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13 DEMARAY LLC

14 UNITED STATES DISTRICT COURT
15 NORTHERN DISTRICT OF CALIFORNIA
16 SAN JOSE DIVISION

17
18 APPLIED MATERIALS, INC.,

19 Plaintiff,

20 vs.

21 DEMARAY LLC,

22 Defendant.
23

) Case No. 5:20-cv-09341-EJD
)

) **DEMARAY LLC'S REPLY**
) **MEMORANDUM IN SUPPORT OF**
) **MOTION TO AMEND ITS ANSWER TO**
) **ADD AFFIRMATIVE COUNTERCLAIMS**
) **FOR INFRINGEMENT**

) **Hearing Date:** September 29, 2022
) **Hearing Time:** 9 a.m.
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1 **I. PRELIMINARY STATEMENT**

2 The Court should grant Demaray leave to amend its Answer to add affirmative
3 counterclaims for infringement of the '276 and '657 patents under Federal Rule of Civil Procedure
4 15(a). Applied does not, and indeed cannot, contest that (1) the reactor configurations that are the
5 subject of Demaray's infringement claims are not publicly accessible, (2) Applied has been telling
6 Demaray throughout this matter that it does not use a narrow band rejection filter ("NBRF"), all the
7 while refusing to provide filter details necessary for Demaray to test such assertions, and (3) details
8 regarding the protective filters in certain of Applied's reactors just became available through
9 Demaray's diligent third-party discovery efforts (such details have not been disclosed for other
10 Applied reactor models). Under the applicable legal standard, these facts alone warrant amendment
11 to add infringement claims based upon this new information.

12 In its Opposition, Applied attempts to unfairly paint Demaray as having a dilatory purpose
13 in bringing such claims, but ignores its own conduct in making affirmative misleading statements
14 that its reactors do not contain a NBRF, while refusing to disclose details on the filters used for the
15 *last fifteen months*. Indeed, it required an inspection at a third-party filter supplier, Comet, for
16 Demaray to finally obtain this information. Applied's failures to disclose the information sought by
17 Demaray are not a proper basis for denying Demaray leave. Applied is likewise unable to show
18 delay or bad faith on Demaray's part in seeking to amend, especially given the fact that Demaray
19 moved to add these claims immediately after receiving the filter disclosures.

20 In addition, Applied is unable to show any substantial prejudice that it would face from
21 Demaray's proposed amendments given that fact discovery is just beginning, there is no governing
22 case schedule, and Applied has been on notice of the possibility of these affirmative infringement
23 claims since the inception of this case.

24 Demaray's request for leave to amend its Answer to add affirmative counterclaims for
25 infringement should thus be granted.

1 **II. ARGUMENT**

2 It is undisputed that in the Ninth Circuit, Rule 15's policy of favoring amendments to
3 pleadings should "be applied with extreme liberality." *Eminence Cap. LLC v. Aspeon, Inc.*, 316
4 F.3d 1048, 1051 (9th Cir. 2003). Applied's stonewalling in providing discovery regarding its filter
5 configurations in its reactors is not a basis to ignore this standard.

6 **A. Applied Ignores That It Has Repeatedly Failed To Provide Its Filter Details** 7 **Both Here And In Texas**

8 Applied's repeated failures to disclose its filter configurations is not a basis for denying
9 Demaray leave. Both parties agree that the Demaray patent claims require, among other
10 limitations, a NBRF or an equivalent. *See* Opp. at 1. Applied acknowledges that, over a year ago,
11 in the parties' January 14, 2021, Joint CMC Statement, Demaray raised its need for "targeted
12 discovery...from Applied regarding matters such as the configurations of PVD reactors that
13 Applied manufactures and uses," including any RF filter details, in order to evaluate the propriety
14 of affirmative infringement claims and noted that "[i]f Demaray does assert such claims, the
15 parties can propose a case schedule based upon the Patent Local Rules." *Id.* at 3 (citing Dkt. 27 at
16 17). While Applied tries to discount this disclosure as a mere "narrative that [Demaray] would
17 carry forward up until the instant motion" (*id.*), it shows that Demaray has consistently informed
18 both Applied and the Court throughout this case of Demaray's need for the targeted discovery. *See*
19 *also* Dkts. 69 at 3-4 (same), 82 at 4-8 (same). This is further reflected in the parties' most recent
20 Joint CMC Statement: "[o]nce Applied provides the required details on its products and processes,
21 including details on the protective filters or alternative protective mechanisms used, Demaray will
22 timely make infringement determinations." Dkt. 106 at 6. Because Applied continues to refuse to
23 provide necessary configuration details on its Cirrus and other reactors voluntarily or in response
24 to Demaray's discovery demands in this case, Demaray has moved to compel before Judge
25 Cousins (the motion is still pending). Dkt. 118, 1-3. Any perceived delay is thus one of Applied's
26 own making.

27 In its Opposition, Applied also ignores its repeated false statements, both here and in the
28 co-pending Texas cases, that its reactors do not include a NBRF. In its first filing in this case,

1 Applied asserted "Applied's Endura products do not infringe claim 1 of the '276 patent at least
2 because *these products do not meet or embody a reactor comprising... 'a narrow band-rejection*
3 *filter....*" Dkt. 1, ¶¶ 95, 100. And in the Texas cases, Applied repeatedly asserted that while its
4 Cirrus reactors do have a RF filter, "*it doesn't have a narrow band rejection filter. It's got a low*
5 *band pass filter.*" See, e.g., Ex. 6, 8/17/2021 Tr. 44:15-16. Even after three successful motions to
6 compel in Texas, Applied still refused to provide its alleged support for these statements claiming
7 that it lacked any documents detailing its RF filter configurations. See, e.g., Ex. 5, 9/27/2021 Tr.
8 48:1-13. As a result, despite Demaray's diligence in seeking these targeted disclosures, the first
9 disclosure of details on Applied's RF filter configurations sufficient to allow Demaray to evaluate
10 whether an NBRF is used was not made until January 19, 2022—and it did not come from
11 Applied. On that date, in response to a subpoena, Applied's third-party filter supplier, Comet,
12 provided schematics of the RF filter that Applied uses in its Cirrus reactors. And, only after
13 Demaray conducted an on-site inspection in early February did the full details of Applied's filter
14 finally come to light. See Dkt. 127 (details on Comet disclosures and inspection).

15 **B. Applied Tries To Downplay The Importance Of The Comet Disclosures**

16 Faced with newly disclosed information on the RF filters used in its Cirrus reactors,
17 Applied improperly asks the Court to adopt its contention that the disclosed filter configuration
18 does not infringe. Opp. at 2 ("the alleged 'new' evidence relied upon by Demaray to support its
19 motion to amend is irrelevant to infringement"), 19-20 ("...the measurements further evidence that
20 Demaray has no basis to assert infringement."). This is not a proper basis for opposing
21 amendment. See *Netbula, LLC v. Distinct Corp.*, 212 F.R.D. 534, 539 (N.D. Cal. 2003)
22 ("Ordinarily, courts will defer consideration of challenges to the merits of a proposed amended
23 pleading until after leave to amend is granted and the amended pleading is filed."). If Applied
24 wants to bring a motion for summary judgment, after appropriate discovery, it is entitled to do so
25 (though any such motion would be baseless). But there is no basis for the Court to make the
26 requested factual determinations in Applied's favor in addressing leave to amend. Of note, Applied
27 has *not* argued that Demaray's amendment would be futile, and thus has waived any such
28

1 argument. *See, e.g., Bautista v. Valero Mktg. & Supply Co.*, No. 15-cv-05557-RS, 2016 WL
2 6822024, at *1 (N.D. Cal. Nov. 18, 2016).

3 **C. Demaray Has Not Unduly Delayed In Seeking Amendment**

4 Applied's delay arguments are premised upon its mischaracterizations of the factual record
5 and improper discounting of the recent Comet disclosures. Applied admits that the delay "inquiry
6 focuses on whether *the plaintiff knew of the facts or legal bases for the amendments at the time*
7 *the operative pleading was filed* and nevertheless failed to act promptly to add them to the
8 pleadings." Opp. at 9-10 (*citing Johnson v. Serenity Transp., Inc.*, No. 15-cv-02004-JSC, 2015
9 U.S. Dist. LEXIS 108227, at *13 (N.D. Cal. Aug. 17, 2015)). As discussed above in Section II.A,
10 Demaray did **not** have detailed filter configuration details until the recent Comet disclosures. Since
11 the first disclosure by Comet of a circuit-level schematic for Applied's Cirrus RF filter on January
12 19, 2022, Demaray has: (1) confirmed the relevant configuration through visual inspection and
13 testing at Comet's facility on February 4, 2022 (*see* Dkt. 127 at 2), (2) the very next business day,
14 on February 7, 2022, filed a letter brief before Judge Cousins requesting leave to amend to add its
15 infringement counterclaims (*id.*); and, (3) after Applied disputed having Judge Cousins hear the
16 motion, filed the present motion to amend with the Court (Dkt. 133). Applied's delay arguments
17 are premised on improperly ignoring the new Comet disclosures and Demaray's diligent follow-
18 up.

19 Demaray also lacks any dilatory motive or bad faith in seeking to amend. In accusing
20 Demaray of an "aggressive campaign to delay this case" (Opp. at 10) Applied ignores its
21 stonewalling of Demaray's efforts to discern the RF filter configurations in Applied reactors;
22 Demaray's repeated successful motions to obtain this information in Texas; Demaray's timely
23 efforts to obtain such information from Applied's third-party filter supplier, Comet; and,
24 Demaray's timely efforts to seek associated relief from this Court. Applied cannot show undue
25 delay where the delay was caused by Applied's own affirmative representations and failure to
26 provide requested disclosures, and where Demaray diligently sought leave shortly after
27 discovering new information.
28

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