IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
WACO DIVISION

Ocean Semiconductor LLC, Plaintiff, v. NVIDIA Corporation, Defendant.	Civil Action No.: 6:20-cv-1211-ADA JURY TRIAL DEMANDED PATENT CASE

PLAINTIFF OCEAN SEMICONDUCTOR LLC'S SUR-REPLY IN SUPPORT OF ITS OPPOSITION TO NVIDIA CORPORATION'S MOTION TO DISMISS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

I. INTRODUCTION

NVIDIA's Reply continues either to mischaracterize or ignore relevant precedent while attempting to blur the early threshold requirements to survive a motion to dismiss. The cases, from this Court, other district courts, and the Federal Circuit, all support denial of NVIDIA's Motion to Dismiss. When properly analyzed both factually and legally, it is clear that the methods of the asserted patents fall squarely within the coverage of § 271(g). At worst, fact issues relating to commercial viability preclude dismissal of the § 271(g) causes of action.

II. ARGUMENT

A. The '538, '305, and '248 Patents Are Directed to the Manufacture of a Product and Subject to Section 271(g)

As an initial matter, NVIDIA's claim that "Plaintiff argues that processes merely 'implicating' manufacturing or related to 'commercial viability' are enough to meet the 'made by' requirement of section 271(g)" (Dkt. 18 at 1) is incorrect. Contrary to NVIDIA's characterization, Ocean has not asserted that each of the patents is covered by § 271(g) solely because the claimed processes "implicate" to the production of semiconductors. (*See* Dkt. 17 at 3-6.) Rather, in accordance with *Bayer* and other precedent, Ocean has looked to the claims and specification of the patents themselves and has identified aspects of each process demonstrating that the claimed processes result in the making of physical products. Moreover, Ocean only argued about "commercial viability" in the context that fact issues preclude dismissal at this time.[1] (*Id*. at 8-9.)

1. NVIDIA Mischaracterizes Federal Circuit Authority on Section 271(g)

NVIDIA's recitation of applicable law continues to be incomplete. For example, the full quotation from *Bayer* cited in added bold by NVIDIA (Dkt. 18 at 3) reads: "Thus, the process

[1] NVIDIA cites no authority for its contention (Dkt. 18 at 2) that commercial viability is "only" relevant to whether a product is materially changed by subsequent processes.

must be used directly in the manufacture of the product, ***and not merely as a predicate process to identify the product to be manufactured***."[2] *Bayer AG v. Housey Pharms, Inc.*, 340 F.3d 1367, 1378 (Fed. Cir. 2003). Ocean has never asserted that processes do not need to be used in manufacturing semiconductors under § 271(g), only that they do not need to ***claim physical manufacture of products***. (Dkt. 17 at 5.) NVIDIA's attempt to blur this distinction in the law is inappropriate and should be rejected.[3]

Similarly, NVIDIA further confuses matters when it sets up a straw man argument that Ocean ***has never made***: that the drug product in *Bayer* was "made by" a process covered by § 271(g). (Dkt. 18 at 3.) In reaching its conclusion that the claimed process in question there produced only information, the *Bayer* court noted that the drug product analyzed by the claimed process issue was itself a physical product. *Bayer*, 340 F.3d at 1377. Here, however, what is imported is ***not*** information, but the ***physical products*** that are manufactured using these patented processes.

NVIDIA's continued reliance on *Momenta* (Dkt. 18 at 4) is also misplaced as that case involved a testing process that was performed on a sampling of intermediate products that destroyed the samples on which the tests were performed. *Momenta Pharms., Inc. v. Teva Pharms. USA Inc.*, 809 F.3d 610, 616-17 (Fed. Cir. 2015). As a result, there could never be any subsequent sale of any product on which the claimed method had been performed—only products on which the claimed method had ***not*** been performed survived to be developed into final products, and later imported and sold.

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[2] Unless otherwise noted, emphasis within this brief has been added.

[3] *Anticancer, Inc. v. Pfizer, Inc.*, Case No. 11-CV-107-JLS, 2012 WL 13180611 (C.D. Cal. June 1, 2012), cited by NVIDIA (Dkt. 18 at 2) for the proposition that the scope of § 271(g) is a question of law, is inapposite. The complaint there failed to allege both a product manufactured using a patented process and importation of a product and, as such, judgment on the pleadings was appropriate. Moreover, the plaintiff there acknowledged that the process in question was for testing

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