

THE HONORABLE JAMES L. ROBART

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26

**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

**MOTION TO PRECLUDE  
CONSIDERATION OF BELATED  
CLAIMS CONSTRUCTION POSITIONS**

**NOTE ON MOTION CALENDAR:  
MAY 4, 2018**

CYWEE MOTION GROUP, LTD.'S MOTION TO  
PRECLUDE  
CASE No. 2:17-cv-932-JLR- 1

SHORE CHAN DEPUMPO LLP  
901 MAIN STREET, SUITE 3300  
DALLAS, TX 75202  
TELEPHONE: 214-593-9110

1 In their initial invalidity contentions, Defendants (collectively “HTC”) alleged that only a  
2 single term was indefinite. More than *two months* later, HTC alleged that three additional claim  
3 terms are also indefinite. HTC made these allegations *less than a month* before the parties’ Joint  
4 Claim Chart and Prehearing Statement deadline. HTC never sought leave to amend its invalidity  
5 contentions. Rather, HTC unilaterally alleged that three additional terms were indefinite in its  
6 Disclosure of Preliminary Claim Constructions and Evidence (the “Disclosure”). CyWee’s  
7 expert witness report on claim construction, which CyWee timely served more than a month and  
8 a half ago, did not address the indefiniteness of any terms beyond the sole term that HTC  
9 identified in its invalidity contentions. Hence, HTC’s belated and unwarranted assertion that  
10 three additional terms are indefinite substantially prejudices CyWee by preventing its expert  
11 from rendering an opinion applicable to this case. The Court should refuse to consider such late  
12 assertions in claims construction.

### 13 I. FACTUAL BACKGROUND

14 On December 14, 2017, this Court issued its minute order setting trial and related dates. Dkt.  
15 42. The order commands the parties to comply with the Court’s Standing Order (“Standing  
16 Order”). *Id.* at 2. The Standing Order, in turn, requires HTC to include “any grounds for  
17 invalidity based on indefiniteness, enablement, or written description under 35 U.S.C. §112” in  
18 its preliminary invalidity contentions. Standing Order at 2-3.

19 On January 19, 2018, HTC served its invalidity contentions, an excerpt of which is attached  
20 hereto as Exhibit A. In its invalidity contentions, HTC identified only the term “the spatial  
21 reference frame” as indefinite. Based in part on those contentions, and pursuant to the Court’s  
22 scheduling order, on February 16, 2018, CyWee served its expert report regarding *Markman*  
23 issues, addressing indefiniteness only as to the term “the spatial reference frame.” Dkt. 42 at 1.  
24 Thereafter, HTC served its initial proposed claim terms on February 20, 2018 and its Disclosure,  
25 attached hereto as Exhibit B, on March 30, 2018.

1 In its Disclosure, HTC alleged for the first time that the following three claim terms were  
2 indefinite:

- 3 • utilizing a comparison to compare the first signal set with the second signal set;
- 4 • comparing the second quaternion in relation to the measured angular velocities  $\omega_x$ ,  $\omega_y$ ,  
5  $\omega_z$  of the current state at current time T with the measured axial accelerations  $A_x$ ,  $A_y$ ,  $A_z$   
6 and the predicted axial accelerations  $A_x'$ ,  $A_y'$ ,  $A_z'$  also at current time T; and
- 7 • generating the orientation output based on the first signal set, the second signal set and  
8 the rotation output or based on the first signal set and the second signal set.

9 *See* Ex. B at 4. HTC had not alleged that any of these terms were indefinite in its invalidity  
10 contentions. *See* Ex. A. CyWee immediately objected to HTC's belated allegations of  
11 indefiniteness. The parties met and conferred on April 5, 2018; however, HTC refused to drop  
12 the additional claim terms referenced above, nor did it seek leave of Court to add them.<sup>1</sup>

## 13 II. ARGUMENT

14 Rather than trying to narrow the issues in preparation for the Joint Claim Chart and  
15 Prehearing Statement, HTC now insists on expanding them and muddling the claim construction  
16 process. CyWee will be severely prejudiced by HTC's belated allegations of indefiniteness. *See*  
17 *Bechtel v. Robinson*, 886 F.2d 644, 652 (3d Cir. 1989) (A party shows prejudice when it has been  
18 "unfairly disadvantaged or deprived of the opportunity to present facts or evidence which it  
19 would have offered had the . . . amendments been timely."). Had HTC complied with the  
20 Standing Order and timely identified all its assertions of indefiniteness, CyWee would have  
21 included the three additional claim terms in its expert report. Because HTC's belated allegations  
22

23  
24 \_\_\_\_\_  
25 <sup>1</sup> HTC later agreed to drop its allegations of indefiniteness for a fourth term, which it identified  
26 as a term to be construed for the first time in its Disclosure.

1 of indefiniteness have deprived CyWee of the opportunity to address the three terms in its expert  
2 report, these additional claim terms should not be considered in claims construction. *See id.*

3 Such prejudice to CyWee cannot be ameliorated by delaying claim construction to allow  
4 CyWee to supplement its expert report, because delaying claim construction would still prejudice  
5 CyWee. In patent cases, claim construction is the most critical pre-trial event. *See e.g.*  
6 *Retractable Techs., Inc. v. Becton, Dickinson & Co.*, 659 F.3d 1369, 1370 (Fed. Cir. 2011)  
7 (Moore, J., dissenting) (joined by Rader, J.) (“Claim construction is the single most important  
8 event in the course of a patent litigation. It defines the scope of the property right being enforced  
9 and is often the difference between infringement and non-infringement, or validity and  
10 invalidity.”) Therefore, once a claim construction order issues, the case is more likely to settle  
11 because the parties would be able to evaluate their positions based on how the claims are  
12 construed. Here, any delay only compounds the harm CyWee suffers since CyWee’s patents are  
13 being infringed. Rather, the appropriate remedy to the prejudice caused by HTC’s belated  
14 indefiniteness assertions is for the Court to simply exclude those assertions from consideration.<sup>2</sup>

15 Furthermore, the Northern District of California has held that “[a]ny invalidity theories not  
16 disclosed pursuant to Local Rule 3–3 are barred, accordingly, from presentation at trial (whether  
17 through expert opinion testimony or *otherwise*).” *See Karl Storz Endoscopy-Am., Inc. v. Stryker*  
18 *Corp.*, No. 14-CV-00876-RS(JSC), 2017 WL 5257001, at \*4 (N.D. Cal. Nov. 13, 2017) (citing  
19 *MediaTek Inc. v. Freescale Semiconductor, Inc.*, No. 11-CV-5341-YGR, 2014 WL 690161, at \*1  
20 (N.D. Cal. Feb. 21, 2014) (emphasis added). In *Karl Storz Endoscopy-Am., Inc.*, the defendant’s  
21 35 § 101 theories, not disclosed in its Invalidity Contentions, were stricken. *Id.* This District’s  
22

23 <sup>2</sup> CyWee’s prejudice cannot be mitigated, solely, through the use of extrinsic evidence from a  
24 different case, in a different district, and used in a different context. HTC cannot obstruct  
25 CyWee’s ability to defend against all theories of invalidity in *this case* simply by asserting new  
26 allegations of indefiniteness in the eleventh hour.

1 Local Patent Rules are very similar to those of the Northern District of California. In fact, this  
2 Court has used those rules to interpret this District's rules on various occasions. *See e.g. Pac.*  
3 *Bioscience Labs., Inc. v. Nutra Luxe MD, LLC*, No. C10-0230JLR, 2012 WL 12845608, at \*2  
4 (W.D. Wash. July 9, 2012) (using the Northern District of California rules to evaluate Local  
5 Patent Rule 124). Consequently, this Court should bar HTC from attempting to use new theories  
6 it has failed to include in its Invalidity Contentions.

7 HTC's untimely indefiniteness assertions cannot be excused by amending its invalidity  
8 contentions. Local Patent Rule 124 allows for amendments of infringement contentions "only by  
9 order of the Court upon a timely showing of good cause." L.P.R. 124. Setting aside *arguendo* the  
10 fact that it has not sought leave of Court to amend its invalidity contentions, HTC cannot show  
11 the necessary good cause for amendment. This District's Local Patent Rules require the parties to  
12 provide early notice of their infringement contentions, and to proceed with diligence in amending  
13 those contentions. *REC Software USA, Inc. v. Bamboo Solutions Corp.*, No. C11-0554JLR, 2012  
14 WL 3527891, at \*2 (W.D. Wash. Aug. 15, 2012) (quoting *O2 Micro Int'l Ltd. v. Monolithic*  
15 *Power Sys., Inc.*, 467 F.3d 1355, 1365-66 (Fed. Cir. 2006)). "In contrast to the more liberal  
16 policy for amending pleadings, 'the philosophy behind amending claim charts is decidedly  
17 conservative and ***designed to prevent the 'shifting sands' approach to claim construction.***" *Id.*  
18 (emphasis added) (quoting *LG Elecs., Inc. v. Q-Lily Computer, Inc.*, 211 F.R.D. 360, 367  
19 (N.D.Cal. 2002)). In determining whether there is good cause for amendment, this District  
20 follows a two-part test: (1) examining the diligence of the moving party; and (2) upon a finding  
21 of diligence, examining the prejudice to the non-moving party. *Id.* at \*2-3.

22 Here, HTC has not acted diligently, and an amendment would result in undue prejudice to  
23 CyWee. When HTC served its invalidity contention ***more than two months ago***, there was  
24 nothing preventing HTC from asserting that the additional terms identified in the Disclosure are  
25 indefinite. HTC has made no effort to explain why it failed to allege the three claim terms as  
26

# Explore Litigation Insights

Docket Alarm provides insights to develop a more informed litigation strategy and the peace of mind of knowing you're on top of things.

## Real-Time Litigation Alerts



Keep your litigation team up-to-date with **real-time alerts** and advanced team management tools built for the enterprise, all while greatly reducing PACER spend.

Our comprehensive service means we can handle Federal, State, and Administrative courts across the country.

## Advanced Docket Research



With over 230 million records, Docket Alarm's cloud-native docket research platform finds what other services can't. Coverage includes Federal, State, plus PTAB, TTAB, ITC and NLRB decisions, all in one place.

Identify arguments that have been successful in the past with full text, pinpoint searching. Link to case law cited within any court document via Fastcase.

## Analytics At Your Fingertips



Learn what happened the last time a particular judge, opposing counsel or company faced cases similar to yours.

Advanced out-of-the-box PTAB and TTAB analytics are always at your fingertips.

## API

Docket Alarm offers a powerful API (application programming interface) to developers that want to integrate case filings into their apps.

## LAW FIRMS

Build custom dashboards for your attorneys and clients with live data direct from the court.

Automate many repetitive legal tasks like conflict checks, document management, and marketing.

## FINANCIAL INSTITUTIONS

Litigation and bankruptcy checks for companies and debtors.

## E-DISCOVERY AND LEGAL VENDORS

Sync your system to PACER to automate legal marketing.