

THE HONORABLE JAMES L. ROBERT

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

CYWEE GROUP LTD.,

Plaintiff,

v.

HTC CORPORATION, and HTC AMERICA,
INC.,

Defendants.

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

**HTC'S MOTION FOR LEAVE TO
FILE FIRST AMENDED THIRD-
PARTY COMPLAINT**

**NOTE ON MOTION CALENDAR:
JUNE 1, 2018**

HTC CORPORATION, and HTC AMERICA,
INC.,

Third-Party Plaintiffs,

v.

STMICROELECTRONICS N.V.,
STMICROELECTRONICS, INC., AND CYWEE
MOTION GROUP LTD.,

Third-Party Defendants.

JURY TRIAL DEMANDED

Pursuant to Rule 15(a) of the Federal Rules of Civil Procedure and LCR 15, Defendants and Third-Party Plaintiffs HTC Corporation ("HTC Corp.") and HTC America, Inc. ("HTC America") (collectively, "HTC") respectfully move the Court for leave to file a FIRST AMENDED THIRD-PARTY COMPLAINT, a copy of which is attached to this motion. The

1 proposed new pleading, attached as Exhibit A to the Declaration of James C. Yoon¹, adds a new
2 party, STMicroelectronics Asia Pacific Pte. Ltd. (“STM Asia”), and deletes former Third-Party
3 Defendant STMicroelectronics, Inc. (“STM Inc.”), while maintaining the same claims and
4 allegations against Third-Party Defendants STMicroelectronics N.V. (“STM N.V.”) and CyWee
5 Motion Group Ltd. (“CyWee Motion”). (*See also* Ex. B [showing HTC’s proposed changes in
6 redline].)

7 **I. BACKGROUND**

8 On July 6, 2017, Plaintiff CyWee Group Ltd. (“CyWee”) filed a First Amended
9 Complaint (Dkt. # 20) asserting that HTC infringes U.S. Patent No. 8,441,438 (“the ’438
10 Patent”) and U.S. Patent No. 8,552,978 (“the ’978 Patent”) (collectively, the “Asserted
11 Patents”) by making, using, selling, offering to sell, and/or importing into the United States
12 products that embody or practice the apparatus and/or method covered by one or more of the
13 claims of the Asserted Patents, including the HTC One M9, HTC One A9, HTC 10, HTC Bolt,
14 and HTC U Ultra (collectively, “Accused Products”). CyWee’s infringement allegations—both
15 therein and in the now operative Second Amended Complaint filed on March 9, 2018 (Dkt.
16 # 61)—focus upon six-axis or nine-axis motion sensor modules and functionalities in a wireless
17 device. CyWee’s Infringement Contentions, served on December 29, 2017, focused primarily
18 on generic motion sensor hardware components and Android source code and functionalities.
19 (Yoon Decl.² at ¶ 3.)

20 To respond to CyWee’s infringement contentions, HTC performed an initial
21 investigation with the assistance of Dr. Benjamin Goldberg, who concluded that the portions of
22 source code functions cited for every asserted independent claim are inoperable on the Accused
23 Products. (*Id.* ¶ 4.) On January 29, 2018, HTC served its Preliminary Non-Infringement
24 Contentions denying allegations of use of the accused Android code. (*Id.* ¶ 5.) The fact that the
25 alleged Android source code is inoperable in HTC’s products should have been no surprise to

26
27 ¹ All exhibits referenced herein are attached to the Declaration of James C. Yoon.

28 ² “Yoon Decl.” refers to the concurrently filed Declaration of James C. Yoon.

1 CyWee. HTC has repeatedly informed CyWee that the Accused Products incorporate licensed
2 hardware and software provided by CyWee's licensees, thus triggering HTC's license and
3 patent exhaustion defenses against CyWee's patent infringement claims. (*Id.* ¶ 6.) However,
4 HTC did not have access to all the applicable agreements between CyWee, CyWee Motion, and
5 the STMicroelectronics entities until after it filed its Third-Party Complaint on January 11,
6 2018 (Dkt. # 43). (Yoon Decl. at ¶ 7.) During discovery, CyWee produced technology
7 agreements that helped confirm HTC's understanding that those parties had intended that the
8 products sold by STMicroelectronics and CyWee Motion would be covered by a license.

9 Based on HTC's internal investigations, the business and licensing arrangement between
10 ST, CyWee, and HTC were negotiated and supported by STMicroelectronics employees based
11 in a Taiwan office that did not appear to be affiliated with STM Asia. (Yoon Decl. at ¶ 8.)
12 When HTC reached out to STM Asia regarding CyWee, the present action, and indemnification
13 for the Accused Products, STM Asia referred HTC to STM Inc. (*Id.* ¶ 9; *see also* Exs. C-E.)
14 On October 6, 2017, Andrew Mayo of STM Inc. responded to HTC's indemnification request
15 by letter. (*See* Ex. D.) HTC relied on these communications to prepare its Third-Party
16 Complaint.

17 On March 26, 2018, STM Inc. filed a Motion to Dismiss (Dkt. # 64). In its motion,
18 STM Inc. claimed that STM N.V. is the ultimate parent company of STM Inc. and its affiliates,
19 which include more than 60 companies around the world. (*Id.* ¶1.) STM Inc. also asserted,
20 through the Declaration of Mr. Karl Straatveit, a senior account manager at STM Inc., that STM
21 Inc. has not sold or supplied motion sensor devices to HTC. (Dkt. # 65 at 1.) After reviewing
22 STM Inc.'s motion and supporting papers, HTC submitted a Statement of Non-Opposition on
23 April 13, 2018, and indicated therein that it may be seeking leave to amend its Third-Party
24 Complaint to remove STM Inc. and replace it with STM Asia. (*See* Dkt. # 77 at 2.) HTC now
25 respectfully requests that the Court grant HTC leave to amend the Third-Party Complaint.

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1 II. LEGAL STANDARD

2 When the deadlines for adding parties and amending pleadings have passed, as is the case
3 here, (*see* Dkt. # 42 at 1), a plaintiff may seek amendment only by first showing “good cause”
4 under Federal Rule of Civil Procedure 16(b)(4), *Johnson v. Mammoth Recreations, Inc.*, 975
5 F.2d 604, 607-08 (9th Cir. 1992); *see Rain Gutter Pros, LLC v. MGP Mfg., LLC*, No. C14-0458
6 RSM, 2015 U.S. Dist. LEXIS 141340, at *2-3 (W.D. Wash. Oct. 15, 2015) (“[G]iven that
7 the Court has already entered a Scheduling Order setting a deadline to join new parties and that
8 deadline has passed, the instant motion to add new parties to the Counterclaim is properly
9 analyzed first under Rule 16 as a request to amend the scheduling order.”); Fed. R. Civ. P.
10 16(b)(4) (“A schedule may be modified only for good cause and with the judge’s consent.”).
11 “Rule 16(b)’s ‘good cause’ standard primarily considers the diligence of the party seeking the
12 amendment.” *Johnson*, 975 F.2d at 609. To show “good cause,” a party must show that it could
13 not meet the deadline in the scheduling order despite the party’s diligence. *Id.* “Although the
14 existence or degree of prejudice to the party opposing the modification might supply additional
15 reasons to deny a motion, the focus of the inquiry is upon the moving party’s reasons for seeking
16 modification.” *Id.*

17 If a party shows good cause, it must then also demonstrate that the amendment is proper
18 under Federal Rule of Civil Procedure 15. *See id.* at 608; *Rain Gutter Pros*, 2015 U.S. Dist.
19 LEXIS 141340, at *3 (“[I]f Defendant establishes good cause for the amendment, it must
20 demonstrate that the amendment is proper under Federal Rule of Civil Procedure 15.”). Unless a
21 party qualifies to amend its pleading “as a matter of course,” Fed. R. Civ. P. 15(a)(1), “a party
22 may amend its pleading only with the opposing party’s written consent or the court’s leave,”
23 Fed. R. Civ. P. 15(a)(2). “In deciding whether to grant leave to amend under Rule 15(a), courts
24 generally consider the following factors: undue delay, bad faith by the moving party, prejudice to
25 the opposing party, futility of amendment, and whether the party has previously amended his
26 pleadings.” *Rain Gutter Pros*, 2015 U.S. Dist. LEXIS 141340, at *3 (citing *Foman v. Davis*, 371
27 U.S. 178, 182 (1962)).

28

1 Rule 15(a) further requires that “court[s] should freely give leave when justice so
2 requires.” Fed. R. Civ. P. 15(a)(2). The Ninth Circuit has “stated that this policy is to be applied
3 with extreme liberality.” *Owens v. Kaiser Found. Health Plan, Inc.*, 244 F.3d 708, 712 (9th Cir.
4 2001). Accordingly, an evaluation of the aforementioned factors (“the *Foman* Factors”),
5 “[g]enerally . . . should be performed with all inferences in favor of granting the motion.”
6 *Griggs v. Pace Am. Grp., Inc.*, 170 F.3d 877, 880 (9th Cir. 1999). In other words, “[t]he party
7 opposing amendment bears the burden of demonstrating a permissible reason for denying the
8 motion to amend.” *Rain Gutter Pros*, 2015 U.S. Dist. LEXIS 141340, at *4 (citing *DCD*
9 *Programs, Ltd. v. Leighton*, 833 F.2d 183, 187 (9th Cir. 1987); *Richardson v. United States*, 841
10 F.2d 993, 999 (9th Cir. 1988)).

11 **III. ARGUMENT**

12 **A. HTC’s Diligence Provides Good Cause to Amend the Third-Party Complaint**

13 HTC has good cause for seeking the Court’s leave to amend its Third-Party Complaint.
14 The Court’s inquiry turns on whether HTC was “diligent in discovering the basis for and
15 seeking” to join STM Asia. *Rain Gutter Pro*, 2015 U.S. Dist. LEXIS 141340, at *4. Prior to
16 filing its Third-Party Complaint, HTC reached out to STM Asia regarding indemnification for
17 the Accused Products, but STM Asia referred HTC to STM Inc. (Yoon Decl. at ¶ 9; *see also*
18 Exs. C-E.) Based on these communications and HTC’s own internal investigation indicating that
19 STM N.V. acts with and through its subsidiaries, HTC filed its Third-Party Complaint against
20 STM N.V. and STM Inc. on January 11, 2018, in compliance with the Court’s scheduling order.
21 (Dkt. # 42 at 1.) Only via the motion to dismiss filed by STM Inc. on March 26, 2018 did HTC
22 learn of STM Inc.’s claims that STM Inc. has not sold or supplied motion sensor devices to
23 HTC. (*See* Dkt. # 64 at 3; Dkt. # 65 at 1.) After reviewing STM Inc.’s motion and supporting
24 papers and after further internal investigation, HTC accordingly filed a Statement of Non-
25 Opposition to STM Inc.’s motion on April 13, 2018. (*See* Dkt. # 77.) Notably, HTC filed its
26 Statement of Non-Opposition slightly in advance of its deadline to respond. (*Compare* Dkt. # 64
27 (noting the motion for consideration on April 20, 2018), *and* L.P.R. 7(d)(3) (“Any opposition
28

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