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

QUEST NETTECH CORPORATION,	§	Case No. 2:19-cv-00118-JRG
	§	
Plaintiff,	§	
	§	**JURY TRIAL DEMANDED**
v.	§	
	§	
APPLE INC.,	§	
	§	
Defendant.	§	
	§	
	§	

PLAINTIFF QUEST NETTECH CORPORATION'S SUR-REPLY IN FURTHER OPPOSITION TO APPLE INC.'S MOTION FOR LEAVE TO SUPPLEMENT ITS INVALIDITY CONTENTIONS (DKT. 58)

Plaintiff Quest NetTech Corporation ("NetTech" or "Plaintiff") respectfully submits this Sur-Reply in Further Opposition to Apple Inc.'s ("Apple" or "Defendant") Motion for Leave to Supplement Its Invalidity Contentions (Dkt. 58).

I. INTRODUCTION

Apple's reply fails to remedy the deficiencies of its opening brief. Apple has not shown how NetTech's infringement contentions or Pitroda's nonstandard language caused Apple to miss the deadline to disclose the Pitroda reference by three months. Apple's changing account of how it located and evaluated Pitroda and its refusal to disclose its search criteria and the timeline of the search prevent it from meeting its burden to show diligence. Given that the Pitroda reference is cumulative of five other references, and that Apple may ultimately litigate invalidity under Pitroda in the Patent Trial and Appeal Board, Apple cannot show good cause to supplement its invalidity contentions in this Court with the Pitroda reference.

II. ARGUMENT

A. Apple Has Not Shown Diligence in Locating Pitroda or Delivering It to NetTech

Apple's reply brief again fails to demonstrate that it diligently located and disclosed the Pitroda reference. First, Apple presents no evidence supporting its argument that NetTech's assertion of certain patent claims, which it later withdrew before the Pitroda reference was found, had prevented Apple from locating Pitroda earlier. The mere fact that Pitroda was found after claims 1-3 and 5-7 were withdrawn does not establish a causal relationship. Quite the opposite, this argument is undermined by the fact that Apple located five allegedly anticipatory references and disclosed them in their infringement contentions *before* NetTech dropped these claims. If the dropped claims prevented Apple from locating Pitroda in a timely fashion, they should also have

prevented Apple from locating the five references which supposedly anticipate the remaining claims. Apple has no explanation for this flaw in its argument.

Second, Apple's argument that its delay is justified based on NetTech's "vague" infringement contentions is not credible because Apple does not identify a single specific aspect of the infringement contentions that was so vague that it prevented Apple from conducting an effective prior art search.[1] While it is commonplace for a defendant to send a letter with alleged deficiencies in a plaintiff's infringement contentions, Apple never pursued the issue and was able to identify dozens of prior art references in its invalidity contentions despite the supposed vagueness. Again, Apple established neither that the infringement contentions were vague nor that this undisclosed vagueness prevented it from locating Pitroda in a timely way.

Third, Apple changes its argument concerning its delay in disclosing Pitroda. On reply, Apple states for the first time that Pitroda's allegedly idiosyncratic language "delayed examination" of Pitroda. *See* Dkt. 61 at 4. This contradicts Apple's opening argument that Pitroda's "nonstandard terms" made Pitroda "more difficult to find via the practical automated tools that searchers use to filter the flood of potential prior art." Dkt. 58 at 7. In any event, the issue is not whether Pitroda uses language that is different from the language in the other references, but whether such language made it undiscoverable or delayed Apple from examining it. It did not. For instance, a reference that Apple disclosed in its infringement contentions, U.S. Patent No. 4,900,903 ("Wright"), does not include the words "smart card," "integrated circuit card," "IC card," "payment card," "contactless card," or "chip card," which Apple insists are "better-known terms." Dkt. 61 at 4. Yet, Apple was able to discover Wright and timely disclose

[1] Apple attempts to blame NetTech for Apple's decision not to escalate any alleged deficiencies to the Court because of NetTech's delay in reviewing source code. Even if NetTech did delay in its review of source code, this argument is irrelevant to Apple's search for prior art and does not address its lack of diligence. Apple has consistently avoided a proper detailed explanation for its delay in discovering and disclosing Pitroda.

it to NetTech even. This undermines Apple's argument that the absence of those "better-known terms" in Pitroda prevented it from timely examining Pitroda.

The inquiry into this good-cause factor is hindered by Apple's refusal to disclose its search methodology as evidence of its diligence or to provide a clear timeline of the events leading to the late disclosure of Pitroda. If that evidence were favorable to Apple, one would assume Apple would have disclosed it. A self-proclaimed "delayed examination" of Pitroda is an insufficient reason to grant Apple's motion. *See Innovative Display Techs. v. Acer Inc.*, No. 2:13-cv-00522-JRG, Dkt. 71 at 3 (E.D. Tex. June 19, 2014) ("That it took Defendants more time beyond the original deadline to find these new arts, in and of itself, is no excuse for a late supplementation. To hold otherwise would 'render the explanation for the party's failure to meet the deadline a non-factor.'") (citation omitted).

Apple likens this case to *Optis Wireless Tech., LLC v. Huawei Techs. Co. Ltd.*, No. 2:17-cv-00123-JRG, Dkt. 119 (E.D. Tex. Jan. 26, 2018), but in *Optis*, the Court granted the defendant's motion for leave to supplement invalidity contentions because the defendant provided a detailed account of its diligence by recounting the dates it communicated with its search firms and reviewed the relevant reference. Apple has never disclosed its search terms or the dates it examined Pitroda. The Court also noted the defendant's promptness in bringing the additional reference to the attention of the Court within 21 days after discovering the reference. *See Optis Wireless*, No. 2:17-cv-00123-JRG, Dkt.135 at 2. Here, Apple discovered Pitroda on October 29, 2019, and filed its motion on December 17, 2019, nearly two months later. In addition, the defendant notified the opposing party of its discovery eight days later, while Apple notified NetTech over one month after it identified Pitroda.

For these reasons, the first factor weighs strongly against a finding of good cause.

B. Apple Has Not Shown That Pitroda is Important

Apple has failed to meet its burden of proof in showing importance. Apple offers no evidence that Pitroda is important as compared to the other references it timely disclosed. *See Blue Calypso*, No. 6:12-cv-486-JRG, Dkt. 317 at 2 (E.D. Tex. Aug. 6 2015) (finding that the defendants could not meet the importance factor where there were other references in the suit "that allegedly anticipate the patent in suit, yet, [the defendants] go to no length to explain why the patent in question is ***better*** than those references.") (emphasis added). If Pitroda is anticipatory in ways that are noncumulative, Apple must explicitly lay out this argument on importance because it bears the burden of proof on this issue. Simply stating that a reference is important without evidentiary support is insufficient. *See Innovative Display*, No. 2:13-cv-00522-JRG, Dkt. 71 at 3 (finding that it could not determine importance based on defendants' conclusory argument that the prior art is important and provides "unique ground" for anticipation and obviousness). Apple relies on the fact that it provided a 42-page claim chart to show how Pitroda anticipates or renders obvious each limitation of each asserted claim. However, this is not dispositive, as this Court has denied a motion to supplement invalidity contentions where the defendants had a 40-page amended invalidity contentions and 280-page claim chart. *See id.* This Court held that the defendants did not explain in their motion, "the subject matter of the four new arts, much less how [those] arts, if supplemented to the original Infringement Contentions, would render a particular patent invalid." *Id.* Similarly, Apple failed to provide this information in its motion.

Apple attempts to downplay the importance of its refusal to commit to litigating invalidity in this Court. If an *inter partes review* based on Pitroda is filed, Apple will undoubtedly seek to stay the case pending the review. This will make Pitroda unimportant to the

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