UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

INFOGATION CORPORATION,

Plaintiff,

v.

GOOGLE LLC,

Defendant.

Case No.: 21-cv-00843-H-LL

ORDER:

GRANTING PLAINTIFF'S MOTION FOR LEAVE TO FILE A SECOND AMENDED COMPLAINT; AND

[Doc. No. 95.]

DENYING DEFENDANT'S MOTION TO DISMISS PLAINTIFF'S FIRST AMENDED COMPLAINT AS MOOT

[Doc. No. 32.]

On August 24, 2020, Defendant Google LLC filed a motion to dismiss Plaintiff InfoGation Corporation's first amended complaint pursuant to Federal Rule of Civil Procedure 12(b)(6). (Doc. No. 32.) On September 8, 2020, InfoGation filed a response in opposition to Google's motion to dismiss. (Doc. No. 37.) On September 15, 2020, Google

filed its reply.[1] (Doc. No. 40.)

On August 12, 2021, InfoGation filed a motion for leave to file a second amended complaint. (Doc. No. 95.) On August 30, 2021, Google filed an opposition to InfoGation's motion for leave to amend. (Doc. No. 96.) On September 3, 2021, InfoGation filed its reply. (Doc. No. 97.)

On September 8, 2021, the Court took the matters under submission. (Doc. No. 98; see also Doc. No. 85 at 26 n.9.) For the reasons below, the Court grants InfoGation's motion for leave to file a second amended complaint, and the Court denies Google's motion to dismiss the first amended complaint as moot.

Background

In the present action, InfoGation asserts a claim for patent infringement against Google, alleging infringement of U.S. Patent No. 6,292,743. (Doc. No. 27, FAC.) Specifically, InfoGation alleges that certain Google products and services, including those that incorporate the technology of the Google Maps API, infringe at least Claim 21 of the '743 patent. (Id. ¶ 12; see also id. ¶¶ 13-20, 26-28.)

The '743 patent is entitled "Mobile Navigation System" and "relates generally to [a] mobile navigation system and apparatus, and more particularly to a distributed navigation system having a wireless connection to a server for calculating optimal routes using real-time data." U.S. Patent No. 6,292,743, at 1:5-8. In describing the prior art, the '743 patent explains that, at the time of the invention, "navigation systems, in which automobiles are equipped with a navigational computer that includes a display screen, an input means such as a keypad or a remote control, and a storage means such as a CD" had become quite popular. Id. at 1:10-14. The '743 patent explains that the problem with these devices is that they are "stand-alone devices that rely completely on data stored on the local storage

[1] On June 8, 2021, the Court issued a claim construction order. (Doc. No. 85.) In the claim construction order, the Court ordered supplemental briefing on Google's pending motion to dismiss the first amended complaint. (Id. at 26 n.9.) On June 17, 2021, the Court vacated that supplemental briefing schedule pursuant to the parties' joint motion. (Doc. No. 89.)

device for geographical and other information. Thus, the capacity of the storage device becomes a limiting factor as to how much information is available to users. In addition, users must update their mapping databases frequently to stay current." Id. at 1:27-32.

In light of these problems, the '743 patent explains that it is desirable to have an online navigation system that can provide current information to the user – including real-time information such as traffic, weather, and road conditions – without the need for the system to update its local databases whenever changes occur. '743 Patent at 1:36-41. The '743 patent acknowledges that there are some prior art navigation systems, such as Toyota's MONET system, that are able to connect to online servers and provide real-time information to the user. Id. at 1:46-61. But the '743 patent notes that there are several problems with those real-time navigation systems.

The '743 patent explains the problems with the real-time navigation systems at the time of the invention as follows:

> In these current systems, all geographical data transmitted by the server is in a propriety [*sic*] format. That is, downloaded information used to describe geographical data, such as point-of-interest addresses and detailed map data, includes data points, indices and the like that are specific to the particular mapping database used on the client.
>
> Accordingly, the client navigation system must have a particular pre-defined mapping database installed in order to work with the server. In some cases, the mapping database used by the client and server must be identical. If there is a mismatch between the expected mapping database and the actual mapping database used on the client, the client cannot properly interpret the geographical data downloaded from the server and the system will fail to operate.
>
> Accordingly, customers using these current systems must obtain the latest version of the mapping database software available. This presents a major burden for customers and manufacturers alike due to the high frequency in which these databases must be updated.
>
> In addition, the data downloaded by the client generally requires high bandwidth communication channels due the shear volume of data transmitted by these current systems. Such high bandwidth communication channels are

> expensive and may not be readily available in all areas. It would be desirable to develop a system that requires lower bandwidth communication channels than that required by these current systems.
>
> Another problem with the current systems outlined above is that the client must include sophisticated algorithms for calculating optimal routes. In addition, these route-calculating algorithms in the client must be updated in accordance with current services and options available on the server. . . .
>
> Another problem with the current systems is that the proprietary server cannot be used with navigation systems and mapping databases provided by other manufacturers.

'743 Patent at 1:62-2:37.

The '743 patent seeks to remedy these problems in the prior art systems by using a generic natural language description to specify the optimal routing information that is generated at the server and then transmitted from the server to the client. '743 Patent at 3:21-23. The specification of the '743 patent describes "a client navigation system" as follows:

> The client navigation system establishes a wireless connection to the server via cellular telephone technology or the like. Once connected, the client requests a specific route by uploading start and stop specifications to the server. The server independently calculates an optimal route for the user based on real-time and current data available to the server, as well as user preferences or the like.
>
> The routing information is formatted using a natural language specification in accordance with each specific embodiment of the present invention.

Id. at 3:27-36.

The '743 patent explains that by having the route data generated only at the server, it allows the client devices to be much less complex and not require software changes when the server provides new information. '743 Patent at 2:53-3:10. The '743 patent further explains that by using a generic natural language description to specify the optimal routing information, the optimal routing data from the server "can be interpreted by a variety of

clients with minimal software additions." Id. at 3:11-14. Further, the patent explains that the natural language routing descriptions can be highly compressed allowing the information to travel on lower bandwidth communication channels. Id. at 3:14-20.

Independent claim 21 of the '743 patent, the only claim asserted by Plaintiff in the present action (see Doc. No. 27, FAC ¶¶ 12, 20; Doc. No. 51 at 6), expressly claims:

> A method for providing an optimal route using real-time information from a server of a navigation system, the navigation system also comprising a client and said server coupled to a computer network, said method comprising the steps of:
>
> establishing a wireless connection with the client;
>
> receiving at the server start and end route designations from the client;
>
> calculating at the server the optimal route based on real-time information at the server and said start and end route designations;
>
> formatting at the server the optimal route into a non-proprietary, natural language description;
>
> downloading from the server said non-proprietary, natural language description to the client so that the client can reconstruct the optimal route using a local mapping database and display said optimal route on a display system coupled to the client.

Id. at 18:6-24.

On May 5, 2020, InfoGation filed a complaint in the United States District Court for the Western District of Texas against Google, alleging infringement of the '743 patent. (Doc. No. 1.) On August 13, 2020, InfoGation filed an amended complaint against Google. (Doc. No. 27.) On April 29, 2021, the Texas district court granted Google's motion to transfer and transferred the action to the United States District Court for the Southern District of California. (Doc. No. 65.) On June 8, 2021, the Court issued a claim construction order. (Doc. No. 85.)

By the present motions, Google moves pursuant to Federal Rule of Civil Procedure 12(b)(6) to dismiss InfoGation's first amended complaint for failure to state a claim. (Doc. No. 32.) And InfoGation moves for leave to file a second amended complaint. (Doc. No. 95.)

Discussion

I. Plaintiff's Motion for Leave to Amend

InfoGation moves for leave to file a second amended complaint against Google. (Doc. No. 95-2 at 1.) InfoGation explains that it is seeking leave to amend to conform its infringement allegations to the Court's recent claim construction order. (Id. at 6.)

A. Legal Standards Governing Motions for Leave to Amend

Federal Rule of Civil Procedure 15(a) allows a party leave to amend its pleading once as a matter of right prior to service of a responsive pleading. Thereafter, "a party may amend that party's pleading only by leave of the court or by written consent of the adverse party and leave shall be freely given when justice so requires." Fed. R. Civ. P. 15(a). The Ninth Circuit has instructed that this policy is "'to be applied with extreme liberality.'" Owens v. Kaiser Foundation Health Plan, Inc., 244 F.3d 708, 712 (9th Cir. 2001). "Five factors are taken into account to assess the propriety of a motion for leave to amend: bad faith, undue delay, prejudice to the opposing party, futility of amendment, and whether the plaintiff has previously amended the complaint." Johnson v. Buckley, 356 F.3d 1067, 1077 (9th Cir. 2004) (citing Nunes v. Ashcroft, 348 F.3d 815, 818 (9th Cir. 2003)). The decision whether to grant leave to amend "is entrusted to the sound discretion of the trial court." Pisciotta v. Teledyne Indus., 91 F.3d 1326, 1331 (9th Cir. 1996).

B. Futility

In the proposed second amended complaint, InfoGation alleges a single cause of action against Google for infringement of the '743 patent. (Doc. No. 95-1 ¶¶ 49-55.) InfoGation argues that the factual allegations in the proposed second amended complaint are sufficient to establish that Google directly infringes claim 21 of the '743 patent. (Doc. No. 95-2 at 1.) Google argues that InfoGation should be denied leave to amend because the infringement theories set forth in the proposed second amended complaint are futile. (Doc. No. 96 at 1, 7-19.) Specifically, Google argues that InfoGation's infringement allegations are futile with respect to the "downloading" and "non-proprietary" claim limitations. (Id.)

i. Legal Standards for Futility of Amendment

"Futility of amendment can, by itself, justify the denial of a motion for leave to amend." Bonin v. Calderon, 59 F.3d 815, 845 (9th Cir. 1995). "'[A] proposed amendment is futile only if no set of facts can be proved under the amendment to the pleadings that would constitute a valid and sufficient claim or defense.'" Sweaney v. Ada Cty., Idaho, 119 F.3d 1385, 1393 (9th Cir. 1997) (quoting Miller v. Rykoff–Sexton, Inc., 845 F.2d 209, 214 (9th Cir. 1988)); accord Barahona v. Union Pac. R.R. Co., 881 F.3d 1122, 1134 (9th Cir. 2018). In other words, "[a] proposed amended complaint is futile if it would be immediately 'subject to dismissal.' Thus, the 'proper test to be applied when determining the legal sufficiency of a proposed amendment is identical to the one used when considering the sufficiency of a pleading challenged under Rule 12(b)(6).'" Nordyke v. King, 644 F.3d 776, 788 n.12 (9th Cir. 2011), on reh'g en banc, 681 F.3d 1041 (9th Cir. 2012) (citations omitted); see Miller, 845 F.2d at 214.

A complaint will survive a Rule 12(b)(6) motion to dismiss if it contains "enough facts to state a claim to relief that is plausible on its face." Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009). "A pleading that offers 'labels and conclusions' or 'a formulaic recitation of the elements of a cause of action will not do.'" Id. (quoting Twombly, 550 U.S. at 555). "Nor does a complaint suffice if it tenders 'naked assertion[s]' devoid of 'further factual enhancement.'" Id. (quoting Twombly, 550 U.S. at 557). Accordingly, dismissal for failure to state a claim is proper where the claim "lacks a cognizable legal theory or sufficient facts to support a cognizable legal theory." Mendiondo v. Centinela Hosp. Med. Ctr., 521 F.3d 1097, 1104 (9th Cir. 2008).

In reviewing a Rule 12(b)(6) motion to dismiss, a district court must accept as true all facts alleged in the complaint, and draw all reasonable inferences in favor of the plaintiff. See Retail Prop. Trust v. United Bhd. of Carpenters & Joiners of Am., 768 F.3d

938, 945 (9th Cir. 2014). But a court need not accept "legal conclusions" as true. Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009).

ii. Legal Standards for Patent Infringement

A patent infringement analysis proceeds in two steps. Markman v. Westview Instruments, Inc., 52 F.3d 967, 976 (Fed. Cir. 1995). In the first step, the court construes the asserted claims as a matter of law. See id. In the second step, the factfinder compares the claimed invention to the accused device. Id. "A determination of infringement, whether literal or under the doctrine of equivalents, is a question of fact." Allergan, Inc. v. Sandoz Inc., 796 F.3d 1293, 1311 (Fed. Cir. 2015).

"'The patentee bears the burden of proving infringement by a preponderance of the evidence.'" Creative Compounds, LLC v. Starmark Labs., 651 F.3d 1303, 1314 (Fed. Cir. 2011). "To prove literal infringement, the patentee must show that the accused device contains every limitation in the asserted claims. If even one limitation is missing or not met as claimed, there is no literal infringement." Riles v. Shell Exploration & Prod. Co., 298 F.3d 1302, 1308 (Fed. Cir. 2002).

iii. "downloading "

Google argues that InfoGation's allegations of patent infringement are futile because InfoGation has failed to adequately allege that the accused products satisfy the "downloading" claim limitation. (Doc. No. 96 at 8-15.) Specifically, Google argues that InfoGation's infringement allegations regarding the "downloading" claim limitation are futile because Google is twice removed from the "client" and has no means by which to control the "client" in the context of Directions API, the accused technology. (Id. at 7.)

Claim 21 of the '743 patent recites "[a] method for providing an optimal route using real-time information from a server of a navigation system, the navigation system also comprising a client" comprising, among other steps, "downloading from the server said non-proprietary, natural language description to the client so that the client can reconstruct the optimal route using a local mapping database and display said optimal route on a display system coupled to the client." '743 Patent at 18:6-9, 18:20-24. In the Court's claim

construction order, the Court construed the claim term "downloading from the server said non-proprietary, natural language description to the client" as "the server sending the non-proprietary, natural language description and the client receiving the non-proprietary, natural language description." (Doc. No. 85 at 25-26.) InfoGation argues that while Google does not itself perform the "receiving" part of the Court's claim construction, the client's actions in receiving the non-proprietary, natural language description are legally attributable to Google, making Google a direct infringer. (Doc. No. 95-2 at 11.)

With respect to method claims like claim 21 of the '743 patent, "[d]irect infringement under § 271(a) occurs where all steps of a claimed method are performed by or attributable to a single entity." Akamai Techs., Inc. v. Limelight Networks, Inc., 797 F.3d 1020, 1022 (Fed. Cir. 2015). "Where more than one actor is involved in practicing the steps, a court must determine whether the acts of one are attributable to the other such that a single entity is responsible for the infringement. [A court] will hold an entity responsible for others' performance of method steps in two sets of circumstances: (1) where that entity directs or controls others' performance, and (2) where the actors form a joint enterprise." Id. (footnote).

Under the first scenario, which is at issue here, "liability under § 271(a) can . . . be found when an alleged infringer conditions participation in an activity or receipt of a benefit upon performance of a step or steps of a patented method and establishes the manner or timing of that performance." Id. at 1023. "In those instances, the third party's actions are attributed to the alleged infringer such that the alleged infringer becomes the single actor chargeable with direct infringement. Whether a single actor directed or controlled the acts of one or more third parties is a question of fact, reviewable on appeal for substantial evidence, when tried to a jury." Id.

In the proposed second amended complaint, InfoGation alleges:

> 40. The client receives the non-proprietary, natural language description transmitted by Google. While Google does not perform this receiving directly, the client's actions in receiving the non-proprietary, natural language description are attributable to Google at least because Google

> conditions participation in an activity and receipt of a benefit on the client receiving the non-proprietary, natural language description and establishes the manner and/or timing of such receipt.
>
> 41. More specifically, Google conditions the performance of an activity and receipt of a benefit on the client receiving the non-proprietary, natural language description. Google's infringing services – e.g., the Google Directions Service and the Google Directions API – provide directions for an efficient path in response to a directions request. Google provides the directions using a non-proprietary, natural language description as described above. The client cannot perform the relevant activity – receiving directions from Google – or obtain the benefit of Google's services without receiving the non-proprietary, natural language description which includes the directions for an efficient path that the client requested. The client extracts the directions for the efficient path from the non-proprietary, natural language description transmitted by Google and received by the client, making the receipt of the non-proprietary, natural language description a technological prerequisite for obtaining the benefit of Google's services, *i.e.*, obtaining the directions for an efficient path calculated by Google that the client requested. In short, whatever benefits flow to the client device from use of the accused Google services can only be realized if the client performs the "receiving." In contrast, the client cannot enjoy the accused services without performing the "receiving."

(Doc. No. 95-1 ¶¶ 40-41; see also id. ¶¶ 44-45.) In addition, InfoGation alleges that Google establishes the "manner" and "timing" of the client's receipt of the non-proprietary, natural language description. (Id. ¶¶ 42-43.)

These allegations are sufficient to allege that the accused products satisfy the "downloading" claim limitation under the standard set forth in Akamai. Google argues that these allegations are insufficient because Google has no direct relationship with the "client" and has no means to direct or control the "client." (Doc. No. 96 at 8-12.) Google also argues that these allegations are insufficient because the "receiving" step is entirely client-driven. (Id. at 12-14.) The problem with these arguments is that Google fails to recognize that at the Rule 12(b)(6) motion to dismiss stage, the Court must accept the facts alleged in the complaint as true, and draw all reasonable inferences in favor of the plaintiff. See Retail Prop. Trust, 768 F.3d at 945.

The proposed second amended complaint alleges that Google establishes the

"manner" and "timing" of the client (the user device)'s receipt of the non-proprietary, natural language description. (See, e.g., Doc. No. 95-1 ¶ 42 ("Google transmits the non-proprietary, natural language description to the client and therefore controls the timing of the client's receipt because the client cannot receive the non-proprietary, natural language description until Google transmits to the client that information and it only will transmit the information if the client has executed an agreement."), ¶ 43 ("Google transmits the non-proprietary, natural language description using a communication protocol selected by Google.").) The Court must accept these allegations as true and draw all inferences in favor of InfoGation. See Retail Prop. Trust, 768 F.3d at 945. As such, these allegations are sufficient to satisfy the "downloading" claim limitation at the pleading stage.

Google also argues that InfoGation's infringement allegations fail because InfoGation fails to allege that the other client performed steps are attributable to Google. (Doc. No. 96 at 14-15.) This argument is based on Google's contention that Claim 21 recites two other steps performed by the client beyond the "downloading" step. (Id. at 14.) According to Google, claim 21 also recites a "reconstruct[ing]" step and a "display[ing]" step that are performed by the client. (Id.) InfoGation dispute this. InfoGation explains that because the claim language uses the word "can" in explaining that the client "can" reconstruct and display the optimal route, there is no requirement that the client actually perform those two actions. (Doc. No. 97 at 6.) InfoGation argues that "receiving" is the only required step performed by the client. (Id.)

The Court agrees with InfoGation. By using the word "can," claim 21 merely requires that the client be capable of performing the actions of reconstructing and displaying. See '743 Patent at 18:21. Cf ParkerVision, Inc. v. Qualcomm Inc., 903 F.3d 1354, 1362 (Fed. Cir. 2018) ("[W]here claim language recites 'capability, as opposed to actual operation,' an apparatus that is 'reasonably capable' of performing the claimed functions 'without significant alterations' can infringe those claims." (quoting Ericsson, Inc. v. D-Link Sys., Inc., 773 F.3d 1201, 1217 (Fed. Cir. 2014).) The claim language does not require that those two actions actually be performed by the client. As such, the Court

rejects Google's contention that Claim 21 recites a "reconstruct[ing]" method step and a "display[ing]" method step. In sum, the Court rejects Google's futility argument based on the "downloading" claim limitation.

iv. "non-proprietary"

Google also argues that InfoGation's allegations of patent infringement are futile because InfoGation has failed to adequately allege that the accused products satisfy the "non-proprietary" claim limitation. (Doc. No. 96 at 15-19.) In response, InfoGation argues that the proposed second amended complaint adequately alleges that certain fields are capable of being used with mapping databases provided by other manufacturers. (Doc. No. 97 at 7-8.)

In the Court's claim construction order, the Court construed the term "non-proprietary" as a "format that can be used with mapping databases provided by other manufacturers." (Doc. No. 85 at 14.) In the proposed second amended complaint, InfoGation alleges: "Using the technology of the Google Maps API, Google formats at the server the optimal route into a non-proprietary, natural language description." (Doc. No. 95-1 ¶ 30.) "The description prepared by use of the Google Maps API is non-proprietary at least because the description is formatted using standardized messages based on a published API (which is available at least through Google's website as shown and described herein)." (Id.) InfoGation then provides several examples to support these allegations, such as: "On information and belief, the DirectionsResult object and the components therefor are capable of being used with mapping databases provided by other manufacturers such that a device that receives the DirectionsResult object would be able to reconstruct the route using a mapping database provided by other manufacturers." (Id. ¶ 31; see also, e.g., id. ¶ 32 ("All of these fields are capable of being used with mapping databases provided by other manufacturers.").)

These allegations are sufficient to allege that the accused products satisfy the "non-proprietary" claim limitation. Google argues that these allegations are insufficient because the proposed second amended complaint does not allege anywhere that there exists a

mapping database of a third-party manufacturer that is capable of using routes formatted according to Google's Directions API. (Doc No. 96 at 7, 17-19.) This argument fails however because in its claim construction briefing, Google asserted: "the word 'can' in Google's construction means only that the 'non-proprietary' format is capable of being used by other manufacturers. Nothing in the construction actually requires identifying 'other manufacturers' to satisfy the claim language." (Doc. No. 59 at 5 (citation omitted); see also Doc. No. 85 at 14 n.4.) If nothing in the Court's construction of the claim term "non-proprietary" requires identifying "other manufacturers" to satisfy the claim language, then the proposed second amended complaint need not identify a specific third-party database to adequately allege infringement. Thus, Google's argument fails.

Google also argues that InfoGation's allegations are insufficient because InfoGation does not allege that the route format as a whole – meaning every one of the route's data fields, both individually and as an ordered combination – can be used with a third-party mapping database. (Doc. No. 96 at 16-17.) In response, InfoGation contends that by presenting this argument, Google is introducing a new claim construction argument at this stage in the proceedings. (Doc. No. 97 at 7.) Google fails to adequately explain how its contention that the entire route format as a whole, both individually and as an ordered combination, must be capable of being used with a third-party mapping database is supported by the Court's claim construction for the term "non-proprietary." As such, the Court also rejects this argument.

Finally, Google also asserts that its Directions API Policies categorically preclude using Directions API with any non-Google maps database. (Doc. No. 96 at 6, 17.) But this is of no consequence. The Court's claim construction for the term "non-proprietary" only requires that it be a format that "can be used" with mapping databases from other manufacturers. (Doc. No. 85 at 14.) The Court's construction only requires that the route be capable of being used with third-party mapping databases. Whether Google legally permits such capabilities under its policies is irrelevant. In sum, the Court also rejects Google's futility argument based on the "non-proprietary" claim limitation.

C. The Other Johnson Factors

The other Johnson factors favor granting InfoGation leave to file its proposed second amended complaint. See Johnson, 356 F.3d at 1077. There is no evidence of bad faith by InfoGation. InfoGation seeks to amend its complaint to conform its infringement allegations to the Court's claim construction order.[2] (Doc. No. 95-2 at 6.) Further, InfoGation has only previously amended its complaint once, and there is no prejudice to Google. In addition, there is no undue delay because InfoGation filed the present motion for leave to amend prior to: (1) Google filing an answer; (2) any fact discovery occurring; and (3) this Court issuing a scheduling order in the action. As such, the Court grants InfoGation leave to file a second amended complaint.

II. Defendant's Rule 12(b)(6) Motion to Dismiss

Google moves to dismiss InfoGation's first amended complaint for failure to state a claim pursuant to Federal Rule of Civil Procedure 12(b)(6). (Doc. No. 32.) "It is well-established in [the Ninth C]ircuit that an 'amended complaint supersedes the original, the latter being treated thereafter as non-existent.'" Ramirez v. Cty. of San Bernardino, 806 F.3d 1002, 1008 (9th Cir. 2015). As such, because the Court has granted InfoGation leave to file its proposed second amended complaint, the Court denies Google's motion to dismiss the first amended complaint as moot. See id. ("[T]he Plaintiff's Second Amended Complaint superseded the First Amended Complaint, and the First Amended Complaint ceased to exist. Because the Defendants' motion to dismiss targeted the Plaintiff's First Amended Complaint, which was no longer in effect, we conclude that the motion to dismiss should have been deemed moot . . . ." (citations omitted)).

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[2] Google asserts that InfoGation is acting in bad faith because InfoGation purportedly asserted that joint infringement was not at issue in this case. (Doc. No. 96 at 5, 20 (citing Doc. No. 37 at 7).) This contention is not supported by the record. In the cited brief at issue, InfoGation stated that joint infringement might be at issue depending on the Court's claim constructions. (See Doc. No. 37 at 7-8.) Because InfoGation seeks leave to amend its complaint in light of the Court's recent claim construction order, (Doc. No. 95-2 at 5), InfoGation's current proposed second amended complaint is consistent with its prior statements regarding joint infringement.

Conclusion

For the reasons above, the Court grants Plaintiff InfoGation's motion for leave to file a second amended complaint, and the Court denies Defendant Google's motion to dismiss the first amended complaint as moot. Plaintiff InfoGation must file the proposed second amended complaint within **fourteen (14) days** from the date this order is filed.

IT IS SO ORDERED.

DATED: September 21, 2021

MARILYN L. HUFF, District Judge
UNITED STATES DISTRICT COURT