

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

**POLARIS POWERLED
TECHNOLOGIES, LLC,**

Plaintiff,

v.

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

Defendants.

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CIVIL ACTION NO. 2:17-CV-00715-JRG

ORDER

Before the Court is Plaintiff Polaris PowerLED Technologies, LLC’s (“Polaris”) Motion to Amend Infringement Contentions (the “Motion”) (Dkt. No. 149), which Defendants Samsung Electronics America, Inc., Samsung Electronics Co., Ltd., and Samsung Display Co., Ltd. (collectively, “Samsung”) oppose. Also before the Court is Polaris’s Motion for Leave to File Supplemental Briefing in Support of the Motion (the “Motion to Supplement”) (Dkt. No. 180), which Samsung does not oppose. Having considered the Motion to Supplement, and noting that it is unopposed, the Court finds that the Motion to Supplement should be and hereby is **GRANTED**. Therefore, the Court considers both Polaris’s supplemental brief in support of the Motion (Dkt. No. 181) and Samsung’s response thereto (Dkt. No. 188).

In its Motion, Polaris seeks leave to amend its infringement contentions to add two new lines of accused products: Samsung’s Galaxy Note9 smartphones (“Note9”) and Samsung’s Kant M2/M3 televisions (“Kant M2/M3 TVs”). Polaris argues that Samsung failed to disclose these products in discovery. Samsung responds that it had no obligation to disclose these products, which

Polaris could have readily identified through public sources. Having considered the parties' positions and for the reasons set forth herein, the Court finds that the Motion should be and hereby is **GRANTED**.

I. BACKGROUND

A. Discovery Dispute

Polaris asserts that a number of Samsung's smartphone, tablets, and televisions infringe U.S. Patent No. 8,223,117 (the "'117 Patent"), which claims a method and apparatus for adjusting the brightness of display screens in response to ambient light. On February 1, 2018, Polaris served its Disclosure of Asserted Claims and Infringement Contentions (P.R. 3-1) (Dkt. No. 161-7), which accused several Samsung products of infringing the '117 Patent, including individually numbered models of Samsung's Kant televisions¹ as well as individually numbered models of Samsung's Galaxy Note style smartphones, including the Note5, Note7, and Note8. Three months later, on May 11, 2018, Polaris served Interrogatory #11 on Samsung, which asks Samsung to "[i]dentify each Accused Product." "Accused Product" is defined as:

each and every Samsung [tablet product, smartphone product, and television] made in the U.S., imported or sold or offered for sale in the U.S. on or after July 11, 2012 (including without limitation each Samsung product identified in Plaintiff's Infringement Contentions and First Amended Infringement Contentions) that includes functionality whereby the selecting, controlling or adjusting of the brightness of the display is based at least in part on a combination of ambient light and a user's selection of the brightness of the display.

(Dkt. No. 149-5, at 2-3.)

On June 26, 2018, Samsung objected to this Interrogatory as overly broad and "improperly shifting the burden to Samsung to identify allegedly infringing products." (Dkt. No. 149-7, at 2.)

¹ While Polaris's initial disclosure refers to these models under generic headings, such as "2017 UHD Smart TV," subsequent amended disclosures refer to these models under the heading "Samsung Kant Televisions." (*Compare* Dkt. No. 161-7 with Dkt. No. 149-4.)

Therefore, Samsung only identified “the respective Samsung products identified in Plaintiff’s P.R. 3-1 Infringement Contentions.” (*Id.* at 3.)

Polaris responded with a July 17, 2018, letter to Samsung “regarding Samsung’s ... incomplete responses and its improper objections to [Polaris’s] interrogatories.” (Dkt. No. 161-17.) Polaris stated that:

interrogatory 11 requests identification of all models of the families of the accused products -- telephones, tablets and televisions -- identified in plaintiff’s infringement contentions. This is information that is within Samsung’s possession, yet Samsung has refused to provide it, instead stating that plaintiff should apparently be limited to the specific model number numbers [sic] stated in its infringement contentions.

(*Id.*) Samsung replied in a July 30, 2018, letter stating that Polaris was “incorrect that Samsung has ‘refused to provide’ the requested identification. Samsung is investigating whether there are any other models for the products Polaris has accused in its infringement contentions.” (Dkt. No. 161-18.)

B. Samsung Launches New Products

During the course of discovery, Samsung launched several new products. In March 2018, Samsung launched the Galaxy S9 and S9+, the 2018 iteration of its flagship smartphones. (*See* Dkt. No. 161-20.) Polaris noticed the launch of these new products and added them to its infringement contentions. (Dkt. No. 167, at 3 n.2.)

That same month, Samsung also launched its 2018 line of televisions, including the Kant M2/M3 TVs. (Dkt. No. 161-2.) Unlike its smartphones and tablets, Samsung identifies its televisions to the public only by model number—“Kant” is an internal designation that does not appear in Samsung’s advertising. (*See id.*) Polaris did not amend its infringement contentions to include the Kant M2/M3 TVs. (*See* Dkt. No. 167, at 3 n.2.)

In August 10, 2018, after Samsung appeared to acknowledge that it would comply with Interrogatory #11, Samsung launched the Note9. (Dkt. No. 161-11.) Samsung did not supplement its response to Interrogatory #11 to reflect this new product, and Polaris did not add it to its infringement contentions. (*See* Dkt. No. 167, at 3 n.2.)

On December 14, 2018, a Rule 30(b)(6) witness for Samsung testified that the Note9 smartphone employs the same display brightness functionality as Samsung’s other accused smartphones. (Dkt. No. 149, at 6.) On December 19, 2018, another Rule 30(b)(6) witness testified about the existence of the Kant M2/M3 TVs. (*Id.*)

On December 20, 2019, Polaris raised Samsung’s apparent failure to identify these products as required by Interrogatory #11. (Dkt. No. 149-9, at 7.) Samsung responded that it had complied with Interrogatory #11 because, “[j]ust as requested by [Polaris’s] July 11 letter, [Samsung] identified all U.S. models for the families of products Polaris identified in its infringement contentions--that is, the Samsung Galaxy S4-S9, Galaxy Note5-Note8, ... and Kant TVs.” (*Id.* at 3.) On January 11, 2019, Samsung ultimately agreed to provide financial information about the Kant M2/M3 TVs and the Note9. (Dkt. No. 149, at 6.) It also provided technical information about the Kant M2/M3 TVs, while stipulating that the Note9 functions the same as Samsung’s other smartphones in the case in order to avoid producing Note9 technical information. (*Id.*) However, Samsung did not consent to adding these two new products to the case.

On January 28, 2019, Polaris filed this motion to amend its infringement contentions to add the Note9 and Kant M2/M3 TVs.

II. LEGAL STANDARD

This Court’s local rules require that “a party claiming patent infringement must serve on all parties a ‘Disclosure of Asserted Claims and Infringement Contentions.’” P.R. 3-1. Except in

specific circumstances not applicable here, an amendment or supplementation of any infringement contentions “may be made only by order of the Court, which shall be entered only upon a showing of good cause.” P.R. 3-6(b).

In determining whether good cause exists, courts in this district 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.” *Keranos, LLC v. Silicon Storage Tech., Inc.*, 797 F.3d 1025, 1035 (Fed. Cir. 2015). Good cause requires “diligence in discovering the additional products and in seeking to amend.” *Id.*

III. DISCUSSION

Considering these factors, the Court finds that Polaris has shown good cause for leave to amend its infringement contentions. In reaching this conclusion, the Court has considered the following:

A. Factor 1—Explanation for Polaris’s Failure to Meet the Deadline

As to the first factor, Polaris has sufficiently explained its failure to meet the deadline for its infringement contentions. The Note9 and Kant M2/M3 TVs had not yet been launched by the time Polaris served its initial infringement contentions, and Polaris was diligent in seeking discovery on these products and seeking to amend its contentions as soon as it became aware that these products might infringe.

Samsung argues that Polaris’s failure to identify these products despite their publicized launches shows a lack of diligence by Polaris. However, Samsung points to no publicly available information that indicated the Note9 and Kant M2/M3 TVs included the accused technology. *See Keranos*, 797 F.3d at 1038 (noting that good cause may not exist where “public information

accompanying [non-accused products] would have allowed [the plaintiff] to identify that those products included the accused technology.”) Moreover, “[d]iligence is a factor, but it is not a threshold requirement that must be evaluated in a vacuum.” *Keranos, LLC v. Silicon Storage Tech., Inc.*, No. 2:13-CV-00017-RWS-RSP, 2018 WL 574867, at *2 (E.D. Tex. Jan. 28, 2018). Even if information sufficient to accuse the Note9 and Kant M2/M3 TVs could have been gleaned from public sources, Samsung had a duty to supplement their discovery responses to include these new products. Fed. R. Civ. P. 26(e)(1)(A). Samsung failed to do so.

Samsung claims it had no duty to identify the Note9 and Kant M2/M3 TVs in response to Polaris’s Interrogatory #11. Samsung contends the parties reached an agreement to limit the scope of Interrogatory #11 to identification of model numbers of the families of products identified in Polaris’s infringement contentions. (Dkt. No. 161, at 6.) In essence, Samsung argues that Polaris’s July 17 letter—demanding an explanation for Samsung’s “incomplete responses and its improper objections to [Polaris’s] interrogatories”—was actually an offer to limit the scope of those interrogatories. Samsung says it accepted this “offer” by stating in its July 30 letter, “you are incorrect that Samsung has ‘refused to provide’” the information requested by Interrogatory #11. Neither the tone nor the text of these letters suggests that they were intended as an offer or agreement to limit Interrogatory #11 to model numbers of families of already accused products.²

Samsung points to Polaris’s inclusion of the Galaxy S9 smartphone after its launch, as evidence that Polaris did not need additional discovery to accuse newly released products. However, Polaris’s ability to identify potentially infringing products via public information does

² Moreover, even if these letters did constitute an agreement, Samsung imports its own definition of “families” found nowhere in Polaris’s purported offer. It offers no explanation for why the Galaxy Note9 should not be considered part of the family of Galaxy Note smartphones or why the Kant M2/M3 TVs should not be considered part of the family of Kant televisions.

not excuse Samsung's failure to comply with proper discovery requests. (Dkt. No. 161, at 7–8.) “The rules of discovery ... do not permit parties to withhold material simply because the opponent could discover it on his or her own.” *Gomez v. Ford Motor Co.*, No. SA-15-CA-00866-DAE, 2017 WL 5178043, at *7 (W.D. Tex. June 7, 2017) (quoting *Abrahamsen v. Trans-State Express, Inc.*, 92 F.3d 425, 428 (6th Cir. 1996)).

Similarly, Samsung argues that a separate request by Polaris for information about products similar to the accused products (but not accused themselves) is somehow evidence that Polaris limited Interrogatory #11 to products identified in its infringement contentions. To the contrary, this makes evident that Polaris expected its discovery requests to be *broader* than merely the products accused in its infringement contentions and demanded such information when it was aware the information was lacking.

“Our system of discovery was designed to increase the likelihood that justice will be served in each case, not to promote principles of gamesmanship and deception in which the person who hides the ball most effectively wins the case.” *Hernandez v. Results Staffing, Inc.*, 907 F.3d 354 (5th Cir. 2018). While Polaris possibly could have identified the Note9 and Kant M2/M3 TVs from public sources, Polaris did not simply sit on its hands. It pursued discovery in this case with reasonable diligence and was entitled to rely on the accuracy and completeness of Samsung's responses. Samsung's failure to comply with its obligations under Federal Rule of Civil Procedure 26(e)(1)(A) might by itself be sufficient grounds to grant Polaris's motion.³ *See* Fed. R. Civ. P. 37(c)(1)(C). It is certainly a sufficient explanation for Polaris's failure to accuse these products.

³ For the reasons discussed *infra* IV, Polaris's request for legal fees, to the extent timely raised, is denied.

B. Factor 2—Importance of the Item Excluded

As to the second factor, the importance of what would be excluded weighs in favor of granting leave. “If leave to amend were denied, [Polaris] would be unable to accuse the new products of infringement.” *Mass Engineered Design, Inc. v. Ergotron, Inc.*, No. 2:06-CV-272, 2008 WL 1930299, at *3 (E.D. Tex. Apr. 30, 2008).

C. Factor 3—Potential Prejudice Caused by Allowing Amendment

As to the third factor, the Court finds no prejudice in allowing Polaris to amend its infringement contentions. Prior to this Motion, Samsung stipulated that the Note9 functioned in the same manner as Samsung’s other accused products. (Dkt. No. 149, at 1; Dkt. No. 174, at 5 n.2.) However, Samsung’s position on whether prejudice would be caused by allowing Polaris to accuse the Kant M2/M3 TVs has, to be charitable, “evolved.”

On February 26, 2019, Samsung served a report from its technical expert, Dr. Philip Hobbs, which concluded “for purposes of analyzing infringement of the ’117 patent claims that I understand have been asserted, there are *no substantial differences* in the operation of the functionalities of the ... Kant, and Kant M2/M3 products.” (Dkt. No. 181-2 ¶ 166 (emphasis added).) However, in Samsung’s sur-reply, filed three days after Dr. Hobb’s report was served, Samsung appeared to represent to the Court precisely the opposite.⁴ (Dkt. No. 174, at 4 (“technical documentation ... clearly showed that the accused functionality in Samsung’s 2017 TVs differed from Samsung’s 2018 family”); *id.* at 4–5 (“technical experts provided ... ‘preliminary analysis’ for Samsung’s 2018 TV family, which ... contains differences from the functionality accused of infringement in Samsung’s 2017 TV family”).)

⁴ The Court was alerted to this discrepancy by Polaris’s supplemental brief.

Samsung first raised this issue in its response brief, where it argued that if the Motion were granted Samsung would “need additional time to perform expert analysis on the additional products.” (Dkt. No. 161, at 14; *see also id.* at 13 (“Samsung has not performed expert analysis on the Kant M2/M3 software Bringing Kant M2/M3 into the case would require a new round of supplemental expert reports.”).) “*At the time*, this was most certainly a true statement,” Samsung claims. (Dkt. No. 189, at 4 (emphasis added).) However, if this statement was no longer true at the time Samsung filed its sur-reply—as Dr. Hobb’s report seems to indicate—Samsung’s duty of candor required that they correct this point, not gloss over it. *See* ABA Model Rule 3.3(a)(1) (“A lawyer shall not knowingly ... make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer.”)

Instead, Samsung argued in its sur-reply that evidence “clearly showed that the accused functionality in Samsung’s 2017 TVs differed from Samsung’s 2018 family,” of which the Kant M2/M3 TVs are a part. (Dkt. No. 174, at 4.) Samsung did note that both Polaris’s and Samsung’s experts had conducted a “preliminary analysis” of Samsung’s 2018 televisions. (*Id.* at 4–5.) However, in that same sentence, Samsung pointed again to the supposed differences in accused functionality, despite—and without any mention of—their expert’s testimony that no substantial difference existed. (*Id.*) Moreover, while Samsung’s sur-reply did not claim the need for further technical analysis as a reason for a continuance (Dkt. No. at 5; *see also* Dkt. No. 198, at 3), it did not correct or retract this precise claim, which was made in Samsung’s response brief (Dkt. No. 161, at 14). Not repeating a misstatement is not the same as correcting that misstatement.

Only after being confronted with Polaris’s supplemental brief did Samsung finally concede that there is no “risk of prejudice from additional technical analysis.” (Dkt. No. 189, at 4.) Given this, and Samsung’s prior stipulation regarding the Note9’s functionality, it appears that the only

outstanding item needed with regard to these new products is certain non-technical discovery, such as component cost information, internal service manuals, and marketing and advertising materials. (*See id.* at 2.)

Though producing this information may be somewhat burdensome for Samsung, this is a burden Samsung should have discharged months ago. Any increased burden in producing this information on an expedited timeframe is a problem of Samsung's own making. Polaris is, of course, prejudiced by not having received this information before now, but that is no reason to deny its Motion.

D. Factor 4—Availability of a Continuance to Cure Prejudice

As to the fourth factor, the Court finds that no continuance is necessary. The parties appear to agree that the Note9 and Kant M2/M3 TVs do not substantially differ from Samsung's other products with regard to the accused functionality. However, for the avoidance of doubt, the Court instructs that Polaris may not rely on any new theory of infringement and is confined to infringement theories that have previously been disclosed to Samsung for the other accused products. With this instruction, and assuming the parties comply with the Court's limited discovery order set forth herein, the Court finds that the parties should be prepared for trial without any need for a continuance.

On balance, the Court finds that these factors, when taken together, clearly weigh in favor of granting leave to amend.

IV. CONDUCT OF THE PARTIES' COUNSEL

The Court is troubled by the parties' behavior both in the lead up to this Motion as well as in their related briefing. The apparent failure of the parties to adequately meet and confer seems to have precipitated not only this Motion but other issues in this case, such as the parties' inability to

conduct four of their expert depositions within the time allotted by the Court (*see* Dkt. No. 186) or even to agree on appropriate briefing for this Motion (*see* Dkt. No. 188).

As discussed above, the Court questions whether Samsung has been completely forthright with Polaris or with the Court. However, Samsung's conduct is no excuse for the heated rhetoric Polaris has used throughout its briefing. Polaris, in its reply alone, accuses Samsung of reasoning that is "severely flawed," "highly problematic," "highly troubling," and "complete nonsense." (Dkt. No. 167, at 2, 4–5.) Not to be outdone, Samsung regularly, and somewhat ironically, accuses Polaris of "misleading" the Court. (Dkt. No. 161, at 5 n.3; Dkt. No. 174, at 3; Dkt. No. 189, at 2, 5.) This is not effective advocacy. It does not well serve the Court or the legal profession. As the parties prepare for trial in this case, the Court admonishes them to conduct their affairs with each other and before this Court with the requisite professionalism, candor, and decorum expected of officers of the Court. *Cf.* 35 U.S.C. § 285.

Said, to both sides, another way: drop the name-calling and communicate with each other and the Court openly and honestly.

V. CONCLUSION


For the reasons set forth herein, Polaris's Motion to Amend Infringement Contentions (Dkt. No. 149) and its Motion for Leave to File Supplemental Briefing (Dkt. No. 180) are **GRANTED**. Polaris is **GRANTED** leave to amend its infringement contentions to add the Note9 and Kant M2/M3 TVs but may only rely on theories of infringement as to such added products that have already been disclosed. Polaris is **ORDERED** to serve its amended infringement contentions on Samsung within three (3) days of the issuance of this Order.

Since discovery has already closed in this action, the Court hereby **ORDERS** limited discovery related to the Note9 and Kant M2/M3 TVs. The parties are **ORDERED** to meet and

confer regarding the proper scope of discovery related to these products within three (3) days of the service of Polaris's amended infringement contentions. Any discovery disputes shall be submitted for resolution via Local Rule CV-26(e) within 24 hours of the meet and confer deadline. All discovery shall be completed within two weeks of the issuance of this Order. The parties are granted leave to supplement their expert reports, which shall be served no later than three weeks after the issuance of this Order, for the limited purpose of incorporating these new products into the expert's existing opinions, such as adding the products to damages calculations. The parties may not supplement such reports to raise or address any new theory of infringement or non-infringement.

Polaris's requests for legal fees (Dkt.No. 167, at 6; Dkt. No. 181, at 3) are **DENIED**. However, the Court will remain mindful of this dispute if and when it is asked to determine, at a future date, whether or not this case is exceptional.

So ORDERED and SIGNED this 24th day of April, 2019.



RODNEY GILSTRAP
UNITED STATES DISTRICT JUDGE