirmative infringement claims. Dkt. 116. Since that submission, Demaray submitted to the Court a letter brief request for leave to amend its answer to include affirmative infringement claims. Dkt. 127. Despite its prior position that "Applied does not oppose Magistrate Judge Cousins addressing whether Demaray should be allowed to amend its answer and make compulsory counterclaims of infringement" (Dkt. 116 at 2 n.1), Applied opposed that request on substantive and procedural grounds (Dkt. 128), and also moved to strike Demaray’s motion (Dkt. 130), insisting upon a noticed motion before Judge Davila rather than a letter brief (Dkt. 128).

While Demaray believes that its letter brief was procedurally proper, in order (a) to avoid burdening the Court with deciding Applied’s motion to strike and (b) to avoid the delay that Applied had sought to introduce through the motion to strike, Demaray withdrew its letter brief in favor of the Motion to Amend. *See* Dkt. 134. Demaray also requested and reserved the earliest-available hearing date: September 29, 2022. In light of the delay that this late September hearing date would impose (and which Demaray sought to avoid with the filing of its letter brief), Demaray will also file a motion to request an earlier date before Judge Davila.

In view of its filing of the Motion to Amend, and consistent with Demaray’s previously proposed case schedules, Demaray respectfully requests this Court either (a) hold in abeyance the Patent Local Rule deadlines pending a ruling on the Motion to Amend from Judge Davila, or, (b) in the alternative, adopt a schedule based upon Demaray’s proposed schedule setting forth deadlines that account for Demaray’s affirmative infringement claims, *see* Dkt. 116.

Demaray’s requested relief will promote the conservation of the Court’s and the parties’ resources. For example, temporarily holding in abeyance the forthcoming Patent Local Rules deadlines for cases without affirmative infringement claims will lessen the likelihood of premature or duplicative claim construction briefing. For example, should Judge Davila grant Demaray’s motion to amend, Demaray would be required to provide its infringement contentions and Applied would be required to provide its invalidity contentions (including any claim terms that it believes

are indefinite). Patent L.R. 3-3, 3-4.

Such early disclosure of infringement and invalidity contentions is intended to enable the parties to surface and identify claim construction issues prior to the claim construction process. Otherwise, the parties would be shooting at moving targets, briefing claim constructions without full disclosure of the infringement and invalidity issues that are at play in this particular case, particularly those issues involving these two specific parties.¹ Moreover, in the absence of such disclosures, it would be difficult for key aspects of the claim construction disclosure process to play out (*e.g.*, identifying which claim terms require construction, much less identifying the "most significant" claim terms). Patent L.R. 4-3.

For all of these reasons, Demaray respectfully requests this Court either (a) hold in abeyance the Patent Local Rule deadlines pending a ruling on the Motion to Amend from Judge Davila, or, (b) in the alternative, adopt a schedule based upon Demaray's proposed schedule setting forth deadlines that account for affirmative infringement claims, *see* Dkt. 116.

Respectfully submitted,

/s/ Olivia Weber

Olivia Weber

of Irell and Manella LLP

Counsel for Defendant

Demaray LLC

¹ Although Demaray has also sued Applied's customers in the Texas court, there is no indication, much a less a guarantee from Applied, that Applied will proffer the same invalidity and/or claim construction positions as its customers. This is because Applied's customers use and are therefore liable for their use of tools made by other manufacturers. Thus, the invalidity and claim construction positions of Applied's customers likely diverge from those of Applied.