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

SPORTSCASTR INC. (d/b/a PANDA INTERACTIVE), Plaintiff, v. SPORTRADAR GROUP AG, and SPORTRADAR AG, Defendants.	Case No. 2:23-cv-00472-JRG

DEFENDANTS' OPPOSITION TO
PLAINTIFF'S CORRECTED MOTION FOR LEAVE TO AMEND

Plaintiff Sportscastr Inc.'s ("Panda") Motion for Leave to Amend (Dkt. 42) is a classic example of a litigant, instead of taking responsibility for its own actions, ignoring its own culpability and disingenuously placing blame on its adversary. The facts indisputably reflect that: (1) Panda served infringement contentions with its Amended Complaint on March 8, 2024; (2) three days later, Panda allegedly sought to revise and expand those contentions by adding "*117 additional claims*" and additional accused products; (3) Panda attempted service of its revised contentions on a different party in a different case that same day (not on Defendants); (4) Panda immediately learned of its mistake, on March 12, 2024, and, for whatever reason, chose not to attempt service on Defendants at that time; (5) Defendants were unaware of Panda's failure; (6) now, *almost 5 months late*, Panda belatedly, and prejudicially, seeks leave to serve amended contentions; and (7) Defendants will be materially and unfairly prejudiced should Plaintiff be permitted to amend its contentions, particularly by adding *117 new claims* and new accused products, at this late date. Defendants are not in any way responsible for Panda's conduct. Plaintiff Panda's Motion should be denied.[1]

I. <u>Panda Did Not Commit An "Inadvertent Clerical Error</u>."

While Panda contends that its failure to serve its proposed amended infringement contentions on Defendants was a purported "inadvertent clerical error," it was not. Panda's Motion fails to provide the Court with important facts that undermine its claims.

Panda contends that its failure of service resulted when "the wrong email addresses were inadvertently entered into [an] FTP site." (Dkt. 42, Mot. at 1.) But, the circumstances involved significantly more than e-mails entered into an FTP site. For example, the Certificate of Service

[1] Defendants do not oppose Panda's amending its original contentions, directed to the 7 asserted claims and originally-accused products, to simply add citations/references to Defendants' source code and non-public documents reviewed in discovery. (*Infra*, § VIII.)

for the March 11, 2024 contentions was signed by Panda's lead counsel, Chris Campbell, and is directed to a completely different entity's (Genius's) counsel (Kirkland) in a different case -- not Defendants.[2] (Dkt. 42-23, Pl. Ex. 20 at 9.) Responsibility for Panda's alleged error(s) lies with Panda's counsel – not with a clerical employee (which Panda's counsel had a duty to supervise), and certainly not with Defendants. Conspicuously, there are no independent, corroborating, or other factual representations concerning the supposed "inadvertent clerical error" in any of Panda's counsels' three accompanying declarations. (*Compare* Dkt. 42-1, Lafferty Decl. *and* Dkt. 42-2 and 42-3, Wood Decls., *with* Exhibit B, Fedman Decl. at Dkt. 269-1, ¶¶ 3-10 in *Apple Inc. v. Samsung Elecs. Co., Ltd.,* No. CV 12-630 LHK, (N.D. Cal. Oct. 5, 2012).)

Further, Panda's March 11th "service" email to Genius's counsel copies, as reflected in the "cc" field, Panda's entire litigation team ("PANDA-SportRadar_23-cv-00472" email reflector/listserv). (Dkt. 42-4, Pl. Ex. 1.)[3] Presumably, Panda's entire litigation team, including the seven attorneys of record who receive ECF notices from the Court in this case, receive e-mails directed to "PANDA-SportRadar_23-cv-00472." In short – Plaintiff Panda's attorneys oversaw the amended infringement contentions dated March 11th, signed the Certificate of Service directing the materials to counsel for the wrong party in a different case, and Panda's counsel received copies of the e-mail that was sent to Genius' counsel on March 11th. Yet, no one on Panda's litigation team did anything to attempt to cure the alleged error.[4]

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[2] The same attorney signed both the present Motion and the Certificate of Service, and did not submit a declaration. (Dkt. 42, Mot. at 16; Dkt. 42-23, Pl. Ex. 20 at 9.)

[3] Defendants have communicated with Plaintiff's counsel by sending emails to that address.

[4] Panda also provides no explanation as to why Panda served Genius with the purported Sportradar infringement contentions. Plaintiff's Motion generally references its co-pending litigation with Genius, but Plaintiff served infringement contentions on Genius in that case almost ***two months*** earlier (on January 18, 2024). *See SportsCastr Inc. v. Genius Sports Ltd.*, E.D. Tex. No. 2-23-cv-00471, Dkt. 18-1 (Docket Control Order).

Panda's attempt to blame Defendants for its own culpability rings hollow. And, as set forth in the section below, Panda's failure to apprise the Court that Panda's litigation team received *actual notice* from Genius is another compelling omitted fact.

While Panda's Motion raises more questions than it answers, the facts make clear that its failure was not simply an inadvertent error by a clerical employee. Defendants had every reason to rely on the March 8, 2024 infringement contentions and, moreover, Panda has failed to explain why Defendants should not have understood those contentions to have comprised its "contentions," nor how adding "*117 new claims*" and additional accused products – almost 5 months late – will not materially harm and prejudice Defendants. *See Apple Inc. v. Samsung Elecs. Co., Ltd.,* No. CV 12-630 LHK, 2012 WL 5632618, at *5 (N.D. Cal. Nov. 15, 2012) ("Courts have declined to find good cause where plaintiffs sought to add 'mistakenly omitted' infringements where plaintiffs could not adequately explain the cause for the errors or the amendment's delay.").

II. Genius Contacted Panda Regarding Its Receipt of the Amended Contentions on March 12, 2024 -- Panda and Its Counsel Did Nothing.

Plaintiff Panda contends that its lack of knowledge as to its supposed "clerical errors" "cannot be reasonably disputed." (Dkt. 42, Mot. at 5.) The facts belie Panda's contention. Plaintiff Panda's litigation team was aware of the alleged errors, did nothing, and sat on them.

Plaintiff Panda's litigation team knew, at least as early as March 12, 2024, that it failed to serve Defendants with its amended preliminary infringement contentions, and waited 4 ½ months -- until July 22, 2024 -- to attempt to untimely effectuate service (*without leave of Court*), then delayed another two weeks -- until August 7th -- to first approach the Court to seek leave, and then, in seeking leave to amend, did not inform the Court that members of its litigation team had knowledge of the errors almost 5 months earlier, on March 12th.

This is a particularly egregious fact as just one day after Plaintiff Panda served its amended infringement contentions on Genius (*not Defendants*), on March 12, 2024, Genius' litigation team contacted Plaintiff Panda's litigation team to inquire as to whether Genius was "supposed to receive" the Sportradar infringement contentions. (Exhibit A, March 12, 2024 email thread (reproduced in part herein).) Panda's counsel's litigation team paralegal responded that very same day that, the "preliminary infringement contentions" were "sent in error to your team" and "apologize[d] for the error." *Id.* Panda has no credible basis to argue that it was unaware of its failed service, or purportedly lacked notice. *See Apple*, 2012 WL 5632618, at *2 (N.D. Cal. Nov. 15, 2012) ("In considering the party's diligence, the critical question is whether the party 'could have discovered [the new information] earlier had it acted with the requisite diligence.' The burden is on the moving party to show diligence." (internal citation omitted)). Panda had *actual notice* and, unquestionably, "could" have and "should" have known of the circumstances had it acted with diligence.

RE: SportsCastr v. Genius Sports

Reply | Reply All | Forward | ...

SN Susie Newman <SNewman@KSLAW.c
To Merideth, Vicki
Cc Jennifer Inghram
Tue 3/12/2024 10:01 AM

If there are problems with how this message is displayed, click here to view it in a web browser.

Thank you Vicki.

That email was sent in error to your team and your team was not given access to the materials in the Box account. The preliminary infringement contentions were submitted in Case No. 23-cv-00472 for Defendant Sportradar. I apologize for the error and thank you for reaching out.

Susie

From: Merideth, Vicki <vicki.merideth@kirkland.com>
Sent: Tuesday, March 12, 2024 10:56 AM
To: Jennifer Inghram <JInghram@KSLAW.com>; Susie Newman <SNewman@KSLAW.com>
Subject: SportsCastr v. Genius Sports

CAUTION: MAIL FROM OUTSIDE THE FIRM

Good morning,

Some of our team received service emails from you both last night for preliminary infringement contentions and production for the SportsRadar case. I just want to confirm we were supposed to receive those, and if so, could you provide me access to the materials (I received Jennifer's production email but no password). Please remember to add me to all service emails as well as our email reflector, GeniusSports-SportsCastr@kirkland.com. Thanks!

Vicki Merideth
Senior Paralegal

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Independent of the strategies or reasons behind Panda's arguments here, at a minimum, its myriad actions and inactions call into question the accuracy of its representations and the sufficiency of its own investigation. Again, Panda's untimely attempt to serve amended contentions 5 months late is not the result of Defendants' conduct – Panda should have known of

its error on March 11th, actually knew of its error on March 12th, and Panda alone is responsible.

III. Panda's Improper Attempt to Blame Defendants for Issues It Alone Created.

Defendants were not on notice that Panda failed to serve amended contentions on March 11th and did not sit on such knowledge. Defendants properly and predictably understood that the documents Panda served on March 8, 2024, referred to as "contentions" and titled "Plaintiff's Preliminary Infringement Contentions," comprised Panda's intended infringement contentions. Panda's argument that Defendants are somehow responsible for Plaintiff's conduct, strategies, failures and errors, and to paint Defendants with any misconduct here, is entirely unfounded. *See Apple*, 2012 WL 5632618, at *5 (N.D. Cal. Nov. 15, 2012) ("Although Apple contends that Samsung should have informed Apple the omitted charts were missing, it is not Samsung's affirmative duty to police Apple's claims charts for omissions."). Not only are Defendants not culpable for Panda's conduct, but Defendants are also not responsible for maintaining Plaintiff Panda's litigation docket, catching and correcting Panda's errors, or complying with Panda's obligations. And, when Defendant stated its position – that Plaintiff failed to serve separate infringement contentions on March 11th and Defendants were relying upon those served on March 8th – Plaintiff did nothing. (*See* Dkt. 42-6 at 2 n.1.) The facts overwhelmingly establish that Defendants did not "hide behind a log" or perform any other alleged acts to conceal Panda's conduct. Panda alone is responsible, not Defendants.

Under P.R. 3-1, Panda's infringement contentions were due on or before March 11, 2024. From all appearances, Panda attempted to satisfy the requirements of P.R. 3-1 on March 8th, serving its "infringement contentions" with its Amended Complaint. (Dkt. 17, Am. Compl. at ¶¶ 105, 138, 189, 259; Dkt. 17-5 through 17-16.) Panda did not serve, or represent that it was serving, a mere outline or representative infringement contentions. Rather, it served comprehensive, detailed, contentions and charts laying out its infringement contentions

consuming *over 600 pages*, in *12 Exhibits*, identifying *7 asserted claims*, specifically identifying accused products, and detailing the bases for its "infringement contentions" for direct, indirect, and willful infringement. And, to leave no doubt, it referred to and/or titled the comprehensive charts – all in the same format – as Panda's "contentions" and "Plaintiff's Preliminary Infringement Contentions," and sought to reserve "the right to modify, amend, or supplement these claim charts should it become aware of additional information regarding the Accused Products and systems, including through discovery, or should one or more claims be construed in a manner differently than interpreted herein." (*See*, *e.g.*, Dkt. 17-14 at 1, 3; *see also*, *e.g.*, Dkt. 17-5 at 1, 3.)[5] Not surprisingly, Defendants properly and in good faith concluded that Panda intended its "infringement contentions" to comprise its infringement contentions. The fact that Panda served its contentions on a Friday (March 8th), instead of on the following Monday (March 11th), did not suggest that its contentions were not its contentions. Indeed, it is not unusual for litigants to serve a required disclosure *one business day early*, particularly where Panda filed this case on October 5, 2023, and was serving contentions in connection with its Amended Complaint.[6]

Rather than take responsibility for its conduct and errors, including failing to act after learning that it served Genius and not the Defendants, Plaintiff disingenuously attempts to portray Defendants as having "lay[ed] behind the proverbial log for months." (Dkt. 42, Mot. at

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[5] The infringement contention charts that Panda allegedly sought to serve on March 11 have the exact same title as those that it actually served on March 8 (*compare* Dkt. 17-14 at 1, *with* Dkt. 42-9 at 1), undermining Panda's instant claim that the March 8 charts could not be its infringement contentions because they are "not even labeled 'infringement contentions'" (Dkt. 42, Mot. at 10).

[6] Moreover, Panda's intent to treat the March 8th infringement contentions as its infringement contentions was also reflected in the fact that the submission contained additional contentions/charts that were not included with the infringement contentions served with its original Complaint. (*See* Dkt. 17-13 through 17-16.)

7.)[7] That allegation is patently false. By Panda's own admission, Defendants apprised Panda – in writing – that they were treating Panda's March 8, 2024 infringement contentions as Panda's contentions under P.R. 3-1, and that those contentions did not fully comply with P.R. 3-1 as they did not contain priority and use information. (*E.g.*, Dkt. 42, Mot. at 4.)

While Panda ignores that it was its duty, not Defendants' duty, to serve the infringement contentions it intended under P.R. 3-1, it also attempts to diminish Defendants' numerous communications and notices apprising Panda of Defendants' positions. It is telling that Panda elects not to reproduce any of Defendants' disclosures in full in its Motion.

In reviewing Plaintiff Panda's March 8, 2024 infringement contentions in preparing their invalidity contentions in April,[8] Defendants determined that Panda's exhibits containing its infringement contentions omitted two elements (namely, allegations regarding any asserted priority to any earlier applications, and whether the Plaintiff was allegedly using the alleged invention), and that while the contentions were attached to Panda's Amended Complaint, they were not *separately* served on March 11, 2024.[9] Accordingly, as reproduced below, Defendants

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[7] Panda's repeated citations to the "lay behind the log" phrase from *Orion IP, LLC v. Staples, Inc.,* 407 F. Supp. 2d 815 (E.D. Tex. 2006), is inapplicable here. First, Panda does not accept responsibility for its errors and lack of diligence – and its attempt to blame Defendants for its own conduct is wrong. Second, as explained in this Opposition, Defendants provided express notice to Panda that Defendants were relying upon the contentions Panda served with its Amended Complaint. Third, *Orion* is inapposite. There, the plaintiff timely served infringement contentions and the defendant feigned ignorance as to their scope, in an attempt to delay and manufacture prejudice. *Orion*, 407 F. Supp. 2d at 817-818. That did not occur here.

[8] Panda's allegation that "[Defendants] realized they did not receive [the March 11th infringement contentions] within days," (Dkt. 42, Mot. at 1), is simply false. Brell Declaration ¶ 10.

[9] Defendants' counsel considered whether Defendants should move to dismiss the case or to strike Plaintiff Panda's infringement contentions for failing to fully comply with P.R. 3-1. However, because Panda served its infringement contentions as exhibits to the Amended Complaint, and included priority and use allegations in its Amended Complaint, Defendants took the high road and elected not to move to strike. Brell Declaration ¶¶ 7-9.

expressly explained in their Invalidity Contentions on May 6, 2024, that Defendants were treating the infringement contentions Panda served on March 8th as Panda's infringement contentions under P.R. 3-1:

> "**Plaintiff did not serve separate infringement contentions on March 11, 2024**, as required and pursuant to its P.R. 3-1 obligations and as contemplated by the Docket Control Order (Dkt. 26). As Plaintiff failed to comply with P.R. 3-1, **Defendants have no choice but to treat the charts accompanying Plaintiff's Amended Complaint as Plaintiff's infringement contentions**. *See, e.g.*, Dkt. 17-14. Defendants note that as Plaintiff failed to serve contentions under P.R. 3-1, it did not provide any allegations that any of the asserted patents claim priority to any earlier application(s) as required by P.R. 3-1(e)."

(Dkt. 42-6 at 2 n.1 (emphasis added).)[10] Panda was plainly on notice that Defendants were properly treating Panda's March 8th "infringement contentions" as Panda's "infringement contentions" under P.R. 3-1. Moreover, if there was any doubt, Panda and its counsel surely knew, or should have known, that Defendants' Invalidity Contentions addressed the **7 claims** identified in Panda's March 8th infringement contentions (***not*** the **124 claims** that it attempts to belatedly and prejudicially assert now). And, the work to address Panda's contentions was no easy or inexpensive endeavor, comprising 112 claim charts spanning over ten thousand pages.

Defendants further noted Panda's failure to comply fully with P.R. 3-1 in at least two other documents and communications, preserving their right to raise Panda's failure to fully comply with P.R. 3-1 with the Court. (*See*, *e.g.*, Dkt. 42-7 at 6 ¶ 27, 7 ¶ 29, 13, 17, 22, 35, 37; Exhibit C, Discovery Letter, App'x A at 3 ¶19, 6.)

Panda's attempt to transfer blame for its own conduct by contending that Defendants somehow hid Panda's failure to properly serve a combined P.R. 3-1 disclosure that included its

[10] Plaintiff erroneously contends that the "first" time Defendants raised this issue was on July 19, 2024. (Dkt. 42, Cor. Mot at 5.) That is incorrect. Defendants' Invalidity Contentions, including notice to Panda, were timely served on Panda over two months earlier on May 6, 2024. (Dkt. 42-6 at 66.)

infringement contentions with its alleged priority and use allegations is completely off the mark. As noted above, Defendants clearly addressed the issue on the *second page of the cover document* to their invalidity contentions, devoting approximately a quarter of the page to the issue. (Dkt. 42-6 at 2 n.1.) That the cover document was accompanied by exhibits/charts does not reflect that information prominently displayed on page 2 of the cover document is hidden.

To the extent Panda is asserting that it chose not to fully review Defendants' invalidity contentions cover document, or review the 7 claims Defendants' invalidity contentions were directed to, that decision and any errors Panda made are of its own doing. (Dkt. 42, Mot. at 8-9 (Plaintiff's review was merely for whatever it considered to be "Defendants' substantive responses and positions").) Of course, had Panda's counsel performed even a cursory "substantive" review, they would have appreciated that Defendants addressed only the 7 claims asserted in Panda's infringement contentions. Indeed, as Panda now contends that it intended to assert 124 claims (each and every claim of each and every patent), a simple glance at any one of Defendants' invalidity charts would also have revealed Panda's error.

Panda's blame shifting argument is as troubling as it is inappropriate. Panda is solely responsible for its failure to serve its amended contentions – 5 months ago. Panda, not Defendants, served different contentions on Genius in a different case last March; Panda, not Defendants, failed to act on Genius' notice that Panda served the wrong party in the wrong case; Panda, not Defendants, is responsible for either ignoring, not reviewing, or not responding to Defendants many notices regarding Panda's infringement contentions; and Panda, not Defendants, is responsible for the material prejudice that will be caused if it is permitted to amend its contentions at this late date by adding 117 new claims and accused products.

IV. Plaintiff Failed to Apprise the Court that It Seeks to Add Numerous Additional Accused Products and, Having Lay Silent, Failed to Show Any Good Cause.

Plaintiff inaccurately mischaracterizes its proposed amendments as concerning only: (i) 117 new claims and (ii) supposed non-public information learned through discovery. Yet, the proposed amended infringement contentions grossly expand the scope of products accused of alleged infringement. (*Compare* Dkt. 17-15, March 8th inf. cont. at 1 ("at least Defendant's Sportradar Live Channel Trading and other offerings and services that integrate with Defendant's Sportradar Live Channel Trading (collectively, 'the Accused Products')"), *with* Dkt. 42-25, proposed am. inf. cont. at 1 ("at least Defendant's Sportradar Live Channel Trading (LCT), Live Channel Online, Live Channel Promotion, Live Channel Retail, Live Channel Retail Flex, and Live Data Client, and other offerings and services that integrate with them, including without limitation Sportradar's 'emBet' and 'Over-the-top' ('OTT') platforms, as well as any products that include the same or substantially similar functionality or features described in this chart (collectively, 'LCT' or 'the Accused Products')").)

Plaintiff did not address any proposed "Accused Products" amendments in its Motion and, as a result, neither met its burdens nor showed any good cause (as there is none) for such a gross and unjustified expansion of scope at this stage. Further, doing so would undoubtedly prejudice defendants who had no notice that Plaintiff intended to raise such allegations.

V. Defendants Will Be Materially Prejudiced if 117 New Claims are Added to the Case.

Defendants will be materially prejudiced if the Court allows Panda to add *117 new claims* to the case – over 5 months after Panda's contentions were due. Defendants already expended substantial time and expenses assessing, developing strategies, preparing non-infringement defenses, and preparing invalidity defenses and contentions. To require Defendants to revisit all of these issues, and prepare defenses to *117 new claims* would be prejudicial, improper and

unfair. The prejudice will be material, significant and heavily weighs against finding good cause.

Defendants' invalidity contentions already span over ten thousand pages with 112 claim charts. The parties are in the middle of working on claim construction, are scheduled to exchange claim terms in just weeks, and to inject *117 new claims* at this late date will not only prejudicially take a substantial amount of time and resources to address – diverting valuable resources away from Defendants' work on other aspects of their defenses – it will also be exorbitantly and unfairly expensive. No doubt that such work will require not only the duplication of work that Defendants already performed, but will also require significant assessment and work on a host of entirely new issues and allegations. Panda is responsible for its alleged errors, not Defendants, and Defendants should not bear the massive prejudice and costs that will be incurred.

In support of its position, Panda attempts to rely upon *Straight Path IP Group, Inc. v. BlackBerry Limited,* No. 6-13-cv-00604, slip op. (Dkt. 137) (E.D. Tex. Oct. 23, 2014). (*See* Dkt. 42 at 13.) Yet, *Blackberry* does not support adding 117 new claims so late and, instead, simply addresses adding a new accused product (not 117 new claims). Despite the plaintiff's contention that the new accused product was "substantially similar to the other accused products," the court there held that the defendant would in fact be prejudiced in part because the plaintiff failed to show "that the [new accused product] is so similar to the other accused products that [defendant] would not suffer prejudice by the proposed amendments." *Id.* at 8. And, the Court denied plaintiff's motion to amend. *Id.*

Panda has failed to, and cannot, establish that adding *117 new claims* at this late date is not prejudicial, much less that any of such claims are "integral" or "important" to the case.

VI. Panda's Proposed *117 New Claims* are Not Integral to the Case.

Panda's one page argument that its *117 new claims* are purportedly "integral" to the case is wholly unsupported by any facts. (Dkt. 42, Mot. at 11-12.) And, Panda's several declarations are devoid of any potentially pertinent facts. (*See* Dkt. 42-1, Lafferty Decl. *and* Dkt. 42-2 and 42-3, Wood Decls.) Panda has not met and cannot meet its burden to show any importance of even a single representative new claim, let alone *117 new claims* – much less sufficient importance as weighed against the extreme prejudice the addition would cause.

It comes as no surprise that the 117 new claims are not integral, as none are referenced in Plaintiff's Amended Complaint – filed one court day before the P. R. 3-1 deadline. (*See* Dkt. 27, Am. Compl.) If any of those claims were actually integral as of March 11th, Panda certainly would have and should have identified them in its Amended Complaint and infringement contentions served one business day earlier. It did not do so then for a reason – none are "integral" to this case. Rather, adding them will only serve to prejudicially burden Defendants.

Outside of noting that Panda elected to allegedly chart only system claims in its March 8th infringement contentions (Dkt. 42, Mot. at 11), Panda not only fails to explain why that is relevant, nor does it provide any detail as to how the *117 new claims* it seeks to add are in any way relevantly similar to or different from the 7 claims it included in its March 8th contentions. Indeed, Panda provides no comparative analysis of any of the *117 new claims*, identifies no new scope that may otherwise be excluded, and does not even identify any of the *117 new claims* in its Motion. Instead, it baldly offers only that the "importance [of the 117 new claims] cannot be overstated" – without stating any basis for any alleged importance. (*Id.* at 11),

Indeed, Plaintiff contradicts itself by arguing that its desired amendments "merely set forth its contentions for additional related claims of the Asserted Patents in a way that does not

depart from the core theories set forth in PANDA's complaint" (*id.* at 13; *see also id.*, "PANDA's theory of infringement has not changed.") Either the *117 new claims* have a new scope – in which case Panda implicitly concedes prejudice due to a material change in the scope of its allegations – or the *117 new claims* are substantially the same to those already asserted – in which case they are not at all important. Consistent with its representations on page 13 of its Motion, during the parties' meet-and-confer, Panda's counsel represented its belief that the new claims are substantially similar to those it already identified. (Brell Declaration ¶ 12.) If that is the case, then the *117 new claims* are concededly superfluous and unnecessary.

Panda also incredulously complains that, without amendment, it would be "forced into a narrow subset of claims selected without the benefit of knowing how Defendants' validity contentions or the Court's claim construction may impact the validity or infringement of those claims" and "without the benefit of any discovery." (Dkt. 42, Mot. at 12.) That is not a basis for amendment and, indeed, is true in every single case where infringement contentions ("which shall be deemed to be [a] party's final contentions") are served prior to invalidity contentions being served, prior to discovery commencing, and prior to any claim construction disclosures. (*See* P. R. 3-1, 3-3, 4-1, and 3-6(a).)

Plaintiff claims that it would be harmed by an inability to claim priority as to the asserted patents and whether Panda's own products practice the asserted claims. This was the very reason Defendants' noted Panda's failure to include such information in the infringement contentions served with the Amended Complaint. While Panda arguably waived both, again, Panda's Amended Complaint identified its alleged priority dates (Dkt. 17, Am. Compl. at ¶¶ 46-49) as well as asserting that Panda's products practice the asserted patents (*id.* at ¶ 14). As such, Defendants do not oppose Panda being able to rely upon those allegations as plead.

Plaintiff's cite to *Intellectual Ventures I LLC* does not hold up to scrutiny. (Dkt. 42, Mot. at 11; *see also Intellectual Ventures I LLC v. T-Mobile USA, Inc.,* No. 2-17-cv-00577, slip op. at 5 (Dkt. 109) (E.D. Tex. Aug. 9, 2017) ("[Plaintiff] argues that "the [amendment with respect to '629, '971, and '206 Patents] is 'undoubtedly important' because it is the sole basis for proving infringement… The Court cannot imagine a higher level of importance.").) In *Intellectual Ventures I*, the claims at issue were recited in the plaintiff's original infringement contentions and plaintiff sought leave to amend based upon non-public information learned through discovery – which information was necessary to continue to allege infringement, rendering the amendment highly important. *Intellectual Ventures I LLC,* No. 2-17-cv-00577, slip op. at 2-5 (Dkt. 109) (E.D. Tex. Aug. 9, 2017). No such facts exist here. In the present situation, Panda did not include the 117 new claims in the infringement contentions it served on March 8th. And, since then, no new information has been discovered to justify adding any new claims. And, under Panda's twisted logic, any amendment to add a new claim would be highly important. That is not the case, and Panda's attempt to quote language divorced from the context of *Intellectual Ventures I* does not support its desired amendment.

Panda has not met its burden of showing that any of the *117 new claims* are in any way important, concedes that "PANDA's theory of infringement has not changed," and its request to for leave to add *117 new claims* should be denied.

VII. <u>A Continuance Will Not Cure The Prejudice Defendants Will Incur</u>.

Additional time alone cannot cure the prejudice that will be incurred. Defendants will incur exorbitant additional fees and costs should it be required to assess and address *117 new claims* and its defenses. That burden and prejudice cannot not be addressed by a continuance. And if the entire case is not shifted, Defendants will be forced to address the 117 extremely late-added claims at the same time they are working on other material aspects of claim construction,

discovery and case preparation. Simply allowing additional time cannot cure the prejudice.

VIII. Discovery Does Not Support Adding 117 New Claims and New Products.

Defendants do not oppose Panda amending its original contentions, directed to the 7 asserted claims and originally-accused products, to simply add citations or references to Defendants' source code reviewed in discovery. However, Panda cannot credibly argue that its source code review in any way justifies adding 117 new claims or any additional products. Panda's attempt to add new claims and accused products is not "based on … non-public information" learned in discovery. Indeed, Panda concedes that it knew of the 117 new claims over 5 months ago, before March 11th and the source code discovery, when it failed to serve Defendants with such claims (and well before the May 29 source code review). And, Defendants only provided Panda with discovery and source code for the accused products identified in the March 8th contentions. Plaintiff has not learned anything "new" through discovery that could justify the proposed amendments, and the Court should not permit Plaintiff to add them now.

IX. Conclusion.

The Court should deny Panda's proposed amendment adding 117 new claims and accused products that it failed to timely serve 5 months ago. Panda has not met its burden to show good cause, has failed to adequately explain why it failed to meet its deadline, has failed to adequately explain its lack of diligence after receiving Defendants' communications, has not explained any importance of the 117 new claims and products, and fails to address the material prejudice Defendants will incur. The Court should deny Plaintiff's Motion in its entirety.[11] [12]

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[11] Defendants do not waive any other objections to Plaintiff's proposed amended infringement contentions and, should the Court not deny Plaintiff's Motion in full, Defendants reserve their right to address those objections at an appropriate time.

[12] Defendants' Motion to Dismiss (Dkt. 27) remains pending and, by submitting this Opposition, Defendants are not waiving their arguments regarding jurisdiction and transfer.

Date: August 22, 2024

By: /s/ David A. Roodman

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that all counsel of record who are deemed to have consented to electronic service are being served with a copy of this document via electronic mail this 22nd day of August, 2024. Any other counsel of record in the case will be served by first class mail.

/s/ David A. Roodman