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 REPLY IN SUPPORT OF ITS MOTION TO AMEND PRELIMINARY INFRINGEMENT CONTENTIONS

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I. INTRODUCTION

Plaintiff Aire Technology Limited's ("Aire") Motion to Amend its Preliminary Infringement Contentions is supported by good cause and should be granted. Apple's opposition (Dkt. No. 66 ("Opp.")) does not undercut the fact that all four factors for evaluating good cause weigh in Aire's favor. Apple complains that Aire should have done *less diligence* and asserted claim 13 of the '249 Patent merely based on a February 2022 press release announcing Apple's "plans to introduce" the accused Tap to Pay feature "[l]ater this year." Dkt. No. 66-2 at 1-2. But a sparse press release noting a plan to introduce a feature at some unspecified time does not establish that Apple made, used, offered to sell, or sold the infringing feature. Rather, Aire diligently tracked Apple's roll-out of its Tap to Pay feature in Summer 2022, and promptly provided a claim chart to Apple once Aire confirmed that the feature was being used in the United States and solidified its belief of infringement through observing its use in the marketplace.

Apple's other arguments are unpersuasive. Adding claim 13 to this case is important to avoid a wasteful second litigation—which would not be precluded by the doctrine of claim splitting because Aire's claim arose after the pleadings closed in this action. Apple is also not prejudiced by the addition of claim 13 given the revised Scheduling Order (Dkt. No. 61), which provides sufficient time for any additional discovery and to address any new claim construction issues. Indeed, Aire has already agreed that Apple may (1) have additional time to file its final invalidity contentions and (2) brief additional claim construction terms. Thus, to the extent there is any prejudice, the time left in the Scheduling Order is more than sufficient to cure that prejudice.

II. ARGUMENT

A. Aire diligently sought amendment

Apple argues that because it announced in February 2022 its intention to release the accused Tap to Pay feature sometime later that year, that Aire should have asserted claim 13 of the

'249 Patent in February 2022. Opp. at 4. Not so. In Apple's February 8, 2022 Press Release, it merely "*announced plans to introduce Tap to Pay on iPhone*."[1] Dkt. No. 66-2 at 1-2 (noting "*Later this year*, US merchants will be able to accept Apple Pay" and "[o]nce Tap to Pay on iPhone *becomes available*…."). In other words, Apple simply noted that it had "plans" to release its Tap to Pay feature in February 2022—it did not make the feature available at that time. Additionally, the February 2022 Press Release explains that the feature would first be available in a limited capacity through a single payment platform in the "spring" of 2022 and that "[a]dditional payment platforms and apps will follow *later this year*." *Id.* at 2. As such, Aire had no other facts in February 2022 to conclude that the Tap to Pay feature was made, used, offered for sale, or actually sold to consumers that could serve as the basis for a claim of patent infringement pursuant to 35 U.S.C. § 271. And, it is for this very reason that Aire had to confirm the "real-world" use of the feature to add claim 13 of the '249 Patent to its preliminary infringement contentions.

Further, Apple complains that "Aire's amendment does not rely on any purported investigation of 'real-world use'" and cites "[s]imiliar disclosures [that] appear in Apple's February 8, 2022 press release…." Opp. at 5. But without any real-world investigation of the use of the Tap to Pay feature, there was no way for Aire to know that it could rely on certain representations and depictions in Apple's documents to ensure Apple was on notice of its infringement theory.[2]

Apple also maintains that Aire's diligence arguments should somehow be disregarded because Aire's counsel did not divulge the specific "details of its [] 'real world' investigation."

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[1] All emphasis added unless stated otherwise.

[2] This case is not like *Levine* because, in that case, the "Plaintiff delayed six months or more after the *release* of the phones at issue before moving for leave to amend." *Levine v. Samsung Telecomms. Am., LLC*, No. 2:09-CV-372, 2012 WL 13009216, at *3 (E.D. Tex. July 25, 2012). Here, Aire sought to amend contemporaneously with the *release* of Apple's Tap to Pay feature.

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