

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

ALMONDNET, INC., INTENT IQ, LLC, and
DATONICS LLC,

Plaintiffs,

v.

LOTAME SOLUTIONS, INC.,

Defendant.

C.A. No. 24-376-MN

JURY TRIAL DEMANDED

**PLAINTIFFS' OPPOSED MOTION FOR LEAVE TO FILE A SUR-REPLY IN
OPPOSITION TO DEFENDANT'S MOTION TO DISMISS¹**

Plaintiffs AlmondNet, Inc., Intent IQ, LLC, and Datonics LLC ("AlmondNet") respectfully request, pursuant to Local Rule 7.1.2(b), for leave to file the attached (Exhibit 1 hereto) proposed Sur-reply in Opposition to Lotame's Motion to Dismiss. The basis for AlmondNet's request for such leave is set forth below.

Delaware District Court Local Rule 7.1.3(c)(2) provides that "[t]he party filing the opening brief shall not reserve material for the reply brief which should have been included in a full and fair opening brief." "This provision exists, in part, to prevent litigants from engaging in impermissible 'sandbagging,' reserving crucial arguments for a reply brief to which an opponent cannot respond." *Chervon (HK) Ltd. v. One World Techs., Inc.*, 2022 WL 14812531, at *2 (D. Del. Oct. 26, 2022). Similarly, this Court's Policies and Procedures (Section II.B.2) state that "[reply] briefs must be concise and address only [] issues raised by opposing counsel."

¹ Pursuant to D. Del. LR 7.1.1, the parties met and conferred on this motion and Defendant indicated that it opposes the relief sought herein.

Courts in this District allow leave to file sur-reply briefs “where the proposed brief responds to new evidence, facts, or arguments raised for the first time in the moving party’s reply brief.” *EMC Corp. v. Pure Storage, Inc.*, 154 F. Supp. 3d 81, 103 (D. Del. 2016); *see St. Clair Intellectual Prop. Consultants, Inc. v. Samsung Elecs. Co.*, 291 F.R.D. 75, 80 (D. Del. 2013) (“A Court may grant leave to file a sur-reply if it responds to new evidence, facts, or arguments.”). Courts in this District have also granted leave to file sur-reply briefs when those briefs have been helpful to the Court in resolving the parties’ dispute. *See e.g., Intellectual Ventures I LLC v. Symantec Corp.*, 2019 WL 1332356, at *4 (D. Del. Mar. 25, 2019); *Auer v. Lanier Worldwide, Inc.*, 2009 WL 2169058, at *2 (D. Del. Jul. 20, 2009).

Lotame’s Reply (D.I. 479) improperly raises two new arguments that would have been more properly (but were not) included in Lotame’s opening brief. First, Lotame alleges that past damages should not be allowed because “AlmondNet initially asserted both apparatus and method claims” in its complaint. (D.I. 25 at 7.) Lotame had not previously alleged that AlmondNet had asserted any apparatus claims; instead, Lotame’s motion to dismiss was based on the theory that the patents *included* both method and apparatus claims. D.I. 21 at 15-16. Indeed, Lotame’s motion *acknowledged* that AlmondNet was “only asserting the method claims of these patents.” *Id.* 15 (“That AlmondNet is only asserting the method claims of these patents is of no matter....”); *id.* (alleging: “AlmondNet’s assertion that the marking statute does not apply because it has only asserted method claims in this suit is contrary to law.”) (internal citations omitted).

Second, Lotame’s Reply alleges that “[w]ithout an indirect infringement claim, AlmondNet cannot continue to assert the ’445 Patent.” (D.I. 25 at 8.) This is a new argument; Lotame’s motion set forth separate arguments regarding direct infringement (D.I. 21 at 8-10) and indirect

infringement (*id.* at 11-16), and never implied that a dismissal of *indirect* infringement claims would have any impact on *direct* infringement claims.

Because these arguments were newly raised in Lotame's Reply brief, AlmondNet did not have an opportunity to respond and thus requests leave to file the attached sur-reply (Exhibit 1) that addresses these new arguments.

The parties met and conferred regarding AlmondNet's request. Lotame indicated that it believed the arguments discussed above were properly raised in Lotame's opening brief, and opposes this motion.

Dated: October 15, 2024

Respectfully submitted,

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