

**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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NO. 2:17-CV-00140-RWS-RSP

**DEFENDANTS SAMSUNG ELECTRONICS CO., LTD. AND SAMSUNG
ELECTRONICS AMERICA, INC.’S REPLY IN SUPPORT OF MOTION TO STRIKE
PLAINTIFF CYWEE GROUP LTD.’S UNTIMELY INFRINGEMENT CHARTS**

CyWee’s opposition to Samsung’s motion to strike ignores one simple fact: three of the four products CyWee is now attempting to add to this case were publicly available before the July 12, 2017 due date of its contentions. CyWee argues that the original charted products were exemplars of the relevant products but fails to cite any authority supporting its position that a party may be excused from charting every accused product based only on an unsupported assertion that its claim charts are exemplary of other products. Indeed, the relevant products were not even listed in CyWee’s infringement contentions.

There is no good cause here, and there is considerable prejudice. Were the Court to permit CyWee to amend its infringement contentions at this stage, the burden imposed on Samsung would be considerable. Samsung served its invalidity contentions more than a month ago based on CyWee’s positions set forth in its infringement contentions, and the claim construction process starts in just over two weeks. If CyWee is permitted to amend, Samsung would have to analyze four additional products and potentially alter its invalidity and other

substantive positions based on that analysis. Moreover, CyWee still has not provided any reason why it failed to seek leave of Court in the first place, as required by Patent L.R. 3-6. Thus, Samsung respectfully requests that the Court grant its motion to strike and deny CyWee leave to amend its infringement contentions.

I. CYWEE HAS NOT SHOWN GOOD CAUSE TO AMEND ITS INFRINGEMENT CONTENTIONS

A. CyWee Has Not Explained Why It Failed to Timely Accuse the Galaxy J7V, Galaxy J7 (2017), Galaxy Note 7, or the Galaxy S8 Active

CyWee has not provided any factual basis to support its argument that it had good cause to amend its infringement contentions. Rather than provide any reason why it did not timely accuse the four products it is now attempting to add to this case, CyWee relies on misleading information for the Galaxy J7V and Galaxy J7 (2017), and misrepresentations of Samsung's counsel's statements.

Relying on a single website reference for each product, CyWee represents that the "Galaxy J7 V" and the "Galaxy J7 (2017)" were released in March and July of 2017, respectively, and that it was "unaware" of the Galaxy J7 V when it served its infringement contentions. (Opp. at 2.) Putting aside CyWee's failure to show why it was unaware of a publicly available product, the "Galaxy J7 V" and the "Galaxy J7 (2017)" are variants of the same phone—the 2017 model of the Galaxy J7 ("the 2017 Galaxy J7"). (Declaration of S. Moseley ("Moseley Decl."), Exs. G–H.) Had CyWee adequately investigated these products, it would have learned that the "V" designation was given to the model of the 2017 Galaxy J7 sold by Verizon Wireless, which, as even CyWee's claim charts confirm, is functionally identical to other models of the 2017 Galaxy J7 for purposes of this case. (*See, e.g.*, Opp., Exs. I–L.) The Galaxy J7 V was released in March of 2017, well before the due date of CyWee's infringement

contentions. Accordingly, CyWee does not have any excuse for failing to include the 2017 Galaxy J7 in its original infringement contentions.

CyWee claims that a “worldwide recall” of the Galaxy Note 7 hampered its attempts to obtain a sample of that product. However, CyWee fails to explain why it needed a physical sample of the Galaxy Note 7 to prepare its claim charts, given that its charts for that product contain only information from public websites and cross-references to its existing charts for the Galaxy S7 Edge. (Opp., Exs. G–H.)

CyWee next incorrectly states that Samsung’s counsel requested claim charts for the Galaxy Note 7, offering only its own self-serving correspondence as support. As described in Samsung’s motion to strike, Samsung promptly notified CyWee that its infringement contentions were deficient because, among other things, they failed to include a chart for the Galaxy Note 7. (Mot. at 2.) Samsung also refused to agree to CyWee’s untimely attempt to amend its infringement contentions and notified CyWee that it must request leave from the Court and demonstrate good cause to amend, as required under the rules. (*Id.*) Indeed, in the correspondence immediately preceding CyWee’s, Samsung unambiguously stated that it “disputes that the Note 7 . . . [is a] properly accused product[.]” and that it “will oppose any attempt by CyWee to amend its contentions to include new charts or name new products, absent a showing of good cause sufficient under the local patent rules.” (Mot., Ex. D.) No other correspondence indicates otherwise and Samsung never made any contrary statement during any discussion between the parties. (Moseley Decl. ¶ 4; *see also* Mot., Exs. B–F, Opp., Exs. E–F.) It also makes no sense that Samsung would challenge CyWee’s attempt to untimely amend its contentions only to accept new claim charts at a later meet and confer, without any agreement to mitigate the burden imposed on Samsung by the late amendment.

Finally, CyWee has not explained why it waited more than two months to attempt to amend its infringement contentions to add the Galaxy S8 Active. (*See Opp.* at 4.) As noted in the website cited by CyWee, the Galaxy S8 Active was released on or about August 11, 2017, but CyWee did not move for leave to amend until October 27, 2017. (Declaration of Chris Evans in support of CyWee’s Opposition (“Evans Decl.”) ¶ 6; Dkt. No. 44.) In similar circumstances, this Court has allowed a plaintiff to amend its infringement contentions to add new products only when it has been diligent in doing so. For example, in *TiVo, Inc. v. Verizon Communications, Inc.*, No. 2:09–CV–257–JRG, 2012 WL 2036313 (E.D. Tex. Jun. 6, 2012), the plaintiff diligently attempted to join an additional product to the lawsuit by agreement with the defendant immediately after learning that the product had been sold to the public. *See id.* at *2. In contrast, CyWee waited over a month before serving Samsung with a claim chart attempting to add the Samsung Galaxy S8 Active to this case and waited over two months before filing a motion for leave with the Court.

CyWee lacks good cause to amend its infringement contentions to include any of the four products that were not originally accused, and the Court should disallow CyWee’s attempt to do so.

B. CyWee Has Not Provided Any Case Law Supporting Its Use of Representative Claim Charts

CyWee also fails to provide any authority for its position that it should be allowed to use its existing claim charts as “representative” claim charts for the new products it is adding without any explanation of how the products are allegedly identical. In *UltimatePointer, LLC v. Nintendo Co.*, No. 6:11-CV-496, 2013 WL 12140173 (E.D. Tex. May 28, 2013), the only case cited by CyWee that discusses this issue, the Court found such an approach inappropriate. *Id.* at *3. Specifically, the Court noted that “[i]t is possible for a plaintiff to use a single chart for multiple

products, *if* separate charts would be *identical* for each product.” *Id.* (citing *Juxtacomm Techs., Inc. v. Ascential Software Corp.*, 548 F. Supp. 2d 379, 381 (E.D. Tex. 2008)). The Court also made clear that “broad conclusory allegations that the products are similar do not allow Plaintiffs to circumvent the Local Rules.” *Id.* (citing *Global Sessions LP v. Travelocity.com LP*, No. 6:10-cv-671, 2012 WL 1903903, at *4 (E.D. Tex. May 25, 2012)). Accordingly, the Court found the use of exemplary charts improper because the plaintiff did not “provide an explanation of the technical and functional identity of the products represented [by the exemplary charts].” *Id.*

Here, a number of differences exist amongst the claim charts CyWee served with its original infringement contentions. For example, those claim charts accuse a number of different accelerometers, gyroscopes, and/or compass sensors of meeting limitations of the asserted claims because the charted products use different models of these components. (Moseley Decl., Exs. I–K.) None of the claim charts served with CyWee’s original infringement contentions has any information that would allow Samsung to determine which, if any, of them represent CyWee’s new contentions against the four new products it is now attempting to add. (*See, e.g., id.*) Instead, despite clear evidence in its own claim charts showing that the accused products differ for purposes relevant to this case, CyWee asserts that each of its claim charts is somehow “exemplary” of its accusations against some untold number of other products without any further explanation. (*Id.*) CyWee has not complied with its obligation to provide “chart[s] identifying specifically where each element of each asserted claim is found within each Accused Instrumentality” P.R. 3-1(c).

Given its inability to show good cause for leave, CyWee should not be allowed to belatedly amend its infringement contentions to add the four products at issue.

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