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

	§	
BLITZSAFE TEXAS, LLC,	§	
	§	
Plaintiff,	§	
	§	No. 2:15-CV-01274 (Lead Case)
v.	§	
	§	
HONDA MOTOR CO., LTD, et al.,	§	
	§	
Defendants.	§	
	§	

**PLAINTIFF BLITZSAFE TEXAS LLC'S OPPOSITION TO DEFENDANTS' MOTION
FOR LEAVE TO SUPPLEMENT INVALIDITY CONTENTIONS**

Plaintiff, Blitzsafe Texas, LLC ("Plaintiff" or "Blitzsafe"), files this opposition to

Defendants' Motion for Leave to Supplement Invalidity Contentions (Dkt. 125) ("Motion").

Defendants seek to supplement their invalidity contentions with citations to, and analysis of,

source code from a TOY/PAN interface. (Motion at 1.) Defendants' Motion comes more than

six months after the due date of their invalidity contentions. Defendants' original invalidity

contentions, served on January 19, 2016, relied on the TOY/PAN interfaces as prior art products

and disclosed that Edward Fischer had written the code for the TOY/PAN interface (Ex. D, at

14), and yet Defendants never subpoenaed Fisher's documents, and did not subpoena any other

possible source of the code until May 13, 2016. In fact, Defendants had reason to know about

the source code many months prior to the due date of their invalidity contentions and failed to

pursue it.

Defendants were aware, at least as early as December 30, 2015, of a prior litigation

between Ford Motor Corporation ("Ford") and Blitzsafe's predecessor, Marlowe Patent

Holdings, LLC ("MPH"), concerning one of the patents asserted in this case. (*See* Ex. A, at 2[1].)

In that case, the TOY/PAN source code was produced to Ford in 2015 by Mr. Fischer. (Dkt.

125-11.) Later in 2015, after the *Ford* case settled, the Toyota Defendants to this litigation

retained the same expert witness that Ford had retained and who had analyzed the TOY/PAN

product. (*See* Ex. B.) In December 2015, the Toyota Defendants filed multiple Petitions for

Inter Partes Review ("IPR") of the patents at issue in this case with the support of this expert.

(Ex. A.) Attached to those IPR petitions were declarations prepared by their expert witness in

which he discusses his involvement in the prior *Ford* litigation. (*See* Ex. A and B.) Defendants'

review of the *Ford* case informed them that "Ford managed to locate a copy of the TOY/PAN

source code from the third-party author of that code." (Motion, at 4.) Thus, Defendants became

aware of the prior litigation more than seven months ago, and it clearly informed them of the

location of the information that they now wish to use to supplement their invalidity contentions.

Despite knowing the location of the source code many months ago, Defendants now

assert that "any delay in disclosing these contentions is a direct result of Blitzsafe's failure to

retain and produce its own source code." (Motion, at 2.) In fact, it appears that although MPH's

outside counsel obtained a copy of the source code that had been produced to Ford by Mr.

Fisher, that code was stamped "Attorneys Eyes Only" and was never provided to Ira Marlowe,

MPH's principal. (Ex. C.) Therefore, Blitzsafe was not in possession of the source code and,

therefore, it was not collected or produce by Blitzsafe in this litigation.

Defendants have failed to explain how the new source code citations and analysis are

highly relevant or an improvement over the assertions made in Defendants' initial invalidity

contentions. Defendants already contend in their invalidity contentions that the TOY/PAN

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[1] All exhibits to Blitzsafe's opposition to Defendants' motion for leave to supplement their invalidity contentions are attached to the declaration of Alessandra Messing, attached hereto.

device is prior art to the asserted patents and contain all of the features of several asserted claims, and Defendants' expert submitted an affidavit in the *Ford* case that purports to support this contention (and which is attached to the Motion as Dkt. 125-5.) The source code is therefore of minimal value to Defendants because it is merely duplicative of their existing invalidity contentions.

Moreover, Defendants have failed to show that an amendment at this late date would not be prejudicial to Blitzsafe. Defendants' entire argument regarding lack of prejudice assumes that Blitzsafe had possession of the code but failed to produce it. Notably, Defendants' Motion lacks any evidence that the code was actually provided to MPH or Mr. Marlowe, and so Defendants' allegations that Blitzsafe misrepresented whether it has possession of the code are unfounded.

As explained in further detail below, Defendants' motion to supplement their invalidity contentions should be denied.

I.   STATEMENT OF FACTS

A. Expert Witness Dr. Matheson and Defendants' Awareness of Prior *Ford* Case

The TOY/PAN source code with which Defendants now wish to supplement their invalidity contentions was produced on February 11, 2015 to Ford Motor Corporation ("Ford"), in the earlier litigation between Blitzsafe's predecessor, Marlowe Patent Holdings, LLC ("MPH"), and Ford. (Dkt. 125-11, at ¶ 6.) The expert retained in that case by Ford was Thomas G. Matheson, Ph.D. (*See* Ex. B, at 3.) Dr. Matheson was involved with the *Ford* case early on, providing a declaration regarding the functionality and operation of the TOY/PAN interfaces back in 2013. (*See* Dkt. 125-5.)

Shortly after the *Ford* case settled, in May 2015, Dr. Matheson was retained as an expert by Defendant Toyota to produce declarations in support of a series of Petitions for *Inter Partes*

Review ("IPR"), cases IPR2016-00418, IPR2016-00419, IPR2016-00421, and IPR2016-00422. (*See* Ex. A, at 2[2]; Ex. B.) These four IPR petitions were filed December 30, 2015, each with an attached declaration by Dr. Matheson. (*See* Ex. B.) Dr. Matheson, in the Relevant Professional Experience sections of his IPR declarations, describes his work in the *Ford* case. (*See* Ex. B, at 3.) Additionally, each petition filed by Defendants identifies the *Ford* case as a Related Matter. (*See* Ex. A, at 2.)

B. Possession and Production of TOY/PAN Source Code

In the *Ford* case, Ford filed a Motion for Rule 11 Sanctions, but the Court denied the motion as "a transparent effort to secure summary judgment, in the guise of Rule 11 sanctions." (Dkt. 125-8, at 8.) During discovery, Ford requested information from MPH that had been lost in 2006 due to a leak during a severe storm. (*See* Dkt. 125-7.) Documents and source code that Ford sought were destroyed by mold and mildew, and MPH's data server was subject to flooding. (*Id.*) MPH attempted to recover the lost information, and had the server inspected by a computer repair and upgrade center (the center where the server was purchased). (*Id.*) However, the drive had crashed and the computer repair company could not recover the data. (*Id.*)

After Ford realized that MPH no longer had the source code, it served a document and deposition subpoena on Mr. Fischer, an engineer who had previously performed work for Blitzsafe. (Dkt. 125-11.) Mr. Fischer produced documents responsive to Ford's subpoena, including a copy of the TOY/PAN source code. (*Id.*) Mr. Marlowe, having been under the impression that Mr. Fischer returned all copies of Blitzsafe's intellectual property years earlier, was rightfully upset. (*See* Dkt. 125-10.) Mr. Marlowe was also troubled by the fact that he had informed Mr. Fischer of the flood and server crash that destroyed much of Blitzsafe's intellectual

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[2] Only IPR2016-00418 is attached as exemplary.

property in 2006 and, in response, Mr. Fischer mentioned nothing of the copies of Blitzsafe's code that he had made and kept. (*Id.*)

On February 18, 2015, Ford's attorney emailed the document production received from Mr. Fischer to Mr. Kun Cho, MPH's attorney at the time. (Dkt. 125-9.) The following day, Mr. Cho responded to the Ford's attorney's email saying that he would provide the Fischer production to Mr. Marlowe despite the fact that the code was marked "Attorneys Eyes Only." (*Id.*) Mr. Marlowe, however, never received Ed Fischer's copy of the source code from Mr. Cho. (*Id.*; *see also* Ex. C, at ¶2.) In fact, Blitzsafe has never received the TOY/PAN source code that was sent to Ford's counsel, and only now has a copy in its possession as a result of the production from Ford to Defendants in this case. (Ex. C, at ¶3.)

C. Defendants' Supplemental Invalidity Contentions

Defendants first requested the TOY/PAN interface source code from Blitzsafe on March 3, 2016. (Motion, at 5.) Defendants then waited nearly two months to contact Blitzsafe again to inquire about the source code. (Dkt. 125-13.) Responding to Defendants' inquiry, Blitzsafe's Brown Rudnick attorneys truthfully told Defendants that Blitzsafe does not have the source code for the TOY/PAN products. (Dkt. 125-17, Ex. C, at ¶2.) Defendants subpoenaed Ford and its counsel for the source code and eventually obtained it on June 14, 2016. (Motion, at 5.) Now, six months after filing their invalidity contentions, Defendants submit their motion for leave to supplement their contentions with citations to and analysis of this source code.

II.   ARGUMENT

Defendants' Motion should be denied because Defendants' have failed to show good cause for supplementation. P.R. 3-6(b). Defendants have not shown that they were diligent in obtaining the source code and they have not shown that the source code, and their analysis of the

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