

1 THOMAS HR DENVER, ESQ. (56872)
 2 Mediation Masters
 3 96 North Third Street
 4 Suite 300
 5 San Jose, CA 95112
 6 Telephone: (408) 280-7883
 7 Facsimile: (408) 292-7868
 8 Special Master

8 IN THE UNITED STATES DISTRICT COURT
 9 FOR THE NORTHERN DISTRICT OF CALIFORNIA
 10 SAN FRANCISCO DIVISION

12 ACER INC., HTC CORP., BARCO NV,
 13 Plaintiffs,

14 vs.

15 TECHNOLOGY PROPERTIES, LTD. et al.,
 16 Defendants.

Case No: C-08-00877 JW
 C-08-00882 JW
 C-08-05398 JW

RECOMMENDED DISCOVERY ORDER
 NO. 2.

18 The motion by plaintiff, Barco, to strike portions of TPL's infringement contentions
 19 came on for hearing on February 24, 2012. Extensive briefing having been reviewed and
 20 oral argument heard it is ordered as follows:

21 The Motion is GRANTED, with leave to amend.

22 REASONS FOR ORDER

23 This Motion is, in essence, a follow on to Magistrate Judge Lloyd's 'Order Re:
 24 Discovery Dispute' (Doc. 223). In that Order Judge Lloyd found that: ".TPL must amend its
 25 ICs to either provide information concerning the products at issue or explain how and/or
 26 why information concerning any products not at issue is relevant to its ICs." (Order at Page
 27 7, Lines 11-14)
 28

1 Note that the motion deals with ICs regarding all three patents in suit, the 336, 749
2 and 890 patents.

3 In its amended infringement contentions, served on October 11, 2011, defendant,
4 TPL, has failed to meet the directive in Judge Lloyd's Order, *supra*. Despite TPL's
5 argument to the contrary, plaintiff, Barco, is not attempting to require that the ICs be "a
6 mechanism for resolving the *merits* of the party's dispute." Rather, Barco's motion relies on
7 the language of *Network Caching Tech., LLC v. Novell, Inc.* No. C-01-2079 VRW, 203 WL
8 21699799 (N.D. Cal. Mar. 21, 2003). The Court in *Network Caching* stated that:

9 "at this juncture [the contentions phase], a party may comply with
10 Patent L.R. 3-1 by setting forth particular theories of infringement with
11 sufficient specificity to provide defendants with notice of infringement
beyond that which is provided by the mere language of the patents
themselves."

12 This TPL has failed to do; its amended ICs do not conform with Patent L.R. 3-1 nor
13 the directive of *Network Caching, supra*.

14 In his Order (Doc. 223), Judge Lloyd made two basic findings. First, he found that
15 TPL's original ICs were not "too vague." Second, and relevant here, Judge Lloyd ruled as
16 follows:
17

18 "Barco is correct that some of TPL's ICs are based on material for other
19 products. For instance, TPL accuses Barco of infringement based on
20 its use of a DDP1011 chip but it relies upon a presentation about
21 DDP1000 chip and a datasheet for a CDCDLP223 chip in its ICs. ...
22 and, in so doing, TPL does not explain how or why information
23 concerning a DDP1000 chip or a CDCDLP223 chip is relevant to its
24 IC for a DDP1011. Perhaps information concerning these other two
25 chips is relevant or perhaps it is not; from TPL's ICs, the Court cannot
say. Thus to the extent that TPL's ICs rely upon information
concerning products not at issue in this litigation, TPL must amend its
ICs to either provide information concerning the products at issue or
explain how and/or why information concerning any products not at
issue is relevant to its ICs."

26 In making this Order, Judge Lloyd noted Barco's argument to him that TPL's ICs "rely
27 on published articles and chips other than the accused chips to allegedly show the claim
28

1 elements are found within the accused instrumentalities,” and that “in each case, TPL does
2 not and cannot show any relationship between the actual accused products and the
3 material referenced.” *DDJR No. 2 at 4*.

4 In its amended ICs, TPL has provided a significantly greater volume of information,
5 but no greater clarity, regarding the articles, other chips and unrelated products. It has not
6 met the burden of Judge Lloyd’s Order “to either provide information concerning the
7 products at issue or explain how and/or why information concerning any products not at
8 issue is relevant to its ICs.” (Doc. 223, Page 7, Lines 12-14).

9 In its opposition, TPL asserts that Barco had argued before Judge Lloyd that “TPL
10 has relied on publications or ‘the laws of physics and the state of the art’ without showing
11 any relationship of the publication or laws or ‘state of the art’ to any accused products.” TPL
12 then asserts that Judge Lloyd rejected this argument. TPL is wrong. Judge Lloyd
13 considered Barco’s argument and issued the Order cited above.

14 TPL’s Reliance on Publications: The publications and articles cited in TPL’s ICs deal
15 not with the accused products, but with more general information concerning the physics
16 involved, the manufacturing process and some discussion of “families” of chips. Nowhere
17 do the articles and publications concerned define what a chip “family” is. Further, the
18 language of the articles is general to a worrisome degree. For example, TPL states that its
19 expert, Dr. Oklobdzija ‘has already explained to Barco:

20
21
22
23 [That] Products within the same family *generally* have the
24 same structure *except for possibly some minor functional*
25 *enhancements* unrelated to clock generation which is one of
26 the basic implementational features that *usually* stay
27 unchanged. In this case, all of Texas Instruments’ DLP line of
28 processors come from the same product family, and I have
strong reason to believe that all DLP processors have the
same structure.” [Italics added]

1 In terms of the Patent Local Rule 3-1(c) requirements that ICs contain “a chart
2 identifying specifically where each limitation of each asserted claim is found within each
3 accused instrumentality,” this language is unhelpful. As stated by the Court in *InterTrust*
4 *Techs. Corp. v. Microsoft Corp.*, 2003 U.S. Dist. LEXIS 22736 at *8 (N.D. Cal. Nov. 26,
5 2003): “[The] Purpose of Patent Rule 3-1, however, is in fact to be nitpicky, to require a
6 plaintiff to crystallize its theory of the case and patent claims.” *Network Caching Tech, LLC*
7 *v. Novell Inc.*, 2002 WL 32126128 at *6 (N.D. Cal. August 13, 2002) requires a link
8 between quoted language and the infringement contention. Here, other than in the most
9 general terms, no such link is apparent. The same vice applies to the materials from
10 Zuchowski, Sundaresan and Fetzer, cited by TPL.

11 Unrelated Products: In its amended ICs, TPL refers to several non-Barco products
12 - a ViewSonic Multimedia Projector, a Texas Instruments Projector as described on a
13 Rambus website and a Toshiba Color Television. It is noted that the amended ICs here
14 under discussion were served in October of 2011. Since that time there has been
15 discovery and since the inception of this case, the accused Barco products have been
16 publicly available. Nevertheless, the ICs here in question rely upon the above-described
17 non-Barco products. It is not at all clear how this serves to identify specifically where each
18 limitation of each asserted claim is found within each accused instrumentality as required
19 by Patent L.R. 3-1(c).

20 As an example of the problems raised by TPL’s reliance on non-Barco products,
21 Barco notes that the ViewSonic Multimedia Projector uses a different chip than that
22 incorporated in the accused Barco product. TPL’s explanation for its reliance on the non-
23 Barco item is that the chips involved are from the same family, again without defining
24 “family.” This is not an argument about the merits, but rather an indication that the amended
25 ICs, where they rely on non-Barco products, do not give Barco sufficient notice of the
26 infringement claimed. TPL relies on non-Barco products, which incorporate chips not
27 included in the accused Barco products and relies on generalities about “families” of chips.
28 Judge Lloyd’s observation in his Order cited above:

1 [That] Perhaps information concerning these other two chips is
2 relevant, or perhaps it is not; from TPL's ICs, the Court cannot say."

3 remains valid in light of the amended ICs here under consideration. The ICs are not
4 adequate under the Patent Local Rules nor the relevant case law.

5 Leave To Amend: This District recognizes motions to strike as requests that
6 plaintiffs be compelled to amend their preliminary contentions to provide additional
7 information. *FusionArc, Inc. v. Solidus Networks, Inc.*, No. C 06-06760 RMW (RS), 2007
8 WL 1052900, at *1 & *2 (N. D. Cal. Apr. 5, 2007). Barco argues that the present ICs
9 should be stricken without leave to amend, but supplies nor argument no persuasive
10 authority for the proposition that that should happen here. **Accordingly, amended ICs**
11 **may be served within 20 days of the date that this Order becomes final.**

13 The ICs to be amended are as follows:

- 14 1. ICs for claims 1,6,11, and 13 for *all* eleven Barco products accused of infringing
15 the '336 patent
- 16 2. ICs for claims 1,6,9, 10, 11, 13, 15, and 16 for the following Barco projectors:
17 iCon H400 Projector, SIM 5R Projector, iCon H500 Projector, iCon H250 Projector, and ID
18 R600+ Projector
- 19 3. ICs relating to Barco's Media Axon Server for the following claims: 6, 10, 11, 13,
20 and 16
- 21 4. ICs for claims 1, 6, 9, 10, 11, 13, 15, 16 for the following Barco projectors: iCon
22 H400, SIM 5R, iCon H500, iCon H250, and ID R600+
- 23 5. Claims 1, 6, 9, 10, 11, 13, 15, and 16 for the RLM R6+ Projector
- 24 6. Claims 1, 6, 9, 10, 11, 13, 15, and 16 for the SLM R12+ Projector
- 25 7. Claim 54 for all five of the following Barco projectors: iCon, SIM 5R Projector,
26 iCon H500, iCon H250, and ID R600+
- 27
28

1 8. ICs for all five of the accused Barco projectors for claims 54 and 55: iCon H400,
2 SIM 5R, iCon H500, iCon H250, and ID R600+

3 9. ICs for claim 54 for the following Barco projectors: iCon H400, SIM 5R, iCon
4 H500, iCon H250, and ID R600+

5 10. ICs for claims 11, 12, 17, and 19 for all five of the following Barco projectors
6 accused of infringing the '890 patent: iCon H400, SIM 5R, iCon H500, iCon H250, and ID
7 R600+

8 11. ICs for claim 17 in all of the product reports for all five of the following
9 projectors accused of infringing the '890 patent: iCon H400, SIM 5R, iCon H500, iCon
10 H250, and ID R600+

11
12 The parties have ten days from the date of this Order to file any objection.

13
14
15 Dated: February 24, 2012

/s/ Thomas HR Denver
THOMAS HR DENVER