

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

**PICTIVA DISPLAYS
INTERNATIONAL LTD.**

Plaintiff,

v.

**SAMSUNG ELECTRONICS CO., LTD.,
SAMSUNG ELECTRONICS AMERICA,
INC.**

Defendants.

Civil Action No. 2:23-cv-00495-JRG

JURY TRIAL DEMANDED

**DEFENDANTS' OPPOSITION TO PLAINTIFF'S SECOND MOTION FOR LEAVE TO
AMEND COMPLAINT**

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INTRODUCTION

Pictiva's second motion for leave to amend its complaint, Dkt. 111, should be denied.

First, Pictiva moved to amend its complaint under the wrong legal standard and thus never attempted to make the required showing of "good cause" to add a patent to this case following the service of infringement contentions.

Second, Pictiva's motion should be denied because there is no subject matter jurisdiction over the added infringement claim. As stated in the Second Amended Complaint, Dkt. 112, itself, Pictiva alleges infringement of a patent that had not issued. And the later issuance of that patent cannot cure the jurisdictional defect.

Third, the addition of a seventh patent to this case now—many months after the exchange of contentions, many weeks after the exchange of claim construction positions, and on the eve of the deadline for the substantial completion of document productions—will cause undue burden on Samsung.

Finally, Pictiva's motion should be denied because Pictiva—by its own admission—has again declined to comply with this court's meet-and-confer requirements.

Each of these grounds is alone sufficient to deny Pictiva's motion. But especially taken together, Pictiva's attempt to add a seventh patent to this case should be rejected wholesale.

BACKGROUND

Pictiva filed this action ("*Pictiva I*") on October 19, 2023, alleging infringement of two patents. Dkt. 1. Pictiva filed a first amended complaint ("FAC") on March 1, 2024, adding four new patents. Dkt. 17. On July 26, 2024, Samsung filed a motion to dismiss *Pictiva I* for lack of Article III standing and statutory standing, *see* Dkt. 57, which remains pending. Pictiva served preliminary infringement contentions for the six patents asserted in the FAC on March 11, 2024; Samsung served invalidity contentions on June 10, 2024.

On July 12, 2024, Pictiva filed a second case against Samsung, *Pictiva Display International Ltd., et al. v. Samsung Electronics Co., Ltd. et al.*, No. 2:24-cv-00532-JRG (E.D. Tex.) (“*Pictiva II*”), which included KPI as a plaintiff. By Pictiva’s own admission, *Pictiva II* is “identical” to *Pictiva I* other than the addition of KPI as a plaintiff. See Dkt. 61 at n.1. On August 5, 2024, Pictiva filed a motion for leave to amend the FAC in *Pictiva I* to add KPI as a plaintiff and to consolidate *Pictiva I* and *Pictiva II*. Dkt. 61. That motion is pending.

Pictiva now seeks leave to amend its complaint in *Pictiva I* for a third time to add infringement claims relating to U.S. Patent No. 12,158,250 (the “’250 patent”). Pictiva filed its application for that patent after it initiated this case against Samsung, Dkt. 111-3 at 2. And that patent had not yet issued as of the time Pictiva filed its Second Amended Complaint asserting infringement of it. Dkt. 112 ¶¶ 3, 97; Mot. at 2.

Two weeks after filing this motion seeking to add the ’250 patent to this case, Pictiva separately moved for leave to amend its March 2024 preliminary infringement contentions, asserting five additional claims from currently asserted patents. Dkt. 116.

Claim construction exchanges pursuant to P.R. 4-1, 4-2, and 4-3 have already been served. The deadline to complete claim construction discovery is December 10, 2024. The claim construction hearing is on February 4, 2024.

LEGAL STANDARDS

A pleading seeking to assert an additional, recently issued patent should be “denominated a supplemental pleading” under FRCP 15(d), not an amended pleading under FRCP 15(a), “since it set[s] forth transactions or occurrences or events which . . . happened since the date of the pleading sought to be supplemented.” *GAF Bldg. Materials Corp. v. Elk Corp. of Dallas*, 90 F.3d 479, 483 (Fed. Cir. 1996). Under FRCP 15(d), the Court may permit a party to serve a supplemental pleading “[o]n motion and reasonable notice . . . and on just terms.” Fed R. Civ. P.

15(d). An application for leave to file a supplemental pleading must show that “doing so will promote the economic and speedy disposition of the entire controversy between the parties, will not cause undue delay or trial inconvenience, and will not prejudice the rights of any of the other parties to the action.” *Yoon v. Garg*, No. 23-20519, 2024 WL 2861855, at *4 (5th Cir. June 6, 2024).

Amendment or supplementation of any Infringement Contentions, other than as expressly permitted in Patent Rule 3-6(a), “may be made only by order of the Court, which shall be entered only upon a showing of good cause.” Under Federal Rule of Civil Procedure 16(b)(4), “a schedule may be modified only for good cause and with the judge’s consent.” Under the “good cause” standard, “courts in the Eastern District of Texas consider (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 that thing that would be excluded, and (4) the availability of a continuance to cure such prejudice.” *IDB Ventures, LLC v. Charlotte Russe Holdings, Inc.*, 360 F. Supp. 3d 541, 549 (E.D. Tex. 2018). A party may lack “good cause” even if some of the factors, including importance of amendment, point the other way. *See Fahim v. Marriott Hotel Servs., Inc.*, 551 F.3d 344, 348 (5th Cir. 2008).

ARGUMENT

I. PICTIVA’S MOTION SHOULD BE DENIED BECAUSE PICTIVA MAKES NO ATTEMPT TO SHOW IT MEETS THE APPLICABLE “GOOD CAUSE” STANDARD

Pictiva made its motion seeking to add the ’250 patent to this case pursuant to Federal Rule of Civil Procedure 15(a)’s liberal pleading standard. Mot. at 3. But the specific relief sought by Pictiva—the assertion of a patent that had not issued as of the filing of the initial complaint—must be considered under Federal Rule of Civil Procedure 15(d). Indeed, the Federal Circuit has specifically held that a pleading seeking to assert a patent that issued after the filing of the original

complaint should be “denominated a supplemental pleading” under Federal Rule of Civil Procedure 15(d), not an amended pleading under Federal Rule of Civil Procedure 15(a), “since it set[s] forth transactions or occurrences or events which . . . happened since the date of the pleading sought to be supplemented.” *GAF*, 90 F.3d at 483. Yet Pictiva makes no mention in its motion of Federal Rule of Civil Procedure 15(d); nor does Pictiva make any viable showing that its supplemental pleading will “not cause undue delay or trial inconvenience, and will not prejudice the rights of any of the other parties to the action.” *Yoon*, 2024 WL 2861855, at *4.

What is more, given the stage of this action, Pictiva was also required to show that it has “good cause” to amend its March 2024 infringement contentions with new contentions related to the ’250 patent. Pictiva’s failure to seek leave to amend its infringement contentions to address the ’250 patent is a “clear violation of P.R. 3-6(b).” *Netlist, Inc. v. Samsung Elecs. Co.*, No. 2:22-CV-00293-JRG, 2023 WL 5532133, at *3 n.1 (E.D. Tex. Aug. 28, 2023). In *Netlist*, this Court found that the patentee, represented by the same lead and local counsel representing Pictiva here, “should have known that it would be required to seek leave to amend its [infringement] contentions when it sought leave to assert a new patent in this case after the deadline for infringement contentions had passed.” *Id.* Thus, the “motion should have been brought before the Court as a Motion to Amend the Pleadings and Infringement Contentions, which clearly would have required a showing of ‘good cause.’” *Id.* But rather than follow the Court’s guidance in *Netlist*, Pictiva’s counsel (i) wrongly argued that “because Pictiva is not requesting amendment of any ‘good cause’ deadlines, the liberal standard of Rule 15(a) should apply,” Mot. at 4 n.2, and (ii) failed to make any viable showing that the “good cause” standard could possibly be met here.¹

¹ Pictiva asserts in a footnote that its motion should also be granted under good cause standard but offers no explanation to support that conclusion, and arguments in footnotes are insufficient to present the issue at any rate. See *Core Wireless Licensing S.A.R.L. v. LG Elecs., Inc.*, No.

Because Pictiva’s motion does not engage with the legal standards that apply here—*i.e.*, where the patent sought to be added had not issued at the time of the original complaint and where Pictiva’s infringement contentions were due more than eight months ago—it does not make the required showing to obtain the relief sought. Pictiva’s motion should be denied on that basis alone.

II. PICTIVA’S MOTION MUST BE DENIED BECAUSE THE COURT LACKS SUBJECT MATTER JURISDICTION OVER THE ADDED CAUSE OF ACTION

In addition to applying the wrong legal standards, Pictiva’s motion ignores that its new cause of action for infringement is dead on arrival. Because the ’250 patent had not issued when Pictiva filed its Second Amended Complaint, the Court lacks subject matter jurisdiction over Pictiva’s infringement claim related to that patent.

A patent infringement complaint does not present a justiciable case or controversy under Article III if it alleges infringement of a possible future patent not in existence at the time of filing. *GAF*, 90 F.3d at 482; *see also Seagen Inc. v. Daiichi Sankyo Co.*, 546 F. Supp. 3d 515, 520–21 (E.D. Tex. 2021) (Gilstrap, J.) (“In the context of patent infringement, there can be no jurisdiction if the patent-in-suit has not yet issued at the time the complaint was filed, even if the patent later issues.”). The subsequent issuance of the patent-in-suit does not cure this jurisdictional defect. *GAF*, 90 F.3d at 482; *Seagen*, 546 F. Supp. 3d at 520–21.

Pictiva filed its Second Amended Complaint purporting to add the ’250 patent to this case on November 19, 2024. But at that time, the ’250 patent had not issued. Indeed, Pictiva’s November 2024 Second Amended Complaint makes this clear, alleging only that the ’250 patent is “to be issued on December 3, 2024.” Dkt. 112 ¶¶ 3, 97. But the issuance of the ’250 patent on

2:14-CV-911-JRG, 2016 WL 4440255, at *5 (E.D. Tex. Aug. 23, 2016) (Gilstrap, J.) (“arguments raised in footnotes are not preserved”) (quoting *SmithKline Beecham Corp. v. Apotex Corp.*, 439 F.3d 1312 (Fed. Cir. 2006)).

December 3, 2024, two weeks after the filing of Pictiva's Second Amended Complaint, does not create retroactive jurisdiction as a matter of law. *See GAF*, 90 F.3d at 482; *Seagen*, 546 F. Supp. 3d at 520–21. Moreover, Pictiva cannot fix this jurisdictional defect by re-filing its Second Amended Complaint now that the '250 patent has issued, because the deadline to file amended or supplemental pleadings was November 19, 2024.

Because the '250 patent had not issued as of the filing of the Second Amended Complaint—or as of the deadline for altering the pleadings in this case—Pictiva's motion should be denied.²

III. PICTIVA'S MOTION SHOULD ALSO BE DENIED BECAUSE PICTIVA'S SUPPLEMENTAL ALLEGATIONS WOULD CAUSE UNDUE DELAY AND PREJUDICE

As noted above, Pictiva nowhere attempts to justify its addition of the '250 patent—and the necessary amendments to its infringement contentions—under the applicable “good cause” standard. *See Netlist*, 2023 WL 5532133, at *3 n.1. Even setting that aside, however, and even assuming jurisdiction existed (it doesn't), the addition of a seventh patent to this case at this juncture and on the current schedule would unduly prejudice Samsung. *See Yoon*, 2024 WL 2861855, at *4; *Smith v. EMC Corp.*, 393 F.3d 590, 595 (5th Cir. 2004); *Bingham v. Jefferson Cnty., Tex.*, 2011 WL 13152490, at *2 (E.D. Tex. July 15, 2011). For this reason as well, Pictiva's motion should be denied.

A. Adding The '250 Patent At This Stage Would Unduly Prejudice Samsung

This Court requires that “parties formulate their infringement and invalidity theories early in the case and not make ‘eleventh-hour alterations’ in their positions, subjecting their opposing

² Pictiva also lacks standing to bring the newly alleged cause of action for all the reasons stated in Samsung's Motion to Dismiss Pictiva's First Amended Complaint. *See* Dkt. 57.

party to additional delay, expense, and potential prejudice.” *IDB Ventures*, 360 F. Supp. 3d at 552 (collecting cases). Pictiva’s attempt to add a seventh patent to this case—one that did not even issue until well after the exchange of preliminary contentions and until after the deadline for amending or supplementing pleadings—is just such an unduly prejudicial eleventh-hour alteration.

In this case, Pictiva served its preliminary infringement contentions nearly nine months ago. Samsung served its preliminary invalidity contentions nearly six months ago. Based on those contentions, the parties have already exchanged proposed claim terms pursuant to Patent Rule 4-1, exchanged preliminary claim constructions pursuant to Patent Rule 4-2, and submitted their joint claim construction statement pursuant to Patent Rule 4-3. Samsung’s expert on certain issues related to claim construction is scheduled to be deposed on December 11. The deadline for the substantial completion of document discovery is in less than three weeks, on December 24. And 30(b)(6) depositions on technical issues related to the parties’ contentions are scheduled to take place in the first half of January.

The addition of a seventh patent to the case now would require Pictiva to serve supplemental infringement contentions. It would require Samsung to supplement its invalidity contentions, not only to directly address new subject matter arising from the assertion of the ’250 patent but also potentially to address the overall selection of prior art encompassing both the ’250 patent claim limitations and the related ’425 patent claim limitations already at issue. Claim construction disclosures, discovery, and briefing would need to be supplemented. Searches for relevant documents would need to be revisited. And 30(b)(6) witnesses already scheduled for deposition in January would have to be further prepared to address additional subject matter. Given the deadlines that have already long passed and those that are upcoming in a matter of days and weeks, the current schedule cannot support the addition of a patent at this stage without

inflicting undue burden and prejudice on Samsung, especially in the absence of any attempt to show “good cause” by Pictiva.³

Because the addition of the ’250 patent to this case on the current schedule is unworkable and would cause substantial prejudice to Samsung, Pictiva’s motion should be denied. *See, e.g., Realtime Data, LLC v. MetroPCS Texas, LLC*, No. 6:10CV493 LED-JDL, 2012 WL 12903695, at *3 (E.D. Tex. Apr. 19, 2012) (denying request where “Defendants would likely need to search for and assess additional prior art, as well as amend invalidity contentions” in response to the newly added claims); *see also BTG Int’l Ltd. v. Actavis Labs. FL, Inc.*, No. CV 15-5909 (KM), 2017 WL 529446, at *3 (D.N.J. Feb. 8, 2017) (denying plaintiff’s motion for leave to file an amended complaint adding additional patents where the court found the new patents would “require a separate analysis for infringement and will require separate investigation into prior art and prosecution history for any invalidity defense”).

B. Some Prejudice Could Be Ameliorated By Moving Forward With Pictiva’s Claims Pursuant To The Schedule Entered In *Pictiva II*

For the reasons stated in Samsung’s Motion To Dismiss for Lack of Standing (Dkt. 57), this first-filed case against Samsung should be dismissed, and Pictiva’s claims should be litigated in *Pictiva II*, where KPI has been named as a plaintiff. Pursuant to the schedule ordered in that substantially identical case, the parties could potentially litigate the full scope of Pictiva’s and KPI’s purported claims against Samsung. Although the burden and expense of addressing Pictiva’s eleventh-hour additions in a further round of claim construction and discovery would still be prejudicial to Samsung, at least the schedule entered in *Pictiva II* could allow those proceedings

³ On December 2, 2024, Pictiva filed a motion to amend its March 2024 infringement contentions to add assertions of infringement of additional claims from patents already in suit, which would only compound the issues just identified. Dkt. 116.

to move forward in an ordered way. Accordingly, to the extent the Court is inclined to allow Pictiva to expand its claims against Samsung now, Samsung requests that all claims be litigated in *Pictiva II* and/or that the schedule in this case be aligned with the schedule in *Pictiva II*. See *Good Sportsman Mktg. LLC v. Testa Assocs., LLC*, No. 6:05CV90, 2005 WL 2850302, at *6 (E.D. Tex. Sept. 1, 2005) (“[T]he Court can reset the trial date to overcome any prejudice Defendants do face[.]”); *Trench Tech Int’l, Inc. v. Tech Con Trenching, Inc.*, No. 4:19-CV-00201-O, 2021 WL 4807666, at *5 (N.D. Tex. Apr. 2, 2021) (“Defendants will be granted appropriate time to respond to the Third Amended Complaint as part of a new scheduling order . . .”).

IV. PICTIVA’S MOTION SHOULD BE DENIED BECAUSE PICTIVA AGAIN IGNORED THIS COURT’S MEET AND CONFER REQUIREMENTS

Failure to comply with Local Rules CV-7(h) and CV-7(i) can be a sufficient basis to deny a motion. See *Greenthread*, 2024 WL 1913130, at *7 (“[Plaintiff] has not complied with L.R. CV-7(h) and L.R. CV-7(i). This is a sufficient reason to deny the motion.”); *Entropic Commc’ns, LLC v. Charter Commc’ns, Inc.*, No. 2:22-CV-00125-JRG, 2023 WL 5612443, at *2 (E.D. Tex. Aug. 29, 2023) (Gilstrap, J.) (denying motion “because Entropic did not comply with the requirements of Local Rule CV-7(h)”). Given Pictiva’s previous failures to comply with those rules, see Dkt. 97 at 4, 99 at 14, 104 at 2, this Court has already reminded the parties that failure to adhere to meet-and-confer requirements would result in disciplinary action, Dkt. 104 at 2.

Nonetheless, Pictiva again failed to comply with Local Rules CV-7(h) and CV-7(i) here. Pictiva’s own “Certificate of Conference” confirms that the parties never met and conferred prior to Pictiva filing its motion for leave to amend its complaint to add the ’250 patent. Instead, counsel for Pictiva simply emailed counsel for Samsung at noon Central Time on November 19, 2024, stating that “Pictiva intends to file a motion for leave to file an amended complaint to assert U.S. Patent No. 12,158,250” and asking Samsung to provide its position within six hours. Ex.

A. Counsel for Samsung responded that they could not meaningfully respond in six hours, in part because it was 3 a.m. in Korea, where their client is located. *Id.* Nonetheless, Pictiva filed its motion that same day. Dkt. 111 at 9. By failing to allow the parties a meaningful opportunity to meet and confer, Pictiva essentially guaranteed that there would be no discussion of—for example—a compromise by which (i) Pictiva could assert the '250 patent once it issued (and after the deadline for changes to the pleadings in this case) and (ii) the schedule in this case could be extended to accommodate that addition as well as other patent claim additions Pictiva later proposed.

Given Pictiva's violation of the Local Rules—*after* the Court's reminder that the parties should adhere to those Rules—Pictiva should not be afforded the opportunity to add the '250 patent to this case. The '250 patent was not issued as of the deadline to alter the pleadings in this case; there is thus no jurisdiction for the '250 patent infringement claim as stated in Pictiva's Second Amended Complaint; and Pictiva did not meet and confer with Samsung in good faith in order to determine if a mutually acceptable path forward was possible. These circumstances, combined with the fact that Pictiva's motion does not even employ the appropriate standard (which Pictiva's counsel were previously made aware of by this Court in *Netlist*), justify the outright denial of Pictiva's motion here.

CONCLUSION

Samsung respectfully requests the Court deny Pictiva's Motion.

Dated: December 4, 2024

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CERTIFICATE OF SERVICE

Pursuant to the Federal Rules of Civil Procedure and Local Rule CV-5, I hereby certify that, on December 4, 2024, all counsel of record who have appeared in this case are being served with a copy of the foregoing via the Court's CM/ECF system.

Dated: December 4, 2024

/s/ Melissa R. Smith
Melissa R. Smith