

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

ENERGETIQ TECHNOLOGY, INC.,

Plaintiff,

v.

ASML NETHERLANDS B.V.,
EXCELITAS TECHNOLOGIES CORP., and
QIOPHIQ PHOTONICS GMBH & CO. KG,

Defendants.

Civil Action No. 1:15-cv-10240-LTS
PUBLIC VERSION

**ENERGETIQ'S REPLY BRIEF IN
SUPPORT OF ITS MOTION FOR PRELIMINARY INJUNCTION**

ASML 1409

A preliminary injunction is intended to maintain the status quo; [REDACTED]

[REDACTED] With respect to Excelitas' allegations that an injunction will harm it: "[o]ne who elects to build a business on a product found to infringe cannot be heard to complain if an injunction against continuing infringement destroys the business so elected." *Merial Ltd. v. Cipla Ltd.*, 681 F.3d 1283, 1306 (Fed. Cir. 2012) (citations omitted).

As to Excelitas, this issue is ripe for a preliminary injunction. Based on the little Excelitas says in its opposition to Energetiq's motion, a preliminary injunction clearly is appropriate here.

On the likelihood of success, [REDACTED]

Regarding the timing, Excelitas takes no issue that Energetiq first learned about this infringing product development in late 2014. [REDACTED]

[REDACTED].¹ Nor does Excelitas, a Massachusetts-based company, challenge this court's jurisdiction or service of process.²

I. LIKELIHOOD OF SUCCESS

Infringement. While Defendants argue that [REDACTED]

¹ The referenced declarations are on file with the court as follows: Smith I (Doc. No. 14), Smith II (filed herewith), Lorenz I (Doc. No. 24), Lorenz II (Doc. No. 49), Ross (Doc. No. 50), Ersoni II (Doc. No. 51), Letz II (Doc. No. 54).

²

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

3

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Patent Validity. Energetiq can now say with certainty, having now seen Defendants' best case on validity, that it is likely to prevail on Defendants' invalidity assertions. For instance, with respect to the '455 patent, claim 41, Dr. Ross identifies only one prior art reference (Gärtner) that she says shows every limitation of the claim. But, Dr. Ross made a fatal factual mistake (perhaps underlining a lack of expertise in the area of the patents) by saying that Gärtner has a "curved reflective surface" that meets two requirements of claim 41: (1) "receive and reflect . . . the electromagnetic energy [laser light] toward the ionized gas . . .," and (2) "reflects the high brightness light [generated by the plasma] toward an output of the light source." In fact, the "concave mirror 39" in Gärtner that she points to does not perform the second of these two requirements. And, Gärtner does not disclose a "high brightness light," as the claim requires. Gärtner therefore cannot invalidate claim 41 under 35 U.S.C. § 102. (Smith II ¶¶ 44, 45-54; Ex. 1.)

Dr. Ross also opines that Gärtner, in combination with other prior art, renders claim 41 obvious under 35 U.S.C. § 103. But her obviousness analysis is too conclusory to carry any weight, and indeed, fails to meet the minimum legal requirements for arguing obviousness:

- Dr. Ross failed completely to address the objective evidence of non-obviousness that Energetiq put forward, including long-felt need for the invention, unexpectedly good results from the invention, and overwhelming industry praise of the invention (Smith I ¶¶ 7-11). See *Transocean Offshore Deepwater Drilling, Inc. v. Maersk Contractors USA, Inc.*, 617 F.3d 1296, 1305 (Fed. Cir. 2010) (reversing district court obviousness finding because of "failure to consider the objective evidence of nonobviousness . . ."); *Procter &*

Gamble v. Teva Pharm. USA, Inc., 566 F.3d 989, 998 (Fed. Cir. 2009) (objective evidence of non-obviousness such as long-felt need often is “the most cogent evidence [of non-obviousness] in the record”).

- Dr. Ross provided no reason why a person of ordinary skill in the art at the time of the invention would have made the combinations that allegedly render the invention obvious (Ross ¶¶ 24, 31, 39, 49-56). *See In Touch Tech. v. VGO Communications, Inc.*, 751 F.3d 1327, 1348 (Fed. Cir. 2014) (“Dr. Yanco’s testimony was nothing more than impermissible hindsight; she opined that all of the elements of the claims disparately existed in the prior art, but failed to provide the glue to combine these references.”); *See also Kinetic Concepts, Inc. v. Smith & Nephew, Inc.*, 688 F.3d 1342, 1366 (Fed. Cir. 2012) (obviousness argument fails as defendant did not show reason why person skilled in the art would combine references).
- Dr. Ross’ obviousness analysis consists of nothing more than boilerplate conclusory statements, (e.g. Ross ¶¶ 24, 31, 39, 49-56), and this is not enough. *KSR Int’l Co. v. Teleflex Inc.*, 550 U.S. 398, 341 (2007) (obviousness analysis must be made explicit and conclusory statements do not suffice); *See In Touch Tech.*, at 1352 (Fed. Cir. 2014) (“Dr. Yanco’s testimony primarily consisted of conclusory references to her belief that one of ordinary skill in the art could combine these references, not that they would have been motivated to do so”).

For these reasons alone, the court can find that Defendants failed to raise a substantial question of patent validity. In addition, Defendants’ validity analysis also fails on the technical merits, as shown in Dr. Smith’s second declaration, attached hereto. (Smith II ¶¶ 8-79.)⁵

II. OTHER FACTORS

Irreparable Harm. Defendants’ opposition also underscores the irreparable harm here, absent an injunction. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

⁵ And while Energetiq need only show likelihood of success on one patent claim, Defendants’ invalidity case for claim 10 of the ‘942 patent fails for similar reasons. (Smith II ¶¶ 13-40.) With respect to claim 10, Defendants also raise an argument that the claim 10 term “high brightness light” is indefinite. (Opp. 13 n. 7.) This argument is without merit, as the ‘982 patent specification at col. 1, ll. 9-40, provides an express and certain definition of “high brightness light.” (Smith II, ¶¶ 17-22.)

⁶ *See Celsis in Vitro, Inc. v. CellzDirect, Inc.*, 664 F.3d 922, 930 (Fed. Cir. 2012) (“Price erosion, loss of goodwill, damage to reputation, and loss of business opportunities are all valid grounds for finding irreparable harm.”)

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