

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

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4 AIM HIGH INVESTMENT GROUP, LLC,)

5 Plaintiff,)

6 vs.)

7 SPECTRUM LABORATORIES, LLC,)

8 Defendant.)

Case No.: 2:22-cv-00158-GMN-DJA

ORDER DENYING
AIM HIGH'S OBJECTION

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10 SPECTRUM LABORATORIES, LLC,)

11 Counter-Claimant,)

12 vs.)

13 AIM HIGH INVESTMENT GROUP, LLC,)

14 Counter-Defendant.)

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16 Pending before the Court is Plaintiff and Counter-Defendant Aim High Investment
17 Group's ("Aim High's") Objection/Appeal, (ECF No. 93), to the Magistrate Judge's Order,
18 (ECF No. 90), denying Aim High's Motion to Supplement its noninfringement and invalidity
19 contentions, (ECF No. 58). Defendant and Counter-Claimant Spectrum Laboratories
20 ("Spectrum") filed a Response, (ECF No. 94), to the Objection.

21 Also pending before the Court is Spectrum's Unopposed Motion for Extension of Time
22 to respond to Aim High's Objection. (ECF No. 95).¹

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25 ¹ Aim High did not file a response to Spectrum's Motion, and the deadline to do so has passed. "The failure of an opposing party to file points and authorities in response to any motion, except a motion under Fed. R. Civ. P. 56 or a motion for attorney's fees, constitutes a consent to the granting of the motion." LR 7-2(d). Accordingly, the Court **GRANTS** the Motion as unopposed *nunc pro tunc*.

1 The Court **DENIES** Aim High’s Objection because Aim High fails to establish that the
2 Magistrate Judge’s Order was clearly erroneous or contrary to law.

3 **I. BACKGROUND**

4 This action arises from a patent infringement dispute based on Spectrum’s patented
5 synthetic urine formulas. (*See generally* Compl., ECF No. 1). The patents involve a formula
6 containing biocides added to minimize bacteria growth in the mixture, thus preserving the shelf
7 life of the synthetic urine. (*Id.* ¶ 2). Before litigation began, Spectrum sent a letter to Aim High
8 alleging that the XStream product infringed two of its Patents. (*Id.* ¶ 11). In response, Aim
9 High denied the allegation and requested lab tests demonstrating infringement.
10 (Correspondence, Exs. A–C to Resp. to Mot. Compel, ECF Nos. 51-1, 51-2, 51-3). Spectrum
11 provided a redacted report from S&N Laboratories, stating that the report was disclosed
12 “without any waiver of privilege or work-product.” (Confidential Letter, Ex. D to Resp. Mot.
13 Compel, ECF No. 51-4). Aim High challenged the authenticity of the report, so Spectrum sent
14 Aim High a report from a second lab, Element Laboratories. (Letter and Element Report, Ex. 2
15 to Mot Compel, ECF No. 45-3). Aim High reviewed the correspondence and lab reports, and
16 then brought a claim for declaratory judgment that its XStream product does not infringe on
17 Spectrum’s patents. (Compl. ¶ 1). Spectrum counter-claimed for injunctive relief and damages,
18 alleging that Aim High’s XStream product infringed on its Patents. (Counterclaim, ECF No. 7).

19 On May 13, 2022, Aim High served written discovery requests on Spectrum, and issued
20 subpoenas to the California labs. (Mot. Leave 3:24–28, ECF No. 58); (Subpoenas, Exs. 9–10 to
21 Resp. to Mot. Compel, ECF Nos. 51-9, 51-10). Spectrum and the labs objected on work-
22 product grounds, so Aim High moved to compel. (Opp. to CA Mot. Compel, Ex. 10 to Mot.
23 Compel, ECF No. 45-11); (CA Mot. Compel, Ex. 9 to Mot. Compel, ECF No. 45-10). On
24 October 20, 2022, the California Magistrate Judge denied Aim High’s Motion to Compel the
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1 labs to produce their testing reports. (*See generally* Order, Ex. 12 to Mot. Compel, ECF No. 45-
2 13). Aim High filed an objection. (CA Obj. at 2, Ex. 13 to Mot. Compel, ECF No 45-14).

3 **A. Claim Construction Briefing**

4 During the same time period, the parties began claim construction briefing. Spectrum
5 filed its opening brief on August 24, 2022, Aim High filed its brief a couple weeks later, and
6 Spectrum filed its Reply on September 21. (Spectrum Opening Brief, ECF No. 32); (Aim High
7 Brief, ECF No. 33); (Spectrum Reply Brief, ECF No. 43). Following the conclusion of claim
8 construction briefing and after the California Magistrate Judge’s denial of Aim High’s Motion
9 to Compel the lab reports, Aim High hired new patent counsel who commissioned a prior art
10 search on November 9, 2022. (Smith Decl. ¶¶ 3–4, Ex. 1 to Mot. Leave, ECF No. 58-2). Aim
11 High received the search results on November 23, 2022. (*Id.* ¶ 5). After reviewing the prior art
12 found in the search, Aim High emailed Spectrum a month later to inform Spectrum of its intent
13 to move for leave to supplement its invalidity contentions. (Intent Email, Ex. 8 to Mot. Leave,
14 ECF No. 58-9). Aim High created claim charts explaining its new invalidity contentions based
15 on the prior art and emailed the charts to Spectrum on January 24, 2023. (Chart Email, Ex. 11
16 to Mot. Compel, ECF No. 58-12). When Spectrum did not stipulate, Aim High filed its Motion
17 for Leave to Amend on February 17, 2023.

18 Aim High’s Motion for Leave seeks to supplement its non-infringement and invalidity
19 contentions to include additional invalidity claims based on the prior art that its new counsel
20 discovered. (Mot. Leave 7:7–8:17); (Obj. to MJ Order 5:26–6:9, ECF No. 93). Aim High also
21 sought to add additional details to defenses based on Spectrum’s claim construction briefs.
22 (Obj. to MJ Order 6:5–9). At the time Aim High filed its Motion for Leave, the Court had not
23 yet scheduled a claim construction hearing and discovery was set to close in three months.

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1 **B. Underlying Magistrate Judge Order**

2 Magistrate Judge Albregts denied Aim High’s Motion for Leave on the grounds that
3 Aim High did not demonstrate good cause and that amendment would cause Spectrum to be
4 unduly prejudiced. (MJ Order, ECF No. 90). A party who wishes to amend its disclosures
5 under LPR 1-12, such as Aim High, must: (1) first obtain the Court’s leave; (2) show good
6 cause for the requested amendment; (3) demonstrate it acted diligently; and (4) show the other
7 party would not be “unfairly prejudiced by ‘eleventh hour alterations.’” *See* LPR 1-12; *see*
8 *Silver State Intellectual Techs., Inc. v. Garmin Int’l, Inc.*, 32 F. Supp. 3d 1155, 1162 (D. Nev.
9 2014).

10 Beginning with the good cause analysis, the Magistrate Judge acknowledged that it was
11 a close call, but focused on the timeline and substance of the amendment to reach his
12 conclusion that Aim High was not diligent and lacked good cause to amend. (MJ Order 4:20–
13 22). Though Aim High asserted that Spectrum’s refusal to allow discovery of the lab reports
14 contributed to its decision to conduct a second prior art search, Spectrum’s objection was filed
15 in June of 2022, and the second prior art search was not until November. (*Id.* 4:24–5:2). He
16 found that while the delay could be explained by the California Magistrate Judge’s denial of
17 Aim High’s Motion to Compel on October 20, 2022, Aim High did not sufficiently make that
18 argument. (*Id.* 5:3–10). The Magistrate Judge further stated that Aim High had not explained
19 why the denial of lab report discovery necessitated another prior art search. (*Id.* 5:10–13).

20 Magistrate Judge Albregts came to a similar conclusion on Aim High’s argument that
21 Spectrum’s claim construction position on the term “biocide” further necessitated a second
22 prior art search. (*Id.* 5:14–26). Spectrum filed its opening claim construction brief on August
23 24, 2022, two and a half months before the commission of Aim High’s prior art search, and
24 four and a half months before Aim High informed Spectrum of its intent to amend. (*Id.*). The
25 Magistrate Judge cited two cases in which courts had found that parties were not diligent when

1 they waited three months after learning new information that prompted a second search before
2 disclosing amended contentions. (*Id.* 5:21–26).

3 Lastly, the Magistrate Judge found that Spectrum would be prejudiced by Aim High’s
4 amendment because allowing Aim High’s “extensive changes before the claim construction
5 hearing, which Spectrum asserts would in turn prompt it to amend its claim construction
6 position, would create exactly the kind of ‘shifting sands’ that the Local Patent Rules are
7 designed to avoid.” (*Id.* 6:14–18). He noted that Spectrum had already filed a substantive brief
8 that would be impacted by the amendment, and that depending on the Court’s ultimate claim
9 construction order, Aim High could later seek to amend its contentions. (*Id.* 7:3–12). Aim High
10 now appeals this Order. (Obj., ECF No. 93).

11 **II. LEGAL STANDARD**

12 When reviewing the order of a magistrate judge, the order should be set aside only if the
13 order is clearly erroneous or contrary to law. Fed. R. Civ. P. 72(a); LR IB 3-1(a); 28 U.S.C.
14 § 636(b)(1)(A); *Laxalt v. McClatchy*, 602 F. Supp. 214, 216 (D. Nev. 1985). A magistrate
15 judge’s order is “clearly erroneous” if the court has “a definite and firm conviction that a
16 mistake has been committed.” *See United States v. U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948).
17 “An order is contrary to law when it fails to apply or misapplies relevant statutes, case law or
18 rules of procedure.” *UnitedHealth Grp., Inc. v. United Healthcare, Inc.*, No. 2:14-cv-00224-
19 RCJ, 2014 WL 4635882, at *1 (D. Nev. Sept. 16, 2014) (citation omitted). When reviewing the
20 order, however, the magistrate judge “is afforded broad discretion, which will be overruled
21 only if abused.” *Columbia Pictures, Inc. v. Bunnell*, 245 F.R.D. 443, 446 (C.D. Cal. 2007)
22 (citation omitted). The district judge “may not simply substitute its judgment” for that of the
23 magistrate judge. *Grimes v. City and Cnty. of San Francisco*, 951 F.2d 236, 241 (9th Cir.
24 1991).

1 **III. DISCUSSION**

2 The Court begins its analysis with Aim High’s argument that the Magistrate Judge’s
3 finding that Aim High was not diligent and lacked good cause to amend was clearly erroneous.
4 “The District of Nevada’s Local Patent Rules, like the local patent rules for the Northern
5 District of California, are designed to require the parties to provide ‘early notice of their
6 infringement and invalidity contentions, and to proceed with diligence in amending those
7 contentions when new information comes to light in the course of discovery.’” *Silver State*, 32
8 F. Supp. 3d 1155, 1161–62 (D. Nev. 2014) (quoting *O2 Micro Int’l Ltd. v. Monolithic Power*
9 *Sys., Inc.*, 467 F.3d 1355, 1365–66 (Fed. Cir. 2006)). In contrast to the liberal policy for
10 amending pleadings under Rule 15, “the philosophy behind amending claim charts [under the
11 Local Patent Rules] is decidedly conservative and designed to prevent the ‘shifting sands’
12 approach to claim construction.” *Genentech, Inc. v. Amgen, Inc.*, 289 F.3d 761, 774 (Fed. Cir.
13 2002) (quotation omitted) (discussing local rules for the Northern District of California).²

14 Parties may amend their disclosures without seeking leave of court within 30 days of a
15 court’s claim construction order, which has not yet been issued in this case. *See* LPR 1-18a.
16 Otherwise, “no other amendments to disclosures may be made . . . absent a showing of good
17 cause.” LPR 1-12. “Non-exhaustive examples of circumstances that may, absent undue
18 prejudice to the nonmoving party, support a finding of good cause include: (a) material changes
19 to the other party’s contentions; (b) recent discovery of material prior art despite earlier diligent
20 search; and (c) recent discovery of nonpublic information about the Accused Instrumentality
21 despite earlier diligent search.” *Id.* “The duty to supplement discovery responses does not
22 excuse the need to obtain leave of court to amend contentions.” *Id.*

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² The Federal Circuit governs interpretation and applicability of local patent rules. *O2 Micro Int’l Ltd.*, 467 F.3d at 1364.

1 The moving party has the burden to demonstrate good cause and must first establish that
2 it was diligent. *Verinata Health, Inc. v. Ariosa Diagnostics, Inc.*, 236 F. Supp. 3d 1110, 1113
3 (N.D. Cal. 2017); *O2 Micro*, 467 F.3d at 1355.³ Diligence must be shown in two ways: “(1)
4 diligence in discovering the basis for amendment; and (2) diligence in seeking amendment once
5 the basis for amendment has been discovered.” *Id.* “In considering the party’s diligence, the
6 critical question is whether the party could have discovered the new information earlier had it
7 acted with the requisite diligence.” *Id.*

8 The crux of Aim High’s Motion for Leave to Amend is that the Magistrate Judge erred
9 by ignoring LPR 1-12(a), which lists “material changes to the other party’s contentions” as an
10 example of good cause. (Mot. Leave 18:11–19:1). Aim High contends that it discovered its
11 basis for amendment (1) when Spectrum adopted a new position regarding how much biocide is
12 required for infringement, and (2) when Spectrum and the labs refused to produce the tests. (*Id.*
13 18:16–25). The Magistrate Judge found that Aim High did not adequately explain why these
14 two events constitute a sufficient basis for amendment. (Order 5:18–19). And even if Aim
15 High was diligent in discovering the basis for amendment, the Magistrate Judge found that the
16 three-month gap between discovery and amendment did not demonstrate diligence in seeking
17 amendment. (*Id.* 5:20–26).

18 The first event that Aim High points to as justification to amend is the California
19 Magistrate Judge’s ruling in October 2022, which denied Aim High’s Motion to Compel
20 Spectrum and the labs to produce the test results. (Mot. Leave 9:24–10:3). According to Aim
21 High, it sought to discover the lab report because it intended to demonstrate that the testing was

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23 ³ The Local Patent Rules for the District of Nevada are similar to the local patent rules adopted by the Northern
24 District of California and the Eastern District of Texas. Accordingly, the Court considers opinions by courts of
25 these districts concerning its local patent rules as persuasive. *See Silver State, Inc.*, 32 F. Supp. 3d at 1162–63 (D.
Nev. 2014) (recognizing similarity between District of Nevada and Northern District of California local patent
rules); *Finisar Corp. v. DirecTV Group, Inc.*, 424 F. Supp. 2d 896, 897 n.1 (E.D. Tex. 2006) (“The local patent
rules for the Eastern District of Texas were modeled after the local patent rules adopted by the Northern District
of California.”).

1 “flawed.” (*Id.* 10:3–12). However, Aim High argues, its efforts were blocked when Spectrum
2 objected on privilege grounds after it initially stated it would be relying on the reports as
3 “proof.” (*Id.*). Spectrum replied to this contention in its Response to Aim High’s first
4 objection, (ECF No. 91). Spectrum stated that the reports were privileged work product and
5 that it had not yet chosen, at that stage of litigation, which expert reports and lab tests that it
6 would be relying on to prove infringement. (Resp. to First Obj. at 10–11, ECF No. 94).
7 Spectrum further claims that there is no correlation between its claimed work-product privilege
8 and a new prior art search; and even if there was, Aim High should have performed that search
9 in June 2022 when Spectrum made the objection. (Resp. 9:19–24, ECF No. 98).

10 The Magistrate Judge did not clearly err in finding that Aim High lacked diligence.
11 Spectrum objected on privilege grounds in June of 2022, so Aim High could have discovered
12 this “new information” earlier if it had acted with the requisite diligence. Even if Spectrum’s
13 privilege objection was a material change in position, and the Court is not convinced that it is,
14 the Court agrees with the Magistrate Judge that Aim High does not explain why its lack of
15 access to these particular lab reports would prompt a second prior art search. If Aim High’s
16 strategy was to demonstrate that these lab tests were flawed, Aim High could conduct its own
17 lab testing. But to the extent that Aim High simply wanted to conduct an additional prior art
18 search because it felt it had to adjust its litigation strategy after the California Magistrate Judge
19 agreed with Spectrum in October, the Court does not find this reasoning to constitute good
20 cause.

21 Moving to Aim High’s second justification, the Court finds that Aim High could have
22 discovered Spectrum’s interpretation of the term “biocide” before the Reply brief was filed.
23 Aim High contends that it did not know Spectrum construed the term “biocide” to “not require
24 any minimum concentration sufficient to control microorganisms or minimize sepsis and that
25 any amount of biocide, no matter how miniscule or inconsequential, was sufficient,” until

1 Spectrum’s September 2022 Claim Construction Reply Brief. (Obj. 10:19–24). Aim High
2 argues that this construction was a material change to Spectrum’s position, and that the
3 Magistrate Judge clearly erred in citing Spectrum’s Opening Claim Construction Brief instead
4 of its Reply. (*Id.* 10:24–28).

5 Spectrum, however, points to multiple instances in which Aim High demonstrated that it
6 knew Spectrum’s position as early as the moment it filed its Complaint. Aim High’s Complaint
7 states, “the biocide that Defendant allegedly found present in the Accused Product was . . . in
8 an amount less than one part per billion (1 ppb).” (Compl. ¶ 13). It further claims that
9 Spectrum allegedly found the “presence of MIT in a trace amount (less than 1ppb),” and stated
10 that Spectrum’s “broad construction of its patent claims . . . include even *barely detectable*
11 *amounts of a biocide which are the chemical equivalent of no biocide being present at all*
12 where the purpose of the claimed biocide is to control the presence of bacteria and prevent
13 sepsis.” (*Id.* ¶¶ 29, 33) (emphasis added). Thus, Aim High’s own Complaint demonstrates that
14 Spectrum has asserted from the beginning that “any amount of biocide, no matter how
15 miniscule or inconsequential, was sufficient.”

16 Because Aim High did not demonstrate that Spectrum materially changed its position,
17 and Aim High could have discovered the new information earlier, the Magistrate Judge’s
18 finding was not clearly erroneous. Even though the Court agrees with Aim High that a three-
19 month delay in seeking to amend does not mean Aim High lacked diligence *per se*, Aim High
20 seemingly lacked diligence and good cause to perform the search in the first place. Because
21 this Court finds that Aim High lacked good cause to amend its infringement contentions, there
22 is “no need to consider the question of prejudice.” *O2 Micro*, 467 F.3d at 1368.

23 The Court does not have a definite and firm conviction that Magistrate Judge Albregts
24 committed a mistake by denying Aim High’s Motion for Leave to Amend. Magistrate Judge
25 Albregts is afforded broad discretion and Aim High’s disagreement with his Order does not

1 mean that this Court can, or should, substitute its own judgment. Accordingly, the Court
2 DENIES Aim High's Objection.

3 **IV. CONCLUSION**

4 **IT IS HEREBY ORDERED** that Aim High's Objection/Appeal, (ECF No. 93), is
5 **DENIED.**

6 **IT IS FURTHER ORDERED** that Defendant's Motion for Extension of Time, (ECF
7 No. 95), is **GRANTED** as unopposed *nunc pro tunc*.

8 **DATED** this 12 day of March, 2024.

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13 Gloria M. Navarro, District Judge
14 UNITED STATES DISTRICT COURT
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