

THE HONORABLE JAMES L. ROBERT

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**IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF WASHINGTON  
SEATTLE DIVISION**

CYWEE GROUP LTD.,

*Plaintiff,*

v.

HTC CORPORATION  
and  
HTC AMERICA, INC.,

*Defendants.*

CASE NO. 2:17-cv-00932-JLR

JURY TRIAL DEMANDED

**PLAINTIFF'S REPLY IN SUPPORT  
OF ITS MOTION TO PRECLUDE  
CONSIDERATION OF BELATED  
CLAIMS CONSTRUCTION  
POSITIONS**

**NOTE ON MOTION CALENDAR:  
MAY 4, 2018**

1 In an attempt to justify its belated identification of the Additional Terms,<sup>1</sup> Defendants  
2 (collectively “HTC”) argue that they can “incorporate by reference” *over 14,000 pages* of  
3 invalidity contentions that have been asserted by four other parties in four other cases, as well  
4 as any future invalidity contentions that may be served in those or any other cases. Such  
5 blanket incorporation is improper, violates the local rules and Standing Order, and wholly  
6 failed to provide Plaintiff CyWee Group Ltd. (“CyWee”) with adequate notice of HTC’s  
7 position. HTC further attempts to justify its late identification of terms, and to minimize the  
8 resulting prejudice to CyWee, by arguing that because certain remaining scheduling deadlines  
9 have been extended, the Court should overlook HTC’s complete failure to timely identify the  
10 Additional Terms. HTC also states that it will grant CyWee permission to supplement its  
11 expert report to address HTC’s untimely contentions in light of the extended schedule. But the  
12 fact that certain remaining deadlines have been extended does not excuse HTC’s complete  
13 failure to timely identify the Additional Terms in the first place. CyWee respectfully requests  
14 that the Court preclude the Additional Terms.

### 15 I. FACTUAL BACKGROUND

16 On January 19, 2018, HTC served its invalidity contentions. HTC’s contentions included  
17 over 2,500 pages, and purported to incorporate “by reference *any additional invalidity*  
18 *contentions*, identified prior art, and/or invalidity claim charts *previously disclosed*” or “*disclosed*  
19 *at any later date by any party* to any other litigation or U.S. Patent & Trademark Office  
20 proceeding ... including, but not limited to, invalidity contentions from Apple Inc. (Case No.  
21 4-14-cv-01853); Samsung Electronics Co. Ltd. et al (Case No. 2-17-cv-00140); LG Electronics,  
22 Inc. et al (Case No. 3-17-cv-01102); Huawei Technologies, Co., Inc. (Case No. 2:17-cv-00495);  
23 Motorola Mobility LLC (Case No. 1-17-cv-00780); and ZTE Corporation (Case No. 3-17-cv-  
24 02130).” Dkt. No. 81-1 at 3 (emphases added). The defendants in those cases have, thus far,

25 \_\_\_\_\_  
26 <sup>1</sup> “Additional Terms” refer collectively to the three terms that HTC belatedly identified as indefinite in its  
Disclosure of Preliminary Claim Construction and Evidence, as more particularly described in CyWee’s Motion to  
Preclude Consideration of Belated Claim Construction Positions (Dkt. No. 76) at 3:1-9.

1 served over 14,000 pages of invalidity contentions. More specifically, Samsung served 4,015  
 2 pages, Apple served 3,126 pages, Motorola served 4,216, and Huawei served 2,948 pages.<sup>2</sup>  
 3 Declaration of Ari Rafilson (“Rafilson Decl.”) at ¶ 3. The defendants in the LG and ZTE cases  
 4 have not yet served invalidity contentions, but HTC’s sweeping incorporation purports to  
 5 capture those defendants’ future contentions.

## 6 II. ARGUMENT & AUTHORITIES

7 The patent rules “require parties to crystallize their theories of the case early in litigation  
 8 and to adhere to those theories once they have been disclosed,” *O2 Micro Int’l Ltd. v. Monolithic*  
 9 *Power Sys., Inc.*, 467 F.3d 1355, 1366 n. 12 (Fed. Cir. 2006). The rules are intended “to further  
 10 the goal of full and timely discovery and provide all parties with adequate notice and  
 11 information with which to litigate their cases.” *Fresenius Medical Care Holdings, Inc. v. Baxter*  
 12 *Intern., Inc.*, 2006 WL 1329997 at \*4 (N.D. Cal. 2006) (citations omitted). Any invalidity  
 13 theories not disclosed in invalidity contentions are barred from presentation at trial. *Avago*  
 14 *Techs. Gen. IP PTE Ltd. v. Elan Microelectronics Corp.*, 2007 WL 2103896 (N.D. Cal. Jul. 20,  
 15 2007); *aff’d* 2007 WL 2433386, at \*1 (N.D. Cal. Aug. 22, 2007).

### 16 A. HTC’s Purported Incorporation by Reference Fails to Provide Adequate Notice.

17 Because of the sheer volume of materials HTC attempts to incorporate by reference, HTC  
 18 fails to provide CyWee with adequate notice of its invalidity contentions. *See e.g., NobelBiz, Inc.*  
 19 *v. LiveVox, Inc.*, 2015 WL 225223, at \*8 n.5 (N.D. Cal. Jan. 16, 2015) (“Defendants’ cursory  
 20 incorporation by reference of invalidity contentions from litigation in the Eastern District of  
 21 Texas likewise does not meet the standard required for invalidity contentions under the Patent  
 22 Local Rules.”); *Nautilus Neurosciences, Inc. v. Wockhardt USA LLC*, 2013 WL 7901901, at 4  
 23 (D.N.J. Jan. 23, 2013) (“The indirect nature of Defendants’ incorporation-by-reference theory  
 24

25  
 26 <sup>2</sup> “Samsung” refers collectively to Samsung Electronics Co. Ltd and Samsung Electronics America, Inc. “Apple” refers to Apple Inc. “Motorola” refers to Motorola Mobility LLC. “Huawei” refers collectively to Huawei Device Co. Ltd., Huawei Device (Dongguan) Co. Ltd., and Huawei Device USA, Inc.

1 does not amount to a form of notice that adequately crystallizes the theories of the case.”)  
2 (internal quotations and citations omitted).

3 In the context of patent litigation, claim construction, and validity determinations, the  
4 Federal Circuit has consistently held that “[t]o incorporate material by reference, the host  
5 document must identify with *detailed particularity* what specific material it incorporates and  
6 *clearly indicate where* that material is found in the various documents. *Zenon Env'tl., Inc. v. U.S.*  
7 *Filter Corp.*, 506 F.3d 1370, 1378 (Fed. Cir. 2007) (applying incorporation by reference in  
8 context of continuity of disclosure for priority determination) (emphasis in original, internal  
9 quotes omitted); *see also Cook Biotech Inc. v. Acell, Inc.*, 460 F.3d 1365, 1376 (Fed. Cir. 2006)  
10 (applying incorporation by reference in context of claim construction); *Advanced Display Sys.,*  
11 *Inc. v. Kent State Univ.*, 212 F.3d 1272, 1283 (Fed. Cir. 2000) (applying incorporation by  
12 reference in context of invalidity by anticipation determination). Accordingly, as noted above,  
13 district courts have often held that broad and generalized incorporation by reference in  
14 invalidity contentions is improper, with at least one court explicitly applying the Federal  
15 Circuit’s incorporation by reference framework. *See Merck Sharp & Dohme Corp. v. Sandoz, Inc.*,  
16 2014 WL 997532 at \*6 (D.N.J. Jan 6, 2014) (citing *Zenon*, 506 F.3d at 1378).

17 Here, HTC’s invalidity contentions do not identify with particularity what specific material  
18 HTC attempted to incorporate. Rather, HTC generally incorporated “any additional invalidity  
19 contentions, identified prior art, and/or invalidity claim charts” disclosed, whether previously  
20 or later, by any party to any other litigation or U.S Patent & Trademark Office proceeding and  
21 only obliquely referred to “Samsung Electronics Co. Ltd. et al.” *See* Dkt. No. 81-1 at 3:13-20.  
22 Considering that Samsung’s invalidity contentions exceed 4,000 pages (and that CyWee has  
23 received more than 16,000 pages of invalidity contentions to date for the patents-in-suit),<sup>3</sup>  
24 HTC’s assertion that the Additional Terms “had been *identified* as indefinite in HTC’s  
25 Preliminary Invalidity Contentions” is disingenuous. Dkt. No. 80 at 3:7-8 (emphasis added).

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<sup>3</sup> Rafilson Decl. at ¶ 3.

1 Such a broad and generalized reference to more than 14,000 pages of materials in no way  
2 “identifies” any terms as indefinite but rather forces CyWee to guess which terms and  
3 invalidity arguments HTC “specifically” intended to disclose and rely upon. To make matters  
4 worse, HTC purported to incorporate infringement contentions from other cases *that have not*  
5 *even been served yet*. Rafilson Decl. at ¶ 3. This is improper and contravenes the purpose and  
6 spirit of the Local Patent Rules.

7 HTC’s argument is summed up as follows: CyWee and the Court should not focus solely  
8 on the 2,536 pages of invalidity contentions that HTC actually served in this case, but rather  
9 should assume that the more than 14,000 pages (so far) that have been served by four different  
10 parties in four other lawsuits are also fair game for HTC to rely upon (not to mention the fact  
11 that HTC’s argument requires CyWee to speculate as to contentions in other cases that have  
12 not even been served yet). This kind of blanket incorporation is fundamentally unfair, has no  
13 basis in the rules, and cannot possibly put CyWee on notice of HTC’s position, especially since  
14 HTC does not specify particular terms, references, or portions of the other parties’ invalidity  
15 contentions that it is relying on in this case. Consequently, HTC’s approach neither crystallizes  
16 nor adheres to the theories it actually disclosed in its invalidity contentions.

17 Further, HTC’s contentions constitute 2,536 pages. Given the length of HTC’s contentions,  
18 CyWee should reasonably be able to expect that HTC explicitly selected and identified terms it  
19 alleges are indefinite, and prior art it relies upon, in those contentions.

#### 20 **B. HTC’s Cited Caselaw is Distinguishable.**

21 The cases HTC cites in support of its incorporation by reference are inapposite because  
22 they deal with amending invalidity contentions and/or incorporation by reference of discrete  
23 and specific materials within the same case. *See e.g., PersonalWeb Techs. LLC v. Int’l Bus. Machs.*  
24 *Corp.*, No. 16-cv-01266-EJD (NC), slip op. (N.D. Cal. Jan. 19, 2017); *Adaptix, Inc. v. Apple Inc.*,  
25 No. 5:13-cv-01776-PSG, slip op. at 4-5 (N.D. Cal. Aug. 8, 2014). Unlike the defendant in  
26 *PersonalWeb Techs*, HTC has not attempted to amend its invalidity contentions. To the

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