

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

CYWEE GROUP LTD.,

Plaintiff

v.

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

Defendants.

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NO. 2:17-CV-00140-WCB-RSP

**DEFENDANTS SAMSUNG ELECTRONICS CO., LTD. AND SAMSUNG
ELECTRONICS AMERICA, INC.’S MOTION TO STRIKE PLAINTIFF CYWEE
GROUP, LTD.’S INDUCED INFRINGEMENT ALLEGATION**

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CyWee's expert reports, served on October 8, 2018, rely on a previously undisclosed theory based on previously undisclosed evidence to allege for the first time that Samsung induced infringement of the patents-in-suit. CyWee's Complaint and First Amended Complaint each contain a conclusory allegation of induced infringement, but do not detail any factual basis for that allegation. Likewise, neither CyWee's original infringement contentions nor any of its subsequent supplemental infringement contentions even mention induced infringement, let alone allege any facts in support of CyWee's induced infringement theory. Thus, CyWee failed to timely disclose the basis for its induced infringement claims.

CyWee's delay in disclosing the basis for its induced infringement allegations and late production of allegedly relevant evidence have substantially and unfairly prejudiced Samsung. Not only was Samsung left with an unreasonably short amount of time to analyze third party source code and conduct testing of third party software applications cited for the first time in CyWee's expert reports, Samsung did not have the benefit of specific inducement allegations to understand the alleged relevance of those applications to CyWee's newly disclosed induced infringement theory. As there is now no effective remedy to cure the prejudice to Samsung, Samsung respectfully requests that the Court strike the induced infringement allegations from the expert reports of Dr. Donald Brown and Dr. Joseph LaViola and preclude CyWee from presenting its induced infringement theory at trial.

I. BACKGROUND

A. CyWee's Complaint and the First Amended Complaint

CyWee filed its Complaint on February 17, 2017 and its First Amended Complaint on March 2, 2017. Dkt. Nos. 1, 9. Regarding induced infringement, both the Complaint and the First Amended Complaint state the following:

Samsung has and is continuing to actively and knowingly induce, with specific intent, infringement of the '438 Patent under 35 U.S.C. § 271(b) by making, using, offering for sale, importing, and/or selling '438 Accused Products, all with knowledge of the '438 Patent and its claims. As a result of discussions starting in June 2016, Samsung understands that its activities cause others—including distributors, resellers, and end users—to infringe the '438 Patent. Samsung encourages and facilitates infringing sales and uses of its products through the creation and dissemination of those products, promotional and marketing materials, product manuals, instructions, and/or technical materials to distributors, resellers, and end users.

Dkt. No. 1 ¶ 25, Dkt. No. 9 ¶ 25; *see also* Dkt. No. 1 ¶ 36, Dkt. No. 9 ¶ 206 (same allegations directed to the '978 Patent). Neither the Complaint nor the First Amended Complaint detail any evidence related to CyWee's allegation that third parties (*i.e.*, distributors, resellers, and end users) infringe the patents-in-suit. *See id.*

B. CyWee's Original and Supplemental Infringement Contentions

CyWee's original infringement contentions, served on July 12, 2017, do not mention induced infringement, let alone provide a factual basis to support such a claim. Ex. 1. CyWee's infringement contention claim charts are similarly silent, providing no evidence related to its induced infringement allegations. *See, e.g.*, Exs. 2–3.

CyWee served supplemental infringement contentions on September 18, 2017, September 10, 2018, October 4, 2018, and October 25, 2018. *See* Exs. 4, 7, 10. Like CyWee's original infringement contentions, none of the supplemental infringement contentions mention induced infringement or provide any notice of what evidence CyWee contends supports its induced infringement allegations. *See, e.g.*, Exs. 5–6, 8–9, 11–12.

C. Expert Reports of Dr. Brown and Dr. LaViola

On October 8, 2018, CyWee served the expert reports of Dr. Donald Brown and Dr. Joseph LaViola. In Dr. Brown's report, he purportedly [REDACTED]

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