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

PARKERVISION, INC., Plaintiff, **v.** **LG ELECTRONICS, INC.,** Defendant.	**Case No. 6:21-cv-00520-ADA** **JURY TRIAL DEMANDED**

DEFENDANT'S OPPOSED MOTION FOR LEAVE TO FILE A SUR-SUR-REPLY CLAIM CONSTRUCTION BRIEF TO RESPOND TO NEW ARGUMENT RAISED IN PARKERVISION'S SUR-REPLY CLAIM CONSTRUCTION BRIEF

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Defendant LG Electronics Inc. ("LGE") respectfully moves for leave to file a short, two-page sur-sur-reply in response to Plaintiff ParkerVision, Inc.'s ("ParkerVision") Sur-Reply Claim Construction Brief (Dkt. 40). ParkerVision's Sur-Reply raises a new argument concerning whether the preamble of claim 1 of the '835 patent is limiting that could have and should have been presented in ParkerVision's Responsive Claim Construction Brief (Dkt. 36). LGE respectfully requests a fair opportunity to respond to this new argument and has attached its proposed sur-sur-reply brief at Exhibit A.

I. BACKGROUND

ParkerVision first informed LGE on February 2, 2022, that it planned to assert that the "cable modem" term in the preamble of claim 1 of the '835 patent is limiting. Ex. B. Pursuant to the Agreed Scheduling Order (Dkt. 35), LGE filed its Opening Claim Construction Brief on February 23, 2022, arguing that the "cable modem" term was not limiting. Dkt. 31 at 8-11. ParkerVision filed its Responsive Claim Construction Brief on March 16, 2022, responding to LGE's arguments and arguing that the "cable modem" term was limiting. Dkt. 36 at 9-12. LGE filed its Reply Claim Construction Brief, addressing ParkerVision's arguments concerning the "cable modem" term. Dkt. 37 at 5-7. ParkerVision filed its Sur-Reply Claim Construction Brief on April 15, 2022.[1]

In its Sur-Reply Claim Construction Brief, ParkerVision argues that "cable modem" in the preamble of claim 1 is limiting because it provides antecedence for "cable modem" in dependent claims 16 and 17. Dkt. 40 at 6. This argument was not raised in ParkerVision's initial claim construction brief. *See* Dkt. 36 at 9-12.

[1] ParkerVision's Sur-Reply Claim Construction Brief was due on April 13, 2022, pursuant to the Agreed Scheduling Order. Dkt. 35 at 3. ParkerVision requested and LGE agreed to a two-day extension, moving the deadline to April 15, 2022.

II. LEGAL STANDARD

This Court generally "will not consider new arguments or evidence in a reply brief." *Interactive Graphic Sols. LLC v. Microsoft Corp.*, No. 6:21-CV-00462-ADA, D.I. 67 (W.D. Tex. Apr. 14, 2022) (J. Albright); *see also Jones v. Cain*, 600 F.3d 527, 541 (5th Cir. 2010) ("Arguments raised for the first time in a reply brief are generally waived."). When new arguments are raised for the first time in a reply or sur-reply brief, courts have the discretion to grant leave to file a brief to respond to the new arguments. *Mission Toxicology, LLC v. Unitedhealthcare Ins. Co.*, 499 F. Supp. 3d 350, 359 (W.D. Tex. 2020) (citing *Warrior Energy Servs. Corp. v. ATP Titan M/V*, 551 F. App'x 749, 751 n.2 (5th Cir. 2014)). "[G]ranting leave to file a surreply in extraordinary circumstances 'on a showing of good cause' is a viable alternative to the general practice to summarily deny or exclude 'all arguments and issues first raised in reply briefs.'" *Id.*

III. ARGUMENT

In its Sur-Reply, ParkerVision argues for the first time that "the term 'cable modem' [in the preamble of claim 1] provides antecedent basis for the term '*the* cable modem' in claims 16 and 17 of the '835 patent." Dkt. 40 (PV Sur-Reply) at 6 (emphasis in original). ParkerVision asserts, without supporting authority, that "[t]his ends the inquiry" and the term "cable modem" in the preamble of claim 1 must be limiting. *Id*. This new argument should not be considered by the Court because it is untimely, improper, and could have been raised in ParkerVision's first claim construction brief. *Mission Toxicology*, 499 F. Supp. 3d at 359 ("it is improper for the movant to sandbag and raise wholly new issues in a reply memorandum" (citation omitted)).

To the extent that the Court will consider ParkerVision's untimely argument, good cause exists to permit LGE fair opportunity to respond. ParkerVision's argument assumes, incorrectly, that antecedent basis for a dependent claim is always sufficient to render a preamble limiting. There is no such "bright line rule"—rather, "a preamble of an independent claim need not be found

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