

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

RFCyber Corp.,

Plaintiff,

v.

GOOGLE LLC, and GOOGLE PAYMENT
CORP.

Defendants.

Civil Action No. 2:20-cv-00274-JRG
(Lead Case)

Jury Trial Demanded

RFCyber Corp.,

Plaintiff,

v.

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

Defendants.

Civil Action No. 2:20-cv-00335-JRG
(Member Case)

Jury Trial Demanded

**DEFENDANTS SAMSUNG ELECTRONICS CO., LTD.'S AND
SAMSUNG ELECTRONICS AMERICA, INC.'S MOTION TO STRIKE THE
PRIORITY DATE SET FORTH IN PLAINTIFF'S INTERROGATORY RESPONSES**

I. INTRODUCTION

Defendants Samsung Electronics America, Inc. and Samsung Electronics Co., Ltd. (collectively, “Samsung”) respectfully move to strike the priority date improperly asserted by Plaintiff RFCyber Corp. in its interrogatory responses in violation of Local Patent Rules 3-1 and 3-6. On May 12, 2021, RFCyber served its Infringement Contentions, which included a September 24, 2006 priority date for all of the asserted patents. Samsung justifiably relied on that date in filing four *inter partes* review petitions (“IPRs”), stipulating to not pursue certain invalidity arguments in this case assuming institution of those IPRs, and preparing/serving its Invalidity Contentions. RFCyber, however, subsequently asserted a *new* priority date – nearly *two years* earlier than the priority date it had previously asserted – in its interrogatory responses. Despite having all of the same facts regarding the timing of the alleged inventions of the asserted patents when it served its Infringement Contentions, RFCyber concealed this earlier priority date and waited until *after* Samsung had invested a significant amount of time and resources in its invalidity case to then shift its priority date in order to swear behind Samsung’s prior art. Such gamesmanship should not be permitted. *See Elbit Sys. Land v. Hughes Network Sys., LLC*, 2017 U.S. Dist. LEXIS 94495, at *29 (E.D. Tex. June 20, 2017) (granting motion to exclude late disclosure of an earlier priority date after defendant had “justifiably developed invalidity positions under the assumption that the . . . patent [was] entitled to” the priority date disclosed in Elbit’s P.R. 3-1 contentions).

Further, RFCyber did not seek leave to amend its P.R. 3-1(e) contention to assert a new priority date, and instead tried to circumvent the Local Patent Rules. Recognizing that no good cause exists to properly amend its Infringement Contentions with a new priority date, RFCyber seeks to do so via its interrogatory responses. Needless to say, allowing RFCyber to engage in trial by ambush and assert an earlier priority date at this late date unduly prejudices Samsung’s ability to defend against RFCyber’s infringement allegations.

Accordingly, Samsung respectfully requests that the Court strike RFCyber's belated attempt to assert an earlier priority date in its interrogatory responses, and preclude RFCyber from presenting evidence or arguments that the asserted patents are entitled to a priority date earlier than September 24, 2006.

II. FACTUAL BACKGROUND

A. Samsung Reasonably and Justifiably Relied Upon the September 24, 2006 Priority Date set forth in RFCyber's Infringement Contentions

RFCyber served its Infringement Contentions on May 12, 2021, in which it claimed that each asserted claim "is entitled to the priority date of its earliest application, U.S. Patent Application No. 11/534,653 with a filing date of September 24, 2006." (Infringement Contentions at 5). Approximately one month after receiving RFCyber's Infringement Contentions, Samsung filed four IPRs with the Patent Trial and Appeal Board ("PTAB"). (*See* IPR2021-00978, IPR2021-00979, and IPR2021-00980 (filed June 8, 2021); IPR2021-00981 (filed June 15, 2021)). In those IPR petitions, Samsung demonstrated that RFCyber's patents are invalid over publications available prior to September 24, 2006 – RFCyber's claimed priority date. (*See, e.g.*, IPR2021-00978, Paper 2 at 12-13 (asserting U.S. Patent Appl. Pub. No. 2006/0165060 to Dua ("Dua"), filed on January 21, 2005 and published on July 27, 2006 as the primary invalidating prior art)). Additionally, Samsung advised the PTAB with respect to each IPR that "the effective filing date of the [challenged] patent is September 24, 2006." (*See, e.g., id.* at 6). Moreover, in light of RFCyber's September 24, 2006 priority date, Samsung filed a so-called *Sotera* stipulation with this Court stipulating that it will not pursue any of the grounds asserted in the IPRs (if instituted) or any other ground that could have been raised. (Dkt. 60).

On July 14, 2021, Samsung served its Invalidity Contentions, again relying on the September 24, 2006 priority date. At no time before Samsung served its Invalidity Contentions,

not even after Samsung filed its IPRs, did RFCyber contend that the asserted patents were entitled to an earlier priority date or that the inventors conceived of or reduced to practice any of the purported inventions prior to September 24, 2006.

B. RFCyber Waited Until After Samsung Filed its IPRs and Served its Invalidation Contentions to Assert a December 12, 2004 Priority Date

On July 19, 2021, RFCyber served its Responses to Samsung's First Set of Interrogatories, in which RFCyber moved its alleged priority date by nearly two years – from September 24, 2006 to December 12, 2004 – based on an assertion of an earlier conception and reduction to practice. (See RFCyber's Interrogatory Responses at 7-12). Then, on September 14, 2021, RFCyber supplemented its responses to add figures and excerpts from various RFCyber documents allegedly demonstrating conception “at least as of December 2004” as well as referencing its own confidential source code as purporting to demonstrate the inventors' diligent reduction to practice.¹ (See RFCyber's First Supplemental Interrogatory Responses at 9-17). Further, RFCyber maintained that “[e]ach Asserted Claim is entitled to a priority date at least as early as December 12, 2004.” (*Id.* at 32). Critically, RFCyber did not seek – and still has not sought – leave to amend its Infringement Contentions to change its claimed priority date.

III. LEGAL STANDARD

The Local Patent Rules are “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.*, 2004 WL 5633735, at *1 (E.D. Tex. Apr. 8, 2004). Pursuant to P.R. 3-1(e), a party claiming infringement must identify “the priority date to which each asserted claim allegedly is entitled” in its infringement contentions. *See also Elbit*, 2017 U.S. Dist. LEXIS 94495, at *28.

¹ RFCyber disclosed the existence of its source code in its May 12, 2021 Infringement Contentions, but it did not make it available for inspection until after August 27, 2021.

In addition, P.R. 3-6 provides that a party's infringement contentions "shall be deemed to be that party's final contentions" unless amendment or supplementation is expressly permitted under P.R. 3-6(a) or by an order of the Court, "which shall be entered only upon a showing of good cause." P.R. 3-6(b). The four factors routinely applied to determine whether good cause exists are: "(1) the explanation for the failure to meet the deadline; (2) the importance of the thing that would be excluded; (3) potential prejudice in allowing the thing that would be excluded; and (4) the availability of a continuance to cure such prejudice." *RevoLaze LLC v. J.C. Penney Corp.*, 2020 U.S. Dist. LEXIS 80265, at *5 (E.D. Tex. May 6, 2020). "The burden of proving good cause rests with the party seeking the amendment." *Id.* As demonstrated below, no good cause exists that would permit RFCyber to amend its Infringement Contentions to include an earlier priority date. Accordingly, RFCyber's attempt to circumvent this district's Patent Rules should not be permitted and RFCyber should be precluded from relying on its untimely December 2004 priority date first disclosed in its interrogatory responses.

IV. ARGUMENT

A. **There Is No Justification for RFCyber's Failure to Disclose the December 2004 Priority Date in Its Infringement Contentions**

With the evidence of an alleged earlier priority date in hand, RFCyber chose to disclose September 24, 2006 as the priority date in its Infringement Contentions. Then, after Samsung located and relied upon prior art from before September 24, 2006 (but after December 12, 2004), and knowing that no good cause exists to amend its priority date contentions, RFCyber sought to "back door" a previously undisclosed December 12, 2004 priority date through its interrogatory responses. RFCyber's improper attempt to shift its alleged priority date in an effort to pre-date Samsung's prior art should be rejected.

The documents that RFCyber cited in its original and supplemental interrogatory responses

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