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

BLITZSAFE TEXAS, LLC,	§	
	§	
Plaintiff,	§	
	§	
v.	§	NO. 2:15-CV-01274-JRG-RSP
	§	(LEAD CASE)
HONDA MOTOR CO., LTD., ET AL.,	§	
	§	
Defendants.	§	

DEFENDANTS' REPLY IN SUPPORT OF THEIR MOTION TO STRIKE PORTIONS OF THE REBUTTAL EXPERT REPORT OF JOSEPH C. MCALEXANDER III REGARDING VALIDITY OF U.S. PATENT NUMBERS 7,489,786 AND 8,155,342

Had Blitzsafe truly intended to claim priority to U.S. Patent Application No. 10/316,961, it could have easily said so. Blitzsafe could have said: "Each of the asserted claims of the '342 patent is entitled to the priority date of December 11, 2002." Just as easily, Blitzsafe could have said: "Each of the asserted claims of the '342 patent is entitled to the priority date of U.S. Patent Application No. 10/316,961." Blitzsafe did neither. Instead, it said: "Each of the asserted claims of the '342 patent is entitled to the priority date of ***U.S. Patent Application No. 11/475/847*** [sic], filed ***June 27, 2006***, under P.R. 3-1(e)." Exh. 1 at 6 (emphasis added). In reality, Blitzsafe waited eight months to make such a claim. And when Defendants opposed Blitzsafe's late proposal to amend its P. R. 3-1(e) disclosures—because Defendants specifically relied on the priority date claimed in Blitzsafe's P. R. 3-1(e) disclosures when selecting the Clayton reference and because it was too late to redo their invalidity investigation and analysis[1]—Blitzsafe chose not to seek permission from the Court, but to sandbag Defendants. Now, to avoid the impact of its P. R. 3-1(e) disclosures, Blitzsafe advances an argument that makes no sense and would defeat the purpose of P. R. 3-1(e). This Court should reject Blitzsafe's manufactured argument and grant Defendants' motion.

I. BLITZSAFE DISTORTS THE FACTS.

Blitzsafe twists the language of its P. R. 3-1(e) disclosures to achieve a result that it could not achieve by moving for leave to amend. Blitzsafe now asserts that, "from the very beginning of this case, [it] contended that the claims of the '342 Patent [were] entitled to a priority date of December 11, 2002," but if true, why did Blitzsafe not expressly say so in its P. R. 3-1(e)

[1] Contrary to Blitzsafe's assertion, the cited filings in *inter partes* review ("IPR") proceedings do not negate the prejudice to Defendants. *See* Opposition at 2–3, 6. Blitzsafe only claimed priority to the application filed on June 27, 2006. Exh. 1 at 6. Blitzsafe never moved to amend its disclosures, and it expressly denied any intent to rely on an earlier date. Defendants were entitled to rely on Blitzsafe's disclosures and representations. Potential arguments anticipated by Toyota in an IPR petition, and Blitzsafe's arguments in IPR proceedings that are inconsistent with the express positions it has taken in this litigation, do not render unreasonable Defendants' reliance on Blitzsafe's express representations in this litigation.

disclosures on November 24, 2015? *See* Opposition at 2; Exh. 1 at 6. Instead, the only date Blitzsafe identified was the June 27, 2006 filing date of the '342 Patent's application. Exh. 1 at 6. When interpreting statutes, contracts, and claim terms, a plain-meaning construction is preferred, and the same logic should apply here. *See, e.g.*, *Poly-America, L.P. v. API Indus., Inc.*, 839 F.3d 1131, 1136 (Fed. Cir. 2016) (claim terms); *Ibe v. Jones*, 836 F.3d 516, 526–27 (5th Cir. 2016) (contract); *Sample v. Morrison*, 406 F.3d 310, 312 (5th Cir. 2005) (statute). While Blitzsafe now pretends its P. R. 3-1(e) disclosures inferentially referred to the earliest application on the face of the patent, a plain reading of its disclosures only supports a claim of priority to the June 27, 2006 filing date of the '342 Patent's application. *See* Exh. 1 at 6.

Blitzsafe first expressed a desire to change its P. R. 3-1(e) disclosures on July 25, 2016—six months after Defendants served their invalidity contentions and two months after most Defendants narrowed their list of prior art references and combinations. *See* Exh. 6; Motion at 3–4. Not coincidentally, this was just a few weeks after the PTAB instituted IPR of the '342 Patent based on the Clayton reference. *See* Exh. 9 at 37–38 (attached). The PTAB expressly determined that the asserted claims of the '342 Patent were more likely than not unpatentable in view of Clayton. *See VirtualAgility Inc. v. Salesforce.com, Inc.*, 759 F.3d 1307, 1314 (Fed. Cir. 2014); Exh. 9 at 37. Obviously, this forced Blitzsafe to modify its position and claim that the '342 Patent predated Clayton.

But by July 25, 2016, this litigation had advanced too far for Blitzsafe to make this change without severely impacting Defendants. *See* Motion at 9–10. Because of this prejudice, Defendants opposed Blitzsafe's proposal to amend its P. R. 3-1(e) claim of priority. *See* Exh. 6. Blitzsafe could have filed an opposed motion to get the issue decided then, but it chose not to do so. Defendants, therefore, relied on this decision and reasonably believed that Blitzsafe had

abandoned its plan to rely on an earlier claim of priority in this litigation. Blitzsafe now asserts that it merely considered an amendment to "claim priority to an actual reduction to practice" that it later determined was unnecessary. Opposition at 4–5. Nothing supports this *post hoc* justification. It is inconsistent with Blitzsafe's July 25, 2016 email, which says nothing about reduction to practice, and Blitzsafe's amended interrogatory response (served the same day), which also says nothing about an actual reduction to practice. *See* Exh. 6 and Exh. 7.

Defendants sought a meet-and-confer in mid-August 2016 with the specific purpose of confirming that Blitzsafe was not planning to claim priority to an earlier application in spite of its P. R 3-1(e) disclosures. Blitzsafe expressly stated that was not its intent. *See* Exh. 8. Blitzsafe now mischaracterizes that meeting. The meeting occurred before expert reports were served, so the McAlexander Validity Reports and this motion were not discussed. *See* Opposition at 4. And Defendants certainly disagreed with Blitzsafe's current argument—the whole purpose of the meeting was to confirm, ***before expert reports were served***, that Blitzsafe was not going to advance such an argument. Defendants were thus surprised when it reappeared in the McAlexander Validity Reports two months later.

II. IF BLITZSAFE'S ARGUMENT IS ACCEPTED, P. R. 3-1(e) IS MEANINGLESS.

Blitzsafe's reliance on its reference to "the ***priority date*** of U.S. Patent Application No. 11/475/847 [sic]," as opposed to the "***filing date***," makes no sense, because it ignores the purpose of P. R. 3-1(e). When a patent "claims priority to an earlier application," P. R. 3-1(e) requires disclosure of "the priority date to which each asserted claim allegedly is entitled" precisely because not all claims are necessarily entitled to claim priority to the earliest application in the chain of priority. *See PowerOasis, Inc. v. PowerOasis Networks, LLC*, 522 F.3d 1299, 1305 n.4 (Fed. Cir. 2008). A claim is entitled to claim priority to an earlier application only if that earlier application contains written description support for that particular

claim. *See, e.g.*, *Cordance Corp. v. Amazon.com, Inc.*, 658 F.3d 1330, 1134 (Fed. Cir. 2011). Instead of requiring an accused infringer to investigate the potential priority date of each asserted claim, which "can be quite complex," the purposes of the Patent Rules are served by requiring the patentee to disclose its position at the outset. *See PowerOasis*, 522 F.3d at 1305 n.4; *Comput. Acceleration Corp. v. Microsoft Corp.*, 503 F. Supp. 2d 819, 822 (E.D. Tex. 2007). As the patentee ultimately bears the burden of proving that a particular claim is entitled to claim priority to an earlier application, it makes sense that it is subject to this obligation. *See PowerOasis*, 522 F.3d at 1305–06, 1305 n.4.

Blitzsafe cannot now argue that it claimed priority to the December 11, 2002 filing date of U.S. Patent Application No. 10/316,961 based on its reference to the "priority date of U.S. Patent Application No. 11/475/847 [sic], filed June 27, 2006," because the "priority date" of each of the claims in that application, which issued as the '342 Patent, remains unresolved. Blitzsafe's argument is circular—the asserted claims of the '342 Patent are entitled to the priority date of the priority date of the '342 Patent's application. That is no disclosure at all. It provides no notice and fails to narrow the issues. *See Fenner Invs., Ltd. v. Hewlett-Packard Co.*, No. 6:08-cv-273, 2010 U.S. Dist. LEXIS 17536, at *6 (E.D. Tex. Feb. 26, 2010).

The '342 Patent issued from a continuation-in-part application that is one in a series of such applications. Doc. 1-2, at 2. Generally, each continuation-in-part application adds new material. *PowerOasis*, 522 F.3d at 1305 n.4. Defendants are entitled to know where in the chain of priority Blitzsafe contends that material supporting each of the asserted claims was added.[2]

[2] Blitzsafe contends that the asserted claims of the '342 Patent are entitled to claim priority to U.S. Patent Application No. 10/316,961, filed on December 11, 2002, in its Opposition, but Blitzsafe's expert disagrees. *See, e.g.*, Exh. 10 at 112–13 (opining that the December 11, 2002 Marlowe Application "does not disclose any limitations of the '342 Patent claims") (attached). And in IPR proceedings, Blitzsafe only claimed priority back to 2005. Exh. 11 at 2–3 (attached). These inconsistencies further undermine the credibility of Blitzsafe's argument

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