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I. INTRODUCTION

Google respectfully requests that this Court deny Eolas' Motion for Leave to Supplement its P.R. 3-1 Infringement Contentions with Respect to Google Music and Google+ ("Motion to Supplement") because Google will be severely prejudiced if Eolas is allowed to amend its Infringement Contentions to add new products at this critically late stage of litigation, particularly given the vague and conclusory nature of the proposed amendments. Eolas' original Infringement Contentions, served on Google more than sixteen months ago, accused no less than "eighteen categories of Google products" of infringement. Motion to Supplement (Dkt. 815), at 2. Eolas subsequently served second and third sets of supplemental Infringement Contentions on Google, bringing the total number of accused products to twenty-six.

Now, a week before the close of discovery and two months before trial, Eolas wants to supplement its Infringement Contentions for a *fourth* time to include two additional products: Google Music and Google+.

Eolas presents no *compelling evidence* that the newly released Google Music and Google+ are infringing, nor has Eolas demonstrated why its proposed amendments are sufficiently important to warrant the addition of new products at this late juncture. Eolas' proposed contentions contain vague allegations that merely mimic the claim language and fail to put Google on notice as to the actual functionality accused. Moreover, the prejudice to Google would be significant, as Google would need to develop new defenses, prepare new witnesses, and expend additional resources at these final stages of an already complex and costly litigation. The harm to Google greatly outweighs any purported importance of these amendments, particularly as the new products are in very limited circulation and represent negligible increases in potential damages. Finally, a continuance cannot cure any prejudice to Google because it is

apparent that Eolas will simply use each new product release by Google between now and the eve of trial as an attempt to “litigate by ambush” and supplement its Infringement Contentions yet again.

II. FACTS

On March 5, 2010, as required by Local Patent Rule 3-1, Eolas served its Disclosure of Asserted Claims and Infringement Contentions (“Infringement Contentions”) on Google accusing “eighteen categories of Google products” of infringement. Motion to Supplement at 2. On June 24, 2010, Eolas served on Google its first Supplemental P.R. 3-1 and 3-2 Infringement Contentions for Episodic.com, a product not previously accused of infringement. On September 28, 2010, Eolas moved the Court for leave to serve its second supplemental Infringement Contentions to add Google Instant. Google did not oppose Eolas’ motion. (Dkt. 426).

On April 18, 2011, Eolas moved the Court again for leave to serve its third supplemental Infringement Contentions. *See* Eolas’ Motion for Leave to Supplement its Infringement Contentions for Android 3.0 (Dkt. 634), *denied as moot* (Dkt. 743). Although Eolas’ motion suggested that it merely sought to add Android 3.0 to the list of accused products, in fact the amended contentions significantly modified Eolas’ infringement theories with respect to Android and accused the YouTube app, which was available at the time of Eolas’ original Infringement Contentions. *See* Google’s Opposition to Eolas’ Motion for Leave to Supplement its Infringement Contentions for Android 3.0 (Dkt. 647), at 1. At the hearing, when Eolas withdrew this belatedly disclosed infringement theory, Google stipulated that Android 3.0 could be added to the list of accused products.

On May 10, 2011, Google announced the limited release of Google Music by Google (“Google Music”). Google Music allows users to upload their own music for streaming purposes for free. It is currently in beta testing, hence the official name “Music *Beta*,” and is available to by invitation only. *See* Ex. A.

Google launched Google+ on June 28, 2011 as a social networking service that integrates a number of Google services, allowing users to share contacts, photos, videos, and search topics. It is currently in “limited field trial” testing with a “small number of people.” *See* Ex. B.

Following the limited releases of Google Music and Google+, Eolas indicated to Google that it wants to supplement its Infringement Contentions with respect to those products. Google reiterated to Eolas both via correspondence and at the Local Rule CV-7 meet and confer that adding additional products at this late stage in the case would be highly prejudicial to Google, particularly in view of the extensive discovery requests from Eolas to which Google has responded to, which did not include requests related to these additional products. Motion to Supplement, Ex. 11 (e-mail from Mr. Story to Mr. Mierzejewski (July 29, 2011)).

On August 2, 2011, Eolas filed the present motion to supplement its Infringement Contentions, for the fourth time, to add the additional Google Music and Google+ products. Discovery is scheduled to close on August 12, 2011 (Dkt. 670), dispositive motions are due on August 15, 2011 (Dkt. 816), rebuttal expert reports are due on August 17, 2011 (Dkt. 773), and trial is scheduled for October 11, 2011 (Dkt. 249).

III. DISCUSSION

“The purpose of Local Patent Rules is to ‘further the goal of full, timely discovery and provide all parties with adequate notice and information with which to litigate their cases, not to create supposed loopholes through which parties may practice litigation by ambush.’” *Davis-Lynch, Inc. v. Weatherford Int’l, Inc.*, No. 6:07-CV-559, 2009 WL 81874, *3-4 (E.D. Tex. April 24, 2009) (attached as Exhibit C).

“Patent Rule 3-7 incorporates Rule 16(b)’s good cause standard by stating ‘amendment or modification of the Preliminary or Final Infringement Contentions . . . may be made only by order of the Court, which shall be entered only upon a showing of good cause.’” *STMicroelectronics, Inc. v. Motorola, Inc.*, 307 F. Supp. 2d 845, 849 (E.D. Tex. 2004) (quoting P.R. 3-7). The Court has broad discretion to allow scheduling order modifications and considers four factors to determine if modification is appropriate: (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 the thing that would be excluded, and (4) the availability of a continuance to cure such prejudice. *S & W Enters., L.L.C. v. Southtrust Bank of Ala., NA*, 315 F.3d 533, 535-36 (5th Cir. 2003).

A. **Eolas Has Not Presented Compelling Evidence That The New Products Are Infringing And Should Be Added At This Late Stage of Litigation**

The law is clear that significant justification is required to add new products late in an infringement litigation. For example, in a case where this Court denied plaintiff’s motion to amend its Infringement Contentions to add two new products one month before trial, the Court noted that “there should be at least some *solid justification* for allowing new products into the litigation this close to trial.” *Power-One, Inc. v. Artesyn Technologies, Inc.*, No. 2:05-CV-463,

2007 WL 2986671, *10 (E.D. Tex, Oct. 11, 2007) (denying Power-One’s motion to amend its Infringement Contentions where “Power-One has not presented enough *compelling evidence* that these products are infringing and should be included in the present litigation.”) (emphasis added) (attached as Exhibit D).

Eolas has not presented enough *compelling evidence* that these newly released products are infringing and should be added at this late stage of litigation. *See id.* Eolas’ Motion to Supplement simply alleges that the two products “utilize Eolas’ patented technologies in materially the same way as Google’s other accused products” and that both products allow users to “play, pause, and adjust volume controls . . . interactively through the browser.” Motion to Supplement at 7.

Moreover, Eolas’ proposed contentions contain vague allegations that merely mimic the claim language and fail to put Google on notice as to the actual functionality accused. For example, independent claim 36 of ‘985 patent requires “identifying an embed text format which corresponds to a first location in the document, where the embed text format specifies the location of at least an object.” Eolas’ proposed contentions merely allege, in a conclusory fashion, that Google Music infringes this claim because “Google’s servers format the communications so that the browser on the client workstation *identifies an embed text format which corresponds to a first location in the document, where the embed text format specifies the location of at least portion of an object.*” Motion to Supplement, Ex. 12, at 17 (claim language italicized). Eolas’ proposed contentions then cites to a block of code spanning six *pages* without any explanation as to which, or how, any portion of the cited block contains the alleged “embed text format” that “corresponds to a first location in the document” and “specifies the location of

at least an object.”¹ Indeed, Eolas does not even identify how the six pages of code relate to any functionality of Google Music. See *EON Corp. IP Holdings, LLC v. Sensus USA Inc.*, No. 6:09-cv-116, 2010 WL 346218 at *3 (E.D. Tex. January 21, 2010) (“Simply block quoting references, however, does not necessarily advise a defendant of where a plaintiff believes asserted elements are found in an instrumentality. Similarly, although citing documents has a role and may further notice, it does not, in and of itself, fulfill the notice function. [A patentee] must put forward its position as to where it believes particular limitations are met by the accused instrumentalities”) (attached as Exhibit E).

Eolas’ attempt to add new products supported only by vague, conclusory Infringement Contentions two months before trial is not sufficiently compelling to warrant a supplementation at this late stage of litigation, and, even if Eolas had been diligent, would be significantly outweighed by the other factors discussed below.

B. Eolas Has Not Demonstrated That The Newly Accused Products Are Important To Its Case

Eolas has not demonstrated that the two accused products, which are currently under very limited beta and trial releases, are crucial to its infringement case that already encompasses twenty accused Google products. Eolas offers no discussion on the *importance* of the proposed amendment other than the broad allegations that these new products “utilize Eolas’ patented technologies” and that the alternative would require Eolas to initiate duplicative litigation.

Eolas’ purported justifications for the importance of Google Music and Google+ are insufficient under relevant case law. In *Davis-Lynch, Inc. v. Weatherford Int’l, Inc.*, this Court

¹ Compare Motion to Supplement, Ex. 12, at 19-25 (accusing 6 pages of scripts as the “embed text format”) with ‘985 Patent, Col. 12, Table II (describing “embed text format” as 6 lines of a HTML tag).

denied plaintiff's motion to amend its Infringement Contentions to add new products seven months before dispositive motions were due, despite plaintiff's insistence that the additional products were "important because they make up seventy-five percent of [defendant's] sales." 2009 WL 81874 at *4. Here, the increase in potential damages is comparatively miniscule, given that the two products are recently released, offered for free, have not generated advertising revenue, and are being made available to only a limited few. Indeed, Eolas acknowledges that only "minimal additional discovery related to damages" are needed. Motion to Supplement at 7.

Moreover, exclusion of these additional products will not result in dismissal of Eolas' case in its entirety—far from it. This case will still proceed against the twenty-six Google products currently accused of infringement.² *See id.* (noting that exclusion of additional products will not result in dismissal of plaintiff's case and the case will still proceed against the products already accused); *see also Computer Acceleration Corp. v. Microsoft Corp.*, 503 F.Supp.2d 819, 825 (E.D. Tex., 2007) (excluding products from a case is not the same as granting a default judgment against a Plaintiff).

C. **Google Will Be Severely Prejudiced If Eolas Is Allowed To Amend Its Infringement Contentions Two Months Before Trial**

Google will be severely prejudiced if Eolas is allowed to add new products to the case at this critical stage of litigation and derail Google's trial preparation. In *Power-One*, this Court found prejudice to defendants where plaintiff sought to add new products one month before trial. 2007 WL 2986671, *10. Similarly, in *Davis-Lynch*, this Court found that prejudice to defendant

² The twenty-six accused products include: en.blog.orkut.com, picasa.google.com, www.episodic.com, DoubleClick.com, services.google.com, Finance.Google.com, www.google.com/phone, Video.Google.com, google.com/latitude, google.com/googlevoice, sketchup.google.com, news.google.com, Google AdSense, Google Documents, Google Gmail, Google Instant, Google Search Suggest, Google Search functionality, Google Maps, Google Maps Web Service, iGoogle, Android Operating System, Google Chrome, www.youtube.com, YouTube Search Suggest, and YouTube HTML5.

would be “significant” “in light of the looming deadlines” where plaintiff sought to add new accused products into the case seven months before dispositive motions were due. 2009 WL 81874, *5.

Allowing Eolas to amend its Infringement Contentions to include two additional products a week before the end of discovery and two months before trial would be unduly burdensome and disruptive to Google’s trial preparation. Google would need to develop new defenses in response to Eolas’ new Infringement Contentions, prepare new witnesses knowledgeable on the two products, and expend additional resources in an already complex and costly litigation. This would be rendered all the more difficult because Eolas’ proposed contentions merely restate the claim language, lack adequate evidentiary support, and fail to provide notice to Google with respect to the specific functionality being accused. *See* discussion, *supra*, at 6-7. With discovery ending in two days, dispositive motions due in five days, rebuttal expert reports due in a week, and trial in two months, the prejudice to Google would be “significant,” particularly “in light of the looming deadlines.”³ *Id.*

D. **A Continuance Would Not Cure The Prejudice To Google Given Eolas’ Apparent Attempt To Accuse Every New Product Released By Google**

Eolas’ latest tactics also demonstrate why a continuance cannot cure any prejudice to Google. Google is constantly working to introduce new innovative products to Internet users. Indeed, Google Music and Google+ represent the latest ventures by Google to help make the Internet more accessible to users, for free. Eolas should not be allowed to use every new release by Google as an attempt to “litigate by ambush” and supplement its Infringement Contentions

³ Even had Eolas filed this motion earlier, Google would still have been faced with the then-looming deadlines at the time.

because it misleadingly contends that its patents are used by all modern Internet technology.⁴ Google's ability to adequately prepare its case for trial will be seriously hampered because it may be forced, at any moment, to respond to new Infringement Contentions, divert its resources and expend costs in preparing new defenses. A continuance would create only additional prejudice to Google, both in its ability to defend this case and in the cost required to do so.

IV. CONCLUSION

For the foregoing reasons, Google respectfully requests that this Court deny Eolas' Motion for Leave to Supplement its P.R. 3-1 Infringement Contentions with Respect to Google Music and Google+.

⁴ Indeed, as evident from Eolas' allegation that Google failed to identify these products or include them in its productions "despite what must have been months if not years of planning and development," Eolas unreasonably expects Google to disclose and produce information on any and all products being planned or developed, even before they're released, and even though no analogous product has been accused of infringement. *See* Motion to Supplement, at 5.

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Respectfully Submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that all counsel of record who are deemed to have consented to electronic service are being served with a copy of this document via the Court's CM/ECF system per Local Rule CV-5(a)(3) on August 11, 2011. Any other counsel of record will be served by First Class U.S. mail on this same date.

/s/ Michael E. Jones _____