IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

REALTIME ADAPTIVE STREAMING LLC,

    Plaintiff,

     v.

NETFLIX, INC. AND NETFLIX
STREAMING SERVICES, INC.,

    Defendants.

C.A. No. 17-1692 (CFC) (SRF)

PLAINTIFF REALTIME ADAPTIVE STREAMING LLC'S REPLY BRIEF IN SUPPORT OF ITS MOTION FOR LEAVE TO FILE AMENDED COMPLAINT

July 17, 2019

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I.   **REALTIME'S MOTION TO AMEND—ITS FIRST ADDRESSING PATENT ELIGIBILITY—IS BOTH PROCEDURALLY AND SUBSTANTIVELY PROPER**

A.   **There Is No Procedural Basis to Ignore or Discount Realtime's Amended Complaint**

In their effort to have this Court avoid or ignore the substance of Realtime's factual allegations in its Amended Complaint. Defendant presents three arguments for why Realtime's Amendment is procedurally improper. None have merit.

Defendant's contention of supposed "undue delay" suffers fatal flaws. While conceding that "delay alone" is insufficient under the law, Defendant points to virtually nothing else and boldly asks this Court to find "undue delay" D.I. 53 at 4-5. But the Third Circuit has made clear that the "undue delay" exception to the liberal amendment rule applies when the delay is inexplicable and so excessive that it resulted in a motion to amend being filed after a "final or appealable order." *Mullin v. Balicki*, 875 F.3d 140, 150, n. 17 (3rd Cir. 2017). The R&R is not final nor appealable. Therefore, Defendant's legal argument for "undue delay" has no merit.

Finding zero support in the law, Defendant casts aspersions, suggesting that Realtime strategically chose to withhold it factual allegations. D.I. 53 at 4-5. But Defendant provides no real factual support for this baseless accusation. And none can exist here. Defendants cannot point to any meaningful change in circumstances or leverage of any sort between some "delay" and "undue delay"—particularly where not even a single meaningful event has taken place in this case *since the R&R was issued*. And in any event, Defendant has no answer for the fact that the Federal Circuit has even reversed a district court opinion denying a motion for leave to file "a second amendment" on the patent eligibility issue. *Aatrix Software v. Green Shades Software*, 882 F.3d 1121, 1125 (Fed. Cir. 2018).

Moreover, any contention of "undue prejudice" also fails, in light of the law and facts. The Third Circuit is clear that "[i]n order to show undue prejudice, the party *opposing* a motion to amend bears the burden of showing that it will be 'unfairly disadvantaged or deprived of the opportunity to present facts of evidence' unless leave to amend is denied." *E.g., Bechtel v. Robinson*, 886 F.2d 644, 652 (3rd Cir. 1989). In deciding the issue, district courts should focus on whether allowing an amendment would result in additional discovery, cost, and preparation in order to defend against new facts or new legal theories. *Id.* Defendant's meritless position does not even try to address this standard, let alone meet its burden on it. Indeed, Defendant's own cases are consistent on this point and work against Defendant's position. In *Delaware Display Grp LLC v. Lenovo Grp., Ltd.*, he court held that Rule 15's liberal amendment standard provides that a court should "freely give leave [to amend] when justice so requires." No. 13-2108-RG, 2016 WL 720977 at *7-9 (D. Del. Feb. 23, 2016) When deciding whether there has been undue prejudice or delay, that issue, courts look to factors including "whether allowing an amendment would result in additional discovery, costs, and preparation to defend against new facts or new theories." *Id.* And when applying this test to the facts at issue in that case, which were far more favorable to the defendant opposing the motion to amend, the court in *Delaware Display rejected* the same arguments made by Defendant here.

Beyond the law, Defendant's argument here is circular is wholly unsupported by the factual record. Defendant claims it has suffered undue prejudice merely because Realtime is asking for a "do-over." D.I. 53 at 5. But there is no plausible support for this contention. Moreover, the legal standard for "undue prejudice" must only focus on actual "prejudice" after the original motion to dismiss. This case has only thus far dealt with Defendant's own pleading

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