

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

OCEAN SEMICONDUCTOR LLC,

*Plaintiff,*

v.

WESTERN DIGITAL  
TECHNOLOGIES, INC.,

*Defendant.*

Case No. 6:20-cv-01216-ADA

**ORAL ARGUMENT REQUESTED**

**WESTERN DIGITAL TECHNOLOGIES, INC.’S OPPOSITION TO OCEAN  
SEMICONDUCTOR LLC’S MOTION FOR LEAVE TO FILE SUR-REPLY**

Defendant Western Digital Technologies, Inc. (“WDT”) respectfully opposes Ocean Semiconductor LLC’s (“Ocean”) Motion for Leave to File a Sur-Reply (D.I. 21).

Under the local rules, a party may not file a sur-reply unless it obtains leave of court. W.D. Tex. Loc. R. CV-7(f) (“Absent leave of court, no further submissions [beyond reply] on the motion are allowed.”). In fact, sur-replies “are highly disfavored and permitted only in extraordinary circumstances, such as when necessary to respond to new issues, theories, or arguments raised for the first time in a reply brief.” *Davis v. United Health Servs.*, No. 1:18-CV-1093-RP, 2020 WL 33597, at \*3 (W.D. Tex. Jan. 2, 2020) (internal quotation marks and citations omitted); *see also*, *e.g.*, *Manchester Tex. Fin. Grp., LLC v. Badame*, No. A-19-CV-000009-LY, 2019 WL 4228370, at \*1 n.1 (W.D. Tex. Sept. 4, 2019).

Ocean's Motion for Leave (D.I. 21) broadly identifies two bases for its proposed sur-reply: that WDT allegedly "asserts new arguments" and "cites new legal authority" related to direct and indirect infringement.<sup>1</sup> Mot. for Leave (D.I. 21) at 2. Neither basis warrants a sur-reply.

As for Ocean's allegation that WDT's reply asserts new arguments, Ocean's Motion failed to inform the Court exactly what those new arguments are; indeed, because there are none.<sup>2</sup> See generally Mot. for Leave (D.I. 21). In reply, WDT directly responded to arguments that Ocean raised in its opposition. No sur-reply is warranted. Ocean's sur-reply is, therefore, an improper attempt to continue the argument; and Ocean's leave application should be denied. See, e.g., *Racetrac Petroleum, Inc. v. J.J.'s Fast Stop, Inc.*, No. Civ.A 3:01-CV-1397, 2003 WL 251318, at \*18 (N.D. Tex. Feb. 3, 2003).

As to Ocean's allegation that WDT "cited new legal authority," only one such "new legal authority" is identified in Ocean's proposed sur-reply—*Bayer Healthcare LLC v. Baxalta Inc.*, 989 F.3d 964 (Fed. Cir. 2021).<sup>3</sup> See Proposed Sur-reply (D.I. 21, Ex. A) at 10. But, WDT cited this case in direct response to Ocean's assertion in its opposition that pleading egregiousness is not

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<sup>1</sup> Ocean's motion seeks leave only to address direct and indirect infringement, (see Mot. for Leave (D.I. 21) at 2), yet its proposed sur-reply also addresses willfulness, (see Proposed Sur-reply (D.I. 21, Ex. A) at 9–10).

<sup>2</sup> Tellingly, Ocean's proposed sur-reply addresses essentially every argument that WDT raised in both its opening and reply briefs. See generally Proposed Sur-reply (D.I. 21, Ex. A).

<sup>3</sup> Ocean's proposed sur-reply purports to identify other "newfound" cases in WDT's reply. But, as Ocean concedes, these are not "newfound" cases. In fact, WDT raised these cases in its opening brief and Ocean chose not to address them in its opposition. See e.g. Reply Brief (D.I. 20) at 1 (noting that "Ocean's Opposition does not address the Federal Circuit *Momenta* and *Phillips M. Adams* decisions (or the *Sharafabadi* district court decision, cited approvingly in *Momenta*) that WDT raised in its Motion."); Proposed Sur-reply (D.I. 21, Ex. A) at 1–3 (conceding those cases were discussed in WDT's Opening Brief and seeking to address these allegedly "newfound" cases for the first time in the proposed sur-reply). A failure to respond to issues raised in WDT's opening brief does not justify a sur-reply.

required. *See* Reply (D.I. 20) at 10 (addressing Opp. (D.I. 19) at 19–20). Moreover, Ocean’s proposed sur-reply on this point simply notes that this decision was an appeal of a judgment as a matter of law (*see* Proposed Sur-reply (D.I. 21, Ex. A) at 10)—a fact that WDT already stated in its reply brief. *See* Reply (D.I. 20) at 10. Again, no sur-reply is warranted.

In summary, Ocean has failed to identify any legitimate basis for sur-reply. Accordingly, Ocean’s request for leave to file a sur-reply should be denied.

Dated: April 16, 2021

Respectfully submitted,

/s/ L. Kieran Kieckhefer

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*Counsel for Defendant Western Digital Techs., Inc.*

**CERTIFICATE OF SERVICE**

The undersigned hereby certified that a true and correct copy of the above and foregoing document has been served on April 16, 2021, to all counsel of record who are deemed to have consented to electronic service via the Court's CM/ECF.

/s/ L. Kieran Kieckhefer  
David P. Whittlesey