IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TEXARKANA DIVISION

MAXELL, LTD.,

                Plaintiff

        v.

APPLE INC.,

                Defendant.

Civil Action NO. 5:19-cv-00036-RWS

JURY TRIAL DEMANDED

**APPLE INC.'S MOTION TO STRIKE PORTIONS OF
MAXELL'S OPENING EXPERT REPORTS THAT
EXCEED THE SCOPE OF MAXELL'S P.R. 3-1 INFRINGEMENT CONTENTIONS
AND NEW EXPERT THEORIES OFFERED AFTER EXPERT REPORTS**

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I. INTRODUCTION

Local Patent Rule 3-1's requirement "that a party state it[s] preliminary infringement contentions shortly after the initial case management conference is specifically designed to require parties to crystalize their theories of the case, and to prevent a 'shifting sands' approach to patent litigation." *Motorola, Inc. v. Analog Devices, Inc.*, No. 1:03-CV-131, 2004 WL 5633736, at *1 (E.D. Tex. Apr. 20, 2004). Yet nearly a year after infringement contentions were due, Maxell served expert reports that raise new allegations and theories for the first time.

In addition, Rule 26 requires that expert reports contain "a complete statement of all opinions the witness will express and the basis and reasons for them." Fed. R. Civ. P. 26(a)(2)(B)(i). When a party fails to provide the information required by Fed. R. Civ. P. 26(a), "the party is not allowed to use that information or witness to supply evidence on a motion, at a hearing, or at a trial, unless the failure was substantially justified or is harmless." Fed. R. Civ. P. 37(c)(1).

Maxell did not provide Apple with notice of these new theories, as required by the Federal Rules of Civil Procedure and this District's Patent Rules, and thus Apple respectfully requests that the Court grant this motion and strike these new theories.

II. MATERIAL FACTS

Maxell served three sets of infringement contentions. Maxell's Original Infringement Contentions were served in June 2019, the P.R. 3-1 deadline. After Apple produced source code, Maxell served its First Supplemental Infringement Contentions in October 2019. However, rather than identify "what source code allegedly satisfies the software limitations" as required by P.R. 3-1(g), this Court found that Maxell cited "a large number of undifferentiated source code files and folders insufficiently tied to the accused functionalities without explanation." D.I. 204 at 5. The Court thus ordered Maxell to supplement its contentions. D.I. 223 at 2–3. In March

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