

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
WACO DIVISION**

WEBROOT, INC., OPENTEXT INC.,	§	
	§	
<i>Plaintiffs,</i>	§	
v.	§	
AO KASPERSKY LAB	§	6:22-CV-00243-ADA-DTG
TREND MICRO, INC.	§	6:22-CV-00239-ADA-DTG
SOPHOS LTD.	§	6:22-CV-00240-ADA-DTG
CROWDSTRIKE HOLDINGS, INC.	§	6:22-CV-00241-ADA-DTG
FORCEPOINT, LLC	§	6:22-CV-00342-ADA-DTG

UNOPPOSED MOTION TO MODIFY THE SCHEDULING ORDER

Defendant AO Kaspersky Lab by counsel, respectfully moves the Court for modification of the Fifth Amended Scheduling Order relating to certain deadlines in this consolidated matter as they relate solely to the *Webroot, Inc. et al. v. AO Kaspersky Lab*, 6:22-CV-00243-ADA-DTG action (the “Kaspersky Litigation”).¹ Dkt. 252. The requested modification arises from the recent filing of a Third Amended Complaint in which Plaintiffs OpenText Inc. and Webroot (collectively “Plaintiffs”) added two new parties to suit—Kaspersky Labs Limited and Kaspersky Lab Switzerland GmbH—each of which are international entities. Dkt. 436.

Counsel for the parties have cooperated to facilitate timely incorporation of the two new entities into the lawsuit while maintaining the new defendants’ rights and guarding against potential unfair prejudice. Given these considerations, AO Kaspersky Lab² moves the Court for an extension to the remaining deadlines in the Fifth Amended Scheduling Order solely as they relate to the Kaspersky Litigation.

¹ The Kaspersky Litigation was designated the “LEAD CASE” in the Court’s Order consolidating matters for pretrial issues. Dkt. 49.

² While neither Kaspersky Labs Limited nor Kaspersky Lab Switzerland GmbH have yet appeared, the present motion is also filed on their behalf.

As required by Local Rule CV-7(g), the parties have met and conferred on multiple occasions about the issues pertaining to this motion. Plaintiffs do not oppose this motion.

Factual Background

On March 4, 2022, Plaintiffs filed a Complaint for Patent Infringement against AO Kaspersky Lab in the Western District of Texas. Dkt. 9. AO Kaspersky Lab agreed to waive service and, on May 25, 2022, Plaintiffs filed a waiver of service executed by AO Kaspersky Lab. Dkt. 16. The complaint alleged infringement of six patents. On June 28, 2022, AO Kaspersky Lab filed a response to the complaint that alleged infringement of four patents by Plaintiffs and a Canadian entity, Open Text Corp. Plaintiffs subsequently alleged infringement of four additional patents in a Second Amended Complaint, resulting in a total of ten asserted patents against AO Kaspersky Lab. *Id.*; Dkt. 122.

On March 30, 2023, the Court filed a Fifth Amended Scheduling Order establishing that, among other dates, fact discovery would run from April 18, 2023 to January 18, 2024. Dkt. 252. The Fifth Amended Scheduling Order also set an October 3, 2023 “Deadline to add parties.” *Id.* On September 22, 2023, Plaintiffs filed their Third Amended Complaint for Patent Infringement. Dkt. 436. The complaint added two new international entities, Kaspersky Lab Switzerland GmbH (“Kaspersky Switzerland”) and Kaspersky Labs Limited (“Kaspersky UK”). *Id.* While Plaintiffs contend that they have effectuated service of Kaspersky UK under provisions of the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents (“Hague Convention”), Kaspersky UK has not agreed that service was proper. Chadwick Decl., ¶ 3. Kaspersky Switzerland has not yet been served. *Id.*, ¶ 5.

On October 9, 2023, Plaintiffs filed a Motion for an Order Authorizing Alternative Service upon Kaspersky Switzerland. To resolve any disputed service issues and expedite prompt

incorporation of the two new defendants into the Kaspersky Litigation, Kaspersky Switzerland agreed to waive service under Fed. R. Civ. P. 4(d)(3). Chadwick Decl., ¶ 5, Ex. A. Kaspersky Switzerland further agreed that the 90-day period afforded to defendants located outside the United States would be reduced to 60 days and further agreed that the 60 days would run from the September 22, 2023 filing date of the Third Amended Complaint. *Id.*, ¶ 6. Plaintiffs further agreed that Kaspersky UK's response to the Third Amended Complaint would be due on the same day as Kaspersky Switzerland's responsive pleading. *Id.* Per the parties' agreement, therefore, the deadline for Kaspersky UK and Kaspersky Switzerland to file their respective responses to the Third Amended Complaint is November 21, 2023. *Id.* By the time the new defendants file responses to the Third Amended Complaint, the deadline for fact discovery will be less than two months away. Dkt. 252.

Kaspersky UK is located in London, England while Kaspersky Switzerland is located in Zurich, Switzerland. Chadwick Decl., ¶¶ 2, 4. Neither Kaspersky Switzerland nor Kaspersky UK had counsel to represent it in the Kaspersky Litigation until each separately retained DeWitt LLP ("U.S. Counsel") on October 6, 2023. Chadwick Decl., ¶¶ 2, 4. Both Kaspersky Switzerland and Kaspersky UK are new clients to U.S. Counsel. *Id.* Because U.S. Counsel has no prior relationship with either Kaspersky Switzerland or Kaspersky UK, it lacks meaningful information regarding the role of the new defendants, if any, as relates to business operations giving rise to Plaintiffs' infringement allegations. *Id.*, ¶ 7.

Legal Analysis

Federal Rule of Civil Procedure 16(b)(4) provides that a scheduling order may be modified "only for good cause and with the judge's consent." The court has "broad discretion" to permit amendment of scheduling orders and assesses four factors when reaching its conclusion:

“(1) the explanation for the party’s failure to meet the deadline, (2) the importance of what the court is excluding, (3) the potential prejudice if the Court allows the thing that would be excluded, and (4) the availability of a continuance to cure such prejudice.” *Ciena Corp. v. Nortel Networks Inc.*, 233 F.R.D. 493, 494 (E.D. Tex. Feb. 9, 2006) (citing *S & W Enters., LLC v. Southtrust Bank of Ala.*, 315 F.3d 533, 535 (5th Cir. 2003)). “No factor is dispositive, nor must all the factors be present.” *Ysleta Del Sur Pueblo v. City of El Paso*, No. EP-17-CV-00162-DCG, 2019 WL 1131421, at *2 (W.D. Tex. Mar. 12, 2019) (quoting *Sapp v. Mem’l Hermann Healthcare Sys.*, 406 F.App’x 866, 869 (5th Cir. 2010)). However, good cause necessitates a showing that the deadlines “cannot reasonably be met despite the diligence of the party needing the extension.” *Id.* (quoting *Sw. Bell Tel. Co. v. City of El Paso*, 346 F.3d 541, 546 (5th Cir. 2003)).

Through no fault of their own, the two new defendants cannot meet the deadlines in the Fifth Amended Scheduling Order. The December 11 deadline to narrow claims and prior art requires the new defendants to make binding decisions that will affect the case a mere three weeks after they have responded to the complaint. The current fact discovery deadline would afford the new defendants, at most, one round of written discovery and a significantly compressed timeframe for party depositions or other necessary discovery. Requiring that the current deadlines be maintained would impose unfair prejudice upon Kaspersky UK and Kaspersky Switzerland.

Accordingly, Defendants seek a modest amendment to the scheduling order by postponing each upcoming deadline by approximately 75 days³ as follows:

³ The deadlines in the proposed scheduled have been adjusted within a range from 75 to 80 days to accommodate weekends and Federal holidays.

Event	Current Deadline	Proposed Deadline
Deadline for Kaspersky Labs Limited and Kaspersky Lab Switzerland GmbH to file a response to Plaintiffs' Third Amended Complaint	N/A	Tuesday November 21, 2023
Deadline to serve Final Infringement and Invalidity Conventions. After this date, leave of Court is required for any amendment to infringement or invalidity contentions. This deadline does not relieve the parties of their obligation to seasonably amend if new information is identified after initial contentions.	Tuesday, October 27, 2023 ⁴	Friday, January 5, 2024
Deadline for the first of two meet and confers to discuss significantly narrowing the number of claims asserted and prior art references at issue. Unless the parties agree to the narrowing, they are ordered to contact the Court's law clerk to arrange a teleconference with the Court to resolve disputed issues.	Monday, December 11, 2023	Monday, February 26, 2024
Deadline to amend pleadings. A motion is not required unless the amendment adds patents or patent claims. (Note: This includes amendments in response to a 12(c) motion.)	Monday, December 11, 2023	Monday, February 26, 2024
Close of Fact Discovery.	Thursday, January 18, 2024	Thursday, April 4, 2024
Deadline to serve Opening Expert Reports.	Tuesday, January 30, 2024	Tuesday, April 16, 2024
Deadline to serve Rebuttal Expert Reports.	Tuesday, March 12, 2024	Wednesday, May 29, 2024
Close of Expert Discovery.	Tuesday, March 12, 2024	Wednesday, May 29, 2024
Deadline for the second of two meet and confers to discuss narrowing the number of claims asserted and prior art references at issue to triable limits. If it helps the parties determine these limits, the parties are encouraged to contact the Court's law clerk for an estimate of the amount of trial time anticipated per side. The parties shall file a Joint Report within 5 business days regarding the results of the meet and confer.	Tuesday March 12, 2024	Wednesday, May 29, 2024
Dispositive motion deadline and <i>Daubert</i> motion deadline. Parties shall further contact the law clerks by email to	Tuesday, May 7, 2024	Tuesday, July 23, 2024

⁴ The Court recently extended this deadline an additional 10 days beyond the deadline specified in the Fifth Amended Scheduling Order. *See* Dkt. 461.

determine whether paper copies are desired by Chambers and to obtain link to upload briefs and exhibits.		
Deadline to serve Pretrial Disclosures (jury instructions, exhibit lists, witness lists, discovery and deposition designations).	Tuesday, June 4, 2024	Tuesday, August 20, 2024
Deadline to serve objections to pretrial disclosures/rebuttal disclosures.	Tuesday, June 18, 2024	Tuesday, September 3, 2024
Parties to jointly email the Court's law clerk (See OGP at 1) to confirm their pretrial conference and trial dates.	Tuesday, June 25, 2024	Tuesday, September 10, 2024
Deadline to serve objections to rebuttal disclosures; file Motions <i>in Limine</i>	Tuesday, June 25, 2024	Tuesday, September 10, 2024
Deadline to file Joint Pretrial Order and Pretrial Submissions (jury instructions, exhibit lists, witness lists, discovery and deposition designations); file oppositions to Motions <i>in Limine</i> .	Thursday, July 11, 2024	Tuesday, September 24, 2024
Deadline to file Notice of Request for Daily Transcript or Real Time Reporting. If a daily transcript or real time reporting of court proceedings is requested for trial, the party or parties making said request shall file a notice with the Court and email the Court Reporter, Kristie Davis at kmdaviscsr@yahoo.com . Deadline to meet and confer regarding remaining objections and disputes on Motions <i>in Limine</i> .	Notice of Daily Transcript: Friday July 12, 2024 Meet and confer on remaining objections: Thursday, July 18, 2024	Notice of Daily Transcript: Wednesday, September 25, 2024 Meet and confer on remaining objections: Tuesday, October 1, 2024
Deadline to file Joint Notice identifying remaining objections to pretrial disclosures and disputes on Motions <i>in Limine</i> .	Thursday, July 25, 2024	Tuesday, October 8, 2024
Final Pretrial Conference. Held in person unless otherwise requested.	Thursday, August 1, 2024	Tuesday, October 15, 2024
Jury Selection/Trial⁵	Monday, August 19, 2024	Monday, November 4, 2024

⁵ Before Plaintiffs filed the Third Amended Complaint, AO Kaspersky Lab apprised the Court that its lead counsel had a conflict with the trial date, conferred with Plaintiffs' counsel, and prepared a motion to extend that deadline for good cause. *See Chadwick Decl., Id.*, ¶ 8, Ex. B.

The need to extend deadlines is not due to a lack of diligence by either the Plaintiffs or Defendants. Both have worked within the deadlines provided by this Court and the Federal Rules of Civil Procedure. Plaintiffs properly amended their complaint within the deadline to add parties. Because both new defendants are located abroad, however, service of the complaint consistent with the rights afforded them under the Federal Rules is not a simple matter. In a spirit of cooperation, however, Kaspersky Switzerland waived service to prevent motion practice or require Plaintiffs to effect service through the Hague Convention. Moreover, the parties agreed to shorten from 90 to 60 days, the time afforded to Kaspersky Switzerland to respond under Federal Rule of Civil Procedure 4(d)(3) commencing from the filing of the Third Amended Complaint, two weeks before it had even retained U.S. Counsel. These acts demonstrate an effort to promote efficient effectuation of service and diligently comply with the Court's scheduling order.

U.S. Counsel has never before represented Kaspersky Switzerland or Kaspersky UK and has had no prior contact with any personnel from either defendant. Chadwick Decl., ¶¶ 2, 4. U.S. Counsel is presently unaware of the full extent of the involvement, if any, of either Kaspersky Switzerland or Kaspersky UK relative to the allegations in the latest complaint, including whether jurisdiction over either defendant is even proper. *Id.*, ¶ 7. U.S. Counsel requires time to gain background information necessary for adequate representation, to draft adequate responses to Plaintiffs' 225-page Third Amended Complaint, and to formulate a discovery strategy within an already compressed timeframe. Despite both the Plaintiffs' and defendants' compliance with the various imposed deadlines and overall diligence to date, the current schedule does not afford adequate time for discovery. This factor favors granting the motion.

Should the Court deny this motion, Kaspersky Switzerland and Kaspersky UK believe that this would severely prejudice them. With little more than a month of fact discovery,

Kaspersky Switzerland, Kaspersky UK, and U.S. counsel would be hard pressed to collect, review, and produce documents requested by Plaintiffs or to request, receive, and review documents from Plaintiffs. U.S. Counsel also believes it will need sufficient time to investigate and understand the involvement in the United States, if any, of Kaspersky Switzerland and Kaspersky UK relating to multiple products accused of infringement and to assess any potential defenses that may differ from those applicable to AO Kaspersky Lab. The need for additional time is intensified by the fact that Plaintiffs are asserting infringement of ten patents. Kaspersky Switzerland and Kaspersky UK believe that preventing adequate opportunity for discovery by denying this motion would deprive them of a “just” determination of the lawsuit by suppressing their ability to mount a full and effective defense. *See* Fed.R.Civ.P. 1. Plaintiffs also would be under significant time constraints with respect to discovery directed at the newly added defendants. Despite the uncertainties relating to the new defendants’ involvement, defenses, and the significant amount of discovery required, defendants seek only a modest 75-day extension.

By contrast, Plaintiffs do not oppose this motion. The Kaspersky Litigation is one of five lawsuits filed by Plaintiffs, all of which share an August 2024 trial date. These cases were consolidated only for pretrial purposes and the amended schedule does not affect the pretrial dates for the other cases, only the Kaspersky Litigation. In any event, the August 2024 trial date cannot be maintained for all five cases.⁶

Finally, the pending motion would effectively function as a continuance. As noted above, the Kaspersky defendants believe that maintaining the current schedule would impose unfair and substantial prejudice. The Court can resolve this prejudice by extending the upcoming deadlines

⁶ Defendants believe that the parties in *Webroot, Inc. et al. v. Sophos Ltd.*, 6:22-CV-00240-ADA-DTG have consented to trial by Magistrate Judge Gilliland.

as proposed herein. Granting the requested modification to the scheduling order would enable both sides to fully conduct discovery, permit U.S. Counsel to adequately represent the new defendants, and permit all parties to secure a just and speedy resolution of this dispute.

Therefore, each of the enumerated factors favors modification of the scheduling order and satisfies the good-cause standard required by Fed. R. Civ. P. 16(b)(4).

Conclusion

Neither party has acted without diligence nor neglected other duties that would have permitted compliance with the current scheduling order. The Kaspersky defendants believe that the current deadlines unfairly prejudice the newly added defendants as well as Plaintiffs. That prejudice can be cured by modest extensions to existing deadlines, as requested in the motion. For these reasons, and as more fully set forth herein, defendants respectfully request that the Court grant its Unopposed Motion to Modify the Scheduling Order.

Dated: October 23, 2023

Respectfully submitted,

/s/ Eric H. Chadwick

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