

Demaray LLC (“Demaray”) claims it needs to file an improper sur-reply in order to respond to supposedly new evidence submitted with Samsung’s reply brief. Its request should be denied because (1) the supposedly new evidence simply corroborates that witnesses identified by Demaray’s own corporate representative are located in NDCA and (2) the proposed sur-reply consists almost entirely of arguments that Demaray could have made in its opposition brief and that do not relate to the supposedly new evidence. Demaray is seeking to file a sur-reply not because of anything new in Samsung’s reply, but because it recognizes that the arguments made in its opposition brief are insufficient to defeat transfer. But even if considered on its merits, the proposed sur-reply does not provide grounds to deny Samsung’s motion. Taken together, NDCA is clearly the more convenient forum:

- There are at least fifteen (15) witnesses in NDCA and zero (0) in WDTX;
- It is undisputed that the design and development of the accused Applied reactors occurs in NDCA; none of that work occurs in WDTX;
- Similarly, the Applied prior art system was designed and developed in NDCA, not in WDTX;
- Several witnesses with unique and highly relevant knowledge regarding Samsung’s license defense are in NDCA, but again, none are in WDTX; and
- All that Demaray can point to is that the accused reactors are manufactured in Texas and that Samsung Austin uses the reactors in Texas, but Samsung is not accused of “making” the reactors and use by Samsung Austin is not in question; a location of any alleged infringement, however, does not equate to the location of relevant witnesses and evidence.

Samsung’s Reply Evidence Is Not New Nor Is It Addressed By Demaray’s Proposed Sur-Reply. Plaintiff takes issue with the ‘new’ declaration and exhibits submitted with Samsung’s

Reply, but ignores that most of these exhibits simply corroborate that the non-party witnesses that Demaray's own corporate representative identified are located in NDCA. As shown in Exhibit AW, at least *fifteen (15)* witnesses are in NDCA, the majority of whom are non-parties and require compulsory process, and *zero (0)* witnesses are in WDTX. Demaray claims it was not "afforded an opportunity to address" the relevance of these witnesses, but Demaray was aware of each when it filed its opposition brief because they were *identified by Demaray's own principal*, Dr. Demaray. Demaray characterizes some of these witnesses (without specifically identifying which ones) as having "incidental roles in peripheral events occurring decades ago", but this is nothing more than unsupported attorney argument that they are "extraordinary unlikely to be witnesses at trial." Dkt. No. 91-1 at 1. Dr. Demaray had the opportunity to disclose each individual's relevant knowledge, and such disclosure could have potentially narrowed the list of trial witnesses. But Demaray refused Samsung's request to examine Dr. Demaray, and Demaray's corporate representative identified these individuals. Each is thus as likely a trial witness on Samsung's prior art system invalidity, licensing, standing/ownership, inventorship and inequitable conduct defenses as Dr. Demaray himself absent evidence to the contrary.

Demaray's proposed sur-reply is also not responsive to the evidence raised by Samsung's reply. Rather, Demaray proposes arguments and evidence it could have made, but did not, in its opposition. Indeed, Demaray's proposed sur-reply was *planned* before Samsung even filed its reply. As the Court knows, Demaray provided a corporate representative, Brian Marcucci, for deposition instead of Dr. Demaray himself. Dkt. 61. The Court then ordered Mr. Marcucci to sit for a second deposition due to counsel's improper instructions not to answer. Dkt. No. 82. At the end of the second deposition, Demaray's counsel redirected Mr. Marcucci on topics unrelated to Samsung's examination, such as his search for patents assigned to Applied Materials containing

the words “Austin” and “PVD” to purportedly show that there are relevant witnesses in this district. Ex. AL, 491:23-495:6. Four of Demaray’s proposed sur-reply exhibits were introduced by Demaray’s counsel at that deposition, a week *before* Samsung’s reply was even filed. Thus, Demaray moves for leave not to respond to “untimely” evidence, but to execute a planned strategy to submit evidence it failed to include in its opposition brief.¹ Compare Demaray Exs. 27-28 (Applied patents filed 25 years ago), Ex. 31 (Applied article), Ex. 32 (Advanced Energy website) with Exs. 10-13 identified in Marcucci Dep. (Ex. AL) at 491:4-495:6. The Court should not reward that maneuvering by allowing Demaray the last word on Samsung’s motion.

The Sur-Reply Arguments Do Not Alter The Analysis Or Conclusion That Transfer is Appropriate. To the extent the Court accepts Demaray’s sur-reply, the new evidence and arguments therein do not affect the analysis that aside from considering the case’s originally set trial date, *every* factor weighs in favor of transfer. First, Demaray cannot substantiate why the individuals in Exhibit AW are not likely witnesses. Demaray argues, without support, that Samsung’s inventorship defense is “unalleged” and “speculative”. Not so. Demaray’s own sur-reply exhibit, Defendants’ invalidity contentions, confirms Demaray has been on notice of this defense since last December. Ex. 30 at 15-16. Next, even including the individuals from Corning (none of whom negotiated the license of the patents-in-suit from Symmorphix to AKT, and none of whom are located in WDTX), the witness count is still *fifteen (15)* in NDCA versus *zero (0)* in WDTX, and *fourteen (14)* to *zero (0)* if excluding party witnesses. Moreover, Demaray does not argue that any of the Corning individuals are willing witnesses or that they would be subject to

¹ Within thirty minutes of Samsung’s filing its reply, Demaray contacted Samsung indicating its intent to seek leave to file a sur-reply. Demaray filed its motion the next day while ignoring Samsung’s request to meet and confer about what purportedly new arguments and evidence Demaray sought to address. That practice is inconsistent with the letter and spirit of Local Rule CV-7(i), which requires a conference and good-faith attempt to resolve matters by agreement.

compulsory process from either the NDCA or WDTX court—they do not affect the analysis or conclusion. The availability of compulsory process still “weigh[s] heavily in favor of transfer when more third-party witnesses reside within the transferee venue than reside in the transferor venue.” *In re Apple, Inc.*, 581 F. App’x 886, 889 (Fed. Cir. 2014).

Next, Demaray’s reliance on Mr. Marcucci’s belated patent searches for “PVD” and “Austin” to speculate about witnesses with knowledge in this District is not credible. Dkt. 91, Ex. A at 3. Demaray knows that the accused Applied RMS PVD reactors were designed, developed and configured at Applied’s headquarters and Maydan Technology Center in NDCA. Demaray had the opportunity to depose Applied about where this work occurs, and whether any of it occurred in Austin. Demaray’s subpoena to Applied included topics on these very points. Ou Ex. AD (*see, e.g.*, Topics 4-5). Although the accused Applied RMS PVD reactors are commercially manufactured in Austin, the important fact is that such manufacturing only happens after the reactor is first built for customer demonstratives at Applied’s Maydan Technology Center in NDCA, where the individuals responsible for its design, development, initial build, and configuration (*i.e.*, individuals within Keith Miller’s organization) are located. The patents Mr. Marcucci located do not suggest otherwise. Mr. Miller confirms that none of the named inventors listing Austin as their location design Applied’s PVD reactors. Miller Decl., ¶¶ 3-4. [REDACTED]

[REDACTED] Mr. Miller also reaffirmed his prior testimony: the design, development, initial build and configuration of the accused Applied RMS PVD reactors occurs in NDCA, not in Austin; and there is no research and development work on these PVD reactors done in Austin. *Id.*, ¶ 5. Design documents for those PVD reactors are also created and maintained by his organization in NDCA [REDACTED]

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