



IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division

SAMSUNG ELECTRONICS CO., LTD.,
Plaintiff,

v.

Civil Action No. 3:14cv757

NVIDIA CORPORATION,
Defendant.

MEMORANDUM OPINION

This matter is before the Court on NVIDIA's RENEWED MOTION TO SUPPLEMENT ITS WITNESS LIST (Docket No. 807). NVIDIA Corporation ("NVIDIA") again seeks to supplement its witness list to add its Executive Vice President of Operations, Debora Shoquist ("Shoquist"). For the reasons stated below, NVIDIA's RENEWED MOTION TO SUPPLEMENT ITS WITNESS LIST (Docket No. 807) will be denied.

PROCEDURAL BACKGROUND

On December 16, 2015, the Court issued a Memorandum Opinion denying NVIDIA's Motion for Partial Summary Judgment. (Docket No. 602). The Opinion discussed, among other issues, various ways in which Samsung Electronics Co., Ltd. ("Samsung") might show that NVIDIA "controls" TSMC, such that NVIDIA would be liable for pre-suit damages under 35 U.S.C. § 287(b). On December 29, 2015, Samsung moved to amend the Final Pretrial Order to include NVIDIA's response to Interrogatory No. 10, a

document that Samsung argued tended to show "control" under the standards discussed in the December 16, 2016 Memorandum Opinion. (Docket Nos. 610, 611). The Court's order granting that motion included a provision stating that, if Defendants felt the need to introduce evidence responsive to the newly admitted Interrogatory No. 10, it should move for such relief. (Order, Docket No. 659). On January 16, 2016, NVIDIA filed its original Motion to Supplement Defendants' Witness List with Ms. Shoquist (Docket No. 677), to which Samsung objected.

The Court denied NVIDIA's motion. (Order, Docket No. 692; Memorandum Opinion, Docket No. 735). As the Court noted in that opinion, NVIDIA's concession that Shoquist would not testify to anything that four already-designated witnesses were not already slated to discuss meant that NVIDIA could not prove "manifest injustice" under Fed. R. Civ. P. 16(e). (Memorandum Opinion, Docket No. 735, 4, 6-7). Moreover, the factors enumerated in Koch v. Koch Inds., Inc., 2013 F.2d 1202, 2122 (10th Cir. 2000) weighed against supplementation. Id. (considering (1) prejudice or surprise to the party opposing trial of the issue; (2) the ability of that party to cure any surprise; (3) disruption to the orderly and efficient trial of the case by inclusion of the new issue; and (4) bad faith by the party seeking to modify the order). In particular, the Court found that:

- (1) Samsung was surprised because: (a) Shoquist was never designated under Fed. R. Civ. P. 26(a) as a knowledgeable person; and (b) when NVIDIA was called upon to designate a 30(b)(6) witness to testify about the business relationship between TSMC, Shoquist was not designated. The Court found that, having taken 26(a) and 30(b)(6) depositions on other knowledgeable people, "Samsung has prepared its case, and granting this motion would require Samsung to take depositions on the eve of trial." (Memorandum Opinion, Docket No. 735, 4-5).
- (2) The prejudice could not be cured because: (a) discovery was closed (such that Samsung would not be able to pursue additional paths of discovery that Shoquist's deposition might reveal); and (b) the proximity of trial would inhibit such inquiry even if the Court reopened discovery. (Memorandum Opinion, Docket No. 735, 5).
- (3) Supplementing with Shoquist would disrupt an orderly and efficient trial because: (a) preparation for the trial had been underway for some time, and (b) it would disrupt the trial to require adjustment of trial preparations so quickly before the trial (Memorandum Opinion, Docket No. 735, 5).
- (4) NVIDIA did not act in bad faith. (Memorandum Opinion, Docket No. 735, 6).

Because NVIDIA could not demonstrate manifest injustice and because the Koch factors weighed against supplementation, the Court denied NVIDIA's motion. (Memorandum Opinion, Docket No. 735, 6-7).

For reasons not relevant here, the Court granted a mistrial on the patents to which Shoquist's testimony would have been relevant. (E.g., Memorandum Opinion, Docket No. 829). The new trial on those patents will be held May 4, 2016. Shortly after the mistrial was declared, NVIDIA filed this motion renewing its request to supplement its witness list with Shoquist.

ANALYSIS

NVIDIA's argument can be broken into several major components: (1) Shoquist's testimony is relevant and non-cumulative, such that inability to supplement would constitute manifest injustice; (2) there is no surprise and any surprise is easily cured; (3) supplementation will not disrupt trial; and (4) NVIDIA has not acted in bad faith. However, NVIDIA still has not shown that denying its motion to supplement would result in manifest injustice, and NVIDIA misunderstands surprise and cure in the context of discovery.

A. Manifest injustice, relevance, and cumulativeness

NVIDIA asserts that Shoquist has personal knowledge regarding facts critical to rebutting Samsung's claim that

NVIDIA "owns or controls" TSMC, which is relevant to Samsung's claim for pre-notice damages. (Def.'s Mem. in Supp. of Renewed Mtn. to Supp. Witness List, Docket No. 808, 1) ("Def.'s Mem.").

Although Shoquist appears to have some relevant knowledge on that point, NVIDIA cannot credibly claim that declining to amend the Pretrial Order would constitute manifest injustice because NVIDIA has admitted that all the evidence that Shoquist has to offer is to be addressed by four of NVIDIA's already-designated witnesses. (Memorandum Opinion, Docket No. 735, 4, 6-7). In briefing this motion, NVIDIA attempted to backtrack from this concession by stating that Shoquist's testimony will be non-cumulative because Shoquist will cover NVIDIA's business relationship with TSMC, while currently-designated witness Joseph Greco - one of the four already-designated, allegedly cumulative NVIDIA witnesses - will cover NVIDIA's technical relationship with TSMC. (Def.'s Mem. 5). But, in light of NVIDIA's statements in the previous briefing, the question is not whether Shoquist and Greco are cumulative, but whether Shoquist and Greco and the three other already-designated witnesses are cumulative. By NVIDIA's admission, Shoquist's business testimony overlaps with James Chen and John Hu,¹ rather

¹ Chen and Hu are currently set to testify by deposition, if at all. NVIDIA attempts to argue that bringing Shoquist to testify in person is preferable to the alternative of Chen and Hu

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