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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

ACER, INC., ACER AMERICA CORPORATION and GATEWAY, INC.,

Plaintiffs,

v.

TECHNOLOGY PROPERTIES LIMITED, PATRIOT SCIENTIFIC CORPORATION, and ALLIACENSE LIMITED,

Defendants.

Case Nos. 5:08-cv-00877

DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION FOR LEAVE TO FILE SUR-REPLY IN SUPPORT OF THEIR OPPOSITION TO DEFENDANTS' MOTION FOR RECONSIDERATION OF CERTAIN ASPECTS OF CLAIM CONSTRUCTION

HTC CORPORATION and HTC AMERICA, INC.,

Plaintiffs,

v.

TECHNOLOGY PROPERTIES LIMITED, PATRIOT SCIENTIFIC CORPORATION and ALLIACENSE LIMITED,

Defendants.

Case No. 3:08-cv-00882 PSG

BARCO, N.V., Plaintiffs, v. TECHNOLOGY PROPERTIES LIMITED, PATRIOT SCIENTIFIC CORPORATION and ALLIACENSE LIMITED, Defendants.	Case No. 3:08-cv-05398 PSG

Plaintiffs' seek leave to file a sur-reply to address what they claim are "five pages of new argument." (D.I. 403 at 1.) Plaintiffs' should be denied for at least the following reasons:

First, Defendants' reply arguments were not new and provide no basis for a sur-reply. Plaintiffs claim that Defendants' arguments that the intrinsic record supports its original claim construction of the claim term DMA CPU are new, and that Defendants' are seeking to "relitigate the entire construction of DMA CPU." (*Id.*) However, Defendants' arguments are not new, and were squarely raised their opening reconsideration brief, which argued that "TPL's originally proffered claim construction of the term [DMA CPU] was correct in that it does not limit the construction of DMA CPU to only one of two disclosed microprocessor architecture embodiments (Figs. 2 and 9)." (D.I. 356 at 7.) Plaintiffs' claims that Defendants are seeking to "relitigate" issues are surprising in the context of a *motion for* ***reconsideration*** that on its face seeks reconsideration of the Court's initial ruling and unequivocally asks the Court to adopt Defendants' original construction. At a minimum, Plaintiffs' arguments regarding allegedly "relitigating" issues confirms that Defendants' argument is far from new. Plaintiffs had ample opportunity to attempt to rebut these previously raised arguments. No sur-reply is necessary.

Second, there is no basis to grant Plaintiffs the relief they request. This Court's rules do not generally permit sur-replies. Plaintiffs purport to base their motion on Local Rule 7-3(d)—the *sole authority* Plaintiffs cite in support of granting leave—but that rule only permits objections to reply evidence in certain circumstances and provides no basis for filing a sur-reply. Indeed, the cited Local Rule 7-3(d) would not even permit Plaintiffs to file an objection here because objections under that rule are only permitted "[i]f new evidence has been submitted in the reply." Plaintiffs do not even allege that to be the case here. On the contrary, Plaintiffs' claim only that Defendants submitted "five pages of new ***argument***." (D.I. 403 at 1, emphasis added.) There was no new evidence here. Indeed, as Plaintiffs themselves admit, the arguments in question are based on "the intrinsic record," and not on any "new" evidence. (*Id.*) There is no basis in this case for a sur-reply, or even an objection under Rule 7-3(d).

Third, Plaintiffs failed to meet and confer with Defendants about their anticipated motion for leave to file a sur-reply. Although this brief relates to claim construction, Plaintiffs failed to

engage in any meaningful meet-and-confer process with Defendants, as contemplated by this Court's Local Patent Rules regarding construction of claim terms. *See* Patent L.R. 4-1(b), 4-2(c). Instead, HTC's counsel made an after-hours call to Defendants' counsel at approximately 8:00 p.m. on Friday evening, November 16, and demanded an immediate response as to whether Defendants would oppose Plaintiffs motion for leave from the only attorney still at work. When the associate attorney contacted stated that he could not answer the question on the spot, HTC's counsel indicated that he would take that as an indication of Defendants' answer and filed Plaintiffs' motion for leave minutes later. A meaningful discussion of the issues could have potentially narrowed the issues and avoided an unnecessary dispute here, as contemplated by the Court's Local Patent Rules, without the need to burden the Court with Plaintiffs' baseless motion. The Court should deny Plaintiffs' motion on this additional basis.

Finally, Plaintiffs' substantive arguments also fail. Plaintiffs argue that the claimed DMA CPU could not possibly encompass a "DMA Controller," because Defendants' argument is contrary to the express claim language and reads out the term "CPU," and because Judge Ware's construction was correct. None of these arguments is correct. As Defendants' argued on reply, the DMA CPU term can only be understood in the context of the specification, which uses the terms "DMA CPU 314" and "DMA Controller 314" interchangeably. (*See* D.I. 369 at 11 citing '890 patent, 12:61-65; Fig. 9; 10:52; 13:3-4.) Hence, construing the claims to cover the second embodiment that involves "a more traditional DMA controller 314" is not an attempt to read out the term "CPU," but to correctly understand it in view of the patent specification. (*See id.*) Because Judge Ware's prior construction was based on a technical dictionary without taking into account the second embodiment where "DMA CPU 314" and "DMA Controller 314" are used interchangeably, the Court should grant Defendants' motion and change the construction.

In sum, ***just as Defendants argued in their opening brief*** in support of reconsideration, "TPL's originally proffered claim construction of the term – 'electrical circuit for reading and writing to memory that is separate from a main CPU' – was correct in that it does not limit the construction of DMA CPU to only one of the two disclosed microprocessor architecture embodiments (Firgs. 2 and 9)." (*See* D.I. 356 at 7.)

Dated: November 19, 2012

Respectfully submitted,

AGILITY IP LAW, LLP

By: /s/ James C. Otteson
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TECHNOLOGY PROPERTIES LIMITED
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