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-cv-376-MN JURY TRIAL DEMANDED

PLAINTIFFS' REPLY IN SUPPORT OF MOTION FOR LEAVE TO FILE A SUR-REPLY IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS

Dated: November 5, 2024

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Lotame's reply (D.I. 25) to its motion to dismiss (D.I. 21) plainly introduced new arguments in support of the Lotame's requested relief. Lotame's opposition (D.I. 29) to AlmondNet's motion for leave to file a sur-reply (D.I. 28) fails to identify these arguments in the motion to dismiss, and incorrectly implies that as long as Lotame's reply did not seek new requested relief, it could not have presented new argument.

Regarding marking, Lotame argues that "Lotame's arguments regarding past damages are [not] new" because "Lotame has consistently argued AlmondNet's failure to mark under 35 U.S.C. § 287 precludes past damages." (D.I. 28 at 1.) While Lotame's *requested relief* (i.e., dismissal of a claim for past damages) remains the same, the *arguments* and *legal theories* in support of that requested relief are entirely new.

Lotame's motion to dismiss was based on the fact that "the [asserted] patents include both method and apparatus claims," and that it was "***no matter***" that "AlmondNet is only asserting the method claims." (D.I. 21 at 15 (emphasis added).) In Reply, Lotame changed tack, and argued for the very first time that "In AlmondNet's original Complaint (D.I. 1), AlmondNet asserted all claims of the Asserted Patents." (D.I. 25 at 5.) Lotame points to nowhere in the original motion to dismiss that made this allegation. (*See generally* D.I. 28.)

Lotame now asserts that it was an "***uncontested fact*** that AlmondNet . . . originally asserted both the method and apparatus claims." (D.I. 28 at 2 (emphasis added).) But AlmondNet already debunked this purported "fact" in its proposed sur-reply (D.I. 27-1 at 1). And Lotame's untimely mistatements (which AlmondNet could not have possibly anticipated in its opposition) are precisely why a sur-reply is justified. Lotame seeks to hide the sur-reply from the Court while seeking dismissal of AlmondNet's patent claims based on new arguments. This improper and untimely conduct should not be countenanced.

Regarding the interplay between indirect and direct infringement, Lotame again conflates *not requesting new relief* with *not presenting new argument. See* D.I. 28 at 2 ("Lotame's argument [that] the '445 Patent should be dismissed in its entirety is not new."). While Lotame points to consistent *requested relief*, Lotame does not dispute that the ***reasoning*** underlying its requested relief is entirely new. *See* D.I. 28 at 2-3 (Lotame contending that it was not "required to anticipate" that it might be advantageous to argue that dismissal of indirect infringement allegations would require dismissal of direct infringement allegations, even though Lotame's original motion to dismiss *already* argued for the dismissal of indirect infringement allegations).

Accordingly, AlmondNet respectfully requests that leave to file its proposed sur-reply be granted, because 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).

Dated: November 5, 2024

Respectfully submitted,

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