

E-Filed: April 4, 2014

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5 NOT FOR CITATION
6 IN THE UNITED STATES DISTRICT COURT
7 FOR THE NORTHERN DISTRICT OF CALIFORNIA
8 SAN JOSE DIVISION

9 RADWARE, LTD; RADWARE, INC.,

Nos. C13-02021, C13-02024 RMW (HRL)

10 Plaintiffs, Counterclaim-Defendants,
11 v.

**ORDER GRANTING PLAINTIFFS'
MOTIONS FOR LEAVE TO AMEND
INFRINGEMENT CONTENTIONS**

12 A10 NETWORKS, INC.,

13 Defendant, Counterclaim-Plaintiff.
_____ /

14 RADWARE, LTD.; RADWARE, INC.

15 Plaintiffs, Counterclaim-Defendants,
16 v.

17 F5 NETWORKS, INC.,

18 Defendant, Counterclaim-Plaintiff.
_____ /

19
20 Plaintiffs Radware, Ltd. and Radware, Inc. (collectively, "Radware") sue defendants A10
21 Networks, Inc. ("A10") and F5 Networks, Inc. ("F5") (collectively, "Defendants") in two separate
22 but related cases alleging that Defendants' products infringe three Radware patents related to "Load
23 Balancing" technology. The related cases are subject to the same case management schedule, at
24 least through claim construction. Radware served its preliminary infringement contentions ("PICs")
25 in August 2013. Defendants made source code available for inspection by October 1, 2013. In mid
26 to late December, Radware served its proposed amended infringement contentions ("AICs"), which
27 amendments are purportedly based entirely on information gleaned from Defendants' productions of
28 source code. Radware then filed the instant motions for leave to amend on January 28, 2014.

1 Defendants oppose the motions. The matters were deemed suitable for determination without oral
2 argument, and the March 21, 2014, hearing was vacated. *See* Civil L.R. 7-1(b). Based on the
3 moving and responding papers, Radware’s motions are granted.

4 **BACKGROUND**

5 A10’s production of source code on October 1, 2013, consisted of nearly 300 total versions
6 of the two alleged infringing product series, each version consisting of millions of lines of code.
7 Radware consistently reviewed the available source code from October 8 through October 18, and
8 again from November 4 through November 15; it did not inspect the source code during the two-
9 week period in between. Radware requested hard copies of select portions of the source code in
10 mid-November, some of which it did not receive until December 18. On December 19, Radware
11 served A10 with its AICs, which added: (1) citations to source code; (2) new citations to documents
12 previously cited; and (3) new doctrine of equivalents (DOE) theories for four claim elements. The
13 AICs also eliminated previous assertions of infringement of 10 claims.

14 F5 produced its source code for inspection on September 30, which comprised nearly nine
15 gigabytes of source code – more than one million lines of code. Radware began its review of the
16 source code on October 11. It requested hard copies on October 15, which F5 did not produce until
17 November 2. On December 23, Radware served F5 with its AICs, which added the same three
18 categories of information described above. The AICs also removed eight claims previously alleged
19 to have been infringed.

20 **LEGAL STANDARD**

21 “Amendment of the Infringement Contentions . . . may be made only by order of the Court
22 upon a timely showing of good cause.” Patent L.R. 3-6. The good cause inquiry “considers first
23 whether the moving party was diligent in amending its contentions and then whether the non-
24 moving party would suffer prejudice if the motion to amend were granted. *Acer, Inc. v. Tech.*
25 *Props. Ltd.*, No. 08–cv–00882JF (HRL), 2010 WL 3618687, at *3 (N.D. Cal. Sept. 10, 2010) (citing
26 *O2 Micro Int’l Ltd. v. Monolithic Power Sys., Inc.*, 467 F.3d 1355, 1366-68 (Fed. Cir. 2006)). “The
27 burden is on the movant to establish diligence rather than on the opposing party to establish lack of
28 diligence.” *Karl Storz Endoscopy-America, Inc. v. Stryker Corp.*, No. C09-00355, 2011 WL
5574807, at *1 (N.D. Cal. Nov. 16, 2011) (quoting *O2 Micro*, 467 F.3d at 1366). “However, even if

1 the movant was arguably not diligent, the court retains discretion to grant leave to amend.” *Linex*
2 *Techs., Inc. v. Hewlett-Packard Co.*, No. C13-159 CW, 2013 WL 5955548, at *1 (N.D. Cal. Nov. 6,
3 2013); *see also Apple Inc. v. Samsung Electronics Co.*, No. CV 12-00630 LHK, 2012 WL 5632618
4 (N.D. Cal. Nov. 15, 2012) (granting leave to amend infringement contentions, even though court
5 found plaintiff failed to establish diligence, because of lack of prejudice to the defendants). “In
6 considering the party’s diligence, the critical question is whether the party could have discovered the
7 new information earlier had it acted with the requisite diligence.” *Apple*, 2012 WL 5632618, at *2
8 (internal quotation marks omitted).

9 “The rules are designed to require parties to crystallize their theories of the case early in the
10 litigation and to adhere to those theories once they have been disclosed” *LG Electronics Inc. v.*
11 *Q-Lity Computer Inc.*, 211 F.R.D. 360 (N.D. Cal. 2002) (quoting *Atmel Corp. v. Information*
12 *Storage Devices, Inc.*, No. C 95-1987 FMS, 1998 WL 775115, at *2 (N.D. Cal. 1998)). However,
13 the expectation that a “patentee would have a precise sense of its infringement theory at the outset”
14 is “unrealistic . . . [where] the patentee may not have been able to get access to the necessary
15 information because it is hidden from view (for example, source code).” Peter S. Menell et al.,
16 Federal Judicial Center, *Patent Case Management Judicial Guide* 4-14 (2009). Thus, the good
17 cause standard of Patent L.R. 3-6 “serves to balance the parties’ rights to develop new information
18 in discovery along with the need for certainty in legal theories at the start of the case.” *Apple*, 2012
19 WL 5632618, at *2. “Courts typically grant leave to amend infringement contentions after a
20 patentee has been given the opportunity to inspect relevant source code.” *Linex*, 2013 WL 5955548,
21 at *2.

22 DISCUSSION¹

23 Radware asserts that all its proposed amendments are based on information gleaned from
24 Defendants’ productions of source code. Good cause to amend exists because it has been diligent in
25 reviewing the source code and in amending its infringement contentions based thereon. Moreover,
26 Defendants will not be prejudiced because the AICs were served more than two months prior to
27 claim construction briefing, and by citing to source code and eliminating several claims it previously
28 contended were infringed, the AICs provide Defendants with greater specificity.

¹ Radware’s motions are substantively indistinguishable, as are A10’s and F5’s oppositions with few exceptions. Accordingly, the arguments raised by each will mostly be discussed together.

1 A. Compliance with Patent L.R. 3-1

2 As an initial matter, the Court will address the proper context for Defendants’ arguments that
3 Radware’s AICs do not comply with Patent L.R. 3-1, which constitutes the majority of Defendants’
4 oppositions. The Court agrees with Radware that this is not the appropriate vehicle for challenging
5 the sufficiency of the AICs as a whole. Here, the Court is only concerned with (1) whether Radware
6 acted diligently and (2) whether Defendants will be prejudiced by the amendments themselves as
7 compared to the PICs. Thus, the sufficiency of the amendments is only relevant insofar as it affects
8 the diligence and/or prejudice inquiries of the good cause standard.

9 F5 does not really fit its insufficiency argument into either prong and generally asserts that
10 “Courts have found that one of the factors denying leave to amend is when the proposed
11 amendments are still deficient.” F5 Opp. at 6. However, in support it only cites a single federal
12 claims court case, albeit one applying this district’s Patent Local Rules, which noted that the
13 amended claim chart was significantly deficient, but only after having already found that the
14 plaintiff had not satisfied the good cause standard. *See Canvs. Corp. v. United States*, 107 Fed. Cl.
15 100, 109 (2012).

16 A10 asserts that the sufficiency of the Radware’s AICs goes to the diligence prong of the
17 good cause analysis. According to A10, “[i]t is axiomatic that a party cannot demonstrate diligence
18 when it fails to satisfy the requirement of the local rules,” yet A10 cites no authority for support.
19 A10 Opp. at 11.

20 The Court disagrees with the purported axiom and thinks that, if anything, the sufficiency of
21 the amendments is more appropriately addressed under the prejudice prong of the analysis. While it
22 is possible that amended infringement contentions could be so patently deficient as to evidence a
23 lack of diligence (which is not the case here), it seems more likely that AICs might be insufficiently
24 specific in violation of Patent L.R. 3-1 despite an earnest effort manifesting the requisite diligence.
25 In the latter case, noncompliance may nevertheless cause the opposing party prejudice if, for
26 example, the amendments would render otherwise sufficient infringement contentions noncompliant
27 with the Patent Local Rules. Accordingly, to the extent that sufficiency of the AICs is relevant to
28 this motion at all, it will be addressed under the prejudice prong of the analysis.

1 B. Diligence

2 Defendants assert that Radware was not diligent in its review of source code after it was
3 made available. A10 points to the fact that Radware took a two-week break from source code
4 review from October 21 to November 1. F5 takes issue with Radware’s eleven-day delay in starting
5 its review. Moreover, the two and a half to three month period between source code production and
6 service of the AICs also evidences a lack of diligence.

7 Radware explains that most of the delay was caused by constraints imposed by the stipulated
8 protective order and was exacerbated by the Defendants’ inactivity. Pursuant to the stipulated
9 protective order, Radware could not bring its own computers into the review facility or take source
10 code outside opposing counsel’s office. Thus, in order to conduct its analysis and prepare the AICs,
11 Radware had to request from Defendants hard copies of the portions of source code it wanted to
12 analyze further. F5 took nearly three weeks to provide the requested printouts, while A10 was still
13 producing theirs in piecemeal fashion as late as December 18.

14 Radware does not expressly address the gaps in its source code review at each facility, but
15 presumably it focused on one defendant’s source code at a time. In any case, continuous inspection
16 of source code at both review facilities during the approximately six week period is not a
17 prerequisite for diligence. In view of the massive amounts of code produced, the limitations
18 imposed by the stipulated protective order, and Defendants’ own failure to promptly produce hard
19 copies of source code upon request, the Court thinks that the time spent at opposing counsel’s
20 offices reviewing the source code was reasonable, as was the additional time to prepare and serve its
21 AICs based thereon. Accordingly, the Court finds that Radware exhibited the requisite diligence in
22 amending its infringement contentions, at least insofar as the amendments were in fact based on the
23 source code production.

24 1. Source Code Citations

25 It is undisputed that the citations to source code were necessarily dependent on the
26 production of source code. Accordingly, Radware was diligent in amending its infringement
27 contentions to include source code citations.

28

1 2. New Citations to Documents Previously Cited

2 Defendants assert that Radware cannot have been diligent in adding citations to documents it
3 had in its possession by August 2013 at the latest; to have been diligent, Radware would have had to
4 have included the citations in its PICs. Radware explains that any “supplemental analysis based on
5 the same documents relied upon in the PICs are based on new insights gained by the review of
6 previously unavailable source code.”

7 The mere fact of prior possession does not automatically negate a finding of diligence, and
8 the Court has no trouble believing that the subsequent production of source code could have, and in
9 this case did, shed new light on information previously possessed. Accordingly, the Court is
10 convinced that Radware acted at least minimally diligent in amending its infringement contentions
11 to include citations to documents it previously possessed.

12 3. Doctrine of Equivalents

13 The parties raise essentially the same arguments for and against a finding of diligence with
14 respect to the newly asserted DOE theories. Defendants argue that because the DOE theories are not
15 supported by citations to source code, they must not be based on the source code production.
16 According to Radware, it was its “analysis of the source code in conjunction with [Defendants’]
17 document production that informed Radware’s DOE theories, which Radware now discloses in good
18 faith.” Again, the Court finds that Radware exhibited the requisite diligence in amending its
19 infringement contentions to include some DOE theories.

20 C. Prejudice

21 Defendants’ main argument applicable to the prejudice prong of the good cause analysis is
22 that Radware’s AICs are insufficient pursuant to Patent L.R. 3-1. Defendants primarily attack the
23 sufficiency of the AICs as a whole, not just the proposed amendments. In doing so, Defendants are
24 really challenging the sufficiency of the PICs as much as the AICs, which is not the Court’s concern
25 on this motion. Here, the Court’s focus is on the amendments themselves. Thus, the relevant
26 inquiry now is only whether Defendants will be prejudiced by the additions of citations to source
27 code, citations to other documents, and the assertion of new DOE theories; not whether the
28 amendments adequately cure any and all the purported deficiencies of the PICs. That being said, the
Court does not think that Defendants are prejudiced by the amendments.

1 Defendants argue that they are prejudiced by Radware’s citations to source code because
2 Radware’s purported pincites merely reference several pages of code, which is insufficiently
3 specific per Patent L.R. 3-1. However, even assuming that Radware did not sufficiently pinpoint its
4 citations, the Court is not convinced that Defendants are any worse off by having Radware cite to a
5 few pages of code in the AICs as compared to a complete lack of identification of the source of
6 infringement in the PICs. Thus, Defendants are not prejudiced by the citations to source code, at
7 least not enough to outweigh Radware’s showing of diligence.

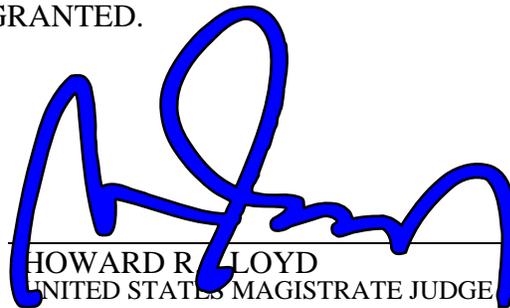
8 Defendants do not contend that they will suffer prejudice by Radware’s new citations to
9 documents previously cited.

10 Defendants assert that they will be prejudiced by Radware’s addition of boilerplate DOE
11 theories. Although the Court thinks that an amendment to include assertions of new theories is an
12 instance where noncompliance with the local rules may cause prejudice sufficient to negate good
13 cause, that is not the case here. While Defendants argue that the DOE theories are insufficiently
14 broad, they do not articulate how that translates to prejudice, and the Court does not think that the
15 potential for prejudice here overcomes Radware’s demonstration of diligence in seeking to add these
16 theories based on Defendants’ recent productions of source code.

17 The proposed amendments will not cause Defendants prejudice sufficient to outweigh
18 Radware’s showing of diligence. Accordingly, good cause exists, and Radware’s motions for leave
19 to amend its infringement contentions are GRANTED.

20 **IT IS SO ORDERED.**

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22 Dated: April 4, 2014

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24 HOWARD R. LOYD
25 UNITED STATES MAGISTRATE JUDGE
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