UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TEXAS
MARSHALL DIVISION

KONINKLIJKE KPN N.V., Plaintiff, vs. TELEFONAKTIEBOLAGET LM ERICSSON and ERICSSON INC., Defendants.	Case No. 2:22-cv-282-JRG JURY TRIAL DEMANDED **PUBLIC REDACTED**

ERICSSON'S RESPONSE IN OPPOSITION TO KPN'S MOTION FOR LEAVE TO AMEND INFRINGEMENT CONTENTIONS

KONINKLIJKE KPN N.V.
EXHIBIT 2022

I. INTRODUCTION

KPN seeks the Court's permission to introduce new accused products and new infringement theories mid-way through this litigation under the pretense that it is "simply amend[ing] its contentions to provide Ericsson with the information it claimed to need." Dkt. No. 85, p. 1. Although Ericsson requested additional detail concerning KPN's infringement contentions (ICs), Ericsson did not invite KPN to revamp its infringement case. Yet that is precisely what KPN seeks to accomplish with its amended ICs.

KPN's amended ICs fall into two buckets: (1) the incorporation of source code into its ICs for previously accused products, and (2) the addition of new products and infringement theories. Ericsson does not oppose the first bucket—thus, KPN's reliance on Paragraph 3(A)(i) of the Discovery Order is inapposite. But, Ericsson *does* oppose narrow portions of KPN's amended ICs that belatedly add new products and new infringement theories without good cause for doing so. This is forbidden by the Local Patent Rules, which "strictly limit[] the ability of parties to change their theories of the case mid-stream." *Implicit, LLC v. Huawei Techs. USA*, Inc., No. 6:17-CV-00182-JRG, 2018 WL 11182156, at *5 (E.D. Tex. July 2, 2018). It is also KPN's burden to demonstrate good cause for leave to make these amendments—a showing that KPN fails to make.

In filing this Opposition, Ericsson is cognizant of the Court's guidance during the May 17, 2023 hearing on Ericsson's Motion to Compel. Ericsson does not ask the Court to preclude KPN from further developing the infringement theories for the accused products that were disclosed in the "final contentions" it served more than five months ago. *See* P.R. 3-6(a). Although it may be entitled to a degree of flexibility, KPN has not met its heavy burden to show good cause for making significant, case-altering changes to its ICs at this point in the litigation.

Accordingly, the Court should deny KPN's motion as it relates to the amendments (discussed below and highlighted yellow in Exhibits 1 to 5) that accuse new products and assert new theories.

II. ARGUMENT

Infringement contentions served pursuant to P.R. 3-1 "shall be deemed to be that party's final contentions." P.R. 3-6(a). "Amendments or supplementation of any Infringement Contentions" for reasons unrelated to claim construction "may be made only by order of the Court, which shall be entered only upon a showing of good cause." *Id*. In determining good cause, "[t]he Court considers the following factors: (A) the explanation for the failure to meet the deadline; (B) the importance of the amendment; (C) potential prejudice in allowing the amendment; and (D) the availability of a continuance to cure such prejudice." *Estech Systems IP, LLC v. Carvana LLC*, No. 2:21-cv-0482-JRG-RSP, 2023 WL 210837, at *2 (E.D. Tex. Jan. 17, 2023).

KPN's attempt to revamp its infringement case more than halfway through discovery and less than two weeks from the Court's P.R. 4-1 deadline is forbidden by the Court's rules and highly prejudicial to Ericsson. As explained in detail below, KPN has not met its burden of showing good cause to introduce newly accused products and new, expanded infringement theories mid-way through the litigation, which is "exactly the kind of dilemma[] the Patent Rules are intended to prevent." *Implicit*, 2018 WL 11182156, at *4.

First, KPN was not diligent in adding its new theories of infringement. KPN's belated additions include citations to Ericsson's public website; products that KPN accused in the prior case (and thus knew about when it filed this case); and documents Ericsson produced to KPN years ago. Had KPN been diligent, it would have included this material when it served its original contentions months ago.

Second, Ericsson is prejudiced by KPN's amendment. As one example, KPN represented to the Court and to Ericsson in prior briefing that it would "rely solely" on infringement theories that it is now seeking to change. KPN also knew when it made this representation that Ericsson took affirmative steps to overcome this theory of infringement, but KPN doubled down—until it reneged and added new theories in its amended ICs. KPN's addition of new products and theories across all five asserted patents also forces Ericsson to identify new witnesses, develop new noninfringement arguments, and consider new claim construction positions—but because KPN delayed in identifying these theories, Ericsson now has only half of discovery remaining, and just two weeks before the parties must exchange proposed terms for claim construction. And though KPN claims that the importance prong weighs in favor of amendment, KPN is wrong: The more important the new theories are to KPN's case, the more prejudicial it is to Ericsson that KPN did not disclose them until now—especially because KPN could have disclosed them if it had been diligent.[1]

A. KPN was not Diligent in Adding New Products and Theories

For all five asserted patents, KPN added new infringement allegations without demonstrating the requisite diligence needed to make these untimely amendments. Thus, KPN has not met the first prong of the good-cause test.

1. '560 Patent

KPN's assertions that the amended ICs "d[o] not accuse any new products" or "assert any new theories" are false. Nowhere is KPN's theory-shifting approach more apparent than in KPN's contentions for element 1.2 of the '560 Patent. In its ICs served on January 5, 2023 ("Original

[1] The last good-cause factor—the availability of a continuance to cure any prejudice—is neutral at best. But even if it weighs in favor of KPN, the other three factors of the good-cause test, including the all-important diligence factor, weigh against amendment.

ICs"), KPN contended that Ericsson's base station products practice element 1.2 of the '560 Patent because "each NB, eNB, or gNB comprises a selector configured by Ericsson to select one or more user terminals capable of performing minimization of drive tests (MDT) functions and/or MDT measurements." Dkt. 54-3 at 5. And, on April 13, 2023, KPN confirmed in briefing to the Court that it is "relying *solely*" on the MDT-based theory of infringement, "not seeking to change its position at all," and "thus has nothing to amend." Dkt. 61 at 1–2 (emphasis in original)

Less than two weeks after making these unequivocal statements, KPN served amended ICs asserting that the MDT-based theory—the only theory of infringement disclosed in KPN's Original ICs—is merely "one selection criteria" that "may be used alone or in conjunction with other criteria." In stark contrast to KPN's representation that it was "relying solely" on an MDT-based theory of infringement for element 1.2, *see* Dkt. 61 at 2, KPN now contends that Ericsson's base station products practice this claim element because they select user terminals based on any "one or more selection criteria."

[redacted]

Dkt. 85-6 at 7. As shown above, KPN's amended ICs are not limited to MDT functionality. Instead, KPN accuses "other criteria, examples of which are described infra in the context of elements 7.2 and 8.2" and devotes the bulk of its supplemental contentions to discussing product features that are not mentioned a single time in KPN's Original ICs, [redacted] *See* Dkt. 85-6 at 8–9.

2. '098 Patent

KPN's Original ICs for the '098 Patent accuse one—and only one—piece of core network equipment: the access and mobility function (AMF). Far from clarifying its Original ICs, KPN's amended ICs provide no additional detail regarding its AMF infringement theory. Instead, KPN accuses an entirely new product: the mobility management entity (MME). As reflected in the redline version of KPN's ICs for the '098 Patent, KPN simply added the phrase "and/or MME" (or a functionally equivalent phrase) to every element of the asserted claims:



Dkt. 85-8 at 11.



Dkt. 85-8 at 14.

KPN concedes that it did not mention the MME in its Original ICs. In an attempt to sidestep this issue, KPN claims that it accused "both Ericsson's AMF . . . and its 4G equivalent," but this is incorrect. KPN's Original ICs say nothing about a purported "4G equivalent" to the AMF, and they certainly failed to put Ericsson on notice that anything besides the AMF was accused of infringement. *See generally* Dkt. 54-5 at 3–7. In fact, as shown below, KPN placed a red box around the AMF in its Original ICs to underscore that it accused the AMF of infringement. Tellingly, KPN deleted this red box in its amended ICs:

[redacted]

Dkt. 54-4 at 5; 85-8 at 5. Rather than provide Ericsson with additional clarity as KPN claims it is doing with these supplemental contentions, KPN is belatedly expanding its infringement theory.

KPN's lack of diligence is apparent here because *KPN accused the MME* in the prior case between the parties. KPN could have accused the MME in its Original ICs served months ago, but KPN chose not to. KPN has not shown good cause to abandon is previously disclosed infringement theory based on the AMF in favor of a new infringement theory based on the MME.

3. '500 Patent

KPN's Original ICs for the '500 Patent mapped the claimed "predetermined signal" to "UE re-registrations." Dkt. 54-6 at 5. Far from clarifying this theory or providing additional details requested by Ericsson, KPN seeks the Court's permission to both expand and obfuscate its contentions for this claim element:

[redacted]

Ex. 85-9 at 20.

As shown in the excerpt of KPN's amended ICs reproduced above, KPN no longer contends that "UE re-registrations" is the accused "predetermined signal," but rather that an undisclosed combination of "UE reselection and/or re-registration signal . . . *comprises the certain predetermined signal*." *Id*. (emphasis added). This amendment is impermissible because it both expands KPN's infringement theory by adding "UE reselection" and obfuscates the identity of the accused "predetermined signal" by asserting that it is comprised (*i.e*., included) within a "UE reselection and/or re-registration signal."

KPN has not carried its burden to show that it was diligent in making this amendment. Nor could it—KPN cites public Ericsson webpages in its amended ICs, something that KPN could have and should have included in its original ICs.

4. '772 Patent

KPN's original ICs accused Standalone Non-Public Network (SNPN) functionality of infringing the '772 Patent. *See, e.g.*, Dkt. 85 at 4 (conceding the same). But, KPN's amended ICs appear to add a completely new infringement theory against Public Land Mobile Network (PLMN) functionality.[2] After Ericsson criticized KPN for changing its theory, KPN denied that its theory had changed, arguing that "SNPN remains *a focal point* of its ['772 Patent infringement] theory." Dkt. No. 85 at 4 (emphasis added). This equivocal language leaves the door open to whether PLMN is being accused. To the extent KPN is *not* accusing PLMN functionality, then Ericsson does not oppose KPN's amendments to its contentions for the '772 Patent.

[2] Many of the document citations added to KPN's final ICs relate to PLMN functionality—not SNPN functionality.

However, if KPN is accusing PLMN functionality, then KPN was not diligent in seeking to amend. The PLMN functionality was known publically well before KPN filed its complaint. But KPN made a choice not to accuse this known functionality in its Original ICs, and KPN should not be given leave to add this new theory under the guise of confidential document production. *See Implicit*, 2018 WL 11182156, at *6.

5. '705 Patent

KPN's original ICs accused Ericsson's Expert Analytics (EEA)'s SLI (Service Level Index) feature of infringing the '705 Patent. Dkt. No. 85 at 3. Presumably, because the SLI feature is turned off by default, KPN's amended ICs add a new accusation against EEA's NSLI (Network Service Level Index) feature. *Id*. KPN excuses the addition of this new NSLI theory because the names are "nearly identical" and [redacted]. Instead, KPN added a new infringement theory.

More puzzling is KPN's statement that NSLI and SLI "infringe in effectively the same way" because the names are similar. KPN's NSLI and SLI theories cannot be the same. The claimed "rule" includes two parts, which KPN's SLI theory maps to an objective "technical parameter" and subjective "psychological measurements." Dkt. 85-5 at 6.

[redacted]

[redacted]

Id. at 7 (emphasis added). Therefore, in addition to being an improper new theory without good cause, KPN's new NSLI theory fails to put Ericsson on notice about what corresponds to the claimed rule's "deviation from the setting requirement." Thus, KPN's motion for leave to add this new theory should be denied.

B. KPN's New Theories Prejudice Ericsson, Especially Because KPN Claims they are Important to KPN's Case

The new products and theories KPN now advances prejudice Ericsson in several ways. For example, KPN told this Court and Ericsson that it would "rely solely" on its MDT-based infringement theory for the '560 Patent. Ericsson took KPN at its word. But as outlined above, KPN is now trying to accuse other selection criteria besides MDT. This wholesale shift in KPN's infringement theory is highly prejudicial to Ericsson's ability to focus discovery, prepare for the upcoming claim construction exchanges, and prepare for trial. This is particularly true since KPN is well aware that Ericsson took affirmative steps to render the accused MDT functionality inoperable in its products. *See, e.g.*, Ex. 6 at 11 (explaining that "Ericsson is in the process of removing all LKFs with the MDT feature set to 'activated' from Ericsson hardware currently operating in the United States"). It would be highly prejudicial to Ericsson for KPN to be able to pivot to a new theory of infringement after Ericsson took affirmative steps to overcome the only infringement theory advanced in KPN's Original ICs. *See Implicit*, 2018 WL 11182156, at *6

("It is not permissible for a plaintiff to essentially revamp its case in order to maintain plausible infringement reads. In fact, the Patent Rules are intended to prevent such an approach."). The other belated amendments described above similarly prejudice Ericsson: After already spending months litigating this case based on KPN's Original ICs, KPN's shifting-sands approach to these amendments would force Ericsson to identify new witnesses, develop new noninfringement positions, and even consider new claim construction positions—all with the P.R. 4-1 deadline rapidly approaching.

Further, the fact that KPN claims these untimely amendments are important confirms that they would be highly prejudicial. *See Uniloc 2017 LLC v. Google LLC*, No. 2:18-CV-00503-JRG-RSP, 2020 WL 709557, at *3 (E.D. Tex. Feb. 10, 2020) (denying proposed amendment of invalidity contentions under the good-cause test and holding that if the new information is important, that only serves to further the prejudice). Indeed, for at least the '560 Patent, KPN's changing theory seeks to undermine the significant effort that Ericsson undertook to render the accused MDT functionality—which KPN said would be the sole infringement theory—inoperable. And while KPN cites *Thomas Swan & Co. Ltd. v. Finisar Corp.* for the proposition that alternative infringement theories are important and should be allowed, that case is not analogous. In *Thomas Swan*, the Court noted that plaintiff's "proposed amendment adds *no new claims or accused products* to this case. It merely asserts infringement under the DOE *for a single claim of a single patent-in-suit*." 2014 WL 12599219, at *2 (emphasis added). That is a far cry from KPN adding new literal infringement theories and accused products to all five patents in suit months into discovery.

In sum, factors two and three of the good-cause test weigh against KPN's amendments discussed above.

III. CONCLUSION

For the reasons above, Ericsson respectfully requests that the Court deny KPN's motion for leave for the amendments discussed herein. The portions of KPN's amended ICs that exceed the scope of permissible amendment are highlighted yellow in Exhibits 1 to 5. The Court should order KPN to strike these portions of its amended ICs.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing document has been served on all counsel of record via the Court's ECF system on May 25, 2023.

/s/ *Nicholas Mathews*
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CERTIFICATE OF AUTHORIZATION TO FILE UNDER SEAL

I hereby certify that the foregoing document is being filed under seal pursuant to the Protective Order entered in this matter.

/s/ Nicholas Mathews
Nicholas Mathews