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December 14, 2022

**VIA ECF**

Hon. Douglas E. Arpert, U.S.M.J.  
U.S. District Court for the District of New Jersey  
Clarkson S. Fisher Building & U.S. Courthouse  
402 East State Street  
Trenton, NJ 08608

**Re: *OANDA Corporation v. GAIN Capital Holdings, Inc., et al.*  
Civil Action No. 20-05784-ZNQ-DEA**

Dear Judge Arpert:

We, along with our co-counsel from Koning Zollar LLP, represent Plaintiff OANDA Corporation (“OANDA”) in this matter, and write to respond to GAIN’s December 7, 2022 letter “motion” to preclude OANDA from amending its infringement contentions. GAIN’s letter, which was filed without prior notice to OANDA, much less any effort to meet and confer, seeks drastic (and possibly even case-dispositive) relief based on a gross distortion of the factual record. It must be denied for the following reasons.

**GAIN’s Drastic Request For Preemptive Relief Is Improper And Should Be Denied**

GAIN’s December 7, 2022 letter (Dkt. No. 145, “Letter”) seeks extraordinary relief—a preemptive order precluding OANDA from bringing a motion to amend its infringement contentions under Local Patent Rule 3.7. Putting aside the complete lack of underlying factual basis for this relief (as discussed further below), the request is procedurally improper in a variety of ways and should be denied on that basis alone.

As an initial matter, GAIN does not cite a single case that has preemptively precluded a party from amending its infringement contentions under Local Patent Rule 3.7. Indeed, the only case relied upon in GAIN’s letter did not consider or grant such relief—it instead determined the propriety of specific amendments proffered by the patentee. *See Eagle View Techs., Inc. v. Xactware Sols., Inc.*, No. CV 15-7025 (RBK/JS), 2017 WL 5886004, at \*7 (D.N.J. Nov. 29, 2017). The absence of any authority for the issuance of a preemptive order precluding future amendments of infringement contentions is hardly surprising. Courts typically decide disputes that are ripe and do not issue advisory rulings. In deciding whether to exercise discretion to permit an amendment, the Court must have before it an actual proposed amendment presented to the Court, along with a motion justifying the basis for leave to amend. By asking the Court instead to issue a blanket order preemptively cutting off any future right to amend before OANDA has even invoked that right, GAIN is circumventing that normal approach to judicial decision making and – because the relevant factual predicates going to the grant or denial of such

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The perils of the preemptive approach urged by GAIN are demonstrated by the ambiguity of the relief it seeks. Rather than deciding whether a specific proposed amendment will or will not be allowed, GAIN is asking the Court to issue a broad order with uncertain contours. GAIN seeks to preclude OANDA from “asserting any theories of infringement that have not been disclosed in OANDA’s [Infringement Contentions] that rely on source code or technical documents produced to date or any theories that could have been raised based on such discovery.” (Letter at 1.) This proposed relief could be read as permitting OANDA to assert any infringement theories fairly encompassed by its existing infringement contentions (even if those contentions are not currently as specific as GAIN would like), and only preventing OANDA from asserting brand new theories. While a preemptive order against amendment would be unjustifiable for all the reasons provided in this response, it appears that GAIN may be seeking much more expansive relief, given its stated position that OANDA has “no real [infringement] contentions to live by.” (Letter at 6.) If GAIN’s position is that OANDA has “no real contentions” *and* that OANDA should be precluded from amending or supplementing those contentions, then GAIN’s proposed preclusion order appears to be intended to operate effectively as an order granting summary judgment on infringement. Whether by accident or design, GAIN appears to have filed a request for potentially case-dispositive relief by way of a letter.<sup>1</sup> This Court should avoid even considering such an unnecessary and far-reaching order when it can simply wait for an actual motion to amend pursuant to Rule 3.7, consider briefing and argument under the relevant standards, and make a narrower decision on a complete record. *See, e.g., Cochlear Ltd. V. Oticon Med. AB*, No. 18-6684 BRM DEA, 2019 WL 3429610, at \*13 (D.N.J. July 29, 2019) (granting Plaintiff’s motion for leave to amend infringement contentions).

In addition, GAIN’s filing defies the Local Rules. If this Letter, which GAIN concedes is a “motion,” (Letter at 6) is intended as a backdoor attempt at summary judgment, it should have been directed to Judge Quraishi under the specific rules he has adopted for such motions, and it could not have been filed without prior approval. *See* Judge Quraishi Judicial Preferences (requiring permission from the Court before filing case-dispositive motions).

This Court should not countenance GAIN’s improper motion. GAIN’s request for relief should be denied in its entirety.

**GAIN’s Contention That OANDA Has Lacked Diligence In Seeking Discovery Into GAIN’s Products Is Baseless**

Even if this Court were to consider GAIN’s preemptive request to preclude amendments to OANDA’s infringement contentions, rather than simply ruling upon a motion to amend when one is filed, GAIN’s preclusion argument is baseless. The central premise of GAIN’s Letter is that it produced complete source code and technical information allowing OANDA to understand

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<sup>1</sup> The ambiguity of GAIN’s requested relief is another reason why a meet and confer would have been productive before GAIN sought Court intervention.

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its systems and products more than a year ago, that OANDA has just spent the last year sitting on its hands, and that OANDA therefore could never demonstrate diligence under Local Patent Rule 3.7 for any proposed amendment. (Letter at 4-5.)

But this version of events rewrites history. It is true that GAIN allowed OANDA to inspect some of its source code about a year ago. But inspecting raw source code by itself is not enough to gain a meaningful understanding of how GAIN's backend systems operate, without also knowing which source code was in operation and when, and without having complete, contemporaneous technical documents about GAIN's products. Accordingly, over the past year, through today, OANDA has been diligently working to obtain the information it needs to fully understand the operation of GAIN's backend systems via meet and confer efforts, written discovery, and depositions. GAIN, meanwhile, has been obstructing those efforts every step of the way.

For example, in December 2021, immediately following the initial inspection of source code, OANDA contacted GAIN with clarifying questions about the source code, including which source code was currently in use, and for any old source code that had been produced, when it stopped being used<sup>2</sup>—basic, but critical, information to help understand how GAIN's systems function. This inquiry was met with stonewalling by GAIN. Over the course of several months, GAIN did not respond to emails at all or, when it did respond, repeatedly professed confusion over this straightforward request. Only after persistent meet-and-confer efforts by OANDA did GAIN provide the requested information—in April 2022, nearly *four months* after OANDA's initial inquiry.

Upon reviewing GAIN's source code in light of the new information about which source code was in use, as well as GAIN's production of documents in response to OANDA's two sets of Requests for Production, it became clear to OANDA that GAIN's production of documents related to infringement was incomplete in material ways. GAIN, for example, claims in its non-infringement contentions that its products do not infringe the '336 Patent because "all clients of the accused system use direct socket connections." But even though GAIN had agreed to produce all documents in support of its non-infringement theories, its document production contained no documents referring to "direct socket connections," and the in-use source code did not appear to reflect use of direct socket connections either. Similarly, GAIN claims in its non-infringement contentions that its products do not infringe the '336 Patent because "[t]he Rate Server Spreader, which is in communication with the Rates Manager, communicates directly with the client platform, rather than with any server frontend." But again, GAIN had produced

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<sup>2</sup> OANDA refers to numerous documents and communications between the parties in this letter, but we are mindful of the guidance of Appendix R to the local rules and have not attached them in an effort to avoid inundating the Court with unnecessary paper and party correspondence. OANDA will provide copies of the referenced documents and communications upon request.

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no documents referencing a “Rate Server Spreader,” and in-use source code did not reflect the use of a Rate Server Spreader. The same thing was true with respect to many of GAIN’s non-infringement contentions. Accordingly, on June 9, 2022, OANDA propounded ten additional Requests for Production (RFP Nos. 44-53) targeted specifically at GAIN’s non-infringement contentions, so that it could understand GAIN’s position on how its accused products and their backend systems allegedly functioned. (*See, e.g.*, OANDA Request for Production No. 44 (“All DOCUMENTS and COMMUNICATIONS CONCERNING the development, use, and/or operation, in connection with the ACCUSED PRODUCTS, of the “direct socket connections” referenced in YOUR non-infringement contentions.”))).

More than *six months later*, and despite OANDA’s diligent efforts, GAIN has not produced *a single document* in response to these Requests. At first, GAIN served improper blanket objections, claiming that the requests were irrelevant, duplicative, and imposed an undue burden on GAIN, and refused to search for or produce any documents. During subsequent meet-and-confer efforts that were promptly initiated by OANDA, GAIN took the position that it would not produce any documents in response to these ten Requests for Production unless and until OANDA agreed to amend the ESI order governing the entire case. While that ESI order had been extensively negotiated, agreed to by the parties, and entered by the Court less than one year prior, and while the concept of placing hard limits on custodians and search terms had been considered and rejected, GAIN held firm to its position. After meet-and-confer efforts reached an impasse, OANDA promptly brought this issue to the attention of the Court on September 21, 2022.

On October 17, 2022, the Court ordered the parties to meet and confer over search terms and custodians, which they did extensively over the course of several weeks, and on November 15, 2022, the parties reached an agreement. On November 23, 2022, pursuant to that agreed protocol, OANDA requested that GAIN initially propose search terms responsive to the outstanding Requests for Production by December 9, 2022. GAIN did not respond until December 8, 2022, whereupon it requested additional time, including because of illness among GAIN’s team of lawyers. GAIN has indicated that it will propose search terms by no later than December 16, 2022. ***Accordingly, as of the date of this letter, GAIN has not searched for, much less produced, any documents responsive to RFPs propounded by OANDA more than six months ago to obtain information necessary to OANDA’s understanding of GAIN’s backend systems.***

In addition, in February 2022, to understand the operation of GAIN’s accused products, OANDA noticed the deposition of David Leach, a Senior Software Engineer at GAIN. For various scheduling reasons, including Mr. Leach’s health issue that rendered him unavailable for more than two months, that deposition did not take place until September 21, 2022. At the deposition, when presented with the architectural diagrams that GAIN has produced to date, Mr. Leach testified that none of them accurately represented GAIN’s accused product as it currently operates. Indeed, with respect to one diagram he was shown, Mr. Leach indicated that he had

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likely revised this diagram dozens of times since 2014, and that he would have “deleted” such revised versions. Mr. Leach further testified that he had received no instructions from GAIN to preserve documents relevant to this litigation. Mr. Leach also identified other sources of technical documents concerning GAIN’s backend systems that had not been produced by GAIN in the lawsuit.

On October 4, 2022, OANDA sent a meet-and-confer letter in light of Mr. Leach’s deposition testimony, demanding that GAIN produce missing technical documents, including architectural diagrams from the relevant period, and seeking assurances about GAIN’s preservation of documents given Mr. Leach’s testimony suggesting spoliation. GAIN responded two weeks later, but only to state that Mr. Leach—contrary to his sworn testimony—did receive a litigation hold notice, and to represent to OANDA that it would respond substantively sometime after November 1, 2022. After multiple follow-ups by OANDA, it took until December 2, 2022—*two months* after the original letter was sent—for GAIN to actually provide that promised response. GAIN’s belated response still addressed none of the issues adequately. For example, GAIN asserted that it had produced “the current or latest version of relevant and responsive architecture diagrams,” without providing any further detail or any explanation about how that could be reconciled with Mr. Leach’s testimony. With respect to additional technical documents requested by OANDA, GAIN indicated that it was “still investigating whether it is possible to search and retrieve information.” OANDA responded with a letter of its own on December 8, 2022, seeking additional clarification of GAIN’s position and requesting transparency as to what technical documents GAIN is withholding. GAIN has yet to respond, and while OANDA takes seriously its obligation to exhaust meet-and-confer efforts before seeking Court intervention, it appears likely that this matter may be brought before the Court shortly.

In sum, contrary to GAIN’s claim that OANDA has had complete information for a year and has lacked diligence in acting on it, the record shows that GAIN’s production is still incomplete, and that GAIN has consistently resisted OANDA’s efforts to obtain critical technical documents. GAIN is thus demanding that the Court preclude OANDA from amending its infringement contentions using source code and technical documents produced to date, while at the same time continuing a year-long effort to obstruct OANDA from obtaining the discovery critical to understanding that source code and technical data. That gamesmanship should not be rewarded.

Once GAIN actually provides a complete set of technical documents that allows OANDA to understand the function of GAIN’s non-public backend systems, OANDA will be able to efficiently review GAIN’s source code and conduct a necessary 30(b)(6) deposition. Then, and only then, will OANDA be in a position to seek leave to amend its infringement contentions, if necessary. OANDA believes that there would plainly be good cause for such supplementation under Rule 3.7, including on the ground that it would amount to “recent discovery of nonpublic information about the Accused Instrumentality which was not discovered, despite diligent efforts, before the service of the Infringement Contention.” L. Pat. R. 3.7; *Cochlear Ltd. v. Oticon Med. AB*, No. CV 18-6684 BRM DEA, 2019 WL 3429610, at \*13 (D.N.J. July 29, 2019)

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