

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION**

CEATS, INC.

Plaintiff,

vs.

**CONTINENTAL AIRLINES, INC., ET
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Defendants.

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**CASE NO. 6:10 CV 120
PATENT CASE**

MEMORANDUM OPINION AND ORDER

Before the Court is Defendant's Motion for Leave to Supplement Invalidity Contentions (Docket No. 521). The Court held a hearing on the Motion on Thursday, July 14, 2011. Having considered the parties' written submissions and arguments, the Court **GRANTS** the motion.

BACKGROUND

On April 6, 2010, CEATS Inc. sued multiple Defendants alleging infringement of several U.S. patents concerning a method of selecting tickets in an online reservation system pertaining to airlines, sports, arts and entertainment.¹ U.S. Airways was added as a Defendant six months later in the second amended complaint filed on October, 5, 2010. The other Defendants timely served

¹ As of the date of filing this Motion, the Defendants include: Continental Airlines, Inc.; Granada Theater; Live Nation Worldwide, Inc.; Ticketmaster, L.L.C.; Tickets.com, Inc.; Ticket Software, L.L.C.; Ticketnetwork, Inc.; Ticketsnow.com, Inc.; TNOW Entertainment Group, Inc.; Airtran Airways, Inc.; Alaska Airlines, Inc.; Horizon Air Industries, Inc., d/b/a Horizon Air; All Nippon Airways Co., Ltd.; Brendan Airways, L.L.C.; Caribbean Airlines Limited; Concur Technologies, Inc.; Delta Air Lines, Inc.; JetBlue Airways Corporation; Malaysia Airline System Berhad; The Royal Jordanian, PLC; United Air Lines, Inc.; Frontier Airlines, Inc.; Virgin America Inc., and US Airways, Inc. (collectively "Defendants").

The patents-in-suit include: U.S. Patent No. 7,454,361 ("the '361 patent"); U.S. Patent No. 7,548,866; U.S. Patent No. 7,548,869; U.S. Patent No. 7,548,870; U.S. Patent No. 7,660,728; U.S. Patent No. 7,660,729; and U.S. Patent No. 7,664,663.

their invalidity contentions on December 14, 2010. Because U.S. Airways was added to the case after the other Defendants, U.S. Airways served its invalidity contentions on January 28, 2011. In the original invalidity contentions, the other Defendants included the Expedia System as prior art under 35 U.S.C. § 103. In its later-served contentions, U.S. Airways identified the Expedia system as prior art under 35 U.S.C. § 102. The other Defendants now seek to amend their invalidity contentions to identify the Expedia System as a § 102 reference and include pin-point citations to the source code supporting certain previously charted prior art references.² Pursuant to the Court's Local Patent Rules, Defendants agreed to a Docket Control Order setting a deadline for serving invalidity contentions. Because that deadline has passed, Defendants' amendment of their invalidity contentions will require the Court to modify its Docket Control Order. The *Markman* hearing was held on July 14, 2011. Fact discovery does not close until October 26, 2011. This case is set for trial in March 2012.

APPLICABLE LAW

Federal Rule of Civil Procedure 16(b) allows a party to modify the Court's Docket Control Order upon a showing of good cause. FED. R. CIV. P. 16. The good cause standard requires the party seeking relief to show that, despite its exercise of diligence, it cannot reasonably meet the scheduling deadlines. *S & W Enters., L.L.C. v. Southtrust Bank of Alabama*, 315 F.3d 533, 535 (5th Cir. 2003). 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

² CEATS argues that the other Defendants incorrectly assume that the later deadline for U.S. Airways automatically applies to them as well. Defendants' notion that their original invalidity contentions are preliminary and freely subject to multiple revisions is contrary to the Court's Local Rules. To be clear, on October 27, 2006, the District amended the Local Patent Rules to state that a party's original Invalidity Contentions are deemed to be its final contentions, except as set forth in P.R. 3-6. The amended Patent Rules are available on the District's website.

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. *Id.* at 536.

ANALYSIS

Defendants seek to amend their invalidity contentions to add: (1) a mouse-over functionality to the previously charted Expedia Seat PinPointer System (“the Expedia System”) prior art reference; and (2) pin-point citations to source code supporting previously charted references in Defendants’ invalidity contentions.³

Explanation for Failure to Meet the Deadline

Defendants contend that they were diligent in their search for prior art and discovered additional details about the Expedia System only after the deadline for the original invalidity contentions had passed. In this regard, Defendants contend that they issued two subpoenas to Expedia and that it took time and effort to locate the documents, which were created more than twelve years ago. With respect to the pin-point citations to the source code, Defendants argue that CEATS agreed at the outset of discovery that the confidential source code would not be produced until an agreed upon protective order had been entered.

CEATS counters that Defendants were not diligent in preparing their invalidity contentions. With respect to the Expedia System, CEATS contends that any delay in obtaining information from Expedia has been entirely in Defendants’ control. CEATS asserts that Defendants did not subpoena Expedia until November 12, 2010 (close to a month before the deadline) and reissued the subpoena on December 14, 2010 (the deadline date). As to the pin-point citations to the source code, CEATS

³ CEATS counters that the changes are not limited to just the two items listed above but constitute a “fundamental rewrite” of the invalidity contentions including a “wholesale shifting” of theories. As stated during oral argument, the Court will allow CEATS to file a motion to strike as to any other changes to the invalidity contentions within ten days from the date of the hearing on this motion.

admits to allowing Defendants to delay producing source code until the Protective Order was entered.

Defendants have properly explained why they could not meet the deadline in providing additional information on the Expedia System. Although the Court has high expectations for the parties as they prepare their infringement or invalidity contentions, those expectations are not unrealistic. *See Orion IP, LLC v. Staples, Inc.*, 407 F. Supp. 2d 815, 817 (E.D. Tex. 2006) (Davis, J.). Specifically, in software cases, this Court recognizes practical limitations on including detailed information when the parties do not have the necessary access to non-public software. *Id.*; *Am. Video Graphics, L.P. v. Elec. Arts, Inc.*, 359 F. Supp. 2d 558, 560 (E.D. Tex. 2005) (Davis, J.). Here, CEATS does not dispute that the technical details necessary to establish whether the Expedia System included the mouse-over functionality was non-public information. Defendants needed to uncover evidence through the discovery process to show that the Expedia System used mouse-over functionality. Expedia did not produce the relevant documents establishing such a functionality until February 2, 2011. Even though, as CEATS alleges, Defendants could have subpoenaed Expedia earlier and obtained the information before the deadline, there is no evidence of unreasonable delay or gamesmanship by Defendants to gain a strategic advantage or otherwise prejudice CEATS. Moreover, as discussed below, CEATS has not shown any prejudice from the delay. *See MacLean-Fogg Co. v. Eaton Corp.*, No. 2:07-cv-472, 2008 U.S. Dist. LEXIS 78301 at *7 (E.D. Tex. Oct. 6, 2008) (Davis, J.) (granting motion for leave to amend even though movant could have been more diligent because delay did not result from inadvertence or gamesmanship, and additionally, the opposing party did not show any actual prejudice from the delay); *see also Mass Engineered Design, Inc. v. Ergotron, Inc.*, No. 2:06-cv-272, 2008 U.S. Dist. LEXIS 42596 at *10-14 (E.D. Tex. May 30, 2008) (Davis, J.) (denying motion for leave to amend in part by rejecting

movant's explanation for failure to meet the deadline because of gamesmanship). Thus, the first factor supports granting the motion.

Importance of What Would be Excluded

Defendants contend that the mouse-over functionality of the Expedia System is important because it discloses the exact functionality claimed by CEATS as novel and thus anticipates the '361 patent, to which each of the other patents-in-suit claim priority. CEATS counters that the importance is overstated because the Expedia System will still be available to Defendants as an obviousness reference in addition to "an overflowing arsenal of alleged prior art" and other invalidity theories.

Defendants have demonstrated the importance of providing additional detail concerning the Expedia System as a means to prove invalidity. CEATS's arguments do not address why this additional information is unimportant. The importance of the source code citations is undisputed. Thus, the second factor weighs in favor of granting the motion.

Potential Prejudice if the Court Allows the Thing That Would be Excluded

Defendants contend that CEATS will not be prejudiced because CEATS was well aware of the Expedia System as an anticipatory reference through U.S. Airways' invalidity contentions. Defendants also argue that the additional information concerning the Expedia System was conveyed to CEATS promptly and before the dates for the exchange of preliminary claim terms to be construed, the serving of proposed claim constructions, the *Markman* hearing, and the close of fact discovery. CEATS counters by simply stating that it is prejudiced because it followed the Court's Local Patent Rules but the Defendants did not.

CEATS will not incur any prejudice if leave is granted. First, CEATS was aware of the Expedia System as prior art under 35 U.S.C. § 102 through U.S. Airways' invalidity contentions. Second, by its own admission, CEATS agreed to allow Defendants to delay producing source code

until an appropriate protective order was in place. Finally, and importantly, CEATS has had enough time to prepare for any new claim construction issues before the *Markman* hearing and continues to have ample time to complete any additional necessary discovery, modify its theories of infringement or shift its trial strategy based on the amendments. Thus, the third factor supports granting leave.

Availability of a Continuance to Cure Such Prejudice

Defendants contend that CEATS has not articulated any prejudice it would likely suffer. As stated earlier, CEATS has not made persuasive arguments regarding any prejudice from the amendments. Moreover, both parties agree a continuance is unnecessary. Therefore, because there is no prejudice, there is no need for a continuance.

Weighing the Factors

Defendants have explained why they could not amend their invalidity contentions before the deadline and have shown the importance of the amendment. The prejudice to CEATS is minimal. Defendants are not adding any new prior art references but instead only seeking to modify the theory concerning the Expedia System that conforms to the earlier-filed U.S. Airways' contentions already present in the case. Thus, CEATS has been on notice of the invalidity theory regarding the Expedia System that Defendants now seek to include in their supplemental contentions. Defendants have shown good cause, and the Court **GRANTS** the motion to amend the invalidity contentions.

CONCLUSION

Accordingly, Defendants' Motion to Supplement Invalidity Contentions is **GRANTED**. Within ten days of the date of hearing on this Motion, CEATS may file a motion to strike Defendants' amended invalidity contentions if CEATS has any specific objections to the other miscellaneous changes to the invalidity contentions.

So ORDERED and SIGNED this 5th day of August, 2011.

A handwritten signature in black ink, appearing to read 'Leonard Davis', written over a horizontal line.

LEONARD DAVIS
UNITED STATES DISTRICT JUDGE