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

PEGASUS WIRELESS INNOVATION LLC, *Plaintiff*, v. CELLCO PARTNERSHIP d/b/a VERIZON WIRELESS *et al.*, *Defendants*, ERICSSON INC. and NOKIA OF AMERICA CORP., *Intervenors*,	Case No. 2:23-cv-00640-JRG (Lead Case)
CELLCO PARTNERSHIP d/b/a VERIZON WIRELESS, *Counterclaim-Plaintiff*, ERICSSON INC. and NOKIA OF AMERICA CORP., *Intervenors*, v. PEGASUS WIRELESS INNOVATION LLC, *Counterclaim-Defendant,* KT CORPORATION, *Third-Party Defendant*,	Case No. 2:23-cv-00640-JRG (Lead Case)
PEGASUS WIRELESS INNOVATION LLC, *Plaintiff*, v. AT&T CORP. *et al.*, *Defendants*, ERICSSON INC. and NOKIA OF AMERICA CORP., *Intervenors*,	Case No. 2:23-cv-00638-JRG (Member Case)

NEW CINGULAR WIRELESS PCS, LLC, *Counterclaim-Plaintiff*, ERICSSON INC. and NOKIA OF AMERICA CORP., *Intervenors*, v. PEGASUS WIRELESS INNOVATION LLC, *Counterclaim-Defendant,* KT CORPORATION, *Third-Party Defendant*,	Case No. 2:23-cv-00638-JRG (Member Case)
PEGASUS WIRELESS INNOVATION LLC, *Plaintiff*, v. T-MOBILE USA, INC. *et al.,* *Defendants*, ERICSSON INC. and NOKIA OF AMERICA CORP., *Intervenors*,	Case No. 2:23-cv-00639-JRG (Member Case)
T-MOBILE USA, INC., *Counterclaim-Plaintiff*, ERICSSON INC. and NOKIA OF AMERICA CORP., *Intervenors*, v. PEGASUS WIRELESS INNOVATION LLC, *Counterclaim-Defendant,* KT CORPORATION, *Third-Party Defendant*,	Case No. 2:23-cv-00639-JRG (Member Case)

PEGASUS WIRELESS INNOVATION LLC'S SURREPLY IN OPPOSITION TO DEFENDANTS AND INTERVENORS' MOTION FOR ENTRY OF AN ORDER FOCUSING ASSERTED PATENT CLAIMS AND PRIOR ART

I. INTRODUCTION

Plaintiff Pegasus Wireless Innovation LLC files this surreply in opposition to Defendants' and Intervenors' Motion for Entry of an Order Focusing Asserted Patent Claims and Prior Art. Dkt. No. 221. Pegasus fully intends to narrow the number of asserted claims, but doing so just one week after the *Markman* hearing, as Defendants request, is premature and prejudices Pegasus. Pegasus will be better positioned to evaluate the claims after the issuance of the Court's claim construction order and with a more fully developed factual record. Defendants' reply brief (Dkt. No. 245) ignores that, and instead tries to distinguish a host of well-reasoned cases from this Court that defers claim narrowing until after the issuance of a claim construction order. Defendants misread those cases, and this Court has made clear that proposals like Defendants' are premature. Their motion should be denied.

II. ARGUMENT

First, Defendants argue that Pegasus "has all the information it needs to narrow" certain claims that are not disputed for the *Markman* hearing and that Pegasus has sufficient time to narrow the disputed claims. Dkt. No. 245 at 1. Defendants ignore the reality of the Court's rulings on claim construction and how they impact a plaintiff's case. Even if certain claims are not in dispute, the Court's constructions on the disputed claims necessarily impacts the evaluation to pursue infringement theories on undisputed claims. Pegasus therefore does not have "all the information it needs" because a favorable (or unfavorable) ruling on a disputed claim can affect the decision to drop undisputed claims.

Second, Defendants mischaracterize Pegasus's cited authority. Defendants try to distinguish *CyEee Grp. Ltd. v. Samsung Elecs. Co.*, No. 2:17-CV-140-WCB, 2018 WL 4100760, at *1 (E.D. Tex. July 2, 2018) because it applied to invalidity contentions on three bases. Dkt. No. 245 at 2. The defendant in *CyEee* argued that the plaintiff's motion to narrow contentions was

"premature" and that claim construction will provide "guidance" on narrowing. *CyEee Grp. Ltd.*, 2018 WL 4100760, at *1. This Court agreed. The Court's opinion was not based on the number of contentions at issue, as Defendants suggest, but rather on the fact that the "appropriate time" to narrow occurs *after* the issuance of a claim construction order, which was consistent with its approach in several cases. *Id.* (collecting cases). The Court applied similar reasoning in *Commonwealth Scientific & Indus. Research Org. v. Cisco Sys., Inc.*, No. 6:11-cv-343-LED, Dkt. 140 at 1 (E.D. Tex. Aug. 9, 2013), where the Court based its decision on the fact that discovery had not yet closed: "Discovery is still ongoing. *Therefore*, it is premature to narrow the number of claims presented at trial." (emphasis added). Both decisions thus focused on the timing of the movant's request to narrow, not on the number of claims.

Third, Defendants, not Pegasus, misread *Intellectual Ventures II* and attempt to distinguish that case simply because Defendants have produced "substantial technical discovery." Dkt. No. 245 at 3. But in *Intellectual Ventures II*, this Court had already construed the asserted patents and noted that "fact discovery is essentially closed," which are events that "only accelerate the natural narrowing of claims that occurs at this stage of the trial process." *Intellectual Ventures II v. FedEx*, No. 2:16-CV-00980-JRG, 2017 WL 6559169, at *1 (E.D. Tex. Dec. 22, 2017). Neither event has occurred here—the Court has not construed the terms, and fact discovery closes on April 14, 2025. Dkt. No. 219. Defendants' reply ignores these facts. The Court should not depart from its approach in *Intellectual Ventures II*.

Fourth, Defendants conveniently ignore that in *Allergan, Inc. v. Teva Pharms. USA*, No. 2:15-cv-1455-WCB, 2017 WL 373462 (E.D. Tex. Jan. 26, 2017), the Court had already issued its claim construction order by the time the defendant filed its motion to narrow the number of claims. *See* Dkt. No. 245 at 3; *Allergan, Inc. v. Teva Pharms. USA*, No. 2:15-CV-1455-WCB, Dkt. No.

214 (Claim Construction Order filed December 13, 2016); *Allergan*, Dkt. No. 238 (Motion to Limit the Number of Asserted Patent Claims filed December 23, 2016). The parties in that case also had a much shorter timeline until the end of discovery than the parties do here. *Allergan*, No. 2:15-CV-1455-WCB, Dkt. No. 107 at 2 (listing Deadline to Complete Fact Discovery as February 2, 2016). The Court's concern in *Allergan* about reduction being ordered "too early in the discovery process" is thus still very much present here, if not even more so, considering the lack of a claim construction order.

Finally, Defendants' concerns about undue burden and expense are overblown. The parties have managed the asserted claims through the case thus far. Defendants repeatedly ignore the fact that Pegasus fully intends to narrow the claims, but not at an arbitrary deadline that only prejudices Pegasus.

III. CONCLUSION

For the foregoing reasons, the Court should deny Defendants' motion.

DATED: February 28, 2025

Respectfully submitted,

By: */s/ William J. Melsheimer*

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CERTIFICATE OF SERVICE

I hereby certify that on February 28, 2025, all counsel of record who are deemed to have consented to electronic service are being served with a copy of this document via the Court's CM/ECF system.

/s/ William J. Melsheimer
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