

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
WICHITA FALLS DIVISION**

SUMMIT 6 LLC,

Plaintiff,

v.

**HTC CORPORATION,
HTC AMERICA, INC.,
LG ELECTRONICS, INC.,
LG ELECTRONICS USA, INC.,
LG ELECTRONICS MOBILECOMM
USA, INC.,
MOTOROLA MOBILITY LLC, and
TWITTER INC.,**

Defendants.

Civil Action No. 7:14-cv-00014-O

SUMMIT 6 LLC,

Plaintiff,

v.

APPLE INC.

Defendant.

Civil Action No. 7:14-cv-00106-O

ORDER

Before the Court are Summit 6’s Partially Opposed Motion to Amend Summit 6’s Preliminary Infringement Contentions and Brief and Appendix in Support (ECF No. 154–56), filed October 21, 2014; HTC’s Response Brief and Appendix in Support (ECF No. 163–64), filed October 29, 2014; Summit 6’s Reply Brief and Appendix in Support (ECF No. 169–70), filed November 3, 2014; and Motorola’s Opposition Brief and Appendix in Support (ECF No. 177–78), filed November

12, 2014.¹

Also before the Court are Summit 6's Partially Opposed Motion to Amend Summit 6's Preliminary Infringement Contentions Against LGE and Brief and Appendix in Support (ECF No. 158, 160–161), filed October 28, 2014; LGE's Response Brief and Appendix in Support (ECF No. 171–72), filed November 5, 2014; and Summit 6's Reply Brief and Appendix in Support (ECF No. 174–75), filed November 10, 2014.

Also before the Court is HTC's Emergency Motion for Leave to Take Expedited Discovery and Stay Summit 6's Motion to Amend Infringement Contentions and Brief in Support (ECF No. 166–67), filed November 1, 2014. On November 1, 2014, the Court issued an Order deferring ruling and ordering expedited briefing. *See* Electronic Order, Nov. 1, 2014, ECF No. 168. Pursuant to that Order, Summit 6 filed a Response Brief (ECF No. 173), on November 7, 2014; and HTC filed a Reply Brief and Appendix in Support (ECF No. 179–80), on November 12, 2014.

Having considered the motions, related briefing, and applicable law, the Court **DENIES** HTC's Emergency Motion, and the Court **GRANTS in part** and **DENIES in part** Summit 6's Motions to Amend its Preliminary Infringement Contentions.

I. BACKGROUND

On February 18, 2014, Summit 6 LCC ("Summit 6") filed this patent infringement lawsuit

¹ On October 21, 2014, Summit 6 filed an opposed Motion to Compel Motorola to Identify Phone Models with the Accused Functionality in Response to Summit 6's Common Interrogatory No. 1 and to Amend Summit 6's Preliminary Infringement Contentions to Incorporate Phone Model Numbers (ECF No. 151). HTC has since provided Summit 6 with a full listing of the requested phone models, mooted the motion to compel. *See* Pl.'s Mem. Supp. Partially Opposed Mot. Am. Infringement Contentions 2, ECF No. 155. Summit 6 also has filed an amended motion to amend its preliminary infringement contentions (ECF No. 154). Thus, Summit 6's motion to compel and original motion to amend the preliminary infringement contentions, both contained in ECF No. 151, must be **DENIED as moot**.

alleging infringement against application developer Twitter, Inc. (“Twitter”) and four mobile device manufacturers and their affiliates, namely, Apple Inc. (“Apple”), HTC Corporation and HTC America, Inc. (collectively, “HTC”), LG Electronics, Inc., LG Electronics USA, Inc., and LG Electronics MobileComm USA, Inc. (collectively, “LGE”), and Motorola Mobility LLC (“Motorola”). The gravamen of Summit 6’s lawsuit is that Defendants are using Summit 6’s patented technology without permission to produce and sell devices and/or operate online services capable of obtaining digital content, pre-processing it, and transmitting it to another device, server, or location. *See generally* Am. Compl., ECF No. 6.

Summit 6 now moves to amend its preliminary infringement contentions to accuse newly released and historic products that allegedly infringe its patents. *See* Pl.’s Mot. Amend Re HTC, ECF No. 154; Pl.’s Mot. Amend Re LGE, ECF No. 158. Defendants do not oppose the addition of newly released products, but do oppose the addition of historic products. *See* Def. HTC’s Resp., ECF No. 163; Def. LGE’s Resp., ECF No. 171; Def. Motorola’s Opp’n, ECF No. 177. HTC filed an emergency motion for discovery and a stay of the ruling on Summit 6’s motion. *See* Def. HTC’s Emergency Mot., ECF No. 166. The Court ordered expedited briefing on HTC’s motion, postponing its ruling. *See* Electronic Order, Nov. 1, 2014, ECF No. 168. The issues having been briefed, the motions are ripe for adjudication.

II. LEGAL STANDARD

A. Amending Preliminary Infringement Contentions

This Court follows the Northern District of Texas’s Local Patent Rules, adopted in Amended Miscellaneous Order No. 62 (“Local Patent Rules”). The goal of local patent rules is to aid in efficiently managing the various stages of patent litigation. *See Finisar Corp. v. DirecTV Grp., Inc.*,

424 F. Supp. 2d 896, 899 (E.D. Tex. 2006); *O2 Micro Int'l Ltd. v. Monolithic Power Sys., Inc.*, 467 F.3d 1355, 1364 (Fed. Cir. 2006). Under the Local Patent Rules, the party alleging infringement is required to submit preliminary infringement contentions early in the litigation. The purpose of this step is to streamline the discovery process by narrowing the issues for claim construction and trial. *H-W Tech., L.C. v. Apple, Inc.*, No. 3:11-CV-651-G, 2012 WL 3650597, at *2 (N.D. Tex. Aug. 2, 2012), *adopted sub nom. H-W Tech., L.C. v. Amazon.com, Inc.*, No. 3:11-CV-0651-G BH, 2012 WL 3656293 (N.D. Tex. Aug. 27, 2012) (Fish, J.).

Infringement contentions may be amended only upon a showing of good cause. Local Patent Rule 3–7. Under Local Patent Rule 3–7, “good cause” includes amendments based upon “newly discovered accused instrumentalities, newly discovered bases for claiming infringement, or newly discovered prior art references.” The Rule further specifies that the party seeking amendment “must include in its motion to amend a statement that the newly discovered accused instrumentalities, newly discovered bases for claiming infringement, or newly discovered prior art references were not known to that party prior to the motion despite diligence in seeking out same.” *Id.*

To determine whether good cause for amendment to the contentions exists, the Court will consider the following four factors: “(1) the reason for the delay and whether the party has been diligent; (2) the importance of what the court is excluding and the availability of lesser sanctions; (3) the danger of unfair prejudice; and (4) the availability of a continuance and the potential impact of a delay on judicial proceedings.” *H-W Tech.*, 2012 WL 3650597, at *6 (quoting *Davis-Lynch, Inc. v. Weatherford Int'l, Inc.*, No. 6:07-CV-559, 2009 WL 81874, at *3 (E.D. Tex. Jan.12, 2009)). “The district judges in the Northern District of California,” which is the district that pioneered the implementation of local patent rules, “have understood the good cause requirement in the local

patent rules to require a showing that the party seeking leave to amend acted with diligence in promptly moving to amend when new evidence is revealed in discovery.” *O2 Micro*, 467 F.3d at 1363; *see also Finisar Corp.*, 424 F. Supp. 2d at 897 n.1 (finding Northern District of California interpretations of local patent rules persuasive authority for interpreting Eastern District of Texas local patent rules). The Court here will look to cases originating in the Eastern District of Texas and the Northern District of California as persuasive authority.

B. Seeking Discovery of Attorney Work-Product

“Federal Circuit law applies when deciding whether particular written or other materials are discoverable in a patent case, if those materials relate to an issue of substantive patent law.” *In re EchoStar Commc’ns Corp.*, 448 F.3d 1294, 1298 (Fed. Cir. 2006) (quoting *Advanced Cardiovascular Sys. v. Medtronic, Inc.*, 265 F.3d 1294, 1307 (Fed. Cir. 2001)).

Under Federal Rule of Civil Procedure 26(b)(1), a party generally “may obtain discovery of any matter that (1) is ‘not privileged’ and (2) ‘is relevant to the claim or defense of any party.’” *Id.* at 1300. The doctrine of privileged work-product “promotes a fair and efficient adversarial system by protecting ‘the attorney’s thought processes and legal recommendations’ from the prying eyes of his or her opponent.” *Id.* at 1301 (quoting *Genentech, Inc. v. U.S. Int’l Trade Comm’n*, 122 F.3d 1409, 1415 (Fed. Cir. 1997)). The doctrine protects tangible as well as “nontangible” work-product, “[o]therwise, attorney’s files would be protected from discovery, but attorneys themselves would have no work product objection to depositions.” *In re Seagate Tech., LLC*, 497 F.3d 1360, 1376 (Fed. Cir. 2007).

A party may discover information protected by the work-product doctrine only if the party “shows that it has substantial need for the materials to prepare its case and cannot, without undue

hardship, obtain their substantial equivalent by other means.” Fed. R. Civ. P. 26(b)(3). “This rule, however, only allows discovery of ‘factual’ or ‘non-opinion’ work product and requires a court to ‘protect against the disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative.’” *In re EchoStar*, 448 F.3d at 1302 (quoting Fed. R. Civ. P. 26(b)(3)). When the distinction between fact and opinion is unclear, “a district court should balance the policies to prevent sword-and-shield litigation tactics with the policy to protect work product.” *Id.* at 1302.

III. HTC’S EMERGENCY MOTION

On November 1, 2014, HTC moved for discovery and for the Court to issue a temporary stay before a ruling on Summit 6’s Motion to Amend. *See* Def. HTC’s Emergency Mot., ECF No. 166. In its support brief, HTC argued that discovery is necessary for the Court to resolve the question of whether Summit 6 fulfilled the requirements of Local Patent Rule 3–7. *See* Def. HTC’s Br. Supp. Emergency Mot. 1–2, ECF No. 167. HTC argues that Rule 3–7 requires Summit 6 to prove that it had no prior actual knowledge of the products that it now accuses. *Id.* HTC seeks a limited deposition and a privilege log to determine whether Summit 6 had actual knowledge of the products. *Id.* at 1 n.1. The Court first turns to the requirements of Rule 3–7.

A. Local Patent Rule 3-7

Under the Northern District of Texas’s Local Patent Rule 3–7, infringement contentions may only be amended upon a showing of good cause, which includes amendments based upon “newly discovered accused instrumentalities.” The Northern District of Texas’s Local Patent Rules are unique because they give more detail about the requirements for amending for good cause than many other local patent rules. *See Compare Rules: Amending/Final Contentions*, Local Patent Rules,

<http://www.localpatentrules.com/compare-rules/amending-final-contentions/> (last updated Mar. 2014) (listing the amendment provisions of various local patent rules). The last sentence of Rule 3–7 specifies that the party seeking amendment “must include in its motion to amend *a statement* that the newly discovered accused instrumentalities, newly discovered bases for claiming infringement, or newly discovered prior art references were not known to that party prior to the motion despite diligence in seeking out same.” Local Patent Rule 3–7 (emphasis added).

The parties disagree about the proper interpretation of the last sentence in Rule 3–7. As the rules have been only recently introduced, there have been no other district courts in the Northern District that have interpreted this sentence, and no other district’s local patent rules include a requirement that parties include such a statement. *See supra, Compare Rules*. The most similar case in the Northern District is *H-W Tech., L.C. v. Apple, Inc.*, in which the court applied the four factor test, which has become the standard test in many districts with local patent rules, to determine whether there was good cause for amending the preliminary infringement contentions. 2012 WL 3650597, at *6. The court did not discuss whether the Northern District’s requirement of a statement that the newly discovered information was not known to the party prior to the motion affects the four factor analysis. *See generally id.*

HTC urges that the statement requirement should be read as an additional hurdle requiring counsel to demonstrate a lack of knowledge about newly discovered information. *See* Def. HTC’s Reply 2, ECF No. 179. According to HTC, the rule entitles it to discovery, in the form of a limited deposition and privilege log. Def. HTC’s App. Supp. Resp. Br. 14–15, Ex. 2 (Discovery Request Email), ECF No. 167. HTC’s requested deposition would address “for example”:

- Summit 6’s knowledge (including knowledge of counsel) of the 27 “older products”

it seeks to add to the case

- Summit 6's knowledge (including knowledge of counsel) of the support sections of HTC and U.S. Carrier websites
- Summit 6's knowledge (including knowledge of counsel) of HTC products that were accused in cases where McKool Smith was adverse to HTC (e.g., *Rockstar* and *Negotiated Data*), where said knowledge was based on publicly available information
- Facts relating to Summit 6's investigation of HTC and HTC's products from 2010 – present
- Communications and documents referencing or discussing any of the 27 “older products”
- Communications and documents referencing HTC, HTC products, HTC's sales, HTC's marketing, HTC's status in the market, HTC awards and recognition for its products from 2010 - present

Id.

The Court finds that HTC's requests exceed the limits of Rule 3–7 and contort the purpose of infringement contentions. The rule requires a “statement” that a party lacks knowledge. In other words, it requires a party to certify to the Court that it had no prior knowledge. The rule does not contemplate a detailed and rigorous discovery into the mind of counsel. Nor should the Court make such an exploration of potentially privileged information the standard process for requesting an amendment. Preliminary infringement contentions are designed to be amended into final infringement contentions, for good cause upon the discovery of new information, in order to narrow the focus of claim construction and trial. *See H-W Tech.*, 2012 WL 3650597, at *2. Were discovery of the type HTC routinely available, it would disrupt the ability of parties to timely amend and likely disturb work-product privilege. *See Pl.'s Resp. Br. 5 n.1*, ECF No. 173. If a party challenges the veracity of the statement certified to the Court, it should file a Rule 11 motion. *See Fed. R. Civ. P.* 11. The Court finds that the Rule 3–7 requires merely “a statement” or a certification of lack of knowledge during the amendment process.

B. Work-Product Privilege

In the instant case, the information relevant to the four factor “good cause” analysis has already been provided by Summit 6, and thus further discovery would risk invading privilege without sufficient justification. *See In re EchoStar*, 448 F.3d at 1302 (When the distinction between fact and opinion is unclear, “a district court should balance the policies to prevent sword-and-shield litigation tactics with the policy to protect work product.”). In light of the information before the Court, HTC has not met its burden of demonstrating a substantial need for the privileged information it seeks. *See* Discovery Request Email, App. 14–15, ECF No. 167.

According to Summit 6’s brief, “Summit 6 has already provided HTC with non-privileged, underlying facts relied upon.” Pl.’s Resp. Br. 4, ECF No. 173. For instance, Summit 6 explained its investigation, stating that it “identified the two categories of publically available websites it searched, HTC’s U.S. website and major U.S. carrier websites”; “provided HTC with the link to HTC’s U.S. website and pointed to the ‘View all Smartphones’ section that lists the phones currently offered by HTC”; and “listed the phones that contained the accused functionality and were sold during the relevant time period [except Summit 6] did not list phones that it could not confirm as sold during the relevant time period by using this publically available information.” *Id.* From such information, the Court may evaluate whether Summit 6 met its burden of establishing good cause, and specifically past diligence. Therefore, the risk of exposing privileged information about “trial counsel’s strategies, opinions, and work-product for several clients that have or had cases pending against HTC” outweighs any potential benefit. Pl.’s Resp. Br. 1, ECF No. 173.

In conclusion, the Court finds that the information HTC seeks would be privileged, repetitive of information already before the Court, or otherwise not necessary for a determination of whether to allow amendment under Rule 3–7. Accordingly, HTC’s Emergency Motion for Discovery and for

a Stay is hereby **DENIED**.

IV. SUMMIT 6'S MOTION TO AMEND

The Court now turns to Summit 6's motion to amend its preliminary infringement contentions to add several historic products to the list of accused products. Under Local Patent Rule 3-7, infringement contentions may only be amended upon a showing of good cause. To determine whether good cause for amendment to the contentions exists, this Court will consider the following four factors: "(1) the reason for the delay and whether the party has been diligent; (2) the importance of what the court is excluding and the availability of lesser sanctions; (3) the danger of unfair prejudice; and (4) the availability of a continuance and the potential impact of a delay on judicial proceedings." *H-W Tech.*, 2012 WL 3650597, at *6 (quoting *Davis-Lynch*, 2009 WL 81874, at *3). Due to the fact that the Northern District of Texas has only recently adopted local patent rules, the Court considers authority from other districts incorporating similar local rules as persuasive authority for this analysis.

A. Delay and Diligence

First, "'good cause' requires a showing of diligence." *O2 Micro*, 467 F.3d at 1366. This factor mandates that, when a party discovers evidence necessitating amendment, the party must not delay in requesting an amendment to its infringement contentions unless the delay was reasonable. *See id.* "If the parties were not required to amend their contentions promptly after discovering new information, the contentions requirement would be virtually meaningless as a mechanism for shaping the conduct of discovery and trial preparation." *Id.* "The burden is on the movant to establish diligence rather than on the opposing party to establish a lack of diligence." *Id.*

Here, through discovery, Summit 6 sought information about products reasonably similar to

those accused in its preliminary infringement contentions. The “Northern District of Texas has adopted local rules for patent cases directing that ‘the scope of discovery is not limited to the preliminary infringement contentions or preliminary invalidity contentions but is governed by the Federal Rules of Civil Procedure.’” *Epicrealm Licensing, LLC v. Autoflex Leasing, Inc.*, No. 2:05-CV-163DFCMC, 2007 WL 2580969, at *3 (E.D. Tex. Aug. 27, 2007) (quoting Local Patent Rule 2–5). “[T]here is no brightline rule that discovery is permanently limited to the products specifically accused in a party’s PICs. [Such a rule would be] inconsistent with the broad discovery regime created by the Federal Rules and the notion that a party may be able to amend its PICs.” *Honeywell Int’l Inc. v. Acer Am. Corp.*, 655 F. Supp. 2d 650, 655 (E.D. Tex. 2009) (citing *O2 Micro*, 467 F.3d at 1366). A plaintiff may seek to discover products “reasonably similar” to products accused in its preliminary infringement contentions, as long as the plaintiff provides a “specific theory of infringement and that the products for which it seeks discovery operate in a manner reasonably similar to that theory” and Plaintiff demonstrates that it has “diligently sought this information.” *Id.* at 656.

Defendants argue that Summit 6 has not demonstrated appropriate diligence in seeking similar products before it issued its preliminary infringement contentions. HTC argues that Summit 6 had actual knowledge of products from prior litigation and that Summit 6 would have known about the products if it had been appropriately diligent. Def. HTC’s Reply 4, ECF No. 179. Motorola also argues that Summit 6 had actual knowledge, and, because the information about the newly accused historical products is publicly available, Summit 6 could not have conducted a diligent investigation. *See generally* Def. Motorola’s Opp’n, ECF No. 177. Similarly, LGE argues that Summit 6 made “no effort” to identify hundreds of historical LGE products, as Summit 6 only accused current LGE

products in its preliminary infringement contentions. Def. LGE's Resp. 1, ECF No. 171.

Summit 6 counters that although the company could have obtained the names of several products, the publicly available information did not afford the company enough reliable information upon which to allege infringement. *See* Pl.'s Br. Supp. Mot. Amend Re HTC 8, ECF No. 155. In addition to the names of the products, Plaintiff must know when and where it was sold and whether it performs the accused functionality. *See* Pl.'s Reply Mot. Amend Re HTC 1, ECF No. 169. For instance, in reply to HTC, Summit 6 argues that all the necessary information was not on HTC's website or the carrier websites. *Id.* at 3.

In response, Defendants demonstrate several ways all of the necessary information could have been discovered using publicly available information. *See* Def. HTC's Reply 4, ECF No. 179. For instance, the user guides of twenty of the newly accused historic HTC products are available online on HTC's website. *Id.* The websites of the four major carriers, which Summit 6 purportedly searched, identify eighteen of the newly accused HTC products along with their user guides and other product information. *See* Def. HTC's Resp. 4–5, ECF No. 163; Def. LGE's App. Supp. Resp. Br. 199–253, Ex. 10–14 (Carrier Websites), ECF No. 172. LGE argues, “[b]ased on LGE's website alone, Summit 6 could have identified three times more LGE products than it did—it could have identified over 300 LGE phones, rather than 84 LGE products identified in its current infringement contentions.” Def. LGE's Resp. 3, ECF No. 171. LGE further argues that Summit 6 “omitted at least 102 of the historical LGE products that were listed on the discontinued phones webpage of LGE's website.” *Id.* at 2. Defendants also contend that the necessary information could have been obtained by accessing third party websites, such as Wikipedia, as well as archived versions of Defendants' websites. *See id.* at 6–7; Def. LGE's App. Supp. Resp. Br. 148–198, Ex. 8–9 (Archived Websites),

ECF No. 172.

In light of the publicly available information, the Court finds that Summit 6 has not met its burden of proving diligence. “The Patent Rules demonstrate high expectations as to plaintiffs’ preparedness before bringing suit, requiring plaintiffs to disclose their preliminary infringement contentions before discovery has even begun.” *See Am. Video Graphics, L.P. v. Elec. Arts, Inc.*, 359 F. Supp. 2d 558, 560 (E.D. Tex. 2005). “Before bringing suit, plaintiffs are expected to rigorously analyze all publicly available information, and early in the case plaintiffs must explain their infringement theories in detail.” *See id.* at 528.

Summit 6’s strategy of “list[ing] the products for which it had evidence of post-July 2010 infringement in its preliminary contentions, and [seeking] the remainder of the list from HTC through discovery” was disapproved in *Keranos v. Silicon Storage. Keranos, LLC v. Silicon Storage Tech., Inc.*, No. 2:13-CV-17, 2013 WL 5763738, at *3 (E.D. Tex. Aug. 5, 2013). Pl.’s Reply Mot. Amend Re HTC 5, ECF No. 169. There, the court found that a plaintiff may not compensate for a lack of diligence through later discovery when the information was publicly available, writing:

Defendants demonstrate a number of means through which Plaintiff could have identified products incorporating the [allegedly infringing] technology. Instead of making these efforts, Plaintiff chose to list a handful of exemplar products and then demand that Defendants disclose additional products. But the burden is on Plaintiff, not Defendants, to search for and identify infringing products to the extent possible based on publically available information.

Keranos, 2013 WL 5763738, at *3. Were the necessary information not publicly available and Defendants were demanding, for example, that Plaintiff conduct expensive reverse engineering on every phone model, then Plaintiff’s strategy of requesting some missing information through discovery may be reasonable. *See id.* However, here, the Court finds that the Plaintiff has not

diligently scoured through Defendants' websites and other publicly accessible data before bringing its preliminary infringement contentions. Having decided based on publicly available information, the Court does not reach the arguments regarding information obtained through prior litigation.

After Defendants disclosed the historic products to Summit 6, in response to Summit 6's discovery requests, Plaintiff filed for leave to amend the infringement contentions to take into account the new information. The amendment was requested before the claim construction hearing and before the final infringement contentions were due. *See Coopervision, Inc. v. Ciba Vision Corp.*, 480 F. Supp. 2d 884, 890 (E.D. Tex. 2007) ("Unlike many cases in which leave to amend contentions is denied, this request was made months before the claim construction hearing and the deadlines for discovery on claim construction"). Although there is no unreasonable delay from the time the historic products were disclosed to Summit 6 and the time Summit 6 sought amendment, the lack of prior diligence weighs heavily against Summit 6.

B. Importance

Plaintiff argues that adding the products to the infringement contentions would allow the litigation to be combined into one case, rather than potentially split into separate cases for the parties to litigate. However, exclusion of these products would not result in dismissal of Plaintiff's case entirely. *See Davis-Lynch*, 2009 WL 81874, at *4 (finding this factor weighs slightly in favor of permitting amendment even though the case would not be dismissed entirely, but the finding of lack of diligence outweighed the importance factor). Thus, the importance factor weighs slightly in favor of Plaintiff, but not enough to overcome Plaintiff's lack of diligence.

C. Danger of Unfair Prejudice

Courts have a duty to avoid granting amendments which would cause unfair prejudice

through “eleventh-hour alterations.” *Computer Acceleration Corp. v. Microsoft Corp.*, 503 F. Supp. 2d 819, 824 (E.D. Tex. 2007). Because litigation is still in an early stage, there is little danger of unfair prejudice from adding the accused products. *Cf. Kruse Tech. P’ship v. Volkswagen AG*, 544 F. App’x 943, 954 (Fed. Cir. 2013) (affirming district court’s holding that party would be prejudiced by amendment because it would reopen Markman hearings).

D. Impact of Delay

Because the amendment was requested before the claim construction hearing and before the final infringement contentions were due, there will be little impact on the orderly process of the case by granting amendment. *See Coopervision*, 480 F. Supp. 2d at 890. However, the discovery period for claim construction would need to be extended. In light of the importance of maintaining the current schedule and trial date, this factor weighs slightly against amendment.

In sum, Summit 6 has not met its burden of demonstrating that it diligently searched for infringing products as required by Local Patent Rule 3–7 and the four factor “good cause” test. Although several factors weigh slightly in Plaintiff’s favor, they do not overcome the weighty diligence flaws. Therefore, Summit 6 has not demonstrated good cause for amending to include historic products.

IV. CONCLUSION

Accordingly, HTC’s Emergency Motion (ECF No. 166) is **DENIED**, and Summit 6’s Motions to Amend the Preliminary Infringement Contentions (ECF No. 154, 158) are both **GRANTED in part** and **DENIED in part**. Summit 6 may amend its preliminary infringement contentions to accuse newly released products, but may not amend its preliminary infringement contentions to accuse historic products.

It is therefore **ORDERED** that Summit 6 may amend its preliminary infringement contentions to accuse only newly released products on or before **November 28, 2014**. Discovery related to claim construction must be completed on or before **December 12, 2014**.

SO ORDERED on this **16th day** of **November, 2014**.


Reed O'Connor
UNITED STATES DISTRICT JUDGE