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.	§ § § § § § § § § § § §	NO. 2:17-CV-00140-RWS-RSP

DEFENDANTS SAMSUNG ELECTRONICS CO., LTD. AND SAMSUNG ELECTRONICS AMERICA, INC.'S REPLY IN SUPPORT OF THEIR MOTION TO STRIKE PLAINTIFF'S INDUCED INFRINGEMENT ALLEGATIONS

CyWee waited until it served its expert reports on October 8, 2018 to disclose its induced infringement theory. As a result, Samsung had very little time to analyze the third-party software applications CyWee relies upon to support that theory. There is now no remedy to avoid unfair prejudice to Samsung, other than to strike that theory as untimely.

CyWee argues that the Patent Local Rules do not require a party to disclose the basis for its induced infringement allegations in its contentions, and that Samsung had adequate notice based on CyWee's complaints, infringement contentions, and discovery requests. However, CyWee has not set forth any support for its claim that it need not disclose ***any*** detail regarding its induced infringement theory in its contentions, and none of CyWee's prior disclosures contain sufficient detail to provide adequate notice.

CyWee cannot justify its failure to timely and adequately disclose its induced infringement allegations. Samsung therefore respectfully requests that the Court strike those allegations from Dr. Brown's and Dr. LaViola's expert reports and preclude CyWee from presenting that theory at trial.

I. CYWEE DID NOT TIMELY DISCLOSE ADEQUATE DETAIL REGARDING ITS INDUCED INFRINGEMENT THEORY

CyWee failed to adequately disclose its induced infringement allegations during fact discovery and ***still has not done so***. CyWee brushes aside its failure, arguing that Samsung had adequate notice because CyWee pursued discovery regarding third-party applications and identified the standard Android function remapCoordinateSystem(), which CyWee alleges ***might*** be used by third-party applications to generate the "transformed output" required by Claim 10 of the '978 Patent. Even assuming CyWee's representations are true, those disclosures still fail to provide notice of its induced infringement theory. For example, Claim 10 of the '978 Patent requires that a "transformed output" be generated using an "orientation output" and a "rotation

output." To adequately disclose its theory of induced infringement as to that limitation, CyWee needed to allege facts showing that the Accused Products use source code that generates a transformed output using both a "rotation output" and an "orientation output."

CyWee points to its infringement contentions, its discovery requests, and its complaints in this case and others to argue that it provided adequate notice. CyWee muddles the distinction between notice that CyWee has an induced infringement theory and notice ***of what that theory is***. None of CyWee's alleged disclosures contain the detail required in a party's infringement contentions under this Court's Patent Local Rule 3-1, which required CyWee to "provide infringement contentions setting forth '***particular*** theories of infringement with ***sufficient specificity*** to provide defendants with notice of infringement beyond that which is provided by the mere language of the patent [claims] themselves.'" *Motion Games, LLC v. Nintendo Co.*, No. 6:12-cv-878-RWS-JDL, 2015 WL 1774448, at *1 (E.D. Tex. Apr. 16, 2015) (alteration in original) (quoting *STMicroelecs., Inc. v. Motorola, Inc.*, 308 F. Supp. 2d 754, 755 (E.D. Tex. 2004)) (emphasis added).

CyWee argues that its complaints in this case contain adequate facts to support its claim of induced infringement. However, both of CyWee's complaints contain only conclusory allegations of induced infringement. Moreover, the specificity required of infringement contentions under this Court's Patent Local Rules is much higher than what is required of a complaint under the Federal Rules. *See, e.g.*, *Pers. Audio, LLC v. Google, Inc.*, No. 1:15-CV-350, 2017 U.S. Dist. LEXIS 122635, at *11–12 (E.D. Tex. May 15, 2017). CyWee thus cannot rely on Samsung's decision not to move to dismiss the induced infringement claims in CyWee's complaint and the fact that such claims survived motions to dismiss filed by HTC and Huawei in other cases to demonstrate the sufficiency of its disclosures.

CyWee alleges that the claim charts accompanying its complaints disclose its induced infringement theory. But those claim charts merely refer to a standard Android function remapCoordinateSystem() that would have to be called by a third-party application to generate a "transformed output." CyWee's claim charts do not identify any third-party application that ***actually uses*** remapCoordinateSystem() nor do they provide any detail about how that function ***actually uses*** a "rotation output" and "orientation output" to generate a transformed output, as required by Claim 10 of the '978 Patent.

CyWee also argues the claim charts accompanying its infringement contentions (served July 12, 2017, September 18, 2017, September 10, 2018, and October 4, 2018) provided notice of its induced infringement theory. However, like the claim charts served with CyWee's complaints, its infringement contention claim charts do not mention any of the third-party applications upon which CyWee now relies. Although those claim charts "reference the remapCoordinateSystem() function," Dkt. No. 294 at 3, they do not state how that function would satisfy any limitation of any asserted claim.[1]

Further, CyWee asserts that discovery in this case provided Samsung notice of CyWee's induced infringement theory. But the suggestion that Samsung should have presumed CyWee's theory, without CyWee providing detail regarding that theory, and that Samsung should then

[1] CyWee did not identify the Google Maps, Star Walk 2, Pokémon Go and Shooting Showdown applications in its contentions until its supplement on October 25, 2018, after CyWee was permitted to do so to address infringement based on Qualcomm's source code. Dkt. No. 238 ¶ 4; Dkt. No. 277-12 (Mot., Ex. 11) at 27–28. Not only are those applications unrelated to Qualcomm source code, CyWee's October 25 claim charts do not disclose whether those applications use remapCoordinateSystem() or how that function generates a transformed output using both an orientation output and a rotation output, as required by Claim 10 of the '978 Patent. *See id.* While Dr. Brown's report refers to source code for Star Walk 2 that allegedly implements remapCoordinateSystem(), he does not provide any opinion as to how that function generates a transformed output using both an orientation output and a rotation output. Dkt. No. 277-14 (Mot., Ex. 13) ¶¶ 61–66. Dr. Brown admitted that he did not analyze source code for Google Maps, Pokémon Go, or Shooting Showdown. Ex. 21 at 33:24–34:7.

have developed defenses against that presumed theory, is unreasonable. Regardless of discovery relating to induced infringement, the fact remains that during the discovery period CyWee never identified the specific third-party applications upon which its induced infringement theory rests, and never detailed how use of remapCoordinateSystem() allegedly infringes any limitation of any asserted claim. CyWee still has not adequately disclosed that theory.

II. CYWEE CANNOT JUSTIFY ITS UNREASONABLE DELAY

CyWee cannot justify its failure to timely provide notice of its induced infringement theory. CyWee's argument that this Court's Patent Local Rules do not require disclosure of details regarding its theory in its infringement contentions lacks merit and should be rejected.

CyWee argues that, under *Fenner Investments v. Hewlett-Packard*, this Court's Patent Local Rules do not require CyWee to disclose the basis of its induced infringement allegations before the start of expert discovery. Dkt No. 294 at 6–7 (citing *Fenner Investments, Ltd. v. Hewlett-Packard Co.*, No. 6:08-cv-273, 2010 WL 786606, at *2–3 (E.D. Tex. Feb. 26, 2010)). In that case, however, the Court excused the plaintiff's failure to include in its contentions certain details relating to its inducement theory because the plaintiff had ***already*** disclosed its reliance on defendants' manuals to meet the limitation at issue. *Fenner*, 2010 WL 786606, at *8–9.

Here, CyWee does not rely on any such evidence for any Accused Product to support its induced infringement theory. Instead, as discussed in the preceding section, CyWee relies on a generic description of a standard Android function and Dr. Brown's speculation regarding how that function ***could be*** used by unspecified third-party applications. Such unsupported guesswork does not rise to the level of the conclusive evidence endorsed by *Fenner*. *Id.* at *3.

III. SAMSUNG HAS BEEN IRREPARABLY PREJUDICED

CyWee's failure to timely disclose its induced infringement theory continues to prejudice Samsung. Another continuance will not cure this prejudice. CyWee waited until serving expert

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