UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
WACO DIVISION

AIRE TECHNOLOGY LTD., Plaintiff, v. APPLE INC., Defendant.	Case No. 6:21-cv-01101-ADA **JURY TRIAL DEMANDED**

PLAINTIFF AIRE TECHNOLOGY LTD.'S MOTION TO AMEND PRELIMINARY INFRINGEMENT CONTENTIONS

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I. INTRODUCTION

Plaintiff Aire Technology Ltd. ("Aire") respectfully moves the Court for leave to amend its preliminary infringement contentions ("PICs") to add claim 13 of U.S. Patent No. 8,205,249 ("the '249 Patent"). The '249 Patent claims inventions concerning the ability for the exchange of information between a "portable data carrier" (such as a chip card or mobile device) and a payment "terminal" about the type of user authentication (*i.e.*, passcode or biometric) utilized by a customer to engage in a secure electronic transaction. Aire's original PICs allege that a variety of Apple iPhones that utilize near filed communication (NFC) technology and Apple Pay to engage in a secure electronic transaction at a payment terminal infringe the claims of the '249 Patent. The asserted claims (with the exception of claim 13) are directed to a "portable data carrier" (*i.e.*, the iPhone used to authenticate a customer and make a purchase). In contrast, the new claim 13 Aire seeks to add to its contentions is directed to a "terminal."

During Summer 2022, Apple rolled out its new "Tap to Pay" feature only to certain retailers and merchants, which allows a retailer to now use their Apple iPhone as a payment **terminal** in the same way as a traditional credit card payment terminal. Hollander Decl. ¶ 2. After learning that Apple's Tap to Pay feature was now being employed by retailers and merchants, Aire promptly investigated the operation of the feature and its use in real-world transactions to ensure that the feature worked in the manner that Apple advertised. *Id.* ¶ 3. Immediately thereafter, Aire drafted a claim chart mapping claim 13 of the '249 Patent and shared that chart with Apple. *Id.* ¶ 4; Ex. 1 ('249 Patent claim 13 claim chart). Once Apple indicated that it opposed adding claim 13 to the case, Aire promptly filed the instant motion. *Id.* ¶ 5; Ex. 2 (emails between D. Hollander and A. Radsch). As such, Aire was diligent in seeking amendment.

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Further, there is no prejudice to Apple by adding claim 13 of the '249 Patent to the case at this juncture. First, the scope of the accused products is not changed by the addition of claim 13—the accused products are still Apple iPhones, which were already accused of infringement. Ex. 2 (D. Hollander Sept. 27, 2022 email). Second, per the Court's amended Scheduling Order, the close of fact discovery is on March 7, 2023, and the Markman hearing is set for May 16, 2023. Dkt. No. 61. To that end, there is more than sufficient time to address any new discovery that may be necessary. Additionally, while Aire does not believe the addition of claim 13 introduces any new claim construction issues, Apple has ample time to brief any additional terms for construction well in advance of the May 16, 2023 Markman date. Accordingly, because amending Aire's PICs will not prejudice Apple, the Court should grant Aire's Motion to assert this single additional claim.

II. LEGAL STANDARD

A party must demonstrate good cause for a Court to grant leave to amend infringement or invalidity contentions. *See Kinetic Concepts, Inc. v. BlueSky Med. Corp.*, No. SA-08-CV-102-RF, 2009 WL 10664413, at *1 (W.D. Tex. Dec. 21, 2009). "The good cause standard requires the movant to show that, 'despite its exercise of diligence, it cannot reasonably meet the scheduling deadlines.'" *Georgetown Rail Equip. Co. v. Holland L.P.*, No. 6:13-CV-366-JDL, 2014 WL 12703781, at *2 (E.D. Tex. Oct. 7, 2014) (quoting *Garmin S & W Enters., L.L.C. v. Southtrust Bank of Alabama*, 315 F.3d 533, 535 (5th Cir. 2003)). "The following factors are used to determine whether to allow a party to supplement infringement contentions: (1) the reason for the delay and whether the party has been diligent; (2) the importance of what the court is excluding and the availability of lesser sanctions; (3) potential prejudice in allowing the amendment; and (4) the availability of a continuance to cure such prejudice." *Id.*

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