

THE HONORABLE JAMES L. ROBERT

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**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
SEATTLE DIVISION**

CYWEE GROUP LTD.,

Plaintiff,

HTC CORPORATION
and
HTC AMERICA, INC.,

Defendants.

CASE NO. 2:17-cv-00932-JLR

JURY TRIAL DEMANDED

**OPPOSITION TO DEFENDANTS'
MOTION TO AMEND SCHEDULING
ORDER**

**NOTE ON MOTION CALENDAR:
APRIL 13, 2018**

1 Plaintiff CyWee Group, Ltd. (“CyWee”) submits this Opposition to Defendants’ Motion to
2 Amend Scheduling Order and in support thereof states as follows:

3 Defendants HTC Corporation and HTC America, Inc. (collectively, “HTC”) ask the Court to
4 delay numerous deadlines and unreasonably compress the pretrial schedule solely to enable HTC
5 to serve a third-party complaint that appears to have no chance of success. Indeed, as shown in
6 third-party defendant STMicroelectronics, Inc.’s (“STM, Inc.”) motion to dismiss, HTC seems to
7 have no plausible claims, and its third-party claims should be dismissed.¹ See Dkt. 64. HTC’s
8 purported need for a schedule change is a problem of its own making—HTC had all the
9 information that forms the basis of its third-party claims long before it appeared in this lawsuit,
10 which has been pending for nearly a year. HTC should not be permitted to cite its own delays to
11 justify failing to bring its third-party claims long before now. The Court should deny HTC’s
12 Motion to Amend.

13 ARGUMENT

14 HTC’s Motion to Amend the scheduling order requires the Court’s consent, conditioned
15 upon good cause. FED. R. CIV. P. 16(b)(4). The good cause inquiry focuses upon the movant’s
16 diligence. *Johnson v. Mammoth Recreations, Inc.*, 975 F.2d 604, 609 (9th Cir. 1992). HTC has
17 not been diligent; the Court should therefore deny the Motion.

18 A. Third-Party Defendants Need Not Participate in Claim Construction.

19 HTC relies on a faulty justification for its alleged need to postpone various case deadlines—
20 “to afford all third-party defendants the opportunity to participate in claim construction
21 proceedings.” Dkt. 68 at 2.² HTC’s proposed schedule amendments show that this is just an
22 excuse because HTC requests until October 11, 2018 to serve the third-party defendants, but it

23 _____
24 ¹ Although CyWee takes no position on the merits of STM Inc.’s motion, it does not disagree
with the legal arguments presented therein.

25 ² Page citations are to the ECF pagination, not the internal document page.
26

1 proposes to complete all claim construction proceedings by *September 21, 2018*. Thus, even if
2 the Court adopts HTC's requested schedule, the unserved third-party defendants could not
3 participate in claim construction.

4 Nonetheless, accommodating third-party defendant participation in claim construction is
5 unnecessary because those parties have not been sued for patent infringement. HTC brought
6 causes of action against those defendants for contribution, indemnity, and consumer protection
7 act violations. *See* Dkt. 43. Those parties' interests in how the Court construes the claims of the
8 patents-in-suit as between CyWee and HTC are adequately represented by the current parties.
9 Although HTC claims "[c]ourts in this Circuit have found good cause in similar circumstances,"
10 the circumstances in those cases were not "similar" at all. Dkt. 68 at 7. In both *Acer*,³ and *Quanta*
11 *Computers*,⁴ the third-party defendants were accused of patent infringement. Here, the third-
12 party defendants are not. HTC's primary justification for postponing the current schedule is
13 meritless.

14 **B. HTC Has Not Been Diligent.**

15 As HTC acknowledges, its own diligence or lack thereof is a primary consideration in
16 determining whether to amend a schedule under Rule 16. *Johnson v. Mammoth Recreations, Inc.*,
17 975 F.2d 604, 609 (9th Cir. 1992); *see* Dkt. 68 at 6 (citing same). For that reason, "good cause" to
18 amend under Rule 16 can arise where the current schedule cannot be met despite the movant
19 acting with all due diligence to meet the impending deadlines. *Johnson*, 975 F.2d at 609. But
20 when the party seeking the extension has not been diligent, the Rule 16 inquiry "should end"
21 without amending the scheduling order. *Id.*

22 _____
23 ³ *U.S. Ethernet Innovations, LLC v. Acer, Inc.*, No. C 10-3724 CW, 2013 U.S. Dist. LEXIS
24 113551, at *31 (N.D. Cal. Aug. 7, 2013).

25 ⁴ *Victor Co. of Japan, Ltd. v. Quanta Comp., Inc.*, No. C 06-0422 WHA, 2007 U.S. Dist. LEXIS
26 21263 at *6-7 (N.D. Cal. Mar. 15, 2007).

1 HTC's motion focuses only upon its purported diligence *after* it decided to assert third party
2 claims in this case. But whether HTC acted promptly in obtaining summonses, in retaining a
3 company for foreign service of process, and in carrying out related actions is immaterial. The
4 relevant question is: could HTC have filed its claims sooner than it did? HTC clearly did not
5 exercise diligence by waiting until January 11, 2018—nearly *seven months* after this litigation
6 began—to file its third-party claims. Dkt. 43.

7 This case has been pending since June 16, 2017. HTC sought and obtained consent from
8 CyWee for *two* extensions of its answer deadline, and it filed its first responsive pleading on
9 October 26. Dkt. 18, 22. But long before its October 26 appearance in this litigation, HTC knew
10 or should have known the facts underlying its claims against CyWee Motion Group Ltd.
11 (“CyWee Motion”) and the various STMicroelectronics entities it has impleaded as third-party
12 defendants. HTC also knew or should have known that most of the entities it would seek to
13 corral as third-party defendants were foreign entities and would therefore have to be served via
14 extraterritorial judicial process. HTC is certainly aware that service abroad can present
15 difficulties and delays.

16 HTC's prior knowledge of its potential claims is clear because HTC's claims stem from a
17 contract it entered with CyWee Motion and STM in January 2013—more than five years ago.
18 Dkt. 43, ¶¶ 24-34. Thus, HTC cannot deny that it had actual knowledge of the facts it alleges as
19 the basis for its third-party complaint at the time CyWee filed this lawsuit.

20 Upon being served on June 19, 2017,⁵ HTC could have taken at least three actions *other than*
21 waiting until January 2018 to file third-party claims. First, HTC could have answered and
22 impleaded CyWee Motion and the various STMicro entities at any time before its answer
23 deadline. Second, HTC could have brought its third-party claims with its answer. Third, HTC
24

25 ⁵ See Dkt. 6.

1 could have investigated its claims against the various STMicro entities to ensure it would add
2 only proper parties. *See* Dkt. 64. HTC did none of the three. Instead, it filed a motion to dismiss
3 **only** the induced infringement claims that CyWee pleaded in its First Amended Complaint and
4 did not answer the direct infringement causes of action CyWee pleaded. *Compare* Dkt. 35, with
5 Dkt. 20, ¶¶ 26, 124. Indeed, even though HTC did not challenge the adequacy of CyWee’s direct
6 infringement claims, it did not answer those claims until March 23, 2018, which was **five months**
7 after HTC’s original extended answer date (by which time CyWee had filed a second amended
8 complaint). *See* Dkt. 62. In the intervening months, HTC did nothing with respect to its third-
9 party claims.

10 Although HTC had all facts necessary to bring its third-party claims in its possession when
11 CyWee filed this case, HTC sought and received nearly four additional months to file a
12 responsive pleading, to evaluate CyWee’s claims, to investigate licensing issues, and to consider
13 whether to bring third-party claims with its initial responsive pleading. HTC then waited an
14 additional two and a half months to add third-party defendants to this lawsuit. *See* Dkt. 43. HTC
15 did not act diligently.

16 Even after filing the third-party complaint, HTC failed to diligently seek a schedule
17 amendment. On the day after HTC filed its third-party complaint, it inquired whether CyWee
18 would accept service for CyWee Motion. Dkt. 69, ¶ 4. But even though CyWee’s counsel stated
19 it could not accept service for CyWee Motion, and HTC knew it would have to effectuate
20 international service, HTC waited another **seven weeks** to engage an international process server
21 and **ten weeks** before it sought Letters Rogatory for international service on CyWee Motion. Dkt.
22 69, ¶¶ 4, 6. HTC has not diligently pursued its third-party claims, and it should not be permitted
23 to grind this case to a halt as a result.

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