IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
WACO DIVISION

DEMARAY LLC, Plaintiff, v. SAMSUNG ELECTRONICS CO., LTD. (A KOREAN COMPANY), SAMSUNG ELECTRONICS AMERICA, INC., and SAMSUNG AUSTIN SEMICONDUCTOR LLC, Defendants.	CASE NO. 6:20-cv-00636-ADA [redacted] **PUBLIC REDACTED VERSION**

SAMSUNG'S MOTION FOR EXCEPTIONAL CASE AND ATTORNEY FEES

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I. INTRODUCTION

Demaray's conduct makes this case "exceptional," such that fees should be awarded. Demaray engaged in exceptional misconduct throughout this litigation, including at trial. Demaray repeatedly changed its infringement theories, accused a myriad of products only to drop most before trial, and presented a staggering $4 billion damages demand that Demaray knew was not legally supported to the jury. Indeed, the fact that Demaray maintained its damages demand at trial for one accused product (Cirrus) even after failing to adduce additional apportionment evidence—something Demaray was clearly notified it would need to do at the dispositive motions hearing before trial—confirms the objectively unreasonable nature of that demand. And Demaray failed to present any damages theory at all for the other accused product (Avenir).

Compounding these issues, at trial, Demaray repeatedly engaged in misconduct designed to mislead the jury and distract from the exceptionally weak facts of its case. As one example of its trial misconduct, Demaray's corporate representative Brian Marcucci inaccurately testified that Samsung never responded to his settlement outreach, to improperly cast Samsung as a patent holdout and going as far as referring to that inaccurate suggestion as a "power move" by Samsung, clearly in an effort to sway the jury's emotions. As another example, in a move the Court called "inappropriate" and found to be without evidentiary support, [redacted]. When Samsung was allowed to re-call a witness to testify to the truth behind the document, Demaray did not ask a single question on the merits, but instead falsely accused Applied Materials of having been criminally indicted. Demaray's trial conduct in that moment was so prejudicial that the Court offered Samsung the option of requesting a mistrial.

Samsung and its manufacturer-indemnitor Applied Materials have spent nearly four years, and over $25 million in legal fees defending against Demaray's baseless litigation claims.

Although Demaray's exceptional conduct manifested early in this case, Samsung only requests fees relating to the final phase of this case, in the final four months leading up to and through trial, in the amount of $6,765,208.40. That is less than a third of the total fees paid and is necessary to deter the conduct exemplified by Demaray's improper litigation tactics.

II. LEGAL STANDARD

Courts may award reasonable attorneys' fees to the prevailing party in "exceptional cases." 35 U.S.C. § 285. "[A]n 'exceptional' case is simply one that stands out from others with respect to the substantive strength of a party's litigation position (considering both the governing law and the facts of the case) or the unreasonable manner in which the case was litigated." *Octane Fitness, LLC v. ICON Health & Fitness, Inc.*, 572 U.S. 545, 554 (2014). "District courts may determine whether a case is 'exceptional' in the case-by-case exercise of their discretion, considering the totality of the circumstances." *Id.* Courts may consider such factors as "frivolousness, motivation, objective unreasonableness (both in the factual and legal components of the case) and the need in particular circumstances to advance considerations of compensation and deterrence." *Id.* n.6. A case may be exceptional where the losing party engages in "an overall vexatious litigation strategy and numerous instances of litigation misconduct." *Monolithic Power Sys., Inc. v. O2 Micro Int'l Ltd.*, 726 F.3d 1359, 1367 (Fed. Cir. 2013).

III. ARGUMENT

As set forth above, it has taken nearly four years and tens of millions of dollars to defend against Demaray's meritless (and ever-changing) infringement and damages theories. Indeed, despite losing a decisive jury verdict on the issue of infringement, Demaray presses on undeterred, choosing to file a slew of post-trial motions, including to defend some of the same improper trial conduct discussed in this motion. Nevertheless, Samsung is limiting its request for fees relating to activity leading up to and through trial in this case. [redacted]

[redacted] Yet Demaray chose to proceed to trial where it presented its flawed damages theory for Cirrus, presented no damages case at all for Avenir, and used highly improper trial tactics to mask the weaknesses in its liability and damages case.[1] Samsung was then forced to spend its limited trial time unwinding Demaray's many incorrect assertions to the jury, which included that (1) Samsung never responded to Demaray on settlement, in "some type of power move"; (2) the case had nothing to do with Applied Materials, the manufacturer of the actual products accused of infringement; (3) [redacted]); (4) Applied Materials was criminally indicted; and [redacted]. Demaray chose to spin these prejudicial statements rather than litigate the merits of its claims. Demaray's conduct renders this case exceptional and an award of fees is appropriate.

A. Demaray's Misconduct Renders This Case Exceptional

1. Demaray Knowingly Presented a Flawed Technical Apportionment Case at Trial Regarding Cirrus and No Damages Case at All for Avenir

After years of litigation, Demaray's trial strategy to present a knowingly flawed damages case for Cirrus seeking over $4 billion in damages and no damages case at all for Avenir renders this case exceptional. Samsung flagged the critical problems with Demaray's technical apportionment theory in its November 21, 2023, *Daubert* motions. *See* Dkt. 382 at 4–11. Demaray's experts, Drs. Jacob and Giapis, failed to properly apportion the features of the Accused

[1] As one example of Demaray's weak liability case, at trial, Demaray's own technical expert, Dr. Giapis, ***admitted*** that the DC power supply in Cirrus is ***not*** a pulsed DC power supply. *See* Trial Tr. at 463:1–10.

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Chambers to determine the value allegedly attributable to the patented invention. *See id.* [redacted]

Despite the Court's admonition, at trial Demaray did not present evidence of proper technical apportionment for Cirrus and remarkably, presented no damages case at all for Avenir. With regard to Cirrus, Demaray's damages expert Dr. Sullivan admitted that the 15.9% technical apportionment number that he used to calculate his over $4 billion damages demand came from Dr. Jacob. Trial Tr. at 650:12–651:6. But Dr. Jacob's testimony made clear that he did not account for patented versus unpatented features—he admitted that he did not analyze the asserted patent claims or even know which claims were asserted. *Id.* at 530:22–531:2. He further testified that he did not identify how the asserted claim requirements of a pulsed DC power supply, an RF bias power supply, or a narrow band-rejection filter provided performance improvements. *Id.* at 532:1–10; *see also id.* at 533:11–14. ("Q. And when it comes to the chambers at issue in this case, you treated them as a – like a black box? A. Exactly. Yes."). Demaray attempted to have Dr. Giapis

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backfill this obvious gap but was unable to do so since Dr. Jacob admitted that Dr. Giapis never explained to him how the Cirrus chamber worked or what specific components may or may not practice the asserted patents. *Id.* at 535:17–536:17. Dr. Sullivan also admitted he relied only on Dr. Jacob for his technical apportionment number, not Dr. Giapis. *Id.* at 650:12–651:6. And while Demaray attempted to introduce conclusory statements about apportionment, Samsung's objections to those attempts were sustained. *Id.* at 441:23–444:23. And yet, Demaray pressed forward with its unsupported $4 billion damages claim.

And as to Avenir, Demaray's conduct was even more egregious. Despite asserting infringement of Avenir and having its two damages experts opine on damages for Avenir in their expert reports, Demaray chose not to present the jury with any damages number for Avenir at all. *Id.* at 1183:8–11. After being pressed on this issue by the Court, Demaray's counsel finally admitted that there "was no expert who said, here's my final number for [processors which are made using Avenir], and it is equivalent to X millions of dollars." *Id.* at 1361:2–7. Demaray stated it would present Avenir damages in closing arguments, but that never happened either. *Id.* at 1361:81. Instead, Demaray presented its Cirrus damages number as its total damages demand, while implying that Avenir somehow supported it. *Id.* at 1376:8–15 (arguing that it is the same Cirrus and Avenir chambers at issue in this case as were at issue in Intel); *id.* at 1381:15–17 (arguing that the jury heard testimony about Avenir infringement); *id.* at 1382:15–17 (telling the jury that damages are just over $4 billion).

Demaray's failure to apportion between allegedly infringing and non-infringing features for Cirrus and failure to put on evidence of damages for Avenir supports a finding that this case is exceptional. In *Eko Brands, LLC v. Adrian Rivera Maynex Enterprises, Inc.*, the Federal Circuit affirmed an award of fees where a summary judgment motion of obviousness was denied based

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on the plaintiff's expert's explanations of non-obviousness which, while questionable, created disputed issues of fact, but where at trial, the plaintiff failed to prove the primary indicators of non-obviousness and did not bother to show secondary factors of non-obviousness. 946 F.3d 1367, 1375–76 (Fed. Cir. 2020). [redacted]

But it failed to do so for Cirrus and did not even try for Avenir—in hopes that the jury would overlook those omissions and slap Samsung with a whopping multi-billion-dollar award. *Id.* As another example, the court in *Finjan, Inc. v. Juniper Network, Inv.*, found the case exceptional as to the assertion of a patent at trial where the plaintiff tried to sneak in a new damages theory on the eve of trial to "inflate the target revenue base" and then, once that theory was excluded, attempted to present a fact-based damages case that "utterly failed", including because it failed to "allocate the target revenue base between allegedly infringing product functions and non-infringing functions". No. C 17-05659 WHA, 2021 WL 75735, at *2 (N.D. Cal. Jan. 9, 2021). There, the court noted that "the expired patent could not support an injunction. So the whole song and dance came to nothing, even before the jury later rejected the merits of the infringement claim." *Id.* Likewise, here, Demaray knew it could not properly "allocate . . . between allegedly infringing product functions and noninfringing functions" for its Cirrus damages claim and failed to do so at trial; and for Avenir, Demaray forced the parties to go through the "whole song and dance" of a trial on liability when it ***did not even try*** to prove damages for its expired patents. Demaray chose to waste the parties', jury's, and Court's time for nothing. Demaray's "entire assertion of the [asserted patents] thus stood out as exceptional." *Id.*

2. Demaray Made Numerous Inaccurate and Inappropriate Statements at Trial

Another basis for finding this case exceptional is Demaray's decision to make numerous inappropriate statements to the jury in an effort to prejudice Samsung and detract from the weaknesses in Demaray's case. As detailed below, Demaray's misconduct included its corporate representative's inaccurate testimony, [redacted], inaccurate accusations that Applied was criminally indicted, and [redacted]. In response, Samsung was forced to spend material amounts of its limited trial time addressing these issues. These numerous instances of litigation misconduct support a finding of exceptionality. *See Monolithic Power Sys., Inc.*, 726 F.3d at 1367 (affirming finding of exceptionality where counsel repeatedly misrepresented facts and elicited false testimony); *Raniere v. Microsoft Corp.*, No. 3:15-CV-0540-M, 2016 WL 4626584, at *5 (N.D. Tex. Sept. 2, 2016), *aff'd*, 887 F.3d 1298 (Fed. Cir. 2018) (finding case exceptional where the plaintiff's misconduct, namely making false and misleading representations, required the defendants to expend significant resources to oppose those false representations); *see also Gilead Sciences, Inc. v. Merck & Co., Inc.*, No. 13-cv-04057-BLF, 2016 WL 3143943, at * 32 (N.D. Cal. June 16, 2016) (*Gilead Sciences I*) (finding Merck guilty of unclean hands where it engaged in unconscionable acts, including sponsoring fabricated deposition testimony and false trial testimony); *Gilead Sciences, Inc. v. Merck & Co., Inc.*, No. 13-cv-04057-BLF, 2016 WL 4242216, at * 2 (N.D. Cal. Aug. 11, 2016) (*Gilead Sciences II*) (holding that the same unconscionable acts supported finding the case exceptional).

a. <u>Sponsoring Inaccurate Testimony</u>

Demaray sponsored inaccurate testimony from its corporate representative, Mr. Marcucci. On direct examination, Mr. Marcucci inaccurately testified that Samsung never responded to Demaray regarding settlement, to improperly portray Samsung as a patent holdout. Trial Tr. at

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215:24–216:8 ("Q. And did Samsung ever obtain a license to Demaray's patents? A. No. They did not. I reached out to Samsung right after this case was filed. ***They didn't respond.*** They didn't allow to us have a meaningful discussion with them. ***Maybe it's some type of power move that sometimes works for them, but to me it was quite surprising and unusual in my experience.*** They left us little choice, and we're here at trial today and the rest of the week.").[2] Mr. Marcucci further attempted to contrast Samsung's purported lack of response with [redacted]. *Id.* at 216:15–217:8. Samsung's corporate representative, Mr. Eddie Maxwell, had to respond to correct this inaccurate testimony. *Id.* at 1111:25–1112:18 ("Q. And was it true when Mr. Marcucci told the jury that Samsung did not respond to his reachout [*sic*]? A. No, sir. That is false."); [redacted]

Mr. Marcucci also incorrectly testified that the case had nothing to do with Applied Materials. *Id.* at 259:21–260:7 ("Q. Can you explain what is accused in this case? A. Well, what's accused is Samsung infringing the Demaray patents by using technology – the Demaray patented technology to manufacture their chips. That is my memory of what's accused in the complaint. ***It has nothing to do with Applied Materials . . . This is about chips manufactured by Samsung, not chambers made by Applied Materials as far as what's accused of infringement.***"). Yet extensive evidence, including from Demaray's own experts, confirmed that this statement was clearly incorrect. [redacted] Demaray's expert Dr. Giapis similarly testified that the accused reactors were designed and made by Applied Materials. *Id.* at 448:6–452:24. Demaray's sponsorship of

[2] All emphases added unless otherwise noted.

inaccurate testimony from its own witness further supports finding this case exceptional. *See Monolithic Power Sys., Inc.*, 726 F.3d at 1367; *Raniere*, 2016 WL 4626584, at *5, *aff'd*, 887 F.3d 1298.

b. Baseless and Inaccurate Accusations Against Applied Materials

During the cross-examination of Samsung's witnesses, Demaray made baseless and inaccurate accusations against Applied Materials, including by [redacted]

First, [redacted]. Demaray strategically waited until the fact witnesses from Applied Materials had already finished testifying to raise this meritless suggestion, presumably knowing that if they had been asked, Applied Materials' witnesses would have revealed the inaccurate nature of Demaray's suggestion. Instead, during the cross-examination of Samsung's technical expert, Dr. John Bravman, [redacted]. *See, e.g.*, Trial Tr. at 1004:6–1005:25. [redacted] *Id.* at 1006:6–9. [redacted] *Id.* at 1006: 11–14. [redacted] *Id.* at 1006:22–24.

There is no question Demaray's highly inflammatory suggestions that Applied [redacted]

[redacted] to avoid a finding of infringement had no support. As the Court noted, there was no evidence that [redacted]. *Id.* at 1037:22–1038:2 ("THE COURT: I was shocked that you didn't object that. ***There's no evidence that – that your client did that***. I was surprised you didn't say anything. Mr. Chu said that's what you all did, but ***there's no evidence that you did that***."). Indeed, the Court explicitly recognized the inappropriate nature of this aspect of Demaray's cross-examination of Dr. Bravman, which necessitated an additional direct examination of Applied Materials' engineer, Mr. Carl Johnson. *Id.* at 1038:6–15 ("THE COURT: I'm going to permit -- given Mr. Chu's question, I'm going to -- if – I'm going to permit your witness to testify and -- and explain it. ***I thought the question was inappropriate the way it was framed*** and it -- [redacted] And if you have a witness that is going to show that that's not correct, I'm going to allow you to put that person on.").

Second, after Samsung was forced to re-call Mr. Johnson to address [redacted], Demaray doubled down on its inappropriate attacks against Applied Materials. Instead of asking Mr. Johnson a single question about [redacted] Demaray instead inaccurately suggested that Applied Materials had been criminally indicted in a matter that bore no relationship to anything in this case:

> Q. Now I'd like to start where you stopped. You said that you believe that Applied Materials is an honest company with integrity, correct?
>
> A. Yes, sir.
>
> Q. Now, that's not quite true. ***You're aware that in November of last year, Applied Materials was indicted in a criminal*** –
>
> Ms. Li: Your Honor, objection –
>
> THE COURT: Approach the bench.

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Id. at 1085:19–1086:2. This inaccurate and irrelevant suggestion risked permanently skewing the results of the trial. Recognizing the serious nature of this false allegation, the Court took a short recess, stating, "[w]hen we come back out, I'll talk to the defendants about what they want to do with respect to considering a mistrial." *Id.* at 1086:9–14. Rather than requesting a mistrial, Samsung requested that the Court read a jury instruction regarding the inaccurate statement, which the Court later did. *Id.* at 1086:24–1089:5; Dkt. 507 ("***You may have heard a question asked by Demaray LLC's counsel*** this morning suggesting that Applied Materials was criminally indicted. ***That suggestion was false***. I instruct you to disregard the improper suggestion made by Demaray LLC's counsel and to not consider it in any way in your deliberations."). Demaray's counsel did not ask any further questions of Mr. Johnson. Trial Tr. at 1089:21–22. Demaray's "false" and "improper" suggestion to the jury, to deride Applied Materials by inaccurately suggesting that Applied Materials had engaged in misconduct, further supports finding this case exceptional. *See Monolithic Power Sys., Inc.*, 726 F.3d at 1367.

c. [redacted]

[redacted]

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[redacted]

[redacted]

B. Samsung's Requested Attorney Fees Are Reasonable

Samsung seeks a total of $6,765,208.40 in reasonable attorneys' fees in connection with its pretrial and trial work in this case. Federal Circuit law applies to requests for attorneys' fees under § 285. *See Bywaters v. United States*, 670 F.3d 1221, 1227–28 (Fed. Cir. 2012). The Federal Circuit employs the "lodestar" method for calculating attorneys' fees. *See Lumen View Tech. LLC v. Findthebest.com, Inc.*, 811 F.3d 479, 483 (Fed. Cir. 2016). The lodestar method "provides a presumptively reasonable fee amount . . . by multiplying a reasonable hourly rate by the reasonable number of hours required to litigate a comparable case." *Id.* To determine the lodestar, the court should consider the tasks performed by each lawyer, the billing rate of each lawyer, and the time spent by each lawyer. *See Blackbird Tech LLC v. Health In Motion LLC*, 944 F.3d 910, 918 (Fed. Cir. 2019).

The number of attorneys and hours included in Samsung's request are reasonable in view of the size and complexity of this case and were necessary to defend Samsung against Demaray's patent litigation claims, particularly in light of Demaray's trial misconduct. Samsung seeks compensation for 20 attorneys who spent a total of 4,748.3 hours preparing for and conducting the trial from November 1, 2023 through February 16, 2024, and 6 paralegals who spent a total of 1,681.2 hours over that same period. Samsung is only seeking compensation for a fraction of the total fees incurred to date: despite this dispute lasting nearly four years and costing over $25 million in fees, Samsung is only seeking compensation for 20 attorneys and six paralegals for the four-month period leading up to and including the trial. Indeed, other cases of similar scope have been found to support larger teams, hours, and total fees. *See, e.g.*, *Takeda Chem. Indus., Ltd. v. Mylan Labs., Inc.*, 549 F.3d 1381, 1391 (Fed. Cir. 2008) (affirming an award of $16.8 million in litigation that lasted two years and required nine days of trial).

Samsung's attorney hours are also justified, particularly in light of the number of issues which required pre-trial briefing (e.g. Samsung's *Daubert* motion on damages issues), the fact that this case was complex, with multiple different accused products with differing infringement theories, numerous fact and expert witnesses, and a $4 billion damages claim. The litany of improper tactics Demaray deployed throughout the case, described above, multiplied proceedings and drove up Samsung's legal expenses.[3]

[redacted] Samsung has used the industry average rates in the [redacted], [redacted]

[3] In addition to the extensive litigation misconduct detailed above, Demaray engaged in vexatious tactics throughout the litigation, including ever-changing infringement theories which resulted in thirteen supplemental/amended infringement contentions, adding and dropping accused products numerous times in the months leading up to trial, over 30 discovery motions, and over 70 depositions.

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[redacted]. [redacted]. Lotfollahi Decl. ¶¶ 4, 6, 9. These rates—[redacted]—are reasonable for a matter of this magnitude, with multiple accused products and liability theories involving complex technology, over 70 depositions, over 90,000 produced documents, and one of the largest patent damages demands in history (if not the largest) and are consistent with those of comparable attorneys at similar firms. Samsung seeks compensation for 20 attorneys who spent a total of 4,748.3 hours preparing for and conducting the trial from November 2023 through February 16, 2024, and 6 paralegals who spent a total of 1,681.2 hours over that same period.

The rates claimed are reasonable and consistent with the market rates for similar services provided in the legal community. Courts often use the rates set forth in [redacted] database to determine attorney fee awards. *See, e.g.*, *View Eng'g, Inc. v. Robotic Vision Sys., Inc.*, 208 F.3d 981, 987 (Fed. Cir. 2000) (using economic survey as evidence of reasonable fees and awarding fees based on rates shown in survey); *Mathis v. Spears*, 857 F.2d 749, 755–56 (Fed. Cir. 1988) (reliance on industry surveys is proper). The [redacted], when combined with the reasonable hours and skill level of the attorneys required for this case, provides a reasonable amount of fees. A detailed accounting showing the biller, description of services rendered, hours expended, and the applicable [redacted] rate is provided chronologically in the Declaration of Sharre Lotfollahi filed herewith.

IV. CONCLUSION

Samsung respectfully requests that the Court find this case exceptional, and grant Samsung its reasonable pretrial and trial fees of $6,765,208.40.

Dated: April 26, 2024

Respectfully submitted,

/s/ Sharre Lotfollahi

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