

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE**

GEMAK TRUST,)	
)	
Plaintiff,)	
)	
v.)	C.A. No. 18-1855-RGA
)	
RECKITT BENCKISER LLC,)	
)	
Defendant.)	
)	

**DEFENDANT’S OPPOSITION TO PLAINTIFF’S
MOTION FOR LEAVE TO FILE SURREPLY**

Reckitt Benckiser LLC’s (“RB”) reply brief fully and fairly replied to GEMAK Trust’s (“GEMAK”) opposition to RB’s Motion for Judgment on the Pleadings (D.I. 25). GEMAK insists a surreply is warranted for one reason: because RB allegedly raised for the first time in paragraph 2 of its reply that patents are read from the point of view of one skilled in the art. No surreply is warranted.

It is a basic legal principle that patents are read from the point of view of one skilled in the art. More importantly, however, and as is self-evident from the paragraph in question, RB’s argument was directly responsive to “GEMAK[’s] argu[ment] that errors are evident or apparent on the face of the patent because someone reading the claims would understand that the claims violate 35 U.S.C. § 112 ¶ 5.” (D.I. 27, ¶ 2 (*citing* (D.I. 26, ¶ 2).) Because GEMAK made that argument for the first time in its opposition, RB’s response, which was in keeping with the argument it made in its motion that the errors were *not* evident from the face of the patent (D.I. 25, ¶¶ 9–10), was a fair reply point that did little more than explain how and why GEMAK’s contrary argument was legally flawed. By suggesting RB represented in its motion that the Court need not consider the perspective of one skilled in the art when interpreting patents (D.I. 29 at 1),

GEMAK conflates two different arguments, both of which were in RB's motion. First, RB's motion argued that the Court can address the invalidity issue "without the need to engage in claim construction, or analyze the details of the patent specification, or consult the knowledge of a person of skill in the art, or assess any prior art." (D.I. 25, ¶ 4.) Second, RB's motion argued that the standard for when a court may correct a patent is not met here because it was not evident from the face of the patent how the claims should correctly read (*i.e.*, because that the error was not typographical or otherwise apparent simply by reading the patent). (D.I. 25, ¶¶ 10–11.)

These arguments are entirely consistent with one another. That is, while the fact that claims 4–13 are multiple dependent claims is clear based on the language of the claims without the need to consult the knowledge of a person of skill in the art, the fact that the multiple dependency constituted an error (and the appropriate way to correct that error) is not. The Court should deny GEMAK's motion. *Trans Video Electronics, Ltd. v. Netflix, Inc.*, No. 12-1743-LPS, 2014 WL 900929, at *1 n.1 (D. Del., Mar. 4, 2014) (Burke, J.) (denying motion for leave to file sur-reply because "Defendant did not raise 'new arguments' in its Reply brief regarding the Motion; instead, the complained-of material was responsive to theories and arguments raised in Plaintiff's answering brief, which themselves were relevant to topics addressed in Defendant's opening brief").

The Court should deny GEMAK's request for a surreply also because it is GEMAK, not RB, that seeks to advance entirely new arguments that should have appeared in an earlier brief. GEMAK could have argued in its opposition that a person of skill in the art would see a clear error in claims 10 and 11 and a clear way to correct that error. (D.I. 29-2, ¶ 2 (proposed surreply).) It didn't do that even though it would have been responsive to RB's argument, in its motion, that there are multiple equally plausible way to rewrite the claims, including claims 10 and 11. (D.I.

25, ¶ 10 (RB's motion.) GEMAK instead elected to argue only that there is a clear error *because of the prosecution history* (D.I. 26, ¶¶ 3-9), which is an erroneous reading of the law, as set forth in RB's reply (D.I. 27, ¶ 3.) Because GEMAK, not RB, is the party seeking to insert new arguments after the proper time to do so, the Court should deny GEMAK's motion.

Dated: September 5, 2019

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CERTIFICATE OF SERVICE

I, Pilar G. Kraman, hereby certify that on September 5, 2019, I caused to be electronically filed a true and correct copy of the foregoing document with the Clerk of the Court using CM/ECF, which will send notification that such filing is available for viewing and downloading to the following counsel of record:

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I further certify that on September 5, 2019, I caused a copy of the foregoing document to be served by e-mail on the above-listed counsel.

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