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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

APPLIED MATERIALS, INC., Plaintiff, vs. DEMARAY LLC, Defendant.	Case No. 5:20-cv-09341-EJD **DEMARAY LLC'S MOTION TO ENLARGE TIME TO RESPOND** **Hearing Date**: N/A **Hearing Time**: N/A

I. INTRODUCTION

Pursuant to Civil Local Rules 6-1(b) and 6-3, defendant Demaray LLC ("Demaray") hereby requests an order of this Court to enlarge time for its response to plaintiff Applied Material's Inc.'s ("Applied") Opening Claim Construction Brief. Demaray requests that the Court enlarge the time for response to allow the parties to complete their infringement and invalidity disclosures under the Court's Patent Local Rules relating to Demaray's affirmative infringement claims. The parties have met and conferred but were unable to come to an agreement on this issue.

II. BACKGROUND

Applied filed this case seeking declaratory judgment that none of its reactors infringe upon U.S. Patent Nos. 7,544,276 and 7,381,657 (the "Demaray Patents"), both of which require, among other limitations, a "narrow band rejection filter" ("NBRF"). Dkt. 1. As detailed in Demaray's motion to amend and the most recent Joint CMC Statement, Demaray has consistently sought targeted discovery sufficient in detail to determine whether to bring compulsory counterclaims for infringement of the Demaray Patents. Dkt. 133 at 2-2; Dkt. 106 at 11-13. Applied has repeatedly refused to provide the necessary discovery, prompting Demaray to file a motion to compel and to expend significant resources on third-party discovery in co-pending cases in Texas. Dkt. 118; Dkt. 133 at 3.

On February 4, 2022, Demaray confirmed through visual inspection and testing at a third-party facility that, despite Applied's assertions to the contrary, a NBRF is present in certain of Applied's Cirrus reactors. Demaray quickly filed a Motion to Amend to add affirmative counterclaims for infringement and requested the earliest available hearing date of September 29, 2022. Dkt. 133. Demaray also filed a motion requesting an earlier hearing date for the motion. Dkt. 136.

Because the outcome of Demaray's motion to amend could potentially trigger various disclosure requirements under the Patent Local Rules, Demaray also requested that Judge Cousins hold the Patent Local Rules deadlines in abeyance pending resolution of its motion, or in the alternative, adopt a schedule setting forth deadlines that account for Demaray's affirmative

infringement claims. Dkt. 135. Demaray explained in its letter brief to Judge Cousins that if the Court grants Demaray's motion, Demaray will be required to provide its infringement contentions and Applied will be requirement to provide its invalidity contentions under Patent Local Rules 3-1 through 3-4. Without adjusting the claim construction schedule, the process would take place without the parties being aware of the specific infringement and invalidity issues arising from Demaray's affirmative infringement claims. Applied has opposed Demaray's request. Dkt. 139.

Moreover, at Judge Cousins' request, on January 14, 2022, the parties filed competing proposed schedules. Dkt. 116. In Demaray's proposal, it noted that if affirmative infringement claims are brought, claim construction dates would need to be adjusted accordingly. *Id.* Given that the Patent Local Rules are unclear on the claim construction briefing order in cases having neither affirmative infringement or invalidity claims (the current case status here until Demaray's motion to amend is addressed), the parties also agreed to a briefing order in which Applied would file an opening brief, Demaray would respond, Applied would reply and Demaray would receive a sur-reply. *Id.,* n. 5. The Court has not yet entered a schedule or addressed the ordering of claim construction briefing, though Applied has agreed to stipulate to a Demaray sur-reply as stated in the proposed schedules.

On March 18, 2022, Applied filed an Opening Claim Construction brief. Dkt. 138. Per Patent Local Rule 4-5(b), if the brief is deemed proper despite the fact that Applied has not brought invalidity claims, Demaray's response would be due on April 1, 2022.

III. LEGAL STANDARD

A motion to enlarge or shorten time must identify "the substantial harm or prejudice that would occur if the Court did not change the time." L.R. 6-3(a)(3). "Once a particularized showing is made, 'requests for extensions of time made before the applicable deadline has passed should normally...be granted in the absence of bad faith or prejudice to the adverse party." *Lilit Games (Shanghai) Co. Ltd. v. uCool, Inc.*, No. 15-cv-1267, 2015 WL 3523405, at *2 (N.D. Cal. June 4, 2015) (citing *Ahanchian v. Xenon Pictures, Inc.*, 624 F.3d 1253, 1259 (9th Cir. 2010)).

IV. ARGUMENT

A. Extending Demaray's Time to Respond Is Necessary to Prevent Substantial Prejudice to Demaray

If the Court grants Demaray's motion to amend, the parties will be required to exchange infringement and invalidity contentions under Patent Local Rules 3-1 through 3-4—disclosures that typically occur prior to claim construction. If the time for Demaray to respond to Applied's Opening Claim Construction Brief is not extended, Demaray will have to brief its claim construction positions without the benefit of the disclosures called for under the Patent Local Rules. And while Applied has the benefit of Demaray's detailed infringement contentions against Applied's customers in the co-pending Texas actions, additional infringement issues are likely to be at issue in this case given the breadth of Applied's declaratory judgment claims. For the same reasons, Applied's invalidity contentions will likely diverge from those of its customers. As such, Applied is attempting to force Demaray to take positions in claim construction without the disclosures called for under the Patent Local Rules.

Moreover, it is not clear Applied should have even filed an opening claim construction brief at this juncture. On January 14, 2022, the parties filed a joint proposed scheduling order that included a schedule for claim construction briefing. Dkt. 116. That proposed scheduling order included the following footnote:

> Patent L.R. 4-5 states that "… the party claiming patent infringement, or the party asserting invalidity if there is no infringement issue present in the case, shall serve and file an opening brief and any evidence supporting its claim construction." ***As neither circumstance applies to the current posture of the case, the parties met and conferred and propose, subject to Court approval, equal briefing with Applied filing an opening brief, Demaray filing a response, Applied filing a reply and Demaray filing a sur-reply.*** If the Court does not approve of this proposal, the parties have a dispute regarding the ordering of the briefing.

Dkt. 116 at 3, n.5 (emphasis added). A case schedule, including a briefing schedule for claim construction, has not been approved by the Court and it is unclear what briefing sequencing should apply.

Additionally, the Court's Standing Orders provide that "the Court will construe only those terms designated by the parties as '***most significant***' pursuant to Patent L.R. 4-3(c). The claim construction briefs shall address each of those terms and ***only those terms***." Standing Order for Patent Cases (emphasis added). In the parties' Joint Claim Construction Chart, Applied only identified the term "narrow band rejection filter" as being the "***most significant***." Dkt. 126 at 39.

Applied identified the term "pulsed DC power" as "significant as case dispositive with respect to all of its products that use a DC (not pulsed DC) power supply…." *Id.* Applied merely stated that the remaining terms were "significant" as to certain claims. *Id*. Given that the claim terms raised have all already been construed by Judge Albright in the co-pending Texas cases, Demaray did not designate any terms as "most significant." *Id.* Yet Applied has chosen to brief all of its proposed terms in its opening brief, even those not designated as "most significant."

Rather than resolve these inconsistencies and ongoing questions with the case schedule, Patent Local Rules and the Court's Standing Orders, Applied has chosen to seek an advantage over Demaray. Demaray's time to respond should be extended to avoid the substantial prejudice that would result from Applied's tactics.

B. There Is No Prejudice to Applied In Enlarging the Time for Response

Applied would not suffer any prejudice if time for Demaray's response was extended until after the exchange of infringement contentions and invalidity contentions under the Patent Local Rules.

First, as set forth above, this is the normal disclosure sequence under the Patent Local Rules for cases involving affirmative infringement claims. That Applied sought to gain an advantage by filing its Opening Claim Construction Brief before the Court has had a chance to resolve the motion to amend does not prejudice Applied.

Second, Applied itself is responsible for the delay in Demaray's request to add infringement claims. Demaray filed a motion to compel discovery necessary to make affirmative counterclaims for infringement before claim construction briefing began. Dkt. 118. Applied has repeatedly refused to produce meaningful discovery about its reactor configurations or the schematics of filters within those reactors. *Id.* at 5. Demaray moved to amend shortly after confirming the existence of the claimed NBRF in a subset of Applied's reactors through Demaray's own third party discovery efforts in the Texas cases (Demaray still lacks required information regarding Applied's non-Cirrus reactors as described in its motion to compel). Dkt. 133. Applied cannot obstruct Demaray's efforts to gain basic discovery regarding potential infringement claims and simultaneously complain that the resulting delay is prejudicial.

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