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

ERICSSON INC. AND TELEFONAKTIEBOLAGET LM ERICSSON, Plaintiff, vs. SAMSUNG ELECTRONICS CO. LTD., SAMSUNG ELECTRONICS AMERICA, INC., AND SAMSUNG RESEARCH AMERICA Defendants	**Civil Action No. 2:20-cv-380-JRG**

SAMSUNG'S OPPOSITION TO MOTION OF THE HONORABLE PAUL R. MICHEL (RET.) FOR LEAVE TO FILE AMICUS CURIAE BRIEF SUPPORTING ERICSSON'S APPLICATION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

Samsung opposes the motion of the Honorable Paul R. Michel, Ret. ("Movant") for leave to file an amicus brief (Dkt. 28). The timing is prejudicial to Samsung, as Samsung's only brief regarding Ericsson's motion for preliminary injunction was filed on January 1 at 5:00 pm. Movant did not provide notice to Samsung until after that filing, and the timing provides no opportunity to respond. The brief itself exacerbates the timing problem, as the amicus brief is tantamount to a reply for Ericsson, as it responds to and attacks Samsung's opposition. Finally, the substance of the brief is not helpful to the Court. Movant states that "[a]t this stage too little information is available to fully assess" the Chinese court's order and its implications. (Dkt. 29 at 2). And he does not purport to have relevant knowledge about the Chinese court system. Ericsson's position is more than adequately represented by Ericsson's counsel, and the motion should be denied.

RELEVANT BACKGROUND

On December 28, 2020, this Court issued a temporary restraining order ("TRO") (Dkt. 14), based on an application Ericsson had filed the same day (Dkt. 11). The Court's order treated Ericsson's TRO application as its motion for preliminary injunction, and ordered an expedited briefing schedule, with Samsung's opposition and Ericsson's reply due at four-day intervals: Samsung's opposition due January 1st at 5:00 pm, Ericsson's reply due January 5th at 5:00 pm, and a hearing set for 9:00 am on January 7th. Samsung promptly entered an appearance, and filed its opposition brief as scheduled.

Movant has not acted with the same dispatch as the parties. At 7:14 PM Central Time, hours after Samsung filed its opposition brief, Samsung's counsel received an e-mail from Movant's, stating "Judge Michel would like to file an amicus brief in support of Ericsson's application for a TRO and anti-interference injunction." Counsel met and conferred on January 4. Michel's counsel stated that Michel first contacted his counsel about filing an amicus brief on

December 31. Samsung informed Movant's counsel during the call that it was concerned that the timing of the brief did not give Samsung an opportunity to respond,[1] and informed Movant's counsel in a follow-up e-mail that Samsung did not consent to the filing of an amicus brief. The motion for leave has now been filed, (Dkt. 28 (motion); Dkt. 29 (proposed brief)), and Samsung respectfully submits that the Court should deny it.

The Federal Rules of Civil Procedure do not provide for amicus briefs in district court. The decision whether to accept or reject amicus briefs is solely within the Court's discretion. *Club v. FEMA*, 2007 WL 3472851, at *1 (S.D. Tex. Nov. 14, 2007) (quoting *United States ex rel. Gudur v. Deloitte Consulting LLP*, 2007 WL 836935, at *6 (S.D. Tex. Mar. 15, 2007). District courts "commonly seek guidance" from the Federal Rules of Appellate Procedure, "keep[ing] in mind the differences between the trial and appellate court forums." *Id.* "Whether to permit a nonparty to submit a brief, as amicus curiae is, with immaterial exceptions, a matter of judicial grace." *In re Halo Wireless, Inc.*, 684 F.3d 581, 596 (5th Cir. 2012) (quoting *Nat'l Org. for Women, Inc. v. Scheidler*, 223 F.3d 615, 616 (7th Cir. 2000)). Appropriate reasons to reject an amicus brief include where the brief is untimely, the brief raises issues adequately briefed by the parties, the brief raises new facts or arguments, or accepting the brief "would result in needless delay of th[e] case's disposition." *Ysleta Del Sur Pueblo v. El Paso County Water Improvement Dist. No. 1*, 222 F.3d 208, 209 (5th Cir. 2000) (denying leave to file amicus brief); *Halo Wireless*, 684 F.3d at 596 (5th Cir. 2012) (granting motion to strike amicus brief).

ANALYSIS

The motion should be denied for the following reasons.

[1] Movant's statement that "Defendants' counsel provided no explanation for Defendants[']' opposition," Dkt. 28 at 5, is false.

First, the timing is prejudicial to Samsung because the motion does not permit Samsung to respond, and because the expedited, time-sensitive nature of this proceeding makes late-breaking amicus filings particularly inappropriate. The Federal Appellate Rules are designed to require the filing of amicus briefs so that "the opposing party will have sufficient time to review arguments made by the amicus and address them in the party's responsive pleading." Fed. R. App. P. 29(a)(6), committee notes to 1998 amendment; *United States v. Olis*, 2008 WL 620520, at *8 (S.D. Tex. Mar. 3, 2008) (citing *id.*, denying leave to file amicus brief). Thus, in ordinary appeals where response and reply briefs are due at 40- and 21-day intervals, Fed. R. App. P. 31(a)(1), amicus briefs are due 7 days after the principal brief of the party the amicus supports. Fed. R. App. P. 29(a)(6). As noted above, Movant did not contact Samsung until ***after*** Samsung filed its opposition, leaving Samsung no opportunity to respond. Further, the proposed amicus brief reverses the normal order of operations by responding to Samsung's brief and declarations (rather than offering a traditional amicus perspective), thus securing the last word. If the Court grants leave to file, it should permit Samsung to file a surreply. But the Court should not grant leave, as accepting late amicus briefs in this expedited matter "would result in needless delay of this case's disposition." *Ysleta*, 222 F.3d at 209; *see also Okechuku v. United States*, 2019 WL 6497876, at *1 (N.D. Tex. Dec. 3, 2019) (affirming magistrate judge's order denying motion to file amicus brief out of time); *Olis*, 2008 WL 620520, at *8 (rejecting amicus brief as untimely); *Abu-Jamal v. Horn*, 2000 WL 1100784, at *5 (E.D. Pa. Aug. 7, 2000) (rejecting amicus brief as untimely); *Sciotto v. Maple Newtown Sch. Dist.*, 70 F. Supp. 2d 553, 555-56 (E.D. Pa. 1999) (similar)

Second**,** the Movant, who clearly knows a great deal about the U.S. legal system, acknowledges that he does not have expertise on China law or procedures. The motion states that "Judge Michel has a strong interest in offering his unbiased perspective on the likely implications

of the district court's Temporary Restraining Order and Anti-Interference Injunction and the complex—and, particularly in this case, controversial—interaction between U.S. and Chinese patent law." (Dkt. 28 at 4). The brief, however, refutes any suggestion that Movant has any relevant expertise in the matter. Movant states that he is "one of the nation's leading patent law experts," but patent law experts are generally disfavored in litigation, this Court is well familiar with patent law, and the brief does not cite any law at all after the introductory section touting Movant's experience and advocacy. Movant does not purport to have any knowledge at all of the Chinese legal system, nor of any facts beyond those in the briefs.[2] Based on the early stage of the case, and Movant's own unfamiliarity with the Chinese legal system, Movant expresses "concerns" about the pending proceedings in China.[3] Yet, Movant takes issue with declarations by Samsung's experts who have actual and extensive knowledge of the Chinese legal system, stating "[i]t is notable that Samsung needs a declaration to assure this Court that a non-Chinese patent defendant has a fighting chance in a Chinese court." (Dkt. 29 at 6). The brief otherwise speculates at length about how the facts of this case and the Chinese court system "appear" to Movant, repeats that much is "unclear," and occasionally vouches for inferences urged in Ericsson's brief.[4]

An amicus brief such as this, which focuses on alleged facts and inferences, is precisely the sort that courts have said "should rarely be welcomed." *Strasser v. Doorley*, 432 F.2d 567,

[2] Dkt. 29, at 3 ("At this stage, too little information is available to fully assess whether the Wuhan court's apparent ex parte order is sufficient to order—and thus divest—a U.S. court from proceeding to adjudicate a live controversy that implicates global and U.S. patent rights.").
[3] *See, e.g.*, Dkt. 29 at 3 (Stating, without citation, that "[t]he Wuhan court's procedures ***appear*** designed to empower a party to obtain a world-wide injunction with no meaningful opportunity to be heard. And ***it is unclear*** if a party so enjoined has any meaningful opportunity to have such an injunction reconsidered or vacated, whether by the issuing court or an appellate court").
[4] *See, e.g.*, Dkt. 29 (speculating, again without citation or specificity, that "one could review these publicly available yet incomplete facts and reasonably conclude that Samsung took actions to affirmatively hide the Wuhan proceeding from Ericsson").

569 (1st Cir. 1970) ("[A]n amicus who argues facts should rarely be welcomed."); *Club v. FEMA*, 2007 WL 3472851, at *1 (S.D. Tex. Nov. 14, 2007) (quoting *id*, denying motion to file amicus brief); *Christopher M. v. Corpus Christi Indep. Sch. Dist.*, 933 F.2d 1285, 1292 (5th Cir. 1991) ("[A]micus curiae … cannot raise an issue raised by neither of the parties absent exceptional circumstances."); *cf. Straight Path IP Group, Inc. v. Cisco Systems, Inc.*, 411 F. Supp. 3d 1026, 1034-35 (N.D. Cal. 2019) (finding plaintiffs' infringement theory objectively baseless and shifting fees under §285, noting plaintiffs' submission of a declaration from Movant to the contrary, which did not address the proper legal standard and attempted to make new, unpreserved arguments on behalf of one of the parties), *appeal pending,* Fed. Cir. No. 20-1964. That is doubly true where, as here, Movant emphasizes that his own interests are not at stake, but does not suggest that Ericsson is inadequately represented. *See Am. College of Obstetricians & Gynecologists v. Thornburgh*, 699 F.2d 644, 645 (3d Cir. 1983) (denying motion by law professors to file amicus brief, where movants did not represent anyone "with a legally cognizable interest in the subject matter at issue, and give only their concern about the manner in which this court will interpret the law as the basis for their brief," and where "there is no indication that the parties to the law suit and those parties who have been granted leave to file a brief amicus curiae will not adequately present all relevant legal arguments").

CONCLUSION

For the foregoing reasons, the motion for leave to file an amicus brief should be denied. If it is granted, Samsung should be permitted to file a surreply.

Dated: January 6, 2021

Respectfully submitted,

/s/ Melissa R. Smith

Melissa R. Smith
State Bar No. 24001351
GILLAM & SMITH, LLP
303 South Washington Avenue
Marshall, Texas 75670
Telephone: (903) 934-8450
Facsimile: (903) 934-9257
Email: melissa@gillamsmithlaw.com

Gregory S. Arovas, P.C.
greg.arovas@kirkland.com
KIRKLAND & ELLIS LLP
601 Lexington Avenue
New York, New York 10022
Telephone: (212) 446-4800
Facsimile: (212) 446-4900

Edward C. Donovan, P.C.
edward.donovan@kirkland.com
F. Christopher Mizzo, P.C.
chris.mizzo@kirkland.com
KIRKLAND & ELLIS LLP
1301 Pennsylvania Ave. N.W.
Washington, D.C. 20004
Telephone: (202) 389-5000
Facsimile: (202) 389-5200

David Rokach
david.rokach@kirkland.com
KIRKLAND & ELLIS LLP
300 North LaSalle
Chicago, IL 60645
Telephone: (312) 862-2000
Facsimile: (312) 862-2200

Kevin Hardy
kevinhardy@quinnemanuel.com
QUINN EMANUEL URQUHART &
SULLIVAN, LLP1300 I Street N.W.
Suite 900
Washington, D.C. 20005
Telephone: (202) 538-8000

Facsimile: (202) 538-8100

Thomas D. Pease
thomaspease@quinnemanuel.com
QUINN EMANUEL URQUHART &
SULLIVAN, LLP51 Madison Ave., 22nd
Floor
New York, NY 10010
Telephone: (212) 849-7000
Facsimile: (212) 849-7100

Paul Zeineddin
pzeineddin@axinn.com
AXINN, VELTROP & HARKRIDER LLP
950 F. Street, N.W.
Washington, DC 20004
Telephone: (202) 912-4700
Facsimile: (202) 912-4701

Attorneys for Samsung Defendants

CERTIFICATE OF SERVICE

The undersigned hereby certifies that counsel of record who are deemed to have consented to electronic services are being served with a copy of this document via the Court's CM/ECF system per Local Rule CV-5(a)(3) on January 6, 2021.

/s/ Melissa R. Smith

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

ERICSSON INC. AND TELEFONAKTIEBOLAGET LM ERICSSON, Plaintiff, vs. SAMSUNG ELECTRONICS CO. LTD., SAMSUNG ELECTRONICS AMERICA, INC., AND SAMSUNG RESEARCH AMERICA Defendants	**Civil Action No. 2:20-cv-380-JRG**

ORDER DENYING MOTION OF THE HONORABLE PAUL R. MICHEL (RET.) FOR LEAVE TO FILE AMICUS CURIAE BRIEF SUPPORTING ERICSSON'S APPLICATION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

Before the Court is The Honorable Paul R. Michel (Ret.) Motion for Leave to File Amicus Curiae Brief Supporting Ericsson's Application for Temporary Restraining Order and Preliminary Injunction. The Court, having considered same, is of the opinion the motion should be DENIED.