

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

RFCYBER CORP.,	§	Case No. 2:20-cv-00274-JRG
	§	(LEAD CASE)
Plaintiff,	§	
	§	
v.	§	<u>JURY TRIAL DEMANDED</u>
	§	
GOOGLE LLC and GOOGLE PAYMENT	§	
CORP.,	§	
	§	
Defendants.	§	
	§	
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RFCYBER CORP.,	§	Case No. 2:20-cv-00335-JRG
	§	(MEMBER CASE)
Plaintiff,	§	
	§	
v.	§	<u>JURY TRIAL DEMANDED</u>
	§	
SAMSUNG ELECTRONICS CO. LTD. and	§	
SAMSUNG ELECTRONICS AMERICA,	§	
INC.,	§	
	§	
Defendants.	§	

**PLAINTIFF RFCYBER CORP.'S RESPONSE IN OPPOSITION
TO SAMSUNG'S MOTION TO STRIKE THE PRIORITY DATE SET
FORTH IN PLAINTIFF'S INTERROGATORY RESPONSES (DKT. 123)**

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Personalized Media Commc 'ns LLC v. Apple Inc., No. 2:15-cv-1366-JRG-RSP, ECF No. 225 at 1 (E.D. Tex. Sep. 28, 2016) 6

RevoLaze LLC v. J.C. Penney Corp., No. 2:19-cv-00043, 2020 WL 2220158, at *3 (E.D. Tex. May 6, 2020)..... 7

SoftVault Sys., Inc. v. Microsoft Corp., No. 2:06-CV-16, 2007 WL 1342554 (E.D. Tex. May 4, 2007) 6, 7

RFCyber did not violate P.R. 3-1(e) or fail to meet any deadlines. RFCyber set forth its priority date—that is, the earliest application date to which the asserted patents can claim priority, here September 24, 2006—in its P.R. 3-1 contentions. At the same time, pursuant to Rule 3-2(b), RFCyber provided documents evidencing earlier conception and reduction to practice dates. That is what the Rules require, and no Court in this District has held otherwise.

Later, after Samsung served Interrogatories that interpreted the priority date more broadly, RFCyber explained that the patents were entitled to a conception date of December 2004 and were diligently reduced to practice through the filing date of September 24, 2006.

Because RFCyber identified its priority date under the Rules, and because RFCyber timely disclosed its conception date the first time Samsung requested it, there is no basis to strike RFCyber's conception date. Any prejudice to Samsung is of its own making, as it could have served an Interrogatory to discover RFCyber's conception date as early as May 26, 2021, or it could have sought leave to amend its invalidity contentions to assert any earlier art.

I. FACTUAL BACKGROUND

Each of the Patents-in-Suit claims priority, either on its own or through parent and grandparent applications, to U.S. Patent Appl. No. 11/534,653, filed on September 24, 2006. On May 12, 2021, RFCyber served its P.R. 3-1 Infringement Contentions and made its P.R. 3-2 Production. In conformance to the Rule's requirements for each "patent that claims priority to an earlier application," RFCyber identified September 24, 2006 as the priority date to which each asserted claim is entitled. RFCyber also served its Rule 3-2 production which included documents relating to its conception and reduction to practice that occurred before September 24, 2006.

On June 17, 2021, Samsung served its First Set of Interrogatories to RFCyber, requesting, among other things, a priority date for each asserted claim and details regarding conception and

reduction to practice. RFCyber timely responded on July 19, 2021, again indicating that the claims were entitled to the September 24, 2006 priority date of the earliest filed application, and also explaining that the claims were conceived in December 2004 and diligently reduced to practice. In accordance with the Protective Order, RFCyber made its relevant source code available for inspection at its counsel's office. RFCyber later supplemented with a detailed narrative explaining its conception and diligent reduction to practice and provided citations to the source code files.

Samsung was silent for more than two months before complaining on September 20, 2021, that RFCyber's conception date was earlier than the priority date disclosed under P.R. 3-1(e). RFCyber explained the distinction between the two concepts as embodied in the Rules and offered to supplement its response to clarify that September 24, 2006 was the patents' priority date, but that the patents' conception date was December 2004. Samsung nevertheless filed this motion on October 6, 2021, nearly three months after RFCyber provided its Response setting out the December 2004 conception date and less than a month before the fact discovery cutoff. (Dkt. 63 at 3.) As of this writing, Samsung has not inspected RFCyber's source code.

II. ARGUMENT

A. Legal Standard for Motion to Strike

The Court considers four factors when determining if a violation of a disclosure obligation is "substantially harmless" and does not merit exclusion: (1) the importance of the evidence; (2) the prejudice to the opposing party of including the evidence; (3) the possibility of curing such prejudice by granting a continuance; and (4) explanation for a party's failure to disclose. *iFLY Holdings LLC v. Indoor Skydiving Germany GmbH*, No. 2:14-cv-01080-JRG-RSP, 2016 WL 3680064, at *1 (E.D. Tex. Mar. 24, 2016).

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