

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
MARSHALL DIVISION**

CYWEE GROUP LTD.,

Plaintiff,

v.

SAMSUNG ELECTRONICS CO. LTD. and
SAMSUNG ELECTRONICS AMERICA,
INC.,

Defendants.

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Case No. 2:17-CV-140-WCB

MEMORANDUM OPINION AND ORDER

Before the Court are Plaintiff’s Motion for Leave to Supplement Expert Reports to Include Third-Party Discovery, Dkt. No. 176, and Defendants’ Motion to Strike Plaintiff’s Untimely Supplemental Infringement Charts, Dkt. No. 187. On October 24, 2018, the Court held a hearing on various motions in this case, including the two motions referenced above. After considering the arguments made in the parties’ briefs and during the hearing, the Court GRANTED Plaintiff’s Motion for Leave to Supplement Expert Reports to Include Third-Party Discovery and DENIED Defendants’ Motion to Strike Plaintiff’s Untimely Supplemental Infringement Charts. The Court ruled on the motions in open court and noted the decisions in a minute order issued on October 26, 2018. Dkt. No. 238, at 2. This memorandum opinion and order details the reasons for the Court’s rulings on those two motions.

I. Governing Legal Principles

Although the procedural posture of the two motions and the background facts pertinent to each are somewhat different, the issues are similar. In the motion filed by the defendants (“Samsung”), the issue is whether the Court should permit the plaintiff (“CyWee”) to amend its

infringement contentions after the deadline for serving infringement contentions has passed. Samsung's motion is addressed to CyWee's effort to amend its infringement contentions to add a theory that some of the accused devices use a Samsung algorithm to implement their sensor fusion functionality, rather than an Android algorithm, as CyWee had initially contended.

In the motion filed by CyWee, the issue is whether the Court should grant a two-week extension of the period for filing expert reports. The necessary effect of granting CyWee's motion, however, would be to allow CyWee to pursue a theory of infringement that was not in its initial infringement contentions—the theory that some of the accused devices use a Qualcomm algorithm to implement their sensor fusion functionality, rather than an Android algorithm, as CyWee initially contended in its infringement contentions. Because permitting the filing of expert reports incorporating a new theory of infringement would require the service of new infringement contentions, the Court treats CyWee's motion as addressing both the date for serving its expert reports and the deadline for serving amended infringement contentions.

The Discovery Order entered in this case provided that the plaintiff need not comply with the requirement in the local rules to file infringement contentions for claim elements reciting a software limitation “until 30 days after the source code for each Accused Instrumentality is produced by the opposing party.” Dkt. No. 35, at 2. The parties dispute when the source codes for the various accused products in this case were produced. Samsung argues that the source code for the Samsung-algorithm products was produced as early as March 23, 2018, and the source code for the Qualcomm-algorithm products was made available as of July 25, 2018. Under Samsung's theory, because the amended infringement contentions were not served within 30 days of those dates, the amended infringement contentions are untimely, and the extension of time for filing expert reports should not be granted. CyWee contends that the source code for the

Samsung-algorithm code was not produced for inspection until August 14, 2018, and that the amended infringement contentions, which were served on September 10, 2018, were therefore timely. Even if a fully searchable version of Samsung-algorithm code is regarded as having been produced as early as July 30, 2018, CyWee contends that the period of delay is short and excusable in light of the need to confirm whether the proper files were included in the source code that was being produced. As for the Qualcomm-algorithm source code, CyWee contends that while Qualcomm produced the relevant source code on July 25, 2018, CyWee required a deposition of a Qualcomm representative to facilitate the efficient production and identification of relevant information. Given that the only date available for the deposition was October 2, 2018, the request for an extension of time for filing expert reports (and the accompanying request for leave to file infringement contentions reflecting the contents of the expert report) should be granted.

Courts in this district apply a non-exclusive list of factors when considering whether to grant leave of court permitting a party to amend its infringement or invalidity contentions after the deadline for serving those contentions has passed. Those factors are: (1) the length of the delay and its potential impact on the judicial proceedings; (2) the reason for the delay, including whether it was within the reasonable control of the movant; (3) whether the offending party was diligent in seeking an extension of time, or in supplementing discovery, after an alleged need to disclose the new matter became apparent; (4) the importance of the particular matter, and if vital to the case, whether a lesser sanction would adequately address the other factors to be considered and also deter future violations of the court's scheduling orders, local rules, and the federal rules of procedure; and (5) the danger of unfair prejudice to the non-movant. *See Sycamore IP Holdings LLC v. AT&T Corp.*, No. 2:16-cv-588, 2017 WL 4517953, at *2 (E.D. Tex. Oct. 10,

2017); *Allure Energy, Inc. v. Nest Labs, Inc.*, 84 F. Supp. 3d 538, 540–41 (E.D. Tex. 2015); *Tyco Healthcare Grp. LP v. Applied Med. Res. Corp.*, No. 9:06-cv-151, 2009 WL 5842062, at *2 (E.D. Tex. Mar. 30, 2009); *Computer Acceleration Corp. v. Microsoft Corp.*, 481 F. Supp. 2d 620, 625 (E.D. Tex. 2007); *see also Tech Pharmacy Servs., LLC v. Alixa Rx LLC*, No. 4:15-cv-766, 2017 WL 3283325, at *2 (E.D. Tex. Aug. 2, 2017) (same principles applicable to whether to strike or permit amendment of invalidity contentions); *Anascape, Ltd. v. Microsoft Corp.*, No. 9:06-cv-158, 2008 WL 7180756, at *2-3 (E.D. Tex. May 1, 2008) (same). With respect to the issue of diligence, the burden of proof is on the party seeking leave to establish diligence, rather than on the opposing party to establish lack of diligence. *O2 Micro Int’l Ltd. v. Monolithic Power Sys., Inc.*, 467 F.3d 1355, 1366 (Fed. Cir. 2006).

After carefully considering the circumstances leading to the dispute over CyWee’s amendment of its infringement contentions and the request for an extension of the date for filing expert reports, the Court makes the following findings:

1. With respect to the Samsung-algorithm products, given the considerable confusion over the production of the pertinent source code, CyWee was justified in concluding that it was not until Samsung’s offer to produce its source code as of July 30, 2018, at the earliest, that the 30-day period for amending its infringement contentions began to run. Thus, the filing of the infringement contentions with respect to the Samsung-algorithm products, which occurred on September 10, 2018, was at most delayed 12 days.
2. With respect to the Qualcomm-algorithm products, the source code was produced on July 25, 2018. Accordingly, any delay in amending the infringement contentions with regard to the Qualcomm algorithm products was, at most, 39 days. However, the Court acknowledges CyWee’s representation that without a deposition of a Qualcomm

representative, CyWee was unable to identify relevant information in the source code until October 2, 2018.

3. The short periods of delay at issue in this case have had no material impact on the judicial proceedings, as a date for trial has not yet been set and other deadlines have not been adversely affected by the delay.
4. The background circumstances that led to the delay in amending the infringement contentions are attributable to CyWee's lack of information—or at least its lack of recognition—that some of the accused devices were using a Qualcomm algorithm for their sensor fusion technology and that others were using a Samsung algorithm, which was contrary to CyWee's prior understanding. Whether that misunderstanding was chargeable to CyWee and thus the long period between the service of CyWee's initial infringement contentions and the service of its amended infringement contentions was under the reasonable control of CyWee is a difficult issue. The Court has resolved that issue by determining that CyWee's misunderstanding was reasonable and that the delay was therefore not reasonably chargeable to CyWee.
5. While CyWee delayed for a period of time in seeking access to Qualcomm and Samsung's source code, that delay was not the result of unreasonable lack of diligence. Once the need to amend the infringement contentions became clear, CyWee was diligent in conducting the discovery that ultimately led to CyWee's amending its contentions, even though that process took several months to complete.
6. The amendment of the infringement contentions is important to the case, as it appears that the effect of denying an amendment would be that CyWee's claims as to the devices

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