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

BLITZSAFE TEXAS, LLC,	§ § §	
	§	**Case No. 2:15-cv-01274-JRG-RSP**
Plaintiff,	§ §	
	§	**JURY TRIAL DEMANDED**
v.	§ §	
	§	**LEAD CASE**
HONDA MOTOR CO., LTD., ET AL,	§ §	
	§	
	§	
Defendants.	§	

DEFENDANTS' MOTION FOR LEAVE TO
SUPPLEMENT INVALIDITY CONTENTIONS

Defendants Toyota Motor Corporation, Toyota Motor Sales U.S.A., Inc., Toyota Motor

Manufacturing, Texas, Inc., Toyota Motor Manufacturing Kentucky, Inc., Toyota Motor

Manufacturing Mississippi, Inc., American Honda Motor Co., Inc., Honda of America Mfg., Inc.,

Honda Manufacturing of Alabama, LLC, Honda Manufacturing of Indiana, LLC, Hyundai Motor

America, Hyundai Motor Manufacturing Alabama, LLC, Kia Motors America, Inc., Kia Motors

Manufacturing Georgia, Inc., Nissan North America, Inc., and Nissan Motor Co., Ltd.,

(collectively, "Defendants") hereby move for leave to supplement their Invalidity Contentions

served on January 19, 2016.

Supplementation is requested to add citations to and analysis of, source code from

Blitzsafe's own prior art "TOY/PAN" interfaces that Defendants recently received via third party

subpoenas. Defendants have previously disclosed their contentions related to these prior art

TOY/PAN interfaces in their Invalidity Contentions of January 19, 2016. But Defendants could

not include cites or analysis of the source code because it had not been produced by Blitzsafe.

Eventually, Defendants were able to obtain a copy of this source code on June 14, 2016, but not from Blitzsafe. Rather, Defendants obtained the missing source code via a subpoena to a third party (Ford Motor Company), who had uncovered the source code in 2015 during a litigation with Blitzsafe's predecessor Marlowe Patent Holdings, LLC, ("MPH") involving the same '786 patent at issue here.

As discussed in more detail below, documents in the Ford production led Defendants to learn that Mr. Marlowe's counsel in the prior *Ford* litigation, Mr. Kun Cho, may also have retained a copy of the missing source code. Defendants thereafter subpoenaed Mr. Cho and obtained another copy of the missing source code on July 6, 2016; Defendants also learned that Blitzsafe's present counsel (Brown Rudnick, LLP) had teamed up with Mr. Cho to help represent MPH at the same time that Mr. Cho received the source code in the *Ford* litigation. Exs. 11 and 17 at BK0001167-8. Defendants' also learned that Mr. Cho indicated that he would provide a copy of the source code to Blitzsafe after receiving it from Ford on February 18, 2015. Ex. 8.

Defendants learned this after Blitzsafe's present counsel had represented to Defendants on April 29, 2016 that Blitzsafe does not possess or have control of the missing source code, and that the source code was ***not*** provided to MPH during the *Ford* litigation. Ex. 15.

Good cause exists for this motion at least because Defendants have diligently pursued this information, and any delay in disclosing these contentions is a direct result of Blitzsafe's failure to retain and produce its own source code. Blitzsafe will not be prejudiced by this supplementation because Blitzsafe should already know how its own source code works.

Defendants have met and conferred with Plaintiff regarding this motion and also provided Plaintiff with a copy of the Proposed Supplemental Invalidity Contentions; Plaintiff stated that it does not consent to this motion. Ex. 16.

I.   FACTUAL BACKGROUND

The TOY/PAN interfaces surfaced as relevant prior art in an earlier litigation between Blitzsafe's predecessor, Marlowe Patent Holdings, LLC ("MPH") and Ford Motor Corporation ("Ford"). Ex. 1 at 1.[1] In the Ford case, Ford asserted that the TOY/PAN interfaces invalidated certain claims based on an analysis of the interface hardware. Exs. 1- 4. Ford also asserted that the TOY/PAN interfaces rendered the '786 patent unenforceable due to inequitable conduct, because the named inventor, Ira Marlowe, did not disclose material information about these interfaces while prosecuting the application that led to the '786 patent. Exs. 1-3.   At the time of that assertion, Ford did not have the source code for the interfaces and therefore could not analyze the source code. Ex. 4. This is because before, during, and after the *Ford* case, Mr. Marlowe claimed that he lost critical information pertaining to these prior art TOY/PAN interfaces. According to Mr. Marlowe, documents relating to these interfaces were destroyed in a flood, the computer files relating to these interfaces were destroyed in a computer crash, and he did not have the source code which defines many of the features that are included in these interfaces. Ex. 1 at 2; Ex. 6. Moreover, after Ford identified the TOY/PAN interfaces as a critical issue in the litigation, Mr. Marlowe contacted the Internet Archive (a.k.a. The Wayback Machine www.Internetarchive.org) and demanded that they delete the historical versions of his Blitzsafe website. Ex. 1 at 2; Ex. 6 at Pars. 7-13.   According to Ford, these historical versions

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[1] Exhibits cited in this motion are attached to the Declaration of John F. Rabena, Esq. also filed herewith. Two of the Exhibits (9 and 12) contain Blitzsafe's confidential information and accordingly are being filed under seal.

contained evidence that the TOY/PAN interfaces were prior art since they had been sold prior to the filing of the '786 patent application. Ex. 1 at 2.[2]

Based in part on the repeated loss of this information and its relationship to Ford's invalidity and inequitable conduct defenses, Ford filed a Motion for Rule 11 Sanctions in that case. Exs. 2, 3. In its Opposition to that Motion, MPH admitted that the TOY/PAN interfaces were prior art and contended only that the TOY/PAN interfaces were not material prior art because they did not include the claimed "device presence signal" and the claimed "third connector." Ex. 6, e.g., p. 3 (admitting the interfaces were "prior art"), p. 9 (denying that the prior art had a "third connector"), and p. 13 (denying that the prior art had a "device presence signal").

Ford's Motion for Rule 11 Sanctions was denied in 2013 as premature (Ex. 7); but in 2015 Ford managed to locate a copy of the TOY/PAN source code from the third-party author of that code, Edward Fischer. Ex. 10, Pars. 5-6.   Blitzsafe's current counsel, Brown Rudnick, LLP, joined attorney Kun Cho in representing MPH in the *Ford* case at least as early as February 4, 2015. Exs. 11, 17 at BK0001167-68. Ford's attorneys provided MPH's attorney Cho, with a copy of the production from Edward Fischer on February 18, 2015, and Mr. Cho indicated that he would give those documents to Mr. Marlowe. Ex. 8 ("these documents will be provided to Blitzsafe, unless you otherwise object within a week.").   The next week (February 25, 2015), Mr. Marlowe contacted Mr. Fischer directly, stating that it was improper for him to have retained that code. Ex. 9. MPH thereafter dropped its case against Ford in May 2015.

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[2] Fortunately, Ford was able to locate a backup version of www.internetarchive.org in Egypt, so the main version has since been restored. Ex. 1, p. 2.

Turning to the instant case, Defendants included detailed analysis of the TOY/PAN prior art interfaces based on an analysis of the hardware in their Amended Answers and Preliminary Invalidity Contentions.   E.g., cv-15-1274 DI 83, Pars. 12-45; Ex. 12.[3]   On March 3, 2016, Defendants' wrote to Blitzsafe and explicitly requested the source code for these products as well as any documents relating to them, and any documents that Mr. Edward Fischer produced in the prior *Ford* litigation. Ex. 13, e.g., Pars. 1, 26, 27. On April 25, 2016, Defendant Toyota again requested inspection of the prior art TOY/PAN source code. Ex. 14 at 1. On April 29, 2016, Toyota's counsel confirmed Blitzsafe's counsel's representation that "the source code for the TOY/PAN products is not within Plaintiff's possession and was ***not*** produced or otherwise provided to Plaintiff or Marlowe Patent Holdings (MPH) during MPH's prior litigations." Ex. 15, p. 1.   Then on May 16, 2016, Defendants issued subpoenas to Ford Motor Company and its litigation counsel Brooks Kushman, PC. Ford's counsel produced documents pursuant to those subpoenas on June 14, 2016, which included the source code from the prior art TOY/PAN interfaces. Rabena Decl. Par. 19. The production from Ford's counsel also included emails indicating that MPH's counsel did in fact have this source code as recently as February 19, 2015, and that MPH's counsel gave to Blitzsafe the source code that Mr. Fischer produced. Ex. 8.

Defendants then subpoenaed MPH's attorney Kun Cho, who in fact did have a copy of the TOY/PAN source code, contrary to the representations of Blitzsafe's Brown Rudnick attorneys. Rabena Decl. Par. 20.

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[3] As set forth in the Rabena Declaration, Par. 13, Exhibit 12 is a redlined version of the relevant portions of Defendants' Invalidity Contentions that were served on January 19, 2016. The redlines show the proposed supplementation, whereas the non-redlined text is original as served on January 19, 2016.

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