IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

BANDSPEED, LLC,	§	
	§	
Plaintiff,	§	Case No. 1:20-cv-00765-LY
v.	§	
	§	
REALTEK SEMICONDUCTOR	§	
CORPORATION,	§	
	§	
	§	
Defendant.	§	

**DEFENDANT'S RESPONSE TO PLAINTIFF'S
OPENING CLAIM CONSTRUCTION BRIEF (ECF NO. 40)**

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Realtek respectfully requests that the Court adopt its proposed claim constructions or find the claims indefinite (as appropriate) and reject Bandspeed's proposed constructions.

I. Bandspeed Was Not Prejudiced by the Slight Delay in Realtek's Disclosure of Its Indefiniteness Positions for Certain Claims

Realtek served its Invalidity Contentions on Bandspeed on July 12, 2022. Although Realtek's Invalidity Contentions did not contain its indefiniteness position for some terms,[1] all of Realtek's positions were disclosed just days later in its mandatory Disclosure of Claim Terms (Ex. A) identifying claim terms to be construed or found indefinite. Over the next eight weeks leading up to the Joint Claim Construction Statement ("JCCS"), the parties had no less than ten email exchanges, meet-and-confers, and phone conversations related to claim construction issues, including efforts to narrow disputes. *See* Decl. of Jeffrey Johnson ¶¶ 4-8 (Ex. B). Counsel for Bandspeed never indicated that Realtek's assertion of indefiniteness was untimely or that Realtek needed to amend its contentions. In addition, the parties filed their JCCS, on September 13, 2022, which contained all of Realtek's invalidity contentions. Moreover, the parties' Opening Claim Construction Briefs were filed a month later, on October 17, 2022, over which time the parties had another no less than six email or phone call exchanges—again, with no mention of untimeliness. *See id.* ¶¶ 6-9. Bandspeed never requested an extension of the deadline for filing its Opening Claim Construction Brief because some of Realtek's indefiniteness positions were not disclosed in its Invalidity Contentions. The first time that Realtek was made aware Bandspeed had any issue with its disclosures was when Bandspeed filed its opening brief on October 17, 2022, over 12 weeks after Realtek identified its indefiniteness terms on July 22, 2022.

This Court has considered four factors in addressing untimely requests to amend a defendant's invalidity contentions: "(1) the explanation for the failure to meet the deadline; (2) the importance of the thing that would be excluded; (3) potential prejudice in allowing the thing that would be excluded; and (4) the availability of a continuance to cure such prejudice." *Kinetic*

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[1] Realtek did not raise indefiniteness in its Invalidity Contentions for the following terms: "selection kernel," "hopping sequence," "channel index" and "apply[ing] an index to a channel index of the identified communications channel," "bad" and "good," and the "instructions" terms.

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