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15 INC. and SAMSUNG
TELECOMMUNICATIONS AMERICA, LLC

16 UNITED STATES DISTRICT COURT

17 NORTHERN DISTRICT OF CALIFORNIA, SAN JOSE DIVISION

18
19 APPLE INC., a California corporation,

20 Plaintiff,

21 vs.

22 SAMSUNG ELECTRONICS CO., LTD., a
23 Korean business entity; SAMSUNG
ELECTRONICS AMERICA, INC., a New
24 York corporation; SAMSUNG
TELECOMMUNICATIONS AMERICA,
25 LLC, a Delaware limited liability company,

26 Defendant.

CASE NO. 11-cv-01846-LHK

**SAMSUNG'S OPPOSITION TO APPLE'S
MOTION FOR LEAVE TO FILE A
SURREPLY TO SAMSUNG'S MOTION
FOR NEW TRIAL OR, ALTERNATIVELY,
FOR ENTRY OF JUDGMENT ON
LIABILITY**

PUBLIC REDACTED VERSION

Argument

Apple's request for leave to surreply to nearly every argument raised in Samsung's motion should be denied. Apple identifies no "new" arguments Samsung raised in its reply that were not responsive to arguments in Apple's opposition. Moreover, Apple does not raise any arguments that affect the outcome of Samsung's underlying motion.

I. APPLE SHOULD NOT BE PERMITTED TO SURREPLY TO SAMSUNG'S ARGUMENTS REGARDING THE TIMELINESS OF SAMSUNG'S MOTION

Despite peppering its proposed surreply with purported characterizations of Samsung's reply arguments as being "new" or having been raised "for the first time" on reply, in fact each of Samsung's reply arguments was *responsive to arguments Apple raised in its opposition brief*, and thus was appropriate for a reply brief and do not justify a surreply. *See, e.g., Thornton v. Cates*, 2013 WL 2902846, *1 (E.D. Cal. June 13, 2013) (striking plaintiff's surreply "because Defendants did not raise any new arguments in their reply brief, and Plaintiff did not provide any reason that his arguments could not have been made in his opposition to the motion for summary judgment.")

In its motion, Samsung moved under Rule 59 for a new trial on liability as to Apple's claims on the '381 patent in light of newly discovered evidence, or, alternatively, for entry of judgment on liability that would permit an immediate appeal to the Federal Circuit under 28 U.S.C. § 1292(c). In its opposition, Apple argued that both requests were untimely.¹ On reply, Samsung responded to Apple's timeliness arguments by explaining that (1) Samsung's Rule 59 motion is timely because any filing deadlines triggered by the August 24, 2012 judgment were vacated when the Court granted Samsung's earlier motion for new trial (Reply at 2-3); and (2) Samsung's alternative request for entry of judgment on liability is timely because the August 24 judgment was not appealable under 28 U.S.C. § 1292(c) and, in any event, because that judgment was vacated in light of the post-trial rulings (*id.* at 13-14). Unremarkably, Samsung cited authorities in support of its timeliness arguments. None of this was "new" or unfair to Apple. It was simply the proper use of a reply brief.

Moreover, Apple's reliance on Samsung's purported "omission" of the full title of a docket

¹ To the extent Apple felt it had a viable timeliness challenge to Samsung's motion, it was Apple's obligation to raise that challenge in its opposition brief. *See Eberhart v. United States*, 546 U.S. 12, 18 (2005) ("failure to object to untimely submissions entails forfeiture of the objection"); *Lizardo v.*

1 entry from *Robert Bosch* does not support authorizing Apple’s proposed surreply. As an initial matter,
2 a surreply is not warranted because Apple already provided the full title of that docket entry in its
3 opposition brief. *See* Opp. 18 n.5 (citing *Robert Bosch* Dkt. 396, “Final Judgment Following Post
4 Trial Motion Practice Pursuant to Fed. R. Civ. P. 54(b)”). In any event, the title of the docket entry is
5 not the salient issue; rather, the docket entry is relevant because, as the Federal Circuit recognized, it
6 rendered judgment final on all liability issues (but not damages), thus permitting an appeal under
7 Section 1292(c)(2). *See Robert Bosch LLC v. Pylon Manuf. Corp.*, __ F.3d __, 2013 WL2664281
8 (Fed. Cir. June 14, 2013) (“Following a jury trial on liability and motions for judgment as a matter of
9 law, the district court entered judgment on the liability issues.”).

10 Here, the August 24 judgment (the only judgment that has been entered in this case) pertained
11 to both liability *and* damages, and thus, as Samsung has explained (Reply at 13-14), that judgment—
12 unlike the judgments in *Robert Bosch*—was not appealable under Section 1292(c)(2). Entry of a new
13 judgment on liability only (as Samsung seeks here) is therefore necessary before an appeal can lie
14 under Section 1292(c)(2) and the clock can begin to run on the time to file that appeal. This is so
15 regardless of whether the Court was required to enter an amended judgment following resolution of
16 post-trial motions. Apple’s opportunistic use of Samsung’s inadvertent omission of the full title of the
17 Rule 54(b) judgment in *Robert Bosch* thus should be rejected, as it has no effect on the outcome of
18 this motion, and cannot justify the expansive surreply Apple seeks to file.

19 Finally, none of Apple’s arguments or authorities offered in its proposed surreply shows that
20 either of Samsung’s requests is untimely. In particular, Apple still cannot muster a single case holding
21 that the August 24 judgment remains viable following the Court’s order granting a new trial. Apple
22 fails to explain why the principle articulated in *Allegheny Cty. v. Maryland Cas. Co.*, 132 F.2d 894,
23 896 (3d Cir. 1943), and *Ford Motor Co. v. Busam Motor Sales*, 185 F.2d 531, 533-34 (6th Cir.
24 1950)—that an order granting new trial necessarily vacates a judgment entered on the jury’s verdict—
25 does not apply with equal force in the Rule 59 context. Contrary to Apple’s suggestion, neither
26 *Allegheny* nor *Ford* is limited to Section 1291—a statute that neither decision even cites. And the fact
27 that an appellate court, not a district court, ordered a new trial in *SK hynix Inc. v. Rambus Inc.*, 2013
28 WL 1915865, at *13 (N.D. Cal. May 8, 2013), had no bearing on the court’s conclusion that a Rule 59

1 motion filed more than 28 days after a judgment that has been vacated is timely. In any event, Apple
 2 already has conceded that the Court may consider Samsung's new trial motion under Rule 60
 3 regardless of whether it is timely under Rule 59. Opp. 3 n. 1 (conceding that the "Court could choose
 4 to treat Samsung's untimely Rule 59 motion as a motion under Rule 60(b)(2)").

5 In sum, because Apple's proposed surreply does not respond to any new arguments introduced
 6 in reply and Apple's arguments in any event fail on the merits, Apple's request to file a surreply
 7 should be denied.

8 **II. APPLE SHOULD NOT BE PERMITTED TO SURREPLY TO SAMSUNG'S**
 9 **ARGUMENTS REGARDING THE MERITS OF ITS MOTION**

10 Before Apple filed its opposition, it had never presented any infringement theory for the
 11 Gallery, Browser or Contacts applications under the new interpretation of claim 19. Samsung's Reply
 12 and the van Dam Reply declaration addressed Apple's new infringement arguments as permitted by
 13 the Local Rules.² Consequently, Apple's complaints that Samsung's Reply and the accompanying
 14 declaration were improper are without merit. Nevertheless, as explained below, Apple's new surreply
 15 arguments on the merits confirm that Samsung should be granted a new trial on the '381 patent.

16 **A. Apple Now Acknowledges That Claim 19 Was Narrowed Through**
 17 **Reexamination**

18 Apple's surreply abandons the argument that Apple did not narrow claim 19 during
 19 reexamination. Apple now claims that Samsung should have been aware of Apple's new claim
 20 construction position because Dr. Balakrishnan's expert report and trial testimony suggested "that
 21 computer instructions and edge detection **might** be relevant to claim 19." (Surreply at 9) (emphasis
 22 added). Thus, Apple concedes that the narrow claim construction it advanced before the PTO was not
 23 a requirement of claim 19 at the time of trial. Apple also does not dispute that Dr. Balakrishnan took
 24 opposite claim construction positions when arguing infringement and validity during the preliminary
 25 injunction phase, in his expert report and during trial. (Reply at 7-9.) *See Amazon.com, Inc.*
 26 *v. Barnesandnoble.com, Inc.*, 239 F.3d 1343, 1351 (Fed. Cir. 2001) (citations omitted) ("A patent may
 not, like a 'nose of wax,' be twisted one way to avoid anticipation and another to find infringement.").

27 ² Civil L.R. 7-11(c) ("Any reply to an opposition may include affidavits or declarations, as well as a
 28 supplemental brief or memorandum under Civil L.R. 7-4.")

1 In short, Samsung cannot be faulted for not advancing non-infringement arguments based on a claim
2 construction that even Apple concedes did not exist at the time of trial.

3 **B. The Jury Would Have Found Non-Infringement of the '381 Patent As**
4 **Confirmed By Dr. Balakrishnan's Surreply Declaration**

5 Apple does not dispute that the infringement opinions in Dr. Balakrishnan's first declaration
6 were conclusory and should be stricken. (Reply at 10-12.) Instead, Apple tries to rehabilitate Dr.
7 Balakrishnan by submitting a brand new surreply declaration from him. As explained below, Dr.
8 Balakrishnan's new declaration fares no better than his first and leads to only one conclusion – the
9 accused computer instructions perform centering, not edge detection.

10 **Gallery Application.** Both experts agree that [REDACTED]
11 [REDACTED] for the Gallery application under new
12 claim 19. In his surreply declaration, Dr. Balakrishnan addresses for the first time how [REDACTED]
13 [REDACTED]. Dr. Balakrishnan did not present this analysis much less
14 mention [REDACTED] in his expert report or during trial. Yet this function is
15 now central to his infringement argument for new claim 19.

16 Dr. Balakrishnan agrees with Dr. van Dam [REDACTED]
17 [REDACTED]

18 [REDACTED] But Dr. Balakrishnan then ignores that fact and simply concludes that the
19 computer instructions are [REDACTED]
20 [REDACTED]. Dr. Balakrishnan's conclusion is incorrect. As Dr.
21 van Dam explained, [REDACTED] [REDACTED] (van Dam Decl. ¶¶ 31-38;
22 van Dam Reply Decl. ¶¶ 5-8.)

23 Indeed, Dr. Balakrishnan's conclusion is completely undermined by Dr. van Dam's video
24 showing a slightly zoomed image being centered in the Gallery application. (van Dam Reply Decl.
25 Ex. 1.) Dr. Balakrishnan does not dispute that the image in this video is being centered and that the
26 computer instructions that cause this to occur perform centering, not edge alignment. However, he
27 claims this video is "irrelevant" because it is not the scenario Apple demonstrated at trial.
28 (Balakrishnan Surreply Decl. ¶¶ 9-10.) To the contrary, this video is extremely relevant because the

1 same computer instructions are used to realign the images in the allegedly infringing scenarios Dr.
2 Balakrishnan presented at trial and Dr. van Dam’s video, and Dr. van Dam’s video clearly shows that
3 [REDACTED]. Consequently, this video is undisputed proof that [REDACTED]

4 [REDACTED]

5 **Browser Application.** Both experts agree that [REDACTED]
6 [REDACTED] relevant to the infringement analysis of the Browser application under new claim 19.³ As
7 with the Gallery code, Dr. Balakrishnan now concedes that the relevant [REDACTED]

8 [REDACTED]

9 [REDACTED]

10 [REDACTED] Once again, Dr. Balakrishnan simply ignores the function of the relevant instructions and
11 provides a conclusory opinion [REDACTED] (Balakrishnan

12 Surreply Decl. ¶¶ 9.) Dr. Balakrishnan’s analysis is incorrect. As the code itself states, [REDACTED]

13 [REDACTED] (van Dam Decl. ¶¶ 39-47; van Dam Reply Decl. ¶¶ 9-

14 14.)

15 **Contacts Application:** Apple and its expert still fail to identify any instructions that meet the
16 requirements of new claim 19 for the Contacts application. Thus, a new trial should be granted with
17 respect to all products accused of infringing the Contacts Application. (Reply at 13.)

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27 ³ Apple makes much of Samsung’s prior discussion of the doFling() method. Samsung initially
28 focused on this code because Apple had not identified the code it accused of infringing under its new
and narrower interpretation of claim 19.

1 DATED: August 9, 2013

Respectfully submitted,

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