

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

MAXELL, LTD.,

Plaintiff,

v.

APPLE INC.,

Defendant.

Case No. 5:19-cv-0036-RWS

JURY TRIAL DEMANDED

**MAXELL, LTD.'S OPPOSED MOTION FOR LEAVE TO FILE A SUR-REPLY IN
OPPOSITION TO APPLE INC.'S RENEWED MOTION TO COMPEL
INFRINGEMENT CONTENTIONS COMPLIANT WITH PATENT RULE 3-1(G) AND
FOR SCHEDULE EXTENSION OR, IN THE ALTERNATIVE, TO PRECLUDE
MAXELL'S RELIANCE ON SOURCE CODE FOR INFRINGEMENT**

Plaintiff Maxell, Ltd. ("Maxell"), through undersigned counsel, respectfully submits this Opposed Motion for Leave to file a Sur-Reply, filed simultaneously herewith, in Opposition to Apple Inc.'s ("Apple") Renewed Motion to Compel Infringement Contentions Compliant with Patent Rule 3-1(g) and for Schedule Extension or, in the Alternative, to Preclude Maxell's Reliance on Source Code for Infringement. (D.I. 284).

There is good cause for Maxell's proposed filing of its Sur-Reply at this time. With respect to motions to compel, reply briefing is generally not permitted. *See* Standing Order Regarding "Meet and Confer" Obligations Relating to Discovery Disputes at ¶1. The Court, however, ordered that Apple may file a reply brief in support of its motion. D.I. 287. Although not explicitly stated in the Court's Order, it appears that reply briefing may have been permitted to enable Apple to respond to Maxell's Opposition in lieu of a response that would typically be made at an in-person hearing on the motion. Assuming that is correct, and Maxell will not be permitted to address Apple's Reply at a hearing, Maxell submits that it should be provided an equal opportunity to

respond to the arguments raised in Apple's Reply. Maxell specifically seeks to file a Sur-Reply of 5 pages, which is equal in length to the Reply filed by Apple (D.I. 306). Maxell further notes that it is submitting its proposed Sur-Reply prior to the parties' filing of a joint report regarding the results of their meet and confer. D.I. 287. Thus, consideration of Maxell's Sur-Reply would not require any enlargement of the time set by the Court for consideration of Apple's motion and does not disturb Apple's request for expedited treatment.

Maxell's proposed Sur-Reply is further warranted by the fact that Apple's motion is not merely a motion to compel, but also contains a request for an extension that, based on the timing of its motion, would likely result in 1) Apple being given additional time to prepare a rebuttal to Maxell's infringement expert report and 2) an extension of the case schedule that would delay trial. In the alternative, Apple requests the sanction that Maxell be precluded from relying on portions of source code (which Apple has called "the most complete and accurate representation of how accused Apple Products actually work" (*see* D.I. 210 a 4)) to support its allegations of infringement. Maxell deserves the opportunity to be heard prior to being subject to such a sanction.

Maxell's proposed Sur-Reply is also necessary in order to address arguments specifically addressed by Apple for the first time in its Reply, including arguments regarding at least 1) the sufficiency of Maxell's textual descriptions in its infringement contentions, 2) the impact of the infringement contentions on Apple's invalidity expert reports, and 3) the understanding of cited source code by Apple engineers. Furthermore, Maxell's proposed Sur-reply is necessary to afford Maxell the opportunity to discuss Apple's newly identified approach to source code review, which is directly relevant to its claims of prejudice, that was disclosed by Apple on May 1, 2020—after the filing of Maxell's Opposition (but prior to Apple's Reply).

In view of the foregoing, Maxell submits that good cause exists to grant it leave to file the proposed Sur-Reply to its Opposition.

Dated: May 4, 2020

By: /s/ Jamie B. Beaber

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Counsel for Plaintiff Maxell, Ltd.

CERTIFICATE OF CONFERENCE

I hereby certify that Plaintiff Maxell, Ltd. has complied with the requirements of Local Rule CV-7(h) governing this case. Specifically, lead and local counsel for the parties discussed this request on a telephone conference held May 4, 2020. Apple's counsel indicated that Apple would oppose the motion.

/s/ Jamie B. Beaber
Jamie B. Beaber

/s/ Geoff Culbertson
Geoff Culbertson

CERTIFICATE OF SERVICE

The undersigned certifies that all counsel of record who are deemed to have consented to electronic service are being served this 4th day of May, 2020, with a copy of this document via the Court's CM/ECF system per Local Rule CV-5(a)(3).

/s/ Jamie B. Beaber
Jamie B. Beaber