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6 **IN THE UNITED STATES DISTRICT COURT**  
7 **FOR THE DISTRICT OF ARIZONA**  
8

9 TD Professional Services,

No. CV-22-00018-PHX-MTL

10 Plaintiff,

**ORDER**

11 v.

12 Truyo Incorporated, et al.,

13 Defendants.  
14

15 **I. INTRODUCTION**

16 Pending before the Court is Defendants Intraedge Incorporated and Truyo  
17 Incorporated's ("Defendants") Motion to Strike and/or Exclude Plaintiff TD Professional  
18 Services' ("Plaintiff") Infringement Contentions Under Federal Rule 12(f), 16(f), or 37(c).  
19 (Doc. 144.) The Motion has been fully briefed. (Docs. 144, 145, 146.) Defendants  
20 requested oral argument. (Doc. 144 at 1.) After reviewing the briefs, however, the Court  
21 determined that oral argument was not necessary to aid in the Court's decisional process  
22 and vacated the oral argument. *See* LRCiv 7.2(f); *see also Partridge v. Reich*, 141 F.3d  
23 920, 926 (9th Cir. 1998); *Lake at Las Vegas Invs. Grp., Inc. v. Pacific Dev. Malibu Corp.*,  
24 933 F.2d 724, 729 (9th Cir. 1991). For the reasons set forth below, Defendants' Motion is  
25 denied.

26 **II. BACKGROUND**

27 On August 18, 2023, the parties filed a Joint Motion Re Plaintiff TD Professional  
28 Services, Inc.'s Infringement Contentions. (Doc. 135.) On August 22, 2023, the Court

1 granted the motion in part,\* requiring Plaintiff to “provide supplemental infringement  
2 contentions to Defendants no later than October 31, 2023.” (Doc. 136 at 2.) On October  
3 26, 2023, Plaintiff filed a Notice of Updating Infringement Contentions. (Doc. 139.)  
4 Plaintiff disclosed 151 pages of amended infringement contentions. (Doc 145 at 2.)  
5 Defendants stated that they sought to meet and confer with Plaintiff regarding Defendants’  
6 asserted defects in Plaintiff’s infringement contentions, and Plaintiff declined. (Doc. 144  
7 at 7.) Defendants then filed this motion.

### 8 **III. LEGAL STANDARD**

#### 9 **A. Federal Rule of Civil Procedure 12(f)**

10 Pursuant to Federal Rule of Civil Procedure 12(f), a court may strike from a pleading  
11 “any redundant, immaterial, impertinent, or scandalous matter.” Fed. R. Civ. P. 12(f). “A  
12 matter is immaterial if it ‘has no essential or important relationship to the claim for relief  
13 or defenses pleaded,’” and “a matter is impertinent if it does not pertain and is not necessary  
14 to the issues in the case.” *Polaris PowerLED Techs., LLC v. Nintendo Co.*, 623 F. Supp.  
15 3d 1132, 1135–36 (W.D. Wash. 2022) (quoting 5C Charles A. Wright & Arthur R. Miller,  
16 *Federal Practice and Procedure* § 1382 (3d ed. 2022)). “Motions to strike are generally  
17 regarded with disfavor because of the limited importance of pleading in federal practice,  
18 and because they are often used as a delaying tactic.” *Id.* at 1136 (quoting *Cal. Dep’t of*  
19 *Toxic Substances Control v. Alco Pac., Inc.*, 217 F. Supp. 2d 1028, 1033 (C.D. Cal. 2002).  
20 “Where the moving party cannot adequately demonstrate such prejudice, courts frequently  
21 deny motions to strike ‘even though the offending matter literally [was] within one or more  
22 of the categories set forth in Rule 12(f).” *Id.* (quoting *N.Y.C. Emps. Ret. Sys. v. Berry*, 667  
23 F. Supp. 2d 1121, 1128 (N.D. Cal. 2009)).

#### 24 **B. Federal Rule of Civil Procedure 16(f)**

25 Federal Rule of Civil Procedure 16(f) provides that a court may impose sanctions,  
26 either by motion or on its own, for any of the following deficiencies by a party: failure to  
27 appear at a scheduling or other pretrial conference, substantial lack of preparation or failure

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28 \*Additionally, the Order affirmed all other deadlines in the Court’s Scheduling Order and July 13, 2023 Order.

1 to participate in good faith in a conference, or failure to obey a scheduling or other pretrial  
2 order. Fed. R. Civ. P. 16(f). The court may “issue any just orders, including those  
3 authorized by Rule 37(b)(2)(A)(ii)–(vii),” and/or impose attorney’s fees. Fed. R. Civ. P.  
4 16(f)(1)–(2). The sanctions available under Rule 37(b)(2)(A)(ii)–(vii) include:

- 5 (ii) prohibiting the disobedient party from supporting or opposing designated  
6 claims or defenses, or from introducing designated matters in evidence;
- 7 (iii) striking pleadings in whole or in part;
- 8 (iv) staying further proceedings until the order is obeyed;
- 9 (v) dismissing the action or proceeding in whole or in part;
- 10 (vi) rendering a default judgment against the disobedient party; or
- 11 (vii) treating as contempt of court the failure to obey any order except an  
12 order to submit to a physical or mental examination.

13 Fed. R. Civ. P. 37(b)(2)(A)(ii)–(vii).

### 14 **C. Federal Rule of Civil Procedure 37(c)**

15 Federal Rule 37(c) addresses sanctions for the “failure to disclose, to supplement an  
16 earlier response, or to admit.” Fed. R. Civ. P. 37(c). “The court may impose any ‘just’  
17 sanction for the failure to obey a scheduling order, including ‘refusing to allow the  
18 disobedient party to support or oppose designated claims or defenses, or prohibiting that  
19 party from introducing designated matters in evidence.’” *O2 Micro Int’l Ltd. v. Monolithic  
20 Power Sys., Inc.*, 467 F.3d 1355, 1363 (Fed. Cir. 2006). “A decision to sanction a litigant  
21 pursuant to Fed. R. Civ. P. 37 is one that is not unique to patent law, and we therefore apply  
22 regional circuit law to that issue.” *Transclean Corp. v. Bridgewood Servs., Inc.*, 290 F.3d  
23 1364, 1370 (Fed. Cir. 2002) (internal citations omitted). The Ninth Circuit Court of  
24 Appeals looks to five factors when “considering whether a dismissal of default is  
25 appropriate as a Rule 37 sanction.” *Wanderer v. Johnston*, 910 F.2d 652, 656 (9th Cir.  
26 1990). The five factors are the following: “(1) the public’s interest in expeditious resolution  
27 of litigation; (2) the court’s need to manage its dockets; (3) the risk of prejudice to [the  
28 party seeking sanctions]; (4) the public policy favoring disposition of cases on their merits;  
and (5) the availability of less drastic sanctions.” *Id.* “[T]he key factors are prejudice and  
availability of lesser sanctions.” *Id.*

1 **IV. LEGAL ANALYSIS**

2 **A. Motion to Strike Plaintiff’s Supplemental Infringement Contentions**

3 Defendants first ask this Court to “stri[k]e Plaintiff’s Supplemental Contentions in  
4 their entirety as redundant, immaterial, and impertinent.” (Doc. 144 at 17.) Defendants  
5 raise this motion pursuant to Federal Rule 12(f). (*Id.*) The Court will consider infringement  
6 contentions akin to pleadings under Federal Rule 12(f) according to Federal Circuit law.  
7 *See O2 Micro Int’l*, 467 F.3d at 1366 (analyzing amendments to infringement contentions  
8 in relation to the pleading standard required by the Federal Rules). As such, at this stage,  
9 the Court will not strike Plaintiff’s infringement contentions under 12(f) unless the  
10 infringement contentions are so “immaterial or impertinent” that they fail to put Defendants  
11 on notice of the alleged infringement. Defendants have failed on this record to establish  
12 that striking Plaintiff’s supplemental infringement contentions entirely is appropriate. This  
13 Court does not view Rule 12(f) as the appropriate vehicle to test the substance of  
14 infringement contentions.

15 To the extent that Defendants have provided examples of other courts using Rule  
16 12(f) in this manner, the courts in Defendants’ cited cases either (1) rely on Patent Local  
17 Rules specifying what must be contained in infringement contentions or (2) acknowledge  
18 situations where infringement contentions were amended beyond the extent that was  
19 explicitly granted by the court. (*See* Doc. 144 at 3, 7–8, 11.) Accordingly, these cases are  
20 inapposite. The Court emphasizes there are no applicable Patent Local Rules that govern  
21 this action in this District. Defendants suggest that “[w]ithout applicable Patent Local  
22 Rules, Courts address a plaintiff’s failure to serve compliant infringement contentions  
23 under three separate Federal Rules: (1) Federal Rule 12(f), (2) Federal Rule 16(f), and (3)  
24 Federal Rule 37(c).” (Doc. 144 at 3 (internal citations omitted).) Defendants cite to *Sloan*  
25 *Valve Co. v. Zurn Indus., Inc.*, No. 1:10-CV-00204, 2012 WL 6214608 (N.D. Ill. Dec. 13,  
26 2012), to support the use of “Rule 12(f) as a vehicle to strike infringement contentions that  
27 are irrelevant to the dispute or inconsistent with the Court’s discretion.” (Doc. 144 at 3.)  
28 However, *Sloan Valve Co.* is a case from the Northern District of Illinois in which the court

1 indeed had adopted its own Patent Local Rules. *See Sloan Valve Co.*, 2012 WL 6214608,  
2 at \*2–4. Defendants also cite to *Finjan, Inc. v. Blue Coat Sys., Inc.*, No. 13-cv-03999-BLF,  
3 2015 WL 3640694 (N.D. Cal. June 11, 2015), to establish the acceptance of infringement  
4 contentions as forms of pleadings. (Doc. 144 at 7–8.) Even accepting Defendants’  
5 argument that infringement contentions qualify as pleadings, the court in *Finjan* was  
6 operating under its own Local Patent Rules to determine whether a plaintiff’s new  
7 infringement contentions alleged a “new theory or new element of the accused product”  
8 not previously identified, not whether contentions were sufficient. *Finjan*, 2015 WL  
9 3640694, at \*2.

10 Because this Court has no comparable Local Patent Rules, nor has it adopted any  
11 such Rules for this case, this Court will not expand Rule 12(f) to test the substance of the  
12 “pleadings” by way of something akin to a Rule 12(b)(6) motion, but under the guise of  
13 immaterial filings. Accordingly, Defendants’ motion to strike Plaintiff’s supplemental  
14 contentions under Federal Rule 12(f) is denied without prejudice to raising these arguments  
15 in a motion under Rule 56 for summary judgment.

16 **B. Motion for Sanctions for Failure to Obey a Scheduling or Pretrial Order**

17 Defendants next request this Court impose sanctions in the form of “excluding  
18 Plaintiff’s Supplemental Contentions or dismissing Plaintiff’s causes of action for patent  
19 infringement” for failure to comply with the August 22, 2023 Order. (Doc. 144 at 17.)  
20 Defendants raise this motion pursuant to Federal Rule 16(f). (*Id.*) The previous Order at  
21 issue granted in part the parties’ Joint Motion Re Plaintiff TD Professional Services, Inc.’s  
22 Infringement Contentions. (Doc. 136.) Defendants argue that “[p]lainly, Plaintiff has not  
23 endeavored to comply with the Court’s Order in good faith, given its abbreviated review  
24 of the source code and subsequent refus[al] to meet and confer with Defendants on this  
25 issue.” (Doc. 144 at 17.) Defendants state that as a result, they are “unable to ascertain the  
26 basis on which Plaintiff contends the Accused Product practices the claim limitations.”  
27 (Doc. 144 at 15.)

28 Again, this Court recognizes that no applicable Patent Local Rules govern this

1 action. As discussed previously, Defendants suggest that Rule 16(f) applies in the absence  
2 of such local rules. (Doc. 144 at 3.) Defendants cite to *In re Papst Licensing GmbH & Co.*  
3 *KG Litig.*, 273 F.R.D. 339 (D.D.C. 2011), as support for the use of Federal Rule 16(f) to  
4 impose sanctions for failure to comply with a court order. (Doc. 144 at 3.) There, however,  
5 the court had already adopted orders with “standards substantially the same as those  
6 imposed by Rule 3-1” of the Northern District of California Patent Local Rules. *In re Papst*  
7 *Licensing*, 273 F.R.D. at 343. Further the court in *Papst* also required Plaintiff’s final  
8 contentions “to meet the express and detailed standards set forth by the Court.” *Id.* at 343.  
9 There has been no such “detailed standard[]” set forth here. As such, this case is inapposite.

10 Here, the Court partially granted the joint motion to compel Plaintiff to provide a  
11 more definite infringement statement. (Doc. 135; Doc. 136 at 2.) Defendants state that its  
12 motion was granted “in full,” thus claiming numerous times that Plaintiff was required to  
13 amend the infringement contentions in accordance with that which Defendants requested  
14 in the joint motion. (Doc. 144 at 3; *see also* Doc. 144 at 12, 16; Doc. 146 at 3.) Instead, the  
15 Court granted joint motion “in-part” and most importantly did not adopt Defendants’  
16 specifications for how Plaintiff must make its infringement contentions—such as pinpoint  
17 citations to allegedly infringing source code. (Doc. 136 at 2.) Given that the Court did not  
18 include any such detail requirements in its previous Order, the Court certainly cannot  
19 conclude that Plaintiff violated the Order for failing to comply with the non-existent  
20 requirements.

21 Moreover, Defendants’ argument that the supplemental infringement contentions  
22 are not detailed enough is premature. (Doc. 144 at 12–13, 17.) In reality, Defendants ask  
23 this Court, similar to the Rule 12(f) request, to review the substance of the supplemental  
24 contentions and determine whether they are sufficient to either state a claim or create a  
25 disputed issue of fact for trial. This is plainly not appropriate under Rule 16(f). Instead, the  
26 Court must determine if Plaintiff violated the Court’s Order. Here, no one disputes that the  
27 Court ordered Plaintiff to supplement its infringement contentions. (Doc. 144 at 16; Doc.  
28 145 at 2.) Further, no one disputes that the supplement provided more detailed information.

1 The Court’s previous Order identified that Defendants produced over 200,000 documents  
2 and provided access to source code material; Plaintiff’s supplemental contentions were  
3 supplemented accordingly. (Doc. 136 at 1; Doc. 145 at 15.)

4 Thus, Plaintiff has complied with the Court’s Order such that sanctions under  
5 Federal Rule 16(f) are not warranted. Accordingly, the motion to exclude Plaintiff’s  
6 supplemental contentions or dismiss Plaintiff’s causes of action for patent infringement  
7 under Federal Rule 16(f) is denied.

### 8 **C. Motion for Sanctions for Failure to Disclose or Supplement**

9 Defendants finally request this Court impose sanctions in the form of “excluding  
10 Plaintiff’s Supplemental Contentions or dismissing Plaintiff’s causes of action for patent  
11 infringement” for non-compliance with the Court’s Scheduling Order by failing to disclose  
12 or supplement. (Doc. 144 at 16.) Defendants raise this motion pursuant to Federal Rule  
13 37(c). (*Id.*) Defendants urge the Court to find that Plaintiff’s supplemental infringement  
14 contentions “do not identify any explicit description of the elements within the Accused  
15 Product that infringe the Asserted Patents sufficient to meet Plaintiff’s burden, such as set  
16 forth under Local Patent Rule 3.1 for the Northern District of California.” (Doc. 144 at 12.)  
17 Defendants argue the supplemental contentions are deficient because they “do not point to  
18 an *actual* product that has been built by Defendants but rely on marketing materials and  
19 emails.” (Doc. 144 at 12.) Defendants state Plaintiff failed to identify any hardware  
20 component or element of source code, and thus, “fail[ed] to identify particular features of  
21 the Accused Product” in order to be compliant infringement contentions. (*Id.* at 13.)

22 Defendants rely on *Webasto Thermo & Comfort N. Am., Inc. v. BesTop, Inc.*, No.  
23 16-cv-13456, 2019 WL 2171262 (E.D. Mich. May 20, 2019), to support applying Rule 37  
24 in the absence of Patent Local Rules. (Doc. 144 at 3.) In *Webasto Thermo*, the court stated:  
25 “[i]n the absence of local patent rules, as is the case in this District, the Court may look to  
26 case law in other districts that have adopted such rules that contain language similar to that  
27 adopted by the parties and the Court to govern the litigation[.]” *Webasto Thermo*, 2019 WL  
28 2171262, at \*4. This Court has not adopted any language “similar to” any Patent Local

1 Rules from any jurisdiction. Additionally, the court in *Webasto Thermo* had already  
2 ordered in its Scheduling Order “detailed content and timing directives for the filing of  
3 infringement, non-infringement, and invalidity contentions and for amendments to  
4 contentions.” *Id.* This Court has made no such order. Accordingly, this case is inapposite.

5 Defendants again pin their argument on Defendants’ premise that the supplemental  
6 infringement contentions are deficient. (Doc. 144 at 16.) In other words, Defendants do not  
7 argue that Plaintiff failed to make initial disclosures under Rule 26(a), or that Plaintiff  
8 failed to make timely infringement contentions under the Scheduling Order, or that Plaintiff  
9 failed to provide supplemental infringement contentions as ordered by the Court. Instead,  
10 Defendants argue that Plaintiff’s 151 pages of supplemental infringement contentions are  
11 inadequate to either state a claim or create a disputed issue of fact for trial.

12 But like Rule 16(f), the purpose of Rule 37 is to sanction non-compliance, not to  
13 serve as a “first run” at a Rule 56 motion or a “late filed” Rule 12(b)(6) motion. For the  
14 Court to grant Defendants’ Rule 37 request to dismiss this case for inadequate disclosure,  
15 this Court would be required to conclude the 151 pages of supplemental infringement  
16 contentions were in-fact inadequate. This Court cannot make this determination on this  
17 record, and indeed will require summary judgment style evidence to make this  
18 determination. Seemingly quasi-recognizing this reality, Defendants expressly disclaim  
19 they are not moving for summary judgement. (Doc. 144 at 2 n.1.) The Court is not bound  
20 by such disclaimers. The relief Defendants seek relies on a premise the Court cannot reach.  
21 Further, to the extent that Defendants premise this argument on other District’s Patent  
22 Local Rules, those Rules are inapplicable here for the reasons stated above.

23 Thus, because this Court has neither summary judgment style evidence, nor  
24 enforceable Local Rules from which the Court could conclude Plaintiff’s infringement  
25 contentions are in-fact deficient, the Court will not sanction Plaintiff by either striking the  
26 supplemental infringement contentions or dismissing cause of action for patent  
27 infringement. Accordingly, Defendants’ Motion to exclude Plaintiff’s supplemental  
28 contentions or dismiss Plaintiff’s causes of action for patent infringement under Federal



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Rule 37(c) is denied.

**V. CONCLUSION**

Accordingly,

**IT IS ORDERED denying** Defendants' Motion to Strike and/or Exclude Plaintiff's Infringement Contentions Under Federal Rule 12(f), 16(f), or 37(c). (Doc. 144.) Defendants are not prejudiced to raise these arguments properly in a motion for summary judgment under Federal Rule 56.

Dated this 3rd day of April, 2024.

  
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Michael T. Liburdi  
United States District Judge