

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

SILICON GRAPHICS, INC.,

Plaintiff,

v.

ATI TECHNOLOGIES, INC.,
ATI TECHNOLOGIES ULC and
ADVANCED MICRO DEVICES,

Defendants.

ORDER

06-cv-611-bbc

Plaintiff Silicon Graphics, Inc. has moved to strike both the new expert opinions of Drs. Potel and Wolfe on the issues of invalidity and unenforceability filed by defendants ATI Technologies, Inc., ATI Technologies ULC and Advanced Micro Devices, and the new witness on invalidity just named by defendants. The request will be granted, as will defendants' motion to file a sur-reply brief. Defendants' motion to strike plaintiff's reply brief will be denied.

In a ruling on certain threshold issues raised by the parties, I held that the parties could supplement their expert reports only on those matters changed by the court of appeals' ruling. Dkt. #726. Defendants read this holding as allowing them to add new expert

opinions on previously available but uncited prior art and other issues of invalidity all relating to prior art. They argue that new discovery and expert reports are necessary because the court of appeals changed the construction of “a rasterization process which operates on a floating point format,” but they fail to acknowledge that the construction did not change in a way that has any effect on the discovery they undertook prior to the trial in 2007.

The determinative factor is that the “governing” claim construction of rasterization process for trial purposes was not determined until days before trial. In the interim, defendants argued vigorously for the construction that the court of appeals later determined was the correct one. Thus, they had no reason not to gather evidence to challenge the invalidity of that construction, as they themselves pointed out in the parties’ joint pretrial conference report, dkt. #693, filed on November 5, 2010:

Supplements to technical expert reports should not be allowed if the supplemental opinions could have been developed and disclosed during the prior proceedings. For example, AMD does not agree that SGI should be allowed to supplement its technical expert reports in order to address the Federal Circuit’s construction of “a rasterization process which operates on a floating point format.” This Court did not construe that phrase until its summary judgment Order after all expert reports were served, and SGI’s existing technical expert reports apply the construction that the Federal Circuit now has adopted.

Id. at 17. Sauce for the goose; sauce for the gander.

The record and the parties’ admissions show why this case is not like Johns Hopkins University v. CellPro, 152 F.3d 1342 (Fed. Cir. 1998). In CellPro, the court of appeals

found that the district court had erred in not allowing defendant CellPro to add new evidence on obviousness at summary judgment, when the need for such evidence did not arise until after a first trial on the merits had been set aside by the court. In that case, the new post trial construction “changed the rules of the game.” Id. at 1357. No such change occurred here, so it is unnecessary for either side to add new opinions or new experts on the rasterization process. To avoid any further need for clarification, I will make it explicit that this ruling applies to Open GL and plaintiff’s alleged failure to disclose the ‘327 patent to that organization. The parties are not limited with respect to the new construction of claim term “s10e5.”

ORDER

IT IS ORDERED that the motion of defendants ATI Technologies, Inc., ATI Technologies ULC and Advanced Micro Devices to strike the reply brief filed by plaintiff Silicon Graphics, Inc. in support of its motion to strike is DENIED; defendants’ motion to file a sur-reply brief is GRANTED.

FURTHER, IT IS ORDERED that plaintiff’s motion to strike the new expert reports of Drs. Potel and Wolfe and to strike newly disclosed witness Eric Hoffert is GRANTED so

far as those reports and witness relate to the rasterization process.

Entered this 10th day of March, 2011.

BY THE COURT:

/s/

BARBARA B. CRABB

District Judge