

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN

DOW CORNING COMPOUND SEMICONDUCTOR
SOLUTIONS, LLC,

Case No.:

Plaintiff,

Honorable

v

CREE, INC.,

Defendant.

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COMPLAINT FOR DECLARATORY JUDGMENT
AND DEMAND FOR JURY TRIAL

Plaintiff Dow Corning Compound Semiconductor Solutions, LLC, (“DCCSS”) for its
Complaint against Cree, Inc., (“Cree”), hereby alleges as follows:

Nature Of The Action

1. This is an action for a declaratory judgment of non-infringement and invalidity of United States Patent Nos. 7,294,324 (the “’324 patent”), 7,314,520 (the “’520 patent”) and 7,314,521 (the “’521 patent”) (collectively, the “Patents-in-Suit”) pursuant to the Declaratory Judgment Act, 28 U.S.C. §§ 2201-02, and the patent laws of the United States, 35 U.S.C. § 100 *et seq.*, and for such other relief as the Court deems just and proper.

The Parties

2. DCCSS is a wholly owned subsidiary of Dow Corning Corporation (“Dow Corning”) and is incorporated in Delaware with its principal place of business at 2200 W. Salzburg Road, P.O. Box 994, Midland, Michigan 48686.

3. On information and belief, Cree is a North Carolina corporation with a principal place of business at 4600 Silicon Drive, Durham, North Carolina 27703.

Jurisdiction And Venue

4. The Court has exclusive subject matter jurisdiction pursuant to 28 U.S.C. §§ 1331, 1338(a), 1367, 2201, and 2202, and the patent laws of the United States, 35 U.S.C. § 1, *et seq.* Venue is proper in this judicial district pursuant to 28 U.S.C. §§ 1391(b)(2) and 1400.

5. Cree purports to be the owner of all rights, title, and interest in and to the ‘324 patent, the ‘520 patent, and the ‘521 patent.

6. On July 29, 2010, both Dow Corning and Cree were sued by The Fox Group, Inc., (“Fox Group”) in the Eastern District of Virginia, for infringement of two patents related to silicon carbide materials (“SiC”).

7. The market for silicon carbide material is rapidly expanding globally. This demand for silicon carbide is driven by its advantages over silicon, which has been traditionally used in

electronics. Compared to silicon-based devices, silicon carbide-based devices are up to 10% more efficient, and that enables smaller devices. DCCSS believes that silicon carbide will be of increasing economic importance.

8. Dow Corning moved to dismiss Fox Group's complaint in Virginia against it because it had previously filed a Declaratory Judgment action against Fox Group in the Southern District of New York. On October 25, 2010, Dow Corning's motion to dismiss was granted. The Eastern District of Virginia case between Fox Group and Cree on the same two SiC patents went forward.

9. Four days after the Eastern District of Virginia determined that Dow Corning and Cree would not be co-defendants in the same lawsuit, on October 29, 2010, DCCSS received a letter from Cree stating that Cree "has recently implemented a licensing program for the Cree SiC wafer and SiC expitaxy patents," and that Cree would like to "introduce" Dow Corning to the licensing program. Cree stated that "We understand that Dow Corning is manufacturing 75.6 mm and 100 mm SiC wafers and providing SiC epitaxy services" and that Cree has "34 U.S. patents concerning SiC wafer technology and 29 U.S. patents concerning SiC epitaxy technology," along with corresponding foreign applications and related U.S. applications. Cree included with the letter a list of all of its issued patents and corresponding foreign applications covering SiC technology.

10. On March 8, 2011, representatives from Cree met with Dow Corning and DCCSS at Dow Corning's facility in Midland, Michigan. George Brandes, Shawn Pyles, and Charles Jacobson from Cree and Tim Troy from Dow Corning and Tom Zoes from DCCSS attended the meeting. At this meeting, Cree presented its SiC licensing program to DCCSS. In addition, Cree and Dow Corning negotiated a non-disclosure agreement to cover the discussions between Cree and Dow Corning, and discussed whether Cree would include its Gallium Nitride ("GaN") technology patents into the discussions.

11. On June 29, 2011, representatives from Cree again met with Dow Corning and DCCSS at Dow Corning's facility in Midland, Michigan. George Brandes, Shawn Pyles, and

Charles Jacobson from Cree and Tim Troy from Dow Corning, and Tom Zoes and Mark Loboda from DCCSS attended the meeting. At this meeting, Cree presented its licensing terms to DCCSS. These terms were not acceptable to DCCSS.

12. On August 3, 2011, George Brandes of Cree sent lists of patents to Tim Troy of Dow Corning, and a request for a further meeting in September. These lists included an updated list of SiC patents and foreign applications, and a list of patents covering Gallium Nitride technology.

13. On September 8, 2011, George Brandes of Cree sent an email to Tim Troy of Dow Corning stating, in part, that “[i]n our previous meetings and by email Cree has provided Dow Corning with a description of Cree’s Materials Licensing Program, lists of patents and license terms; we are expecting your response at our Sept. 28th meeting.”

14. Representatives for Cree and for Dow Corning and DCCSS are scheduled to meet again at Dow Corning’s facilities in Midland, Michigan, on September 28, 2011.

15. Cree has a history of litigation in connection with its established licensing programs for its gallium nitride /and LED technology. Over a ten year period, Cree initiated five patent litigations in those fields: Cree v. Nichia, CV-01-1736 (N.D. CA, May 3, 2001); Cree v. AXT, CV-03-2700 (N.D. CA June 10, 2003); Cree v. Bridgelux, 1:06-CV-761 (M.D. NC September 11, 2006); Cree v. Semileds (D. Del. October 8, 2010); Cree v. Semileds, 1:11-CV-00292 (M.D. NC April 13, 2011). On information and belief, except for the Semileds cases, those prior litigations ended in settlements in which the accused infringer took licenses to Cree’s asserted patents.

16. Cree’s October 29th letter to DCCSS noting that Cree has only “recently” started its licensing program for SiC technology causes DCCSS to reasonably believe that it is the target of a new campaign to license its patents on SiC technology.

17. There is no indication in Cree’s letter that it does not intend to pursue a similar strategy of litigation with respect to its licensing program for its SiC patent portfolio as it has for its licensing programs for other patented technologies.

18. Cree's September 8, 2011 email from George Brandes to Tim Troy states that Cree expects Dow Corning to make a decision concerning the Cree's licensing proposal at the meeting on September 28, 2011. Based on Cree's litigation history, Cree's October 29th letter, the series of meetings where Cree representatives traveled to Midland Michigan to discuss such a licensing program with Dow Corning and DCCSS, and the deadline set by Cree, DCCSS reasonably believes that Cree will immediately seek to enforce its SiC patents against DCCSS once DCCSS rejects its licensing demands at the September 28, 2011 meeting.

19. DCCSS has not infringed and does not infringe, either directly or indirectly, any valid and enforceable claim of the Patents-in-Suit, either literally or under the doctrine of equivalents. Based on Cree's aggressive licensing pursuit regarding SiC technology and Cree's history of litigation in support of its other licensing campaigns, a substantial controversy now exists between the parties which is of sufficient immediacy and reality to warrant declaratory relief.

20. The Court has personal jurisdiction over Cree because Cree, Inc. is registered to do business in Michigan, I.D. number 654121 (Michigan Department of Licensing and Regulatory Affairs), and has registered an agent for service of process in Michigan, The Corporation Company, 30600 Telegraph Road, Suite 2345, Bingham Farms, MI 48025. MICH. COMP. LAWS § 600.711.

First Claim For Relief

(Declaratory Judgment of Non-infringement of the '324 Patent)

21. DCCSS repeats and realleges each and every allegation in the foregoing paragraphs as though fully set forth herein.

22. DCCSS has not infringed and is not now infringing, either directly, contributorily, or through inducement, willfully or otherwise, the '324 patent.

23. As a result of the acts described in the foregoing paragraphs, there exists a substantial controversy of sufficient immediacy and reality to warrant the issuance of a declaratory judgment.

24. A judicial declaration of non-infringement is necessary and appropriate so that DCCSS may ascertain its rights with respect to the '324 patent.

Second Claim For Relief

(Declaratory Judgment of Non-infringement of the '520 Patent)

25. DCCSS repeats and realleges each and every allegation in the foregoing paragraphs as though fully set forth herein.

26. DCCSS has not infringed and is not now infringing, either directly, contributorily, or through inducement, willfully or otherwise, the '520 patent.

27. As a result of the acts described in the foregoing paragraphs, there exists a substantial controversy of sufficient immediacy and reality to warrant the issuance of a declaratory judgment.

28. A judicial declaration of non-infringement is necessary and appropriate so that DCCSS may ascertain its rights with respect to the '520 patent.

Third Claim For Relief

(Declaratory Judgment of Non-infringement of the '521 Patent)

1. DCCSS repeats and realleges each and every allegation in the foregoing paragraphs as though fully set forth herein.

2. DCCSS has not infringed and is not now infringing, either directly, contributorily, or through inducement, willfully or otherwise, the '521 patent.

3. As a result of the acts described in the foregoing paragraphs, there exists a substantial controversy of sufficient immediacy and reality to warrant the issuance of a declaratory judgment.

4. A judicial declaration of non-infringement is necessary and appropriate so that DCCSS may ascertain its rights with respect to the '521 patent.

Fourth Claim For Relief

(Declaratory Judgment of Invalidity of the '324 Patent)

5. DCCSS repeats and realleges each and every allegation in the foregoing paragraphs as though fully set forth herein.

6. DCCSS is informed and believes and thereon alleges that any and all allegedly infringed claims of the '324 patent are invalid for failure to satisfy the conditions for patentability set forth in 35 U.S.C. §§ 101, 102, 103 and/or 112.

7. As a result of the acts described in the foregoing paragraphs, there exists a substantial controversy of sufficient immediacy and reality to warrant the issuance of a declaratory judgment.

8. DCCSS is entitled to a declaration that the allegedly infringed claims of the '324 patent are invalid.

Fifth Claim For Relief

(Declaratory Judgment of Invalidity of the '520 Patent)

9. DCCSS repeats and realleges each and every allegation in the foregoing paragraphs as though fully set forth herein.

10. DCCSS is informed and believes and thereon alleges that any and all allegedly infringed claims of the '520 patent are invalid for failure to satisfy the conditions for patentability set forth in 35 U.S.C. §§ 101, 102, 103 and/or 112.

11. As a result of the acts described in the foregoing paragraphs, there exists a substantial controversy of sufficient immediacy and reality to warrant the issuance of a declaratory judgment.

12. DCCSS is entitled to a declaration that the allegedly infringed claims of the '520 patent are invalid.

Sixth Claim For Relief

(Declaratory Judgment of Invalidity of the '521 Patent)

1. DCCSS repeats and realleges each and every allegation in the foregoing paragraphs as though fully set forth herein.

2. DCCSS is informed and believes and thereon alleges that any and all allegedly

infringed claims of the '521 patent are invalid for failure to satisfy the conditions for patentability set forth in 35 U.S.C. §§ 101, 102, 103 and/or 112.

3. As a result of the acts described in the foregoing paragraphs, there exists a substantial controversy of sufficient immediacy and reality to warrant the issuance of a declaratory judgment.

4. DCCSS is entitled to a declaration that the allegedly infringed claims of the '521 patent are invalid.

Prayer For Relief

WHEREFORE, plaintiff DCCSS requests that judgment against Cree be entered as follows:

- A. That DCCSS does not infringe any of the Patents-in-Suit;
- B. That the allegedly infringed claims of the Patents-in-Suit are invalid;
- C. That the case is exceptional under 35 U.S.C. § 285 and that DCCSS be awarded its attorneys' fees, costs and expenses incurred in this action as provided by that statute; and
- D. That DCCSS have such other and further relief as the Court may deem just and proper.

Dated: September 27, 2011.

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