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Samsung Research America, Inc.

12 UNITED STATES DISTRICT COURT  
13 NORTHERN DISTRICT OF CALIFORNIA  
14 SAN FRANCISCO DIVISION

15 HUAWEI TECHNOLOGIES CO., LTD., et al.,

16 Plaintiffs,

17 v.

18 SAMSUNG ELECTRONICS CO., LTD., et al.,

19 Defendants.

20  
21 SAMSUNG ELECTRONICS CO., LTD. &  
SAMSUNG ELECTRONICS AMERICA, INC.

22 Counterclaim-Plaintiffs,

23 v.

24 HUAWEI TECHNOLOGIES CO., LTD.,  
25 HUAWEI DEVICE USA, INC., HUAWEI  
TECHNOLOGIES USA, INC., & HISILICON  
26 TECHNOLOGIES CO., LTD.

27 Counterclaim-Defendants.  
28

CASE NO. 16-cv-02787-WHO

**SAMSUNG'S OBJECTION TO  
HUAWEI'S REPLY EVIDENCE OR,  
IN THE ALTERNATIVE, FOR  
LEAVE TO FILE A SUR-REPLY TO  
HUAWEI'S REPLY IN SUPPORT OF  
ITS MOTION TO STRIKE THE  
JURY DEMAND FOR SAMSUNG'S  
BREACH OF CONTRACT  
COUNTERCLAIM**

**Hearing Date: February 13, 2019  
Time: 2:00 p.m.  
Place: Courtroom 2, 17th Floor  
Judge: Hon. William H. Orrick**

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1 **I. INTRODUCTION**

2 Samsung requests that pursuant to N.D. Cal. Civ. Local Rule 7-3 (D)(1) the Court strike  
3 from Huawei's Reply in Support of Its Motion to Strike the Jury Demand for Samsung's Breach of  
4 Contract Counterclaim ("Reply") the following improper portions of the brief and supporting  
5 materials:

- 6 • The third paragraph of § II.A.2 of the Reply (Dkt. 443 at 8:12-9:5);
- 7 • § II.B of the Reply (Dkt. 443 at 9:24-11:9);
- 8 • Ex. 6 to the Reply Greenblatt Declaration (Dkt. 443-2);
- 9 • ¶¶ 4, 6, n.7 of the Raynard Reply Declaration (Dkt. 443-3 at 2:23-3:8, 4:9-20, 5:27-28);
- 10 • Exs. A - E to the Raynard Reply Declaration (Dkt. 443-4; 443-5; 443-6; 443-7; 443-8).

11 In the alternative, Samsung requests that the Court grant leave for Samsung to file its sur-reply  
12 (attached hereto as Exhibit 1) addressing these specific portions of Huawei's reply submissions.

13 **II. BACKGROUND**

14 On January 7, 2017, Huawei filed a Motion to Strike the Jury Demand for Samsung's Breach  
15 of Contract Counterclaim ("Motion"), Dkt. 434, along with a declaration from Professor Raynard  
16 ("Raynard Declaration") and supporting exhibits. On January 22, 2019, Samsung filed an  
17 Opposition ("Opposition"), Dkt. 439, and supported its rebuttal arguments with a declaration from  
18 Professor Jean-Sebastian Borghetti ("Borghetti Declaration"). On January 29, 2019, Huawei filed  
19 a Reply, Dkt. 443, that presented new evidence, raised new arguments, and submitted a further  
20 declaration from Professor Raynard ("Raynard Reply Declaration") offering new opinions on the  
21 new evidence and arguments. For example, Huawei's Reply raised the new arguments that "French  
22 law requires that breach of contract damages be an 'immediate and direct consequence of the non-  
23 performance' of the contract," *id.* at 8, "U.S. federal procedural law governs an award of expert fees  
24 (as opposed to attorneys' fees) as such an award is considered strictly procedural for *Erie* doctrine  
25 purposes," *id.* at 2, and that "expert fees can only be reimbursed pursuant to Article 700 of the  
26 French Code of Civil Procedure," *id.* at 13 (citing Raynard Reply Decl. ¶ 6).

27  
28

1 **III. ARGUMENT**

2 The Court should strike the new evidence and arguments that Huawei presented for the first  
3 time in its Reply or, in the alternative, grant Samsung leave to file a sur-reply to address the new  
4 evidence and arguments. Civ. L. R. 7-3(D)(1); *see Dutta v. State Farm Mut. Auto. Ins. Co.*, 895  
5 F.3d 1166, 1171 (9th Cir. 2018) (“The [Northern] district court’s Rule 7-3(d) provides the aggrieved  
6 party with the opportunity to object to the district court’s consideration of the newly submitted  
7 evidence or to request leave to file a sur-reply opposition to it.”); *see also Kolker v. VNUS Med.*  
8 *Techs.*, No. C 10-00900 SBA, 2012 WL 161266, at \*6 (N.D. Cal. Jan. 17, 2012) (“It is improper for  
9 a moving party to introduce in a reply brief new facts or different legal arguments than those  
10 presented in the moving papers.”) (internal citations removed); *see also In re Rains*, 428 F.3d 893,  
11 902 (9th Cir. 2005) (affirming the district court’s decision to not address an argument that was only  
12 raised in the reply brief).

13 **A. The Court Should Strike Huawei’s New Reply Evidence and the Arguments**  
14 **Based On It Because Huawei Could Have, But Chose Not To, Present Them In**  
15 **Support of Its Motion.**

16 Where, as here, the party bearing the burden (Huawei) fails to support its motion with  
17 evidence and argument that it later offers only on reply, the Court should strike the new evidence  
18 and argument. In *Single Touch Interactive, Inc. v. Zoove Corp.*, the Court refused to consider an  
19 expert declaration that was “new evidence offered for the first time on reply” in ruling on the motion  
20 at issue. No. 12-CV-831 YGR, 2013 WL 3802805, at \*1 (N.D. Cal. July 17, 2013). Similarly, in  
21 *In re Flash Memory Antitrust Litig.*, noting that “the Court does not consider new arguments or  
22 evidence presented for first time in a reply,” the Court refused to consider Plaintiff’s expert reply  
23 declaration where the new evidence submitted fell within the Plaintiff’s initial burden on the issue  
24 and the Court concluded “such evidence should have been proffered with Plaintiffs’ moving papers  
25 in order to afford Defendants a full and fair opportunity to respond.” No. C 07-0086 SBA, 2010  
26 WL 2332081, at \*15 (N.D. Cal. June 9, 2010).

27 The Court should take a similar approach here with respect to Huawei’s new evidence and  
28 arguments. First, the Court should strike the new argument in the Reply regarding the alleged  
consequences of the “immediate and direct” causation requirement of French law. *See Reply at 8-*

1 9. Huawei effectively acknowledges this is a new argument by tying it to a statement in a textbook.  
2 *See id.* at 8 (quoting Dkt. 443-2 at 225). Huawei devoted a significant portion of its Motion and  
3 accompanying exhibits to issues of French law, but failed to present this evidence, or even to raise  
4 this argument, until its Reply. *See generally* Mot. at 9-10, Raynard Decl., Dkt. 434-4. This new  
5 evidence and argument should be stricken.

6 Second, the Court should strike Huawei's new contentions that any and all claims for  
7 experts' fees, even when, as here, they are caused by a breach of contract, are nevertheless always  
8 and exclusively procedural under the *Erie* doctrine. See Reply at 9-11. This is a new legal argument  
9 that "should have been proffered" with Huawei's moving papers. *In re Flash Memory Antitrust*  
10 *Litig.*, 2010 WL 2332081, at \*15.

11 Huawei cannot justify its failure to make these arguments in its Motion. Huawei cannot  
12 credibly argue that it was unaware of Samsung's contention that certain expert fees are recoverable  
13 as damages caused by Huawei's breach of FRAND, and throughout its Motion, Huawei **explicitly**  
14 **acknowledged** that Samsung told Huawei it would claim litigation costs as damages for the breach  
15 of contract counterclaim. *See, e.g.*, Mot. at 3-4 ("Samsung ... stated that the damages included  
16 'litigation costs and other business costs'; "'Samsung has suffered injury including but not limited  
17 to substantial litigation costs'; "'Samsung's injury ... is comprised of the cost of multiple  
18 litigations, attorneys' fees, and the experts' fees.'"). But Huawei chose to focus the arguments in  
19 its opening brief on attorneys' fees. Huawei does not dispute this exclusive focus on Reply, but  
20 instead points to two statements in the original Raynard Declaration addressing both litigation costs  
21 and attorney fees, identifying no argument in its brief at all. *See* Reply at 11.

22 Huawei cannot have it both ways. It could have argued in its Motion that breach of contract  
23 damages must be immediate and direct under French law or that litigation costs, such as experts'  
24 fees, are exclusively covered by federal procedural rules under the *Erie* doctrine. Instead, it chose  
25 to focus on the attorneys' fees argument. The Court should strike the new arguments. *See Kolker*,  
26 2012 WL 161266, at \*6 (declining to consider a new summary judgment contention raised in a reply  
27 brief); *Nuvo Research Inc. v. McGrath*, No. C 11-4006 SBA, 2012 WL 1965870, at \*5 (N.D. Cal.  
28 May 31, 2012) (declining to consider a new motion to dismiss argument raised in a reply brief).

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