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The Honorable William Alsup
United States District Court Judge
450 Golden Gate Avenue
San Francisco, CA 94102

July 10, 2017

**Re: Comcast Cable Communications, LLC v. OpenTV, Inc. and
Nagravision SA, Case No. 3:16-cv-06180-WHA**

Dear Judge Alsup:

In accordance with the Court's précis requirement for motions (*see* Dkt. 145 at 12), OpenTV, Inc. and Nagravision SA (collectively, "OpenTV") respectfully request permission to file a motion to amend its infringement contentions to identify one new product, the XG1v4 set-top box, which was first sold by Comcast in May 2017. This new product came on the market after OpenTV served its original infringement contentions, on March 17, 2017. OpenTV further requests permission to move to supplement its counterclaims to account for this new product.

Patent Local Rule 3-6 permits amendment of infringement contentions by order of the Court "upon a timely showing of good cause." OpenTV has good cause to amend its infringement contentions. First, good cause exists because OpenTV was diligent "in discovering the basis for amendment," and "in seeking amendment once the basis for amendment has been discovered." *See Positive Techs., Inc. v. Sony Elecs., Inc.*, No. C 11-2226 SI, 2013 WL 322556, at *2 (N.D. Cal. Jan. 28, 2013). Upon learning of the newly-released product in May 2017, OpenTV has been diligently—but unsuccessfully—attempting to resolve this matter by agreement with Comcast: on May 31, OpenTV requested information from Comcast regarding

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the XG1v4. On June 3, Comcast refused to provide discovery regarding the XG1v4 because it was not specifically accused of infringement. On June 8, OpenTV responded by noting that its infringement contentions specifically accuse “XG1 models.” OpenTV also noted that the recently-launched XG1v4 product was not “known” at the time OpenTV served its contentions. *See* PLR 3-1(b) (“Each product . . . shall be identified by name or model number, *if known.*” (emphasis added)). On June 9, Comcast declined to make the XG1v4 available for inspection because OpenTV had not moved to amend its infringement contentions. Therefore, on the same day, OpenTV asked Comcast whether Comcast would oppose a motion to amend. On June 19, OpenTV again asked Comcast whether it would agree to amendment. On June 21, Comcast stated that it would oppose adding the XG1v4 to this case. Comcast defended its position in part by reference to the Court’s June 19 order (Dkt. 145). But that order addresses OpenTV’s charting of representative accused products. *Id.* at 6-7. The order does not prevent OpenTV from diligently seeking to accuse a new product that post-dates the contentions.

Second, permitting amendment here will promote judicial efficiency and conserve judicial resources. This Court will adjudicate OpenTV’s claims that certain of Comcast’s X1-enabled set-top boxes infringe certain claims of the ’595 and ’586 patents. Based on publicly-available information describing the XG1v4’s new features, it appears that the XG1v4 is not materially different from the XG1v3-series set-top boxes currently charted in OpenTV’s infringement contentions. Because the same infringement theories appear to apply to the newly-released XG1v4 product, it would be most efficient for this Court to address the XG1v3 and XG1v4 products in the same proceeding. Otherwise, OpenTV would need to file a new lawsuit

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involving the same patents and a materially similar accused instrumentality.

Third, good cause exists because Comcast will not be prejudiced by adding the XG1v4 to this litigation. Given that fact discovery has already closed with respect to claim 1 of the '595 Patent because of the pilot proceedings, OpenTV does not seek to amend its infringement contentions for that claim. Adding a single, derivative product to the remaining litigation will not meaningfully affect the complexity of the case. As explained above, the XG1v4 appears to differ immaterially from the XG1v3. Therefore, OpenTV believes that the same infringement theories will apply to both the XG1v3 and XG1v4. Furthermore, the parties will have sufficient time to take discovery regarding this single, new product because fact discovery does not close until December 15, which is more than five months away. *Compare Rembrandt Patent Innovations LLC v. Apple Inc.*, Case No. 3:14-cv-5094-WHA (N.D. Cal. Dec. 13, 2015), 2015 WL 8607390 (rejecting third attempt at amending contentions, to add four new products). Trial is not set to begin until May 7, 2018.

OpenTV also respectfully requests permission to move to supplement its counterclaims accordingly pursuant to FED. R. CIV. P. 15(d). OpenTV intends to supplement its counterclaims for the sole purpose of incorporating amended contentions that include the XG1v4 product.

OpenTV's motion would be argued by an attorney with fewer than 4 years of experience.

Respectfully submitted,

/s/ Michael K. Plimack
Counsel for Defendants and
Counterclaim Plaintiffs