IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
MARSHALL DIVISION

KONINKLIJKE KPN N.V., Plaintiff, v. TELEFONAKTIEBOLAGET LM ERICSSON and ERICSSON INC., Defendants.	C.A. No. 2:22-cv-282-JRG **JURY TRIAL DEMANDED** [redacted]

PLAINTIFF'S MOTION FOR LEAVE TO AMEND INFRINGEMENT CONTENTIONS

Plaintiff Koninklijke KPN N.V. ("KPN") files this Motion for Leave to Amend its Infringement Contentions—a request that should not be controversial. Notably, however, despite having asked KPN to amend its contentions, and despite claiming to need more information and specificity from KPN about its assertions, Defendants Telefonaktiebolaget LM Ericsson and Ericsson Inc. ("Ericsson") now oppose KPN's attempt to amend its contentions and provide the additional detail they claim to need—telling KPN during the parties' meet and confer that KPN's amended contentions purportedly accuse new products and assert new theories. That is not true.

The reality is this. Per Ericsson's request and to moot the need for the Court to consider Ericsson's motion, KPN amended its contentions based on its review of Ericsson's technical productions, including its incomplete source code production. In doing so, KPN did not accuse any new products. KPN also did not assert any new theories. Rather, KPN simply clarified and refined those theories that it previously asserted, including by providing greater detail about which portion of Ericsson's same accused products performed which accused functions and by identifying additional examples and/or Ericsson-specific nomenclature showing how such products infringe. For this reason alone, the Court should grant KPN's motion.

Further, even setting aside that KPN simply amended its contentions to provide Ericsson with the information it claimed to need, this Court should grant KPN leave to amend for two reasons: ***First***, KPN amended its contentions pursuant to Paragraph 3(A)(i) of the Discovery Order, Dkt. 44, which entitles KPN to amend its infringement contentions without leave of court based on produced source code. And here, KPN amended well within its 30-day window to do so. Indeed, even today, Ericsson has yet to produce the source code for all of its accused products.

Second, even without Paragraph 3(A)(i), KPN has good cause to amend pursuant to Local Patent Rule 3-6(b). KPN acted diligently to review Ericsson's piecemeal productions and amend

its contentions. Further, fact discovery does not close until October 31, and claim construction has yet to begin. Accordingly, Ericsson cannot possibly claim prejudice from KPN's amendments.

I. FACTUAL BACKGROUND

This Motion should be unopposed. Ericsson not only sent KPN a lengthy letter requesting additional information about KPN's contentions, Ex. 1, but ultimately filed a motion to compel KPN to supplement them—claiming to need more information about KPN's theories. Dkt. 54.

As KPN has consistently told Ericsson (and this Court), its initial infringement contentions fully complied with P.R. 3-1 and sufficiently placed Ericsson on notice of KPN's infringement theories. Dkt. 55 at 3. After all, "[c]ontentions 'are not intended to require a party to set forth a prima facie case of infringement,'" *Team Worldwide Corp. v. Acad., LTD*, 2020 WL 4601635, at *2 (E.D. Tex. Aug. 11, 2020), and thus "need not disclose 'specific evidence nor do they require a plaintiff to prove its infringement case.'" *Sol IP, LLC v. AT&T Mobility LLC*, 2020 WL 10045985, at *1 (E.D. Tex. Apr. 23, 2020). Ex. 2 at PDF 1.

Nevertheless, to appease Ericsson, KPN promised that it would supplement its contentions once Ericsson provided its confidential technical documentation and source code. *E.g.*, Ex. 2 at PDF 2 (urging Ericsson to "make its source code available as soon as possible"). And KPN did just that. On April 24, 2023, KPN sent Ericsson amended contentions aimed at providing Ericsson all of the additional detail it claimed to need. Ex. 3; Exs. 4–8 (redlined versions). Given Ericsson's prior requests that KPN supplement (and its motion demanding the same), KPN also asked Ericsson to confirm that it did not oppose the very amendment that it had requested. Ex. 3.

Hearing nothing from Ericsson, KPN followed up a week later. In response, Ericsson told KPN that it opposed KPN's amendment. At the ensuing meet and confer, KPN pressed Ericsson for an explanation regarding how Ericsson could justify opposing KPN's supplement given its

prior requests ***and*** motion to compel KPN to do precisely that. In reply, Ericsson claimed that it opposed KPN's supplement because KPN purportedly changed its infringement theories. Ericsson offered one vague example for each Patent-in-Suit and refused to elaborate further.

To start, KPN struggles to comprehend how Ericsson can both accuse KPN of adding ***new*** infringement theories or ***changing*** its infringement theories while arguing in its pending motion to compel that "KPN's ICs Fail to Put Defendants on Notice of ***Any Infringement Theory***." Dkt. 54 at 4 (emphasis added). Regardless, the point is moot because KPN has not asserted any new theories—much less accused new products. KPN has simply provided the additional detail that Ericsson has demanded, including by providing (at most) additional examples of Ericsson's infringement based on Ericsson's confidential material. For example:

U.S. Patent 7,092,705. The only justification Ericsson has provided for opposing KPN's '705 amendments is its claim that KPN somehow is trying to change its theory by also citing [redacted] Not so. [redacted] Either way, as detailed in KPN's contentions, both are used by Ericsson to infringe in effectively the same way. *See id.* Indeed, KPN is hard pressed to understand why Ericsson produced documents regarding [redacted]

U.S. Patent 8,660,560. For the '560, the only justification Ericsson has offered is that KPN purportedly is trying to add a new infringement theory by identifying actions taken by

[redacted] Again, Ericsson is wrong. Both are components of [redacted] As such, KPN has simply done what Ericsson requested (including in its motion): KPN supplemented its contentions to provide greater specificity as to which parts of Ericsson's accused product were participating in performing each accused element. *See* Ex. 2 at PDF 4.

U.S. Patent 8,886,772. For the '772, the only justification Ericsson offered is its claim that KPN supposedly is trying to move away from its previous infringement theory, which Ericsson claims focused on [redacted] Again, incorrect. As KPN's claim contentions demonstrate, [redacted] KPN simply amended its contentions to also explain how its theories applied to the operations described in the confidential Ericsson technical documents that Ericsson had since produced. *E.g.*, Ex. 6 at 9–11.

U.S. Patent 9,372,098. Ericsson's lone '098 complaint is little different from its other positions. It claims KPN is trying to change its theory by now citing and accusing [redacted] Not so. In its original contentions, KPN accused both [redacted] In its letter to KPN complaining about those contentions, Ericsson claimed that KPN had failed to sufficiently allege what that equivalent component was. Ex. 1 at 4. Accordingly, KPN did as Ericsson requested and provided Ericsson with the very information it claimed to need. Based on its review of Ericsson's code, KPN amended its contention to identify [redacted]

[redacted]

U.S. Patent 10,924,500. Finally, Ericsson's '500 position is much the same. The only justification it has offered is that KPN purportedly added a new theory by accusing [redacted] Again, Ericsson is wrong. Semantics aside, [redacted] KPN amended its contentions to make clear that [redacted] In short, KPN acted diligently to provide Ericsson the very detail and clarification regarding [redacted]

In sum, KPN did not add new products or theories; KPN merely supplemented its contentions to provide Ericsson the clarity and detail it had requested. Further, with limited exception, KPN amended its contentions based on, and to account for, the confidential source code and technical documents that Ericsson produced during discovery.[1]

II. LEGAL STANDARD

"Local Patent Rule 3-1 requires a party claiming infringement to identify each accused product in its infringement contentions." *Intellectual Ventures II LLC v. FedEx Corp.*, No. 2:16-cv-00980-JRG, 2017 WL 4812436, at *2 (E.D. Tex. Oct. 25, 2017) (quoting *Tivo Inc. v. Samsung*

[1] And even though Ericsson has ***still*** not produced its complete code, *see* Ex. 9, KPN did as promised and supplemented its infringement contentions based on the code and technical documents that Ericsson has produced thus far. KPN continues to diligently review those new portions of Ericsson's source code as they become available and will further amend its contentions within the Court's deadlines to the extent new information requires it.

Elecs. Co., No. 2:15-cv-1503-JRG, 2016 WL 5172008, at *1 (E.D. Tex. 2016)).

Nevertheless, because infringement contentions "need only be based on information that is publicly available," *Whipstock Servs., Inc. v. Schlumberger Oilfield Servs.*, 2010 WL 143720, at *2 (E.D. Tex. Jan. 8, 2010) (citation omitted), it "'***expected*** that during the course of discovery, infringement contentions may be clarified or refined' based upon information produced during discovery." *Arigna Tech. Ltd. v. Volkswagen AG*, No. 2:21-cv-00054-JRG-RSP, 2022 WL 2761288, at *2 (E.D. Tex. Jan. 19, 2022) (quoting *Harris Corp. v. Huawei Device USA, Inc.*, No. 2:18-cv-00439-JRG, 2019 WL 4247067, at *3 (E.D. Tex. Sept. 6, 2019)) (emphasis added).

Indeed, pursuant to Paragraph 3(A)(i) of the Discovery Order, Dkt. 44, a party is not required to "comply with P.R. 3-1 for [software based] claim elements until 30 days after source code for each Accused Instrumentality is produced."

Further, regardless of Paragraph 3(A)(i), amendments unrelated to claim construction are permitted "by order of the Court, which shall be entered only upon a showing of good cause." P.R. 3-6(b). In determining whether such good cause exists, four factors are relevant: "(1) the explanation for the failure to meet the deadline; (2) the importance of the thing that would be excluded if the proposed amendment is not allowed; (3) potential prejudice in allowing the thing that would be excluded; and (4) the availability of a continuance to cure such prejudice." *Packet Intelligence LLC v. NetScout Sys.*, 2017 WL 2531591, at *1 (E.D. Tex. April 27, 2017).

III. ARGUMENT

This Court should grant KPN leave to amend its source code for any of three reasons: (1) because KPN properly supplemented its contentions to moot Ericsson's motion asking the Court to compel KPN to do so, Dkt. 54; (2) because KPN has a right to amend per Paragraph 3(A)(i) of the Discovery Order to account for Ericsson's produced source code; and (3) because KPN has

good cause to amend its contentions.

a. KPN Properly Supplemented Its Contentions to Moot Ericsson's Motion.

As explained, Ericsson not only ***requested*** that KPN supplement its infringement contentions, but filed a motion asking the Court to compel KPN to do so. And while KPN continues to disagree that its initial contentions were in any way deficient, as it told Ericsson and (more importantly) the Court, KPN has diligently reviewed Ericsson's confidential technical production, including its incomplete source code production, and supplemented its contentions to provide the greater specificity that Ericsson has claimed to need.

For example, in its motion to compel, Ericsson took issue with KPN's contentions regarding [redacted] As explained, KPN disagrees. Indeed, as KPN noted in its supplemental contentions, Ericsson's own documents identify [redacted]

Regardless, to moot the issue, KPN supplemented its contentions to provide more than two pages of detail (all from Ericsson's internal confidential documents and source code) regarding how the [redacted]

Ericsson likewise complained even in its reply about KPN's contentions regarding the [redacted] Despite disagreeing with Ericsson's complaints, KPN supplemented its contentions as to each. For example, KPN supplemented its contentions to identify [redacted]

And—to be clear—that is not all. Precisely because KPN's goal was to address each of Ericsson's complaints (and moot its motion), KPN used Ericsson's pre-motion list of requests and questions as a roadmap for its supplement, doing its best to address each and every issue based on the information KPN currently has. Such additional examples of KPN's supplements that resolve Ericsson's ***exact*** complaints are detailed *infra* at pages 9–11.

In short, Ericsson said it needed greater specificity, and KPN delivered that specificity after diligently and timely reviewing Ericsson's confidential source code and other materials. Having provided Ericsson exactly what it asked for, Ericsson's objection should be overruled and KPN thus should be granted leave to supplement is contentions as it has proposed.

b. KPN Properly Supplemented Its Infringement Contentions for the '705, '560, '098, and '500 Patents Per Paragraph 3(A)(i) of the Discovery Order.[2]

To the extent that Ericsson is entitled to the software-implementation-level detail it demands, then KPN also was entitled per Paragraph 3(A)(i) of the Discovery Order to provide the details that KPN has been able to glean from the source code Ericsson has produced to date.

To be clear, Ericsson has ***still*** not produced its complete code. *See* Ex. 9. This is important because, under this Court's holding in *Implicit*, KPN's 30-day period to amend its contentions pursuant to Paragraph 3(A)(i) does not begin to run until Ericsson makes ***all*** of its relevant source code available. *Implicit, LLC v. Trend Micro, Inc.*, 16-cv-80-JRG, 2017 WL 11630761, at *3 (E.D. Tex. July 21, 2017) ("An incomplete production does not trigger the thirty-day time limit .... To the extent this provides plaintiffs with extra time ... the fault lies with defendants who fail (inadvertently or not) to produce a complete body of source code for review."). Therefore, KPN's clock has not yet started, and its amended '705, '560, '098, and '500 contentions were timely.

Further, KPN's supplement is exactly in line with what Paragraph 3(A)(i) contemplates. Exhibits 4, 5, 7, and 8 show that KPN amended its contentions to account for details gleaned from Ericsson's source code. For example, as noted above, Ericsson alleged in its motion to compel that KPN [redacted]

[2] KPN omitted '772 from this discussion as it had not yet received sufficient source code to supplement its '772 contentions per Paragraph 3(A)(i).

Ex. 5 at 8–9.

Similarly, Ericsson complained about the information KPN provided [redacted] Again, KPN supplemented its contentions on that element to incorporate the additional detail Ericsson claimed to need, including the below:

[redacted]

Ex. 8 at 26–27.

Likewise, Ericsson accused KPN of simply "parroting" the claim language in support of [redacted] Below is just one page of the additional source code detail KPN supplemented its contentions to provide:

[redacted]

Ex. 7 at 13. KPN's supplemented [redacted] demonstrating that KPN supplemented its contentions based on its review of Ericsson's tardy and incomplete source code

production to provide the very additional detail that Ericsson claimed to need (Dkt. 54 at 9):

[redacted]

To the extent that such details were necessary (and KPN does not believe they were), KPN was entitled to rely on Paragraph 3(A)(i) of the Discovery Order to supplement its contentions to provide them—particularly as Ericsson has produced additional code as late as last week. *Implicit*, 2017 WL 11630761, at *3. For this reason as well, the Court should grant KPN leave to amend.

c. This Court Should Grant KPN Leave to Amend Its Contentions Pursuant to Local Patent Rule 3-6(b).

Even setting aside both Ericsson's pending motion to compel and Paragraph 3(A)(i), the Court should grant KPN leave to amend its infringement contentions pursuant to P.R. 3-6(b), which provides that a party may amend its contentions upon a showing of good cause. KPN easily meets this standard. Indeed, each of the four factors weighs in favor of granting KPN leave to amend. ***First***, KPN acted diligently to supplement its contentions, including to account for information gleaned from Ericsson's confidential technical documents and source code. ***Second***, barring amendment will exclude important material. ***Third***, Ericsson will not suffer any undue prejudice as a result. And ***fourth***, a continuance is not necessary at this early phase of litigation.

i. KPN has been diligent in seeking to amend its contentions.

As an initial matter, KPN has been diligent in supplementing its contentions. As described

above, with limited exception (where it is supplementing solely to provide the very same detail that KPN provided to Ericsson in response to its earlier request for clarification regarding KPN's contentions), KPN's supplements are based entirely on Ericsson's confidential source code and technical materials—information that was not in the public domain and, thus, not available to KPN when it served its original contentions. This situation is not an uncommon one.

As this Court has recognized, "'[i]t is expected that during the course of discovery, infringement contentions may be clarified or refined' based upon information produced during discovery." *Arigna Tech.*, 2022 WL 2761288, at *2. This is ***precisely*** what occurred here.

Further, KPN did not sit idly after it submitted its initial contentions on January 5, 2023. KPN pressed Ericsson repeatedly to provide its source code and confidential technical materials so that it could review them and, if necessary, supplement its contentions. KPN asked, early and often, for Ericsson to make its source code and technical documents available. *E.g.*, Ex. 2 at PDF 2 ("[T]o the extent additional information is necessary beyond that provided below, we renew our request that Ericsson make its source code available as soon as possible."). And, once the source code was made available on March 27, KPN's reviewers worked diligently to make as much headway as possible despite the obstacles thrown in their path by Ericsson, such as [redacted] and failure to provide all of its code. *See* Dkt. 66 at 2–3.

KPN also did not sit on its hands in supplementing. Even though Ericsson still had yet to produce all if its code, KPN went ahead and supplemented its contentions on April 24, 2023, to provide what information it could, including to account for what Ericsson's confidential material had revealed. For example, Ericsson claims that KPN's '705 amendments were improper because [redacted] As explained, KPN does not believe such information (or allegations) are in any way new; Ericsson is simply using an idiosyncratic nomenclature. [redacted]

[redacted] then KPN is permitted to amend its contentions to accuse them as KPN only learned of them through confidential documents Ericsson produced during discovery. *See* Ex. 4 at 7–8 (citing a Bates range).

The same is true for Ericsson's gripes regarding the '560, Ex. 5 (citing produced documents and source code); '772, Ex. 6 (same); '098, Ex. 7 (same); and '500, Ex. 8 (same). The fact that KPN quickly amended its contentions "in light of information produced during discovery does not cut against granting leave"—it weighs in KPN's favor. *Arigna*, 2022 WL 2761288, at *2.

In sum, KPN has been more than diligent in reviewing Ericsson's confidential source code and technical documents. Likewise, KPN has been diligent in amending its contentions based on such confidential information—information that was previously unavailable to KPN and, "therefore, ***it could not have included this information in its contentions***." *Id.* (emphasis added). This factor thus weighs heavily in favor of granting KPN leave to amend its contentions.

ii. Barring amendment will lead to the exclusion important material.

KPN's amended infringement contentions also are important. They "provide[] additional information about how the accused products work and specific details about [the defendant's] source code." *Garmin Ltd. v. Tomtom, Inc.*, No. 2:06-cv-338-LED, 2007 WL 2903843, at *7 (E.D. Tex. Oct. 3, 2007); *Arigna Tech.*, 2022 WL 2761288, at *2 (agreeing amendments that provided greater detail of how plaintiff's infringement theory applied were "important"); *Motion Games, LLC v. Nintendo Co.*, No. 6:12-cv-878-RWS-JDL, 2015 WL 1774448, at *3 (E.D. Tex. Apr. 16, 2015) (concluding that proposed amendment was "important," in part, because it "provide[d] additional details on the operations of the [accused device]").

Indeed, to the extent that any of KPN's additions actually comprise new or additional theories of infringement as opposed to simply providing additional detail and examples regarding the same core infringement theories, they would be ***all the more relevant and important*** to KPN's

infringement case. *See, e.g.*, *Thomas Swan & Co. Ltd. v. Finisar Corp.*, 2:13-cv-178-JRG, 2014 WL 12599219, at *2 (E.D. Tex. Aug. 11, 2014) (finding that an amendment relating to "an alternate means to prove infringement" is "undoubtedly important").

Because the additional detail and examples that KPN provides in its supplemental contentions are important to its case, KPN should be allowed to present them. Indeed, the fact that Ericsson seeks to exclude them despite the early stage of the case only highlights their importance. This factor thus also favors granting KPN leave to amend.

iii. Allowing amendment will not prejudice Ericsson.

The third factor likewise weighs in favor of amendment. As this Court has explained, "the issue is not whether changes exist, but whether those changes ***prejudice*** the Defendants." *Arigna*, 2022 WL 2761288, at *2 ("The fact Arigna amended its infringement contentions inherently means that there are going to be changes in the amended contentions.") (emphasis added).

Given the exceptionally early stage of the case, Ericsson cannot possibly point to any credible prejudice that it would suffer were KPN permitted to supplement its infringement contentions (as Ericsson requested). *Estech Sys. IP, LLC v. Mitel Networks, Inc.*, No. 2:21-cv-00473-JRG-RSP, 2023 WL 221535, at *3 (E.D. Tex. Jan. 17, 2023) (granting leave despite noting that the "showing of diligence [was] thin"); *see also Arigna*, 2022 WL 2761288, at *2 (granting leave and noting that "the prejudice is minimal because the Claim Construction Hearing has not been held yet," and fact discovery would not close for another month from the order).

Simply put, not only has the claim construction process not yet begun, but there are ***months*** left before fact discovery closes on October 31. Indeed, the deadline to substantially complete document production is not until August 8, and Ericsson produced additional source code as late as last week. Thus, as this Court has held, "the amount of time remaining before

claim construction and the close of fact discovery when the supplement was served undermines any prejudice [defendant] may endure." *Estech*, 2023 WL 221535, at *3.

iv. A continuance is not necessary because there is no prejudice.

Finally, a continuance is not necessary because there is no prejudice to cure. It also is unnecessary because fact discovery is not set to close until October 31, 2023, and the claim construction process has yet to even begin. *E.g.*, *Harris Corp.*, 2019 WL 4247067, at *3 ("[E]ven if Huawei were to suffer any prejudice, the current stage of the proceedings provides the Court and the parties with many options for addressing any prejudice arising from these amendments."); *Estech*, 2023 WL 221535, at *3 (considering time parties had before the close of discovery and claim construction). Frankly, the lack of any need for a continuance (or prejudice to Ericsson) is demonstrated by the fact that Ericsson has never even suggested the need for one. *E.g.*, *Arigna Tech.*, 2022 WL 2761288, at *3 (finding that this factor weighed in favor of granting leave after concluding that defendants faced "minimal" prejudice and had not requested a continuance).

For these reasons, this factor—like every other factor—weighs in favor of KPN's request.

IV. CONCLUSION

For each of the above reasons, KPN asks the Court to grant it leave to amend its contentions. Not only did Ericsson demand that KPN supplement its contentions (and moved this Court to compel KPN to do so), but KPN plainly has acted diligently in both reviewing Ericsson's confidential technical materials and supplementing its contentions based on that review—just as this Court expects litigants to do. *See id.* at *2 (explaining that it "'***expected*** that during the course of discovery, infringement contentions may be clarified or refined' based upon information produced during discovery" (citation omitted) (emphasis added)).

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Respectfully submitted,

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CERTIFICATE OF CONFERENCE

I certify that the Parties have met and conferred in compliance with Local Rule CV 7(h) regarding this Motion, and this Motion is OPPOSED.

/s/ Andres Healy

CERTIFICATE OF SERVICE

I certify that on May 11, 2023, the foregoing document and its attachments were served on all parties by email.

/s/ Andres Healy

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/ Andres Healy