

CONTAINS INFORMATION DESIGNATED AS “QUALCOMM – OUTSIDE ATTORNEYS’ EYES ONLY – CONFIDENTIAL SOURCE CODE”

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
MARSHALL DIVISION**

CYWEE GROUP LTD.,

Plaintiff,

v.

SAMSUNG ELECTRONICS CO., LTD. AND
SAMSUNG ELECTRONICS AMERICA, INC.

Defendants.

CASE NO. 2:17-cv-00140-RWS-RSP

JURY TRIAL DEMANDED

FILED UNDER SEAL

**PLAINTIFF’S MOTION FOR LEAVE TO SUPPLEMENT INFRINGEMENT
CONTENTIONS AND EXPERT REPORTS**

Samsung’s¹ gamesmanship on disclosing the code used in its accused smartphone devices continues. Plaintiff CyWee Group Ltd. (“CyWee”) requests leave to supplement its infringement contentions and expert reports to address facts that were disclosed, for the first time, in Samsung’s rebuttal expert report.

As the Court is well aware, CyWee was forced to go to extraordinary lengths to obtain third-party discovery from Qualcomm regarding how its sensor fusion algorithm is implemented in certain of Samsung’s accused products.² After being met with resistance from Samsung and Qualcomm at every step, CyWee finally obtained the deposition of Qualcomm’s representative, and it promptly thereafter supplemented its infringement contentions and expert report. Now, Samsung is attempting to ambush CyWee with a rebuttal expert report that relies upon previously undisclosed information adduced during a *private interview of the same Qualcomm*

¹ “Samsung” refers collectively to Defendants Samsung Electronics Co., Ltd. and Samsung Electronics America, Inc.

² See Dkt. 176.

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witness that CyWee previously deposed. Samsung’s counsel attended the deposition and, although it had the opportunity to do so, did not ask the witness any questions.³

The relief requested in this motion is simple—CyWee seeks leave to supplement its expert report and infringement contentions to address the narrow set of facts that Samsung and Qualcomm unfairly and intentionally concealed, and then conspired together to reveal in a last-minute attempt to derail CyWee’s infringement allegations as to half of the Accused Products. CyWee requests that it be given seven days to do so.⁴

I. BACKGROUND

A. CyWee’s Third-Party Discovery to Qualcomm

Samsung is one of Qualcomm’s most important customers, and [REDACTED]. In fact, Samsung’s relationship with Qualcomm is so significant that they are parties to a joint defense agreement that covers this lawsuit.⁵ There can be no doubt that Samsung has enjoyed access, the right to possess, and the

³ Declaration of Ari Rafilson (“Rafilson Decl.”) ¶ 2.

⁴ CyWee offered to supplement its report and infringement contentions within one week (excluding holidays) of Samsung’s agreement that it may do so. *See* Rafilson Decl. Ex. 1. That offer stands, regardless of Samsung’s opposition to this motion, and should therefore mitigate any contention by Samsung that it will not have the supplements prior to taking the deposition of CyWee’s expert.

⁵ Although Samsung has disclosed that it is a party to a joint defense agreement with Qualcomm, it has never produced that agreement or described what, if any, indemnity or cooperation provisions are contained in that agreement that might apply to this lawsuit or compel Qualcomm’s cooperation in discovery. *See* Dkt. 176 at Declaration of Ari Rafilson (“Rafilson Prior Decl.”) [REDACTED]. Despite their close relationship, Samsung originally represented to CyWee that it had no ability to gain Qualcomm’s cooperation in discovery. *See, e.g., Id.* at Rafilson Prior Decl. Ex. 4 (May 17, 2018 email from E. Brann) (“Samsung did not (and does not) have relevant source code developed by third parties in its possession custody or control . . .”). But obviously, as discussed herein, Samsung is more than able to secure Qualcomm’s cooperation when it stands to gain something from it.

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EYES ONLY – CONFIDENTIAL SOURCE CODE”

ability to produce under the terms of the Protective Order, any information in the possession of Qualcomm related to the code in the Samsung Accused Products.

Despite their close joint defense and customer contractual relationships, Samsung and Qualcomm have worked together to thwart CyWee’s attempts to gain a meaningful understanding of how (and to what extent) Qualcomm’s code operates to infringe a number of the Accused Products. The Court is already familiar with the details of CyWee’s difficulties in obtaining discovery regarding devices that run on Qualcomm’s algorithm, and the Court has already decided many of those facts in CyWee’s favor.⁶ But because this latest dispute cannot be properly framed without reference to the parties’ earlier dispute regarding Qualcomm, a brief recap follows:

- During discovery, despite CyWee’s contention that Samsung had a superior right to demand production of the Qualcomm code *used in* Samsung’s products, Samsung forced CyWee to seek that information through third-party discovery⁷;
- After CyWee served a subpoena on Qualcomm for production of its source code, both Qualcomm *and Samsung* objected to the subpoena, which the Court found “impeded CyWee’s discovery effort”⁸;
- After extended negotiations (including entry of a supplemental protective order and Qualcomm’s vetting of CyWee’s experts), [REDACTED]
- Although CyWee attempted to work informally with Qualcomm to gain an understanding of the code, Qualcomm became “[un]willing to volunteer any more information about the source code”¹⁰;

⁶ See Dkt. 250, Memorandum Opinion and Order; Dkt. 176, Plaintiff’s Motion for Leave to Supplement Expert Reports to Include Third-Party Discovery (filed under seal).

⁷ Dkt. 250 at 8-9.

⁸ *Id.* at 11, 13.

⁹ *Id.* at 11.

¹⁰ *Id.* Obviously, as discussed herein, Qualcomm has been more than willing to work informally with Samsung, to CyWee’s detriment. This should put to rest any questions about Samsung’s sincerity when it contended during discovery that it could not efficiently facilitate production of Qualcomm’s source code without the need for months of third-party discovery.

CONTAINS INFORMATION DESIGNATED AS “QUALCOMM – OUTSIDE ATTORNEYS’ EYES ONLY – CONFIDENTIAL SOURCE CODE”

- When Qualcomm made clear that it would not cooperate voluntarily (even as it was a party to a joint defense agreement with Samsung), CyWee immediately served Qualcomm with a deposition subpoena, and after further extended negotiations and delays on Qualcomm’s part, the deposition was scheduled for October 2, 2018¹¹;
- Foreseeing that it would need to supplement its expert reports following the Qualcomm deposition, CyWee promptly filed its Motion for Leave to Supplement Expert Reports to Include Third-Party Discovery (Dkt. 176); and
- The Court granted CyWee’s motion on October 24, 2018 and issued its Memorandum Opinion and Order (Dkt. 250) on November 7, 2018, finding “nothing to fault in CyWee’s conduct with regard to the Qualcomm discovery.”

On October 2, 2018, CyWee took the deposition of Qualcomm’s representative, Kaushik Sridharan Lnu.¹² During the deposition, [REDACTED]

[REDACTED]
[REDACTED].¹³ Based upon that

testimony, CyWee’s expert prepared a report and charts illustrating infringement by the Accused Products, and further provided an exhibit showing how the [REDACTED]

[REDACTED]

During the deposition, [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

¹¹ *Id.* at 11.

¹² Rafilson Decl. ¶ 2.

¹³ *Id.*

¹⁴ *Id.* at ¶ 3.

¹⁵ *Id.* at ¶ 2.

CONTAINS INFORMATION DESIGNATED AS “QUALCOMM – OUTSIDE ATTORNEYS’ EYES ONLY – CONFIDENTIAL SOURCE CODE”

[REDACTED]¹⁶ [REDACTED]

[REDACTED]

[REDACTED] Evidence regarding [REDACTED]

[REDACTED] is critical to CyWee’s claims for infringement of the ’978 patent by Samsung devices running Qualcomm’s code.¹⁸

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED].²¹ Counsel for Samsung attended Mr. Lnu’s deposition, but did not ask a single question.²² Counsel did not need to ask any questions because they had access to the witness through the joint defense agreement.

B. CyWee’s Supplemental Expert Report and Infringement Contentions

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ Qualcomm’s testimony regarding the code at issue is relevant to show that Samsung’s Accused Products practice a single limitation of claim 10 of the ’978 patent: “obtaining one or more resultant deviation including a plurality of deviation angles using a plurality of measured magnetisms Mx, My, Mz and a plurality of predicted magnetism Mx’, My’ and Mz’ for the second signal set.” None of the issues presented herein impact CyWee’s theories of infringement of the ’438 patent, which does not require the use of a magnetometer.

¹⁹ Rafilson Decl. ¶ 2.

²⁰ *Id.*

²¹ *Id.*

²² *Id.*



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