

In the United States Court of Federal Claims

SCIENCE APPLICATIONS
INTERNATIONAL CORP.,

Plaintiff,

v.

THE UNITED STATES,

Defendant,

and

MICROSOFT CORPORATION,

Intervenor-Defendant,

and

L3 TECHNOLOGIES, INC.,

Third-Party Defendant.

No. 17-cv-825

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Stephen R. Smith, Cooley LLP, Washington, D.C. for Plaintiff. With him on the briefs were *DeAnna D. Allen*, Cooley LLP, Washington, D.C.; *Douglas P. Lobel*, Cooley LLP, Reston, Virginia; and *Gwendolyn Tawresey*, Troutman Pepper Hamilton Sanders LLP, Washington, D.C.

Alex Hanna, United States Department of Justice, Civil Division, Washington, D.C. for Defendant. With him on the briefs were *Brian M. Boynton*, Principal Deputy Assistant Attorney General, Washington, D.C.; *Gary L. Hausken*, United States Department of Justice, Civil Division, Washington, D.C.; *Scott Bolden*, United States Department of Justice, Civil Division, Washington, D.C.; and *Hayley A. Dunn*, United States Department of Justice, Civil Division, Washington, D.C.

Thomas L. Halkowski, Fish & Richardson P.C., Washington, D.C. for Intervenor-Defendant. With him on the briefs were *Ahmed J. Davis*, Fish & Richardson P.C., Washington, D.C.; *Kenton W.*

¹ This Memorandum and Order was filed under seal in accordance with the Protective Order entered in this case (ECF No. 34) and was publicly reissued after incorporating all redactions proposed by the parties. (ECF No. 328.) The sealed and public versions of this Memorandum and Order are otherwise identical, except for the publication date and this footnote.

Freeman, Jr., Fish & Richardson P.C., Washington, D.C.; and *Tracea L. Rice*, Fish & Richardson P.C., Washington, D.C.

William C. Bergmann, Baker & Hostetler LLP, Washington, D.C. for Third-Party Defendant. With him on the briefs were *Charles C. Carson*, Baker & Hostetler LLP, Washington, D.C.; and *Cassandra Simmons*, Baker & Hostetler LLP, Washington, D.C.

MEMORANDUM AND ORDER

Pending before the Court are dueling motions for varying levels of sanctions, brought pursuant to Rule 37 of the Rules of the United States Court of Federal Claims (Rules). First, Plaintiff Science Applications International Corporation (Plaintiff or SAIC) filed a Combined Motion for Sanctions Pursuant to Rule 37 and Partial Motion to Strike Invalidity Contentions against Defendant the United States (the Government), Intervenor-Defendant Microsoft Corporation (Microsoft), and Third-Party Defendant L3 Technologies, Inc. (L3) (collectively, Defendants). ECF No. 289 (Pl.'s Mot. or Combined Motion). Specifically, Plaintiff seeks sanctions pursuant to Rules 37(d) and 16(f) in its Combined Motion, urging the Court to (i) preclude the Government and L3 from introducing evidence concerning the qualification of non-patent references as prior art, and (ii) strike obviousness defenses and certain indefiniteness theories from Defendants' Final Invalidity Contentions. *See id.*; ECF No. 314 (Pl.'s Reply). In response to Plaintiff's Combined Motion, Defendants lodged a Cross-Motion to Exclude Plaintiff's Undisclosed Damages Theory, pursuant to Rule 37. ECF No. 308 (Defs.' Resp.). Defendants urge the Court to impose the Rule 37(c) sanction of exclusion to preclude any evidence pertaining to Plaintiff's damages theory from consideration during future proceedings. *See id.*; ECF No. 319 (Defs.' Reply).

For the reasons explained below, Plaintiff’s Motion for Sanctions Pursuant to Rule 37 is **DENIED**, Plaintiff’s Partial Motion to Strike Invalidity Contentions is **DENIED**, and Defendants’ Rule 37 Cross-Motion to Exclude Plaintiff’s Undisclosed Damages Theory is **DENIED**.

BACKGROUND

This action has a lengthy history, familiarity with which is presumed.² *See, e.g., Sci. Applications Int’l Corp. v. United States*, 135 Fed. Cl. 661 (2018); *Sci. Applications Int’l Corp. v. United States*, 154 Fed. Cl. 594 (2021); *Sci. Applications Int’l Corp. v. United States*, 156 Fed. Cl. 486 (2021); *Sci. Applications Int’l Corp. v. United States*, 161 Fed. Cl. 373 (2022); *Sci. Applications Int’l Corp. v. United States*, 162 Fed. Cl. 213 (2022). A background summary pertinent to the current motions follows.

Plaintiff alleges the Government infringed Plaintiff’s patent, U.S. Patent No. 9,229,230 (the ’230 patent), related to a heads-up display for night vision goggle weapons systems “by entering into contracts with Plaintiff’s competitors for the manufacture and subsequent use of night vision goggle weapon systems with specialized heads up displays that allegedly use Plaintiff’s patented technology.” *Sci. Applications Int’l Corp. v. United States*, 148 Fed. Cl. 268, 269 (2020). The following claim elements are common to the ’230 patent’s claims³:

- (a) receive video images from the first video source and from the second video source,
- (b) receive motion data indicative of motion of the first and second video sources,

² Since its inception in June 2017, this action has been reassigned four times to different judges. *See Sci. Applications Int’l Corp. v. United States*, 148 Fed. Cl. 268, 270 (2020); *see also* ECF No. 25 (Notice of Reassignment, dated April 5, 2018); ECF No. 68 (Notice of Reassignment, dated June 21, 2019); ECF No. 85 (Notice of Reassignment, dated July 23, 2019); ECF No. 113 (Notice of Reassignment to undersigned judge, dated February 27, 2020).

³ Independent claims 15 and 29 — method and computer-readable medium claims, respectively — rephrase steps (a)–(e) as gerunds. *See* ’230 patent at 26:27–47 (Claim 15), 28:16–38 (Claim 29).

(c) identify, based on the received motion data, a part of a first video source image that potentially represents a portion of the external environment represented in a part of a second video source image;

(d) evaluate, based on a comparison of data from the first and second video source images, the identification performed in operation (c); and

(e) display at least a portion of the first video source image and at least a portion of the second video source image such that the second video source image portion overlays a corresponding region of the first video source image portion, wherein the corresponding region represents a portion of the external environment represented in the second video source portion.

'230 patent at 24:25–51 (Claim 1), 26:27–30:42 (Claims 15–41).

I. Plaintiff's Motion for Rule 37 Sanctions

A. Interrogatory No. 18

Plaintiff moves to sanction the Government and L3 pursuant to Rule 37(d)(1)(A)(ii) for allegedly deficient responses to Plaintiff's Interrogatory No. 18. Pl.'s Mot. at 15.⁴ On February 18, 2022, Plaintiff served Interrogatory No. 18 on the Government, and subsequently, on March 31, 2022, served the same Interrogatory No. 18 on L3. Pl.'s Mot. at 7; Pl.'s Mot., Exhibit 1 (ECF No. 289-1); Pl.'s Mot., Exhibit 4 (ECF No. 289-4). Plaintiff did not serve Interrogatory No. 18 on Microsoft. *See* Pl.'s Mot. at 8 n.3. Specifically, in its Motion, Plaintiff seeks the exclusion of "all evidence that the Government or L3 would offer or benefit from to qualify non-patent references as prior art because they refused to respond to Plaintiff's Interrogatory No. 18." Pl.'s Mot. at 15.

Plaintiff's Interrogatory No. 18 states:

For each non-patent reference (e.g., non-patent literature or system art) that You contend is prior art that invalidates any asserted claim of any Asserted Patent alone or in combination with other prior art and that is included in Your Preliminary Election of Asserted Prior Art (or any revision or amendment thereof) and/or that You intend to rely upon in any dispositive motion or at trial, identify all factual and legal bases for Your contention that the reference qualifies as prior art under any subsection of 35 U.S.C. § 102. A complete response should state the subsections

⁴ Citations throughout this Memorandum and Order reference the ECF-assigned page numbers, which do not always correspond to the pagination within the document.

of 35 U.S.C. § 102 under which the reference allegedly qualifies as prior art, identify all evidence supporting your contention that the reference qualifies as prior art under any subsection of 35 U.S.C. § 102, state the critical dates on which the reference was first known, used, offered for sale, sold, publicly used, or made in this country, and the identity and knowledge of each Person who possesses knowledge regarding the reference's qualification as prior art.

Id. at 7–8.

On March 21, 2022, the Government served its objections and response to Interrogatory No. 18. Pl.'s Mot., Exhibit 1 (ECF No. 289-1). The Government's objections were multiple:

The government objects to this Interrogatory to the extent it imposes an obligation on the government to respond with information that does not relate to the only remaining asserted U.S. Pat. No. 9,229,230. The government objects to this Interrogatory to the extent it seeks to impose on the government obligations that are not required by or inconsistent with the Scheduling Order, the Rules of the Court of Federal Claims, the Patent Rules of the Court of Federal Claims, or any other Order in this case. The government further objects to this Interrogatory as vague and ambiguous, particularly in its use of the phrase “non-patent reference (e.g., non-patent literature or system art)” that the Army “contend[s] is prior art that invalidates any asserted claim of any Asserted Patent alone or in combination with other prior art”. The government further objects to this Interrogatory as expressly calling for a legal conclusion, including as to any “non-patent reference (e.g., non-patent literature or system art)” that the Army “contend[s] is prior art that invalidates any asserted claim of any Asserted Patent alone or in combination with other prior art”, and as to “all . . . legal bases for [the Army's] contention that the reference qualifies as prior art”. The government further objects to this interrogatory to the extent it calls for the government to speculate as to its future “inten[t]”, or disclosure its work-product, vis-à-vis what the government will “rely upon in any dispositive motion or at trial[.]” The government also objects to this Interrogatory as containing multiple subparts, being unduly prolix, unduly complex and violating [Rules] 33(a)(1) & (2).

Pl.'s Mot., Exhibit 1 (ECF 289-1) at 22.

In addition to its objections, the Government's response to Interrogatory No. 18 stated:

The government will disclose its invalidity contentions in accordance with the Rules and Orders of this Court. In accordance with the Court's Scheduling Order, the government has served its initial and revised listing of prior art and invalidity claim charts, as well as a preliminary election of asserted prior art (dated November 1, 2021). The government hereby incorporates by reference as if fully set forth herein any identified prior art and invalidity contentions that have been served or will be served by Microsoft and/or L3. To the extent the government understands this Interrogatory, the government will serve final invalidity contentions, which are

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