



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

NINGDE AMPEREX TECHNOLOGY
LIMITED,

Plaintiff,

v.

ZHUHAI COSMX BATTERY CO., LTD.,

Defendant.

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Civil Action No.: 2:22-CV-232-JRG

JURY TRIAL DEMANDED

**NINGDE AMPEREX TECHNOLOGY LTD.'S
MOTION FOR LEAVE TO AMEND INFRINGEMENT CONTENTIONS**

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I. INTRODUCTION

Plaintiff Ningde Amperex Technology Ltd. (“ATL”) has sued defendant Zhuhai CosMX Battery Co. Ltd. (“CosMX”) for patent infringement. The allegedly infringing products in this Action are lithium-ion battery cells that are included in battery packs used in consumer electronic devices such as laptops, smartphones, power tools, electric vehicles, etc. Lithium-ion battery cells contain volatile chemicals and are thus difficult and costly to reverse engineer. In preparation for this Action, ATL obtained several commercially available CosMX battery packs in the United States for analysis. These reverse engineering efforts served as the factual and evidentiary basis for ATL’s original and First Amended Complaint (Dkt. 1 and 8) and for its Patent Local Rule 3-1 infringement contentions served on November 3, 2022.

On May 30, 2023, ATL filed a Second Amended Complaint (Dkt. 97) identifying more than [REDACTED] additional allegedly infringing CosMX battery cells based on discovery taken by ATL up to that date. That same date, ATL served its proposed amended and supplemental infringement contentions on CosMX and asked if CosMX would oppose ATL’s request for leave to amend and supplement its infringement contentions. Despite ATL having given its consent for CosMX to amend its invalidity contentions, CosMX has indicated it opposes ATL’s efforts to amend and supplement its infringement contentions. ATL therefore respectfully seeks an order granting it leave to amend and supplement its infringement contentions pursuant to Local Patent Rule 3-6(b) as attached hereto.

Good cause exists to allow ATL to amend its infringement contentions for the following reasons: *First*, in view of the safety concerns and significant cost associated with reverse engineering hundreds of accused battery cells, ATL has diligently pursued the production of technical documents from CosMX since entry of the Protective Order (Dkt. 59). *Second*, despite

these immediate and persistent efforts, CosMX has resisted producing the requested information and failed to make a full and complete disclosure of documents under Patent Local Rule 3-4(a). In fact, in view of CosMX's failures, ATL was forced to obtain additional commercial samples of CosMX battery cells in order to complete its due diligence as to which patents and claims could be asserted. **Third**, ATL's proposed amendments to the infringement contentions are important because ATL seeks to add four additional patent claims and more than [REDACTED] additional accused products. **Fourth**, CosMX will suffer almost no prejudice if the Court grants it leave to amend because this case is still in its early stages and ATL disclosed its proposed amended infringement contentions before the deadline to amend the pleadings and before the end of claim construction discovery under the Docket Control Order. **Fifth**, there is also no prejudice because ATL's proposed First Amended Infringement Contentions do not offer any new infringement theories but instead add just a few additional claims based on the same structural elements as previously accused and expands the number of accused products based on technical similarities to the reverse engineered product original charted in ATL's original and First Amended Complaints and its initial infringement contentions. Finally, although a continuance is unnecessary because of a lack of prejudice, the availability of a continuance in this case to cure any prejudice favors a finding of good cause.

II. BACKGROUND

ATL alleges that CosMX's lithium-ion battery ("LIB") products infringe U.S. Patent Nos. 11,329,352 (the "'352 Patent"), 10,833,363 (the "'363 Patent"), and 10,964,987 ("'987 Patent") (collectively, the "Asserted Patents"). *See* Dkt. 8.¹ The Asserted Patents are directed to

¹ ATL originally also asserted infringement of U.S. Patent No. 10,971,706 but the parties have stipulated to the voluntary dismissal of this patent from this Action. *See* Dkt. 87.

[REDACTED]

the design, structure, and chemical composition of batteries and/or their components. *See id.*, ¶¶ 24-29. CosMX’s LIB products are used in consumer electronic products (*e.g.*, laptops, tablets, smartphones, etc.) sold around the world², but there is very little public information on which specific products contain CosMX LIB products. Before filing this case, ATL identified CosMX Cell No. CA3862E1 in a Lenovo laptop battery shipped to the U.S. *See id.*, ¶ 19. ATL and its counsel retained a consultant to analyze this cell with respect to at least one independent claim of each asserted patent at the cost of tens of thousands of dollars per patent claim. *See Powell Decl.*, ¶¶ 3-4. After filing suit, on November 3, 2022, ATL complied with P.R. 3-1 by serving its infringement contentions based on the analysis of the CA3862E1 cell. *See Ex. 1.* ATL’s infringement contentions asserted that CosMX infringed, among other things, [REDACTED]

[REDACTED]

[REDACTED] (collectively, “the original asserted claims”). *Id.* at 2.

On December 8, 2022, ATL served CosMX with an interrogatory asking it to “[i]dentify all LIB products [CosMX] have offered for sale, sold, or otherwise delivered to any Person in the United States on or after [the earliest issue date of the Asserted Patents] . . . which, based on [its] knowledge, are reasonably capable of being incorporated into an electronic device manufactures, used, offered for sale, sold, imported, or otherwise distributed in the United States.” *Ex. 2* at 7 (*Interrogatory No. 1*). That same day, ATL also served CosMX with a set of document requests. *Ex. 3.* The document requests sought, among other things, (i) “[a]ll documents relating to the internal design and architecture, chemical composition, structure, design, testing, manufacture, implementation, operation, or function” of the same CosMX LIB products and (ii) sales records for each product, including a product’s first and last sale dates, so that ATL can identify

² *See* <http://www.cosmx.com/html/en/html/about/about/> (last visited May 31, 2023).

additional accused products for each asserted patent. *Id.* at 6, 9 (Request For Production Nos. 4 and 43).

In accordance with the Docket Control Order in this case (Dkt. 60), CosMX served its initial and additional disclosures—including its first production of documents—on ATL on December 16, 2022. *See* Ex. 4. Then on January 9, 2023, CosMX responded to Interrogatory No. 1 by only identifying the product names it uses to “refer[] to Cell No. CA3862E1,” and did not disclose any additional products that are reasonably similar. Ex. 5 at 6-7. Following a meet-and-confer, CosMX supplemented its response on March 10, 2023 to state that it “will review and produce non-privileged documents relating to additional CosMX lithium-ion battery products . . . as necessary and on a rolling basis” and told ATL to look through CosMX’s concurrent production of 10,196 documents (spanning over 60,000 pages) to identify additional accused products. *See* Ex. 6 at 7.

Upon review, ATL determined that CosMX’s technical document production “d[id] not show the products’ design or operation as to the accused features” and thus requested another meet-and-confer. *See* Ex. 7 at 8-9 (5/3/23 C. Yang email). ATL also renewed its “request for physical samples . . . that are representative” of the accused products and sufficient to show the accused features. *Id.* at 9. CosMX finally supplemented its interrogatory responses to specifically identify the potential accused products on May 17, 2023. *See* Ex. 8 at 7-15. At the same time, CosMX finally produced sales records for products sold after the Asserted Patents’ issue dates, making it possible for ATL to ascertain the full list of products at issue in this case. But CosMX still has not completed its production of technical documents pertaining to the potential accused products. *See* Ex. 11 at 1-3 (6/7/2023 C. Yang email outlining remaining deficiencies).

[REDACTED]

Furthermore, CosMX has not produced or made available for inspection a single product sample, after months of conferral. *See* Ex. 12 at 1 (6/13/2023 C. Yang email).

Recognizing the deficiencies in CosMX's technical document production, around March 17, 2023 ATL identified another CosMX LIB product—[REDACTED] [REDACTED] (see Dkt. 95, ¶ 19) and commissioned the teardown, testing, and analysis of this cell with respect to claims [REDACTED] of the '987 Patent. *See* Powell Decl., ¶ 7. ATL had not commissioned pre-suit testing of the CA3862E1 cell with respect to these three claims because (i) it had a limited number of samples of this cell to conduct tests on, (ii) testing a LIB cell with respect to a single claim costs thousands of dollars, and (iii) ATL expected it would be able to determine whether there was infringement of these claims based on technical documents to be produced by CosMX as part of its Patent Local Rule 3-4(a) disclosures. *See id.*, ¶ 8. Upon completing its analysis of the [REDACTED] cell, ATL was able to confirm infringement of claims [REDACTED] of the '987 Patent around May 3, 2023. *Id.*, ¶ 7. ATL also determined that the CA3862E1 and [REDACTED] cells infringed claim [REDACTED] of the '987 Patent based on technical documents produced by CosMX.

On May 20, 2023, just three days after CosMX specifically identified the potential accused products and produced the related sales records, ATL informed CosMX that it intended to amend its infringement contentions, including adding claims 3, 4, 5, and 17 of the '987 Patent. Ex. 9. The parties met and conferred on May 24, 2023 regarding ATL's bases for amending its infringement contentions and how it would impact the proceedings in this case. During the conference, ATL informed CosMX that it intended to file a motion for leave to amend its infringement contentions and asked if CosMX opposed the motion. CosMX responded that it

[REDACTED]

would need to see a copy of the proposed amended infringement contentions before making that decision. *See* Ex. 7 at 2 (5/30/23 J. Totten email).

Less than a week later, ATL emailed CosMX a copy of its proposed First Amended Infringement Contentions and asked again if CosMX would oppose ATL's motion for leave to amend. Ex. 7 at 1 (5/30/23 L. Lin email). For the purpose of this motion, ATL's proposed First Amended Infringement Contentions differ from the original infringement contentions in three relevant ways. First, ATL has updated the proposed First Amended Infringement Contentions to specifically identify additional accused products for each asserted patent based on the CosMX's specific identification of potential accused products on May 17, 2023. *See* Ex. 10 at 3-10. Second, ATL has added claims 3, 4, 5, and 17 of the '987 Patent to the proposed First Amended Infringement Contentions. *See id.* at 2. Third, the claim chart for each asserted patent identifying specifically where each element of each asserted claim is found within the accused products has been updated with citations to technical documents produced by CosMX, including documents produced in March and April 2023. *See id.* at 101-74 (citing BOM and STP documents in Appendices A-B of Exhibit 3). However, the proposed additions to the claim charts do not include any new infringement theories. *Compare* Ex. 1 at 8-48 (Exhibits 2-4), *with* Ex. 10 at 15-174 (Exhibit 1-3).

After reviewing a draft of this motion, CosMX indicated it opposes this motion. Ex. 13. According to the Docket Control Order (Dkt. 100), claim construction discovery concludes on June 20, 2023, the claim construction hearing will take place on August 15, 2023, the fact discovery cutoff is September 18, 2023, and the deadline to complete expert discovery is October 23, 2023.

III. LEGAL STANDARD

The Local Patent Rules permit amendment or supplementation of infringement contentions “by order of the Court . . . upon a showing of good cause.” P.R. 3-6(b). “Good cause in this context ‘requires a showing of diligence.’” *Intell. Ventures II LLC v. FedEx Corp.*, No. 2:16-CV-00980-JRG, 2017 WL 4812436, at *2 (E.D. Tex. Oct. 25, 2017) (quoting *O2 Micro Int’l Ltd. v. Monolithic Power Sys., Inc.*, 467 F.3d 1355, 1366 (Fed. Cir. 2016)). “Courts also consider four factors in determining whether to grant leave to amend infringement contentions: (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.” *Id.* (citation omitted).

IV. ARGUMENT

A. ATL Has Acted With Diligence To Obtain Necessary Technical Information From CosMX

The reasons why ATL did not include the proposed amended and supplemental information—*i.e.*, the additional accused products, citations to CosMX technical documents for the original asserted claims, and infringement allegations for claims 3, 4, 5, and 17 of the ’987 Patent—in its original infringement contentions all favor granting leave to amend. As an initial matter, it would have been too time consuming and cost prohibitive for ATL to identify, acquire, and test every CosMX LIB product to determine which claims of the Asserted Patents it infringes. The cost to acquire and reverse engineer just one CosMX LIB model cost ATL tens of thousands of dollars and ATL’s Second Amended Complaint identifies in excess of [REDACTED] unique CosMX LIB model numbers. *See* Dkt. 95. Acquisition and reverse engineering of each of these LIB models would cost millions of dollars. Accordingly, besides commissioning the teardown,

testing, and analysis of the CA3862E1 cell with respect to an independent claim of each Asserted Patent prior to filing suit, ATL reasonably expected to identify additional products and infringed patent claims during discovery, the scope of which properly includes all CosMX LIB models that are reasonably similar to the originally charted CA3862E1 cell.

To that end, ATL diligently pursued the production of documents from CosMX in accordance with the schedule set forth in the Docket Control Order. ATL served interrogatories and document requests seeking the identification of other potential accused products and related technical documents on December 8, 2022, and it started receiving documents from CosMX on December 16, 2022 (*see* Ex. 4), but ATL still could not include citations to CosMX's technical documents in its infringement contentions because they were due on November 3, 2022. In addition, CosMX did not produce technical documents pertaining to other accused products besides the CA3862E1 cell until March 10, 2023, and its core technical document remains deficient as of the filing of this motion. *See* Ex. 6 at 7. ATL also could not include the additional accused products for each asserted patent in its infringement contentions because CosMX dragged its feet for over five months—until May 17, 2023—before identifying each product by product number and producing the related sales records. *See* Powell Decl., ¶ 9; Ex. 8 at 8-16. Indeed, given CosMX's prolonged refusal to specifically identify its LIB products, ATL purchased additional batteries containing CosMX LIB cells in order to test them for possible infringement of other patent claims. *See* Powell Decl., ¶ 7. As explained above, the high cost of testing LIB products with respect to a single patent claim and the limited number of samples of the CA3862E1 cell also precluded ATL from including infringement allegations for claims 3, 4, 5, and 17 of the '987 Patent in its original infringement contentions. In sum, ATL diligently

[REDACTED]

pursued the product of technical documents from CosMX and was not responsible for failing to include the proposed supplemental information in its original infringement contentions.

ATL has also acted diligently by promptly seeking leave to amend its infringement contentions and providing its proposed amended infringement contentions to CosMX. The Court has found that a party was diligent if it moved to amend its infringement contentions up to three months after receiving sufficient information that was previously unavailable to conclude that a product infringed. *See CyWee Grp. Ltd. v. Samsung Elecs. Co.*, No. 2:17-CV-00140-RWS-RSP, 2018 WL 574871, at *2 (E.D. Tex. Jan. 26, 2018) (finding that plaintiff who filed a motion for leave to amend infringement contentions in October 2017 on two products released in July and August 2017 was diligent); *see also Intell. Ventures II LLC v. FedEx Corp.*, No. 2:16-CV-00980-JRG, 2017 WL 4812436, at *1-3 (E.D. Tex. Oct. 25, 2017) (finding that plaintiff who sought leave to amend its infringement contentions about a month after defendants produced additional discovery regarding two accused products was diligent). Under this standard, ATL is diligent in this case because it moved to amend the infringement contentions less than three months after receiving information from CosMX that allowed it to identify additional accused products. For example, after CosMX finally identified the potential accused products by product number and produced the related sales records on May 17, 2023, ATL identified the additional accused products for each asserted patent listed in its proposed First Amended Infringement Contentions less than two weeks later. In addition, when ATL noticed deficiencies in CosMX's technical document production in March 2023, it identified the [REDACTED] cell and ordered testing with respect to claims [REDACTED] of the '987 Patent that same month. *See Powell Decl.*, ¶ 7. And once it received the test results at the beginning of May 2023, ATL evaluated them to determine that there was infringement and prepared a revised a '987 Patent claim chart adding the

[REDACTED]

infringement allegations for these claims based on the test results by the end of May. Thus, ATL moved to add these new patent claims less than a month after determining that they are being infringed. Another example of ATL's diligence is how—when CosMX produced over 158,800 documents in the span of a month ending on April 21, 2023—ATL reviewed these documents, identified relevant technical documents for the additional accused products, and added citations from the technical documents to the revised '987 Patent claim chart just over a month later on May 30, 2023. Furthermore, the fact that ATL has already provided CosMX with the proposed First Amended Infringement Contentions also shows that it is diligent. *See GREE, Inc. v. Supercell Oy*, No. 2:19-CV-00200-JRG-RSP, 2020 WL 6324902, at *2 (E.D. Tex. Mar. 26, 2020) (“In general, the earlier the requested supplementation is sent to the other side, the more it shows diligence and mitigates potential prejudice.”). Accordingly, this factor strongly favors granting leave to amend.

B. The Proposed Amendments Are Important

The importance of ATL's proposed amendments also favors granting leave to amend. The Court has found that proposed amendments adding patent claims and accused products are important because they affect the scope of the patentee's case against the accused infringer and judicial economy. *See TiVo, Inc. v. Verizon Commc'ns, Inc.*, No. 2:09-CV-257-JRG, 2012 WL 2036313, at *2 (E.D. Tex. June 6, 2012) (“Without inclusion [of the additional accused product], the entire dispute between the parties will not be adjudicated and a subsequent lawsuit may be necessary. Considerations of judicial economy weigh heavily in favor of allowing [patentee's] amendment.”); *Alexsam, Inc. v. IDT Corp.*, No. 2:07-CV-420-CE, 2011 WL 108725, at *2 (E.D. Tex. Jan. 12, 2011) (finding proposed amendment to infringement contentions important because “[i]f the Court denies Plaintiff's motion, Plaintiff will never be able to assert these claims or seek damages against these products in the future”). This principle applies directly to ATL's proposed

amendments in this case because they add additional accused products for each asserted patent and four new patent claims. Accordingly, this factor favors granting leave to amend.

C. CosMX Will Suffer Almost No Prejudice If Leave to Amend is Granted

The potential prejudice to CosMX if the Court grants ATL leave to amend is another factor favoring granting such leave. The Court has found that the amendment of infringement contentions before the completion of claim construction and discovery will result in minimal or no prejudice to the accused infringer. *See Harris Corp. v. Huawei Device USA, Inc.*, No. 2:18-CV-00439-JRG, 2019 WL 4247067, at *3 (E.D. Tex. Sept. 6, 2019) (finding that “there is little, if any, prejudice to [the defendant] in granting leave” to amend the infringement contentions because “the *Markman* hearing has not occurred, discovery has not completed, and the deadline for disclosing experts has not passed”); *Traxcell Techs., LLC v. AT&T Corp.*, No. 2:17-CV-00718-RWS-RSP, 2018 WL 6078202, at *4 (E.D. Tex. Nov. 21, 2018) (finding that prejudice to the defendants from granting leave to amend infringement contentions “would be limited because the litigation is in its early stages” with trial almost a year away, the claim construction hearing is five months away, and despite being almost four months into discovery). In addition, the presence or absence of a new infringement theory in a proposed amendment will cause some or no prejudice, respectively, to the accused infringer. *See CyWee Grp. Ltd. v. Samsung Elecs. Co.*, No. 2:17-CV-00140-RWS-RSP, 2018 WL 574871, at *2 (E.D. Tex. Jan. 26, 2018) (finding “little, if any, prejudice” to the defendant in granting leave because the plaintiff “is not changing its infringement theory relative to its preliminary infringement contentions”). In light of these principles, CosMX will suffer minimal prejudice if the Court allows ATL’s proposed amendments because the Court has not yet held a claim construction hearing and the deadline to complete fact discovery is more than three months away on September 18, 2023. Furthermore, CosMX will not be prejudiced by any new infringement theories because the proposed

amendments do not offer any. And any potential prejudice that CosMX may suffer from ATL's proposed amendments is mitigated by the fact that CosMX has already received a copy of the proposed amendments on May 30, 2023. *See GREE*, 2020 WL 6324902, at *2 ("In general, the earlier the requested supplementation is sent to the other side, the more it shows diligence and mitigates potential prejudice."). Accordingly, this factor also favors granting leave to amend.

D. A Continuance is Available But Unnecessary

No continuance is needed as a result of ATL's proposed amendments to its infringement contentions. As shown above, ATL's proposed amendments will cause little or no prejudice to CosMX. And "whatever prejudice may result could be cured by a continuance." *Intell. Ventures II LLC v. FedEx Corp.*, No. 2:16-CV-00980-JRG, 2017 WL 4812436, at *3 (E.D. Tex. Oct. 25, 2017). Furthermore, although the addition of four patent claims to the infringement contentions is a basis for CosMX to seek leave to amend its invalidity contentions, there is still sufficient time for CosMX to do so before expert reports are due on September 18, 2023. *See* Dkt. 60 at 3. As a result, like the other three factors, this factor leans in favor of granting leave to amend.

V. CONCLUSION

For the foregoing reasons, ATL respectfully requests that the Court grant leave for ATL to amend its infringement contentions.

DATED: June 13, 2023

Respectfully submitted,

By: /s/ Michael D. Powell

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CERTIFICATE OF SERVICE

Pursuant to Local Rule CV-5(c), the undersigned hereby certifies that the foregoing NINGDE AMPEREX TECHNOLOGY LTD.'S MOTION FOR LEAVE TO AMEND INFRINGEMENT CONTENTIONS will be promptly served on or around June 13, 2023 via email to the following individuals, including counsel of record:

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/s/ Ian Wang

CERTIFICATE OF CONFERENCE

I hereby certify that counsel for Ningde Amperex Technology Ltd. and Zhuhai CosMX Battery Co., Ltd. complied with the meet and confer requirement specified in Local Rule CV-7(h) on May 24, 2023. The motion is opposed.

/s/ Michael D. Powell

CERTIFICATE OF AUTHORIZATION TO SEAL

Pursuant to Local Rule CV-5, the undersigned counsel hereby certifies that authorization for filing under seal has been previously granted by the Court in the Protective Order (Dkt. 59) entered in this case on December 12, 2022.

/s/ Ian Wang