IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
MARSHALL DIVISION

NINGDE AMPEREX TECHNOLOGY LIMITED, Plaintiff, v. ZHUHAI COSMX BATTERY CO., LTD., Defendant.	Civil Action No.: 2:24-cv-0728-JRG Honorable Judge Gilstrap Jury Trial Demanded

JOINT MOTION FOR ENTRY OF PROTECTIVE ORDER

Pursuant to the Court's Order dated December 10, 2024 (Dkt. No. 18), Plaintiff Ningde Amperex Technology Limited and Defendant Zhuhai CosMX Battery Co., Ltd. have met and conferred and hereby file this Joint Motion for Entry of Protective Order.

The parties have one dispute, which concerns the entry of provisions relating to the use of materials produced in an earlier litigation between the two parties in this Court, *Ningde Amperex Technology Limited v. Zhuhai CosMX Battery Co., Ltd.*, Case No. 2:22-CV-0232-JRG (the "232 Action"). Defendant submits that the parties should be permitted to use such materials in this case. Plaintiff disagrees that cross-use is appropriate and therefore opposes. Defendant's proposed additions related to cross-use are reflected in Sections 2, 5(e), and 7 of the attached Protective Order.

The parties provide their respective positions regarding Defendant's proposed additions to the Protective Order below.

Defendant's position.

Allowing use of materials produced in the earlier litigation would promote efficiency given the substantial overlap in terms of the technology and products at issue in this action. In 232 Action, ATL accused hundreds of CosMX's battery cells, separators, and electrolytes of infringing a number of patents, three of which proceeded to trial, U.S. Patent Nos. 10,833,363, 10,694,987, and 10,329,352. In this case, ATL has accused CosMX of infringing six patents, also relating to battery cells, separators, and electrolytes. And ATL appears to accuse some of the same products now. In its LPR 3-1 infringement contentions, ATL identified only three cells that it accuses of infringement, and two out of those three cells were accused of infringement in 232 Action. Moreover:

- Two presently asserted patents (U.S. Patent Nos. 11,769,910 and 11,799,131) are related to the earlier-asserted '363 patent. In ATL's infringement contentions in this case, ATL charted one CosMX battery cell against the '910 and '131 patents. The jury found that this cell infringed the claims of the '363 patent, but also found that the '363 patent was invalid over certain prior art products, which will be at issue again.
- Two presently asserted patents (11,575,148, and 10,964,927) relate to the separator technology. And the presently asserted '927 patent and earlier asserted '987 patent issued on the same date. In ATL's infringement contentions in this case, ATL charted a single cell against each of the '148 and '927 patents. A jury found that the same CosMX cell that ATL now accuses of infringing the '148 patent infringed the '987 patent. ATL points out that the '987 patent related to the separators' "Dv90" particle size rather than the deformation characteristics

claimed in the ’927, but ignores that the ’148 patent is also related to the “Dv90” particle size.

Given the related patents and overlap in technical subject matter and accused products, a substantial amount of the discovery that will need to be conducted in this case was likely already conducted in the 232 Action. This includes discovery relating to (1) technical aspects of the accused products, (2) evidence of prior art products, including technical workings and public availability, and (3) evidence relevant to reconstructing the hypothetical negotiation, given that the ’927 patent shares the same hypothetical negotiation date as the earlier-asserted ’987 patent.

CosMX understands that ATL believes that efficiency will not be undermined by requiring all discovery to start from scratch because CosMX is likely to have already collected documents from the relevant witnesses and repositories and it’s therefore “only” a matter of re-reviewing them. But this (1) acknowledges the substantial overlap between the claims and defenses across the two proceedings, (2) creates unnecessary delay and “make work” to re-review and re-produce a voluminous number of documents, and (3) risks creating unnecessary disputes about re-production of already-produced materials relating to similar patents, technology, accused products, and prior art.

ATL’s concern with “use” of irrelevant prior discovery is difficult to understand. It if is truly irrelevant to either parties’ claims and defenses in this case, then it is difficult to see how it could be “used” in this case. If the discovery materials in the prior litigation are *relevant,* then they would presumably be produced in this case anyway. This Court has previously been “persuaded” that “discovery cross-use will reduce the risk of any duplicative discovery between” two separate proceedings. *SiOnyx, LLC .v. Samsung Elecs., Co.*, 2024 WL 4007808 at *4 (E.D. Tex. Aug. 30, 2024). In *SiOnyx*, the patents at issue were related—much like the currently

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asserted '910 and '131 patents are related to the previously asserted '363—and even though the "claims of these patents are not identical" and "[t]here are several divergent issues between the[] actions," including an incomplete overlap of accused products, cross-use was still an effective tool to minimize duplicative discovery. *Id.* *Cf. also Broadcom Corp. v. Qualcomm inc.*, 2005 WL 8161480 at *1 fn. 1 (C.D. Cal. Aug. 16, 2005) (inviting a motion for a cross-use agreement to minimize duplicative discovery even where the patents were unrelated).

ATL's other cases are inapt. In *Adaptix*, the plaintiff sought to introduce millions of pages of document after fact and expert discovery had closed and dispositive motions had been filed, finding lack of diligence alone warranted denial. *Adaptix, Inc. v. AT&T Mobility, LLC*, 2015 WL 12849143, at *2 (E.D. Tex. Mar. 11, 2015). ATL also cites cases that pertain to consolidation. But this issue is not about consolidation, given that the cases are not proceeding in parallel. Discovery—as it is here—may still be duplicative and cross-use warranted even if the legal claims do not warrant consolidation. *See Westinghouse Air Brake Techs. Corp. v. Siemens Mobility, Inc.*, 330 F.R.D. 143, 150 n. 5 (D. Del. Jan. 29, 2019) (severing antitrust and patent claims but advising that the court expected cross use discovery to apply between the severed actions). And unlike *Qualcomm Inc. v. Apple Inc.*, No. 317CV02398DMSMDD, 2019 WL 4284531, at *2 (S.D. Cal. Mar. 27, 2019), CosMX has actually articulated overlapping issues between the two cases.

CosMX also understands that ATL objects to the use of prior materials because of the voluminous nature of materials that are no longer relevant to the parties' current claims based on concerns about expert witnesses having access to those irrelevant materials. But allowing the use of prior discovery materials does not bear on the admissibility of those materials, and there is no prejudice or harm in the parties' outside counsel having access to materials that it will be

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maintaining access to *anyway* from the 232 Action. Moreover, any expert witnesses permitted to view the opposing parties' confidential information will be bound by the Protective Order, as they were, and remain, in the 232 Action. Defendant's proposed additions to sections 2 and 5(e) are meant to clarify in view of section 7 that experts who continue to receive confidential information as part of this case will be bound by all of same confidentiality obligations imposed under this and the prior protective order.

Plaintiff's position. Plaintiff opposes Defendant's request for cross-use of materials produced in *Ningde Amperex Technology Ltd. v. Zhuhai CosMX Battery Co. Ltd., et al.*, No. 2:22-CV-0232-JRG, Dkt. No. 60 (E.D. Tex. Dec. 12, 2022) (the "232 Action"). CosMX offers no authority supporting its position that broader discovery produced in one litigation, where different causes of action were litigated and different patents were at issue, should automatically be deemed relevant and part of the record in a distinct second litigation. Such a rule would be untenable and prejudicial.

First, this case and the 232 Action are far from being mirror images of each other as suggested by CosMX. While the two actions both involve lithium ion batteries, the accused features at issue are substantially different, as shown in the claim charts attached to the operative complaints and infringement contentions in both actions. *See Adaptix, Inc. v. AT&T Mobility, LLC*, No. 6:12-CV-17, 2015 WL 12849143, at *2 (E.D. Tex. Mar. 11, 2015) (denying post-discovery motion for cross-use of materials from related litigations accusing different products where "discovery in each action d[id] not entirely overlap"). CosMX's broad generalization that "[t]wo presently asserted patents (11,575,148, and 10,964,927) relate to the separator technology" is misleading. While both the '927 patent asserted here and the '987 patent from the 232 Action are generally related to the separator—a key and necessary component within the lithium-ion

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battery—the claims of the two patents are directed to entirely different features of the separator. For example, while the '987 patent focuses on the Dv90 of the inorganic particles divided by the thickness of the porous layer, the asserted claims of the '927 patent focus on the absolute plastic deformation rate of the porous substrate of the separator. Even where the patents asserted here are related to patents in the 232 Action, the claims asserted in this action have additional elements not present in the asserted claims of the 232 Action.

This Court has denied consolidation of actions between the same parties, an analogous situation because it requires that the cases share " a common question of law or fact," where "[t]he accused products across the two cases are different" despite common issues, because "common issues do not mandate consolidation." *Network Sys. Techs., LLC v. Samsung Elecs. Co.*, No. 2:22-CV-00481-JRG, 2023 WL 4534358, at *3 (E.D. Tex. July 13, 2023). Indeed, even when two cases "[we]re both pending in the same court, both involve all but one of the same parties, and both allege that the same device…infringes patents," this Court has denied consolidation because "the two cases involve different patents, different claims, and different aspects of the accused [] device." *Dynaenergetics Eur. GmbH v. Hunting Titan, Inc.*, No. CV H-17-3784, 2021 WL 3022435, at *5 (S.D. Tex. July 15, 2021). Shared discovery records are therefore inappropriate here, where the patents-at-issue present distinct technical issues. Moreover, the two actions implicate different relevant periods, such that the accused products are necessarily non-overlapping—the earliest issued patent asserted here is March 30, 2021, and any discovery from the 232 Action regarding accused products that have not been sold after this date is entirely irrelevant here. Likewise, this action will implicate accused products that are newly released after the jury verdict in the 232 Action.

More importantly, in the 232 Action CosMX asserted counterclaims for antitrust violations (attempted monopolization and conspiracy to monopolize), violations of California's Unfair Business Competition Law, attempted extortion under the Texas Theft Liability Act, attempted civil extortion under California Law, and inequitable conduct as to patents not at issue here. *See* 2:22-CV-0232-JRG, Dkt. No. 149 (Aug. 28, 2023) (ATL's Answer to Third Amended Counterclaims). ATL produced both written and oral discovery related to these counterclaims in the 232 Action that has no relevance to this case and that if used here could prejudice ATL, which was exonerated of such claims by the jury in the 232 Action. CosMX has not alleged any analogous claims in this case. There simply is no reason to complicate the discovery record here when any relevant materials form the 232 Action can be produced on an *ad hoc* basis as necessary. *See Qualcomm Inc. v. Apple Inc.*, No. 317CV02398DMSMDD, 2019 WL 4284531, at *2 (S.D. Cal. Mar. 27, 2019) (denying discovery request for all documents from co-pending litigations between parties because "[t]he relevance of all the discovery produced in the other 3 cases is not apparent.").

Second, CosMX's proposed additions to the Protective Order introduce ambiguity that will lead to avoidable discovery disputes. *See Saxon Innovations, LLC v. Nokia Corp.*, No. 6:07-CV-490, 2008 WL 11346472, at *3 (E.D. Tex. Aug. 18, 2008) (denying motion to modify default protective order because "[t]he Court sees no reason to complicate the order with a highly contested, ambiguous, and unnecessary provision."). For example, CosMX's proposed addition to Section 7 states: "The Parties agree that any materials disclosed or produced in the 232 Action may be used in this case, and any confidentiality designations afforded such materials will be treated as if designated pursuant to the terms of this Order." This language raises significant questions, and even suggests that written discovery responses, expert reports, deposition

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transcripts, or any other materials disclosed in the 232 Action would be fair game and could be "used in this case." They should not be. Different patents and substantive issues (as discussed above) were at issue, and allowing for cross-use would muddy and obfuscate the discovery record here while prejudicing ATL. Further, deposition testimony related to CosMX's unfair business practices and antitrust claims has no role in this litigation. It would be unfair and highly prejudicial to allow a flood of material from the 232 Action to play a role here when the issues there were materially different than those presented in this case.

Third, in the 232 Action, CosMX produced large numbers of duplicate and irrelevant documents. ATL had to expend significant resources reviewing these documents (which are almost all in Chinese) and hosting them on its electronic review database. ATL hopes to avoid similar discovery issues here, but will be denied that opportunity if forced to engage in cross-use. If CosMX does engage in similar tactics here, ATL reserves the right to seek reimbursement for such costs.

Fourth, and finally, cross-use will not lead to any added efficiency. There is no burden on CosMX to produce the subset of documents from the 232 Action that CosMX believes are also relevant in this case. Allowing CosMX to merely point to documents produced in the 232 Action, instead of undertaking the effort to identify what is and is not relevant to this case, is not fair and sets the parties up for discovery motion practice. ATL currently asserts different patents presenting different substantive technical issues, and a simple "copy and paste" from the 232 Action will not suffice. The Court can short circuit these potential issues by denying CosMX's request for cross-use.

* * *

Accordingly, the parties respectfully request that the Court resolve their dispute concerning the use of materials produced in the 232 Action, and enter the Proposed Protective Order, attached hereto, with or without the proposed additions related to cross-use.

DATED: February 11, 2025

Respectfully submitted,

By: */s/ Michael D. Powell*

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that, on February 11, 2025, all counsel of record who are deemed to have consented to electronic service are being served with a copy of this document via the Court's CM/ECF system per Local Rule CV-5(a)(3).

/s/ Michael D. Powell

CERTIFICATE OF CONFERENCE

The undersigned hereby certifies that counsel for Plaintiff has met and conferred with counsel for Defendant, and both Parties have agreed to the proposed order submitted herewith.

/s/ Michael D. Powell