FARNAN LLP

May 26, 2020

VIA E-FILING
The Honorable Leonard P. Stark
J. Caleb Boggs Federal Building
844 N. King Street
Room 6124, Unit 26
Wilmington, DE 19801-3556

RE: ***Elm 3DS Innovations, LLC v. Samsung Electronics Co., Ltd. et al.*, (C.A. Nos. 14-cv-1430-32-LPS)**

Dear Chief Judge Stark:

"The court should freely give leave [to amend] when justice so requires." Fed. R. Civ. P. 15(a)(2). Defendants' arguments in opposition to Elm's motion do not overcome the Federal Rules' "liberal amendment regime." *Mullin v. Balicki*, 875 F.3d 140, 149 (3d Cir. 2017).

I. Elm's Amendment Is Timely Under the Scheduling Order and Defendants Have Not Been Prejudiced

The Scheduling Order allowed Elm to move to amend its complaints to include "allegations of willful infringement . . . up to thirty days after the Court's Claim Construction Order." D.I. 176 (14-cv-1430-LPS-CLB). Elm filed its motion within this deadline. The Court routinely grants leave to amend where the motion is filed before the deadline specified in the scheduling order. *See, e.g.*, *Boston Sci. Corp. v. Edwards Lifesciences Corp.*, No. 16-275-SLR, 2017 WL 781046, at *2 (D. Del. Feb. 28, 2017) (granting "motion for leave to amend [that] was filed within the deadline set forth in the scheduling order for amending pleadings, which generally precludes a finding of undue delay"); *Butamax Advanced Biofuels LLC v. Gevo, Inc.*, No. 11-54-SLR, 2012 WL 2365905, at *2 (D. Del. June 21, 2012) ("The instant motion to amend was filed timely and, therefore, there can be no unfair prejudice to defendant.").

Defendants rely on the Court's decision denying leave to amend in *Delaware Display Group LLC v. Lenovo Group Ltd.*, No. 13-2108-RGA, 2016 WL 720977 (D. Del. Feb. 23, 2016). In that case, however, the plaintiff sought to add the underlying facts supporting willfulness to its complaint many years into the case—facts that plaintiff could have pled much earlier. *See id.* at *8-9. Here, by contrast, the facts that support Elm's willfulness allegations, including pre-suit meetings with each of the Defendants, have been alleged in Elm's complaints since the beginning of this case. The only substantive change in the amendments is adding the formal allegations of willful infringement—precisely what the Scheduling Order allows.

Defendants' claims of prejudice do not withstand scrutiny. Defendants complain they cannot serve document requests related to Elm's willfulness allegations. But Defendants have known for years about the underlying factual allegations, including Glenn Leedy's pre-suit meetings with the Defendants and citations of Elm's patents in Defendants' own patent applications. Defendants have served multiple document requests related to these topics, *see* Ex. 7, RFP Nos. 29, 41, 42, and Elm will of course produce any such documents that are located

through a reasonable search. Moreover, the parties have not yet started fact depositions, so Defendants will be able to ask Elm deponents about the allegations. Defendants also complain they will not be able to depose Mr. Leedy, who died in 2017. But Mr. Leedy died while these cases were stayed at *Defendants'* request pending their ultimately unsuccessful IPR petitions. *See* July 11, 2016 Oral Order; D.I. 170, February 26, 2018 Order lifting stay (14-cv-1430-LPS-CJB). Finally, Defendants claim they would have sought opinions of counsel. But Defendants have had every incentive to seek such an opinion given Elm's allegations of indirect infringement, and there is nothing stopping Defendants from seeking such an opinion today.

II. Elm's Proposed Amendments Are Not Futile

Defendants incorrectly contend that Elm's proposed amendments are futile. Most of Defendants' arguments are inappropriate attempts to litigate the factual merits of Elm's allegations. Defendants complain that Elm has not produced documents evidencing to Defendants' satisfaction meetings that took place 20 years ago. Micron devotes a page to quibbling about emails Elm has produced that reference a meeting between Elm and Micron, going so far as to argue the emails are inadmissible hearsay. D.I. 254 at 4 (14-cv-1431-LPS-CJB). Micron also argues that, although it cited Elm's patents in its own patent applications, Micron could not possibly have had knowledge of those patents or Micron's infringement because Micron has a lot of patents (apparently more than 13,000 according to Micron, although that fact is nowhere in the record). *Id.* at 5. This is neither the time nor the place for these arguments. When evaluating a motion to amend, the Court must "accept as true all of the allegations" and must view "all reasonable inferences" in the "light most favorable to" Elm. *Merck & Co., Inc. v. Apotex, Inc.*, 287 F. App'x 884, 888-89 (Fed. Cir. 2008) (quoting *Morse v. Lower Merion Sch. Dist.*, 132 F.3d 902, 906 (3d Cir. 1997)).

Taking the allegations as true, Elm's complaints plausibly state claims for willful infringement. They allege that Mr. Leedy met with each of the Defendants around 2000 or 2001 and explained the patented technology. Ex. 1 ¶ 33; Ex. 2 ¶¶ 31, 50; Ex. 3 ¶ 32. They also allege that the Defendants had knowledge of the patents through other means, including (for Micron) having cited Elm 3DS patents in many of its own patents and patent applications. Ex. 3 ¶¶ 51-60. These allegations make it plausible that Defendants knew or should have known of the asserted patents and infringed them anyway.

Defendants harp on the fact that the pre-suit meetings were about the '167 patent, not the asserted patents. The '167 patent was the parent of the family that constitutes Elm's 3DS portfolio. All of the asserted patents spring from the '167 patent. Construing the allegations in the light most favorable to Elm, it is plausible that Defendants, having specifically been alerted to the '167 patent and Elm's 3DS technology more generally, would have monitored later patents Elm received in the same family, including the patents in suit. In any event, there is no dispute that Defendants had knowledge of the asserted patents and Elm's claims of infringement as of the filing of the complaints in November 2014. So Elm can undoubtedly state a willfulness claim for infringement that continued after the complaints were filed.

For these reasons, Elm respectfully requests that the Court grant leave to amend.

Respectfully submitted,

/s/ Brian E. Farnan

Brian E. Farnan

cc: Counsel of Record (via E-File)