

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

COX COMMUNICATIONS INC., et al.,)	
)	
Plaintiffs,)	
)	
v.)	Civil Action No. 12-487-JFB
)	
SPRINT COMMUNICATIONS)	
COMPANY L.P., et al.,)	
)	
Defendants.)	

MEMORANDUM ORDER

At Wilmington, Delaware this **26th day of July, 2017.**

WHEREAS, Plaintiff Cox Communications, Inc. (“Plaintiff” or “Cox”) has moved to compel Defendant Sprint Communications Company, L.P. (“Defendant” or “Sprint”) to respond to Cox’s Interrogatory No. 22, pursuant to Federal Rules of Civil Procedure 26, 33 and 37 (“the motion” or the “motion to compel”), (D.I. 538), and the Court¹ has considered the parties’ briefs, (D.I. 538, 549, 551);

NOW, THEREFORE, IT IS HEREBY ORDERED that Cox’s motion be resolved as follows:

1. Plaintiff Cox has presented Defendant Sprint with various interrogatories pursuant to Rule 33, including, *inter alia*, Interrogatory No. 22 (also referred to herein as the “Interrogatory”), which reads as follows:

Identify each and every Sprint Product or Service, that practices any claim of any Sprint Patent, and for each such claim, demonstrate on a limitation-by-limitation basis how the claim is satisfied by the identified Sprint Product or Service, and identify any evidence including documents by Bates number, that supports your contention that the claim is practiced by any such Sprint Product or Service.

¹ The instant motion to compel was referred to the Court for resolution on June 23, 2017. (D.I. 560)

(D.I. 538, ex. A at 14) On November 12, 2013, Sprint objected to this Interrogatory on various grounds. (*Id.* at 14-15) In subsequent responses, Sprint stated, with respect to several patents no longer asserted, that it “is not presently aware of” any of its product or services that practiced any of the asserted claims of such patents. (*Id.* at 15-16; *see also* D.I. 551 at 4 n.2) As to these now unasserted patents, Sprint also identified relevant discovery documents and further stated that “the answer” to the Interrogatory could be found in the documents. (D.I. 538, ex. A at 15-17) As to the remaining 40 claims of the 10 patents that currently are being asserted in this case,² (D.I. 549 at 3), the entirety of Sprint’s prior response to the Interrogatory is a statement referencing the deposition testimony of Mr. Harley Ball (“Ball”). (D.I. 538, ex. A at 18) On that score, Sprint responded that Ball’s testimony “constitutes Sprint’s position” as to the Interrogatory. (*Id.* at 18) In the portion of Ball’s deposition that Sprint cited, Ball states: (1) that he “believe[s] [Sprint] is using . . . some of the patents in suit”; and (2) that while he “would have to look at any particular [Sprint] service and do an analysis [to determine a better answer to the question,]. . . . what comes to mind is [Sprint’s] VoIP wholesale services, [which] . . . fall[] within the . . . scope of . . . a number of [asserted] patent claims.” (D.I. 538, ex. B at 385–86)

2. In its motion to compel, Cox contends that Interrogatory No. 22 seeks relevant information, including information relating to “the existence of noninfringing substitutes, secondary considerations of non-obviousness, damages, and Cox’s equitable defenses.” (D.I. 538 at 3 & n.2) Cox also argues that, according to this Court’s Order in *Leader Techs. Inc. v. Facebook Inc.*, No. 08-862-JJF-LPS, 2009 WL 3021168 (D. Del. Sept. 4, 2009), Cox “is entitled

² On May 15, 2017, on remand from the United States Court of Appeals for the Federal Circuit, this Court construed the claims of United States Patent Nos. 7,286,561, 6,633,561, 6,463,052, 6,452,932, 6,473,429, and 6,298,064. (D.I. 541) Claims from these patents as well as claims from United States Patent Nos. 6,697,340, 6,563,918, 6,343,084, 6,330,224, and 6,262,992 remain in this litigation. (D.I. 405 at 1 n.4; D.I. 359 at 1 & nn.1–2)

to know each and every Sprint product or service that practices any asserted claims of the Sprint Voice Patents. . . . [and] which of the asserted claims of which of the Sprint Voice Patents are practiced by which of Sprint's offerings."³ (D.I. 538 at 5)

3. Sprint, for its part, avers that the relevance of Interrogatory No. 22 is "dubious at best[.]" (D.I. 549 at 4 (footnote omitted)) It further responds that it "has not performed an analysis" regarding "which of . . . [the] 40 [asserted] claims of the 10 patents are practiced by the numerous products or services it has offered over the years" and that it should not be forced to "conduct new burdensome analysis" to answer this question now. (*Id.* at 3) Additionally, Sprint contends that the facts of the case at bar "stand in stark contrast to the facts in *Leader Techs.*" (*Id.* (citations omitted))

4. Pursuant to the Federal Rules of Civil Procedure, "[p]arties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case[.]" Fed. R. Civ. P. 26(b)(1). To that end, a party may serve interrogatories on another party, and "[a]n interrogatory may relate to any matter that may be inquired into under Rule 26(b)." Fed. R. Civ. P. 33(a)(2). Parties must either object to an interrogatory or answer it "separately and fully in writing under oath." Fed. R. Civ. P. 33(b)(3). "The grounds for objecting to an interrogatory must be stated with specificity[.]" Fed. R. Civ. P. 33(b)(4), and "[a]n interrogatory is not objectionable merely because it asks for an opinion or contention that relates to fact or the application of law to fact," Fed. R. Civ. P. 33(a)(2).

³ This is a narrower request than what is sought by the original Interrogatory, in that Interrogatory No. 22 also asks Sprint to: (1) "demonstrate on a limitation-by-limitation basis how the claim is satisfied by the identified Sprint Product or Service[]" and (2) "identify any evidence" that supports a "contention that the claim is practiced by any such Sprint Product or Service." (D.I. 538, ex. A at 14) Cox has confirmed, however, that with its motion to compel, it is now seeking an answer as to Interrogatory No. 22 "only [regarding] Sprint's contention as to 'which [asserted] claims are practiced by which of [Sprint's] products and services.'" (D.I. 551 at 1 (citation omitted)) And so that request is the only one the Court will address herein.

Moreover, “the mere statement . . . that the interrogatory [is] overly broad, burdensome, oppressive and irrelevant is not adequate to voice a successful objection to an interrogatory. . . . Instead, the party resisting discovery must show specifically how each interrogatory is not relevant or how each question is overly broad, burdensome or oppressive.” *Redland Soccer Club, Inc. v. Dep’t of Army of U.S.*, 55 F.3d 827, 856 (3d Cir. 1995) (internal quotation marks and citations omitted); *see also* Fed. R. Civ. P. 33(b)(4); *Inventio AG v. Thyssenkrupp Elevator Americas Corp.*, C.A. No. 08-874-RGA, 2013 WL 12133902, at *2 (D. Del. July 29, 2013); *Owens v. Minor*, Civil Action No. 07-365-JJF, 2009 WL 2030938, at *2 (D. Del. July 10, 2009).

5. Here, Cox has identified several potential claims and defenses to which Interrogatory No. 22 is relevant, and has explained (with reference to the specific facts of this case) how and why this is so. (D.I. 538 at 3 & n.2) In contrast, while Sprint states generally that the relevance of the requested information is “highly suspect[,]” (*id.* at 1), it never really articulates with specificity why it is that Cox’s particularized allegations regarding relevance are off base,⁴ (*see* D.I. 549 at 4 & n.2). Nor does Sprint ever reference any fact relating to *this case* in pushing back on relevance grounds. (*Id.*; *see also* D.I. 551 at 4)⁵ Thus, its relevance objections lack the specificity required by Rule 33. *Redland Soccer Club*, 55 F.3d at 856.

6. As to the burden on Sprint, it is worth keeping in mind that Interrogatory No. 22 has been pending since 2013. Sprint owes Cox an answer to the contention interrogatory, and it has

⁴ Indeed, as Cox notes, Sprint has answered the Interrogatory, at least in part, as to other patents that are no longer asserted in the case, and does not appear to have previously objected to the Interrogatory on relevance grounds. (D.I. 551 at 4) This also appears to undercut Sprint’s current position that the Interrogatory is irrelevant.

⁵ Instead of explaining why the Interrogatory is not relevant in light of the facts of the case at bar, Sprint has simply cited to case law—involving cases with different facts than those at issue here. (D.I. 549 at 4 n.2) As Cox notes, “[n]one of the cases cited in Sprint’s footnote cast doubt on whether *this* interrogatory is relevant to multiple issues in *this* case.” (D.I. 551 at 4 (emphasis in original))

had plenty of time to determine what that answer is going to be. If Sprint is aware that certain of its products or services read on certain asserted claims, it should respond by listing which products and services read on which claims. If it is aware that none of its products or services read on certain asserted claims, then it can indicate this by its answer. The Court also supposes it is possible that—despite Sprint’s familiarity with the facts of this case and its own products, and despite the many years the Interrogatory has been pending—Sprint “does not know” whether any of its products or services read on a particular asserted claim. (D.I. 551 at 3; *see also* D.I. 538 at 4) If that is the case, then “Sprint can say that” in response to the Interrogatory. (D.I. 551 at 3)

7. The Court also agrees with Cox that the result in *Leader Techs.* provides support for the grant of Cox’s motion to compel. In *Leader Techs.*, the accused infringer requested discovery similar to that sought via Cox’s Interrogatory No. 22. *Leader Techs.*, 2009 WL 3021168, at *1. In response, the patentee did identify its product that practiced the claimed invention. *Id.* at *2. But it did not provide any information disclosing which claims of the patent-in-suit were practiced by its product, nor did it provide a requested claim chart identifying where each limitation of each asserted claim was found within its product.⁶ *Id.* In resolving that discovery dispute, the *Leader Techs.* Court ordered the patentee to further identify, on a claim-by-claim basis, which of its products and services practiced which of the asserted claims, finding

⁶ Sprint asserts that *Leader Techs.* differs from the instant case because there “it was not burdensome for the patentee to disclose which claims of its patent were practiced by which of its own products and services because the plaintiff already had such information in its possession.” (D.I. 549 at 3 (emphasis in original)) But in *Leader Techs.*, there was no indication that, at the time of the decision, the patentee had in its possession a list of which claims of the patent-in-suit read on its identified product. (*Leader Techs. Inc. v. Facebook, Inc.*, Civil Action No. 08-862-JJF-LPS, D.I. 106 at 1 (D. Del. Sept. 3, 2009)). Instead, the patentee had only made the general statement “that ‘Leader2Leader powered by Digital Leaderboard is covered by the [asserted] ’761 Patent.’” (*Id.* (quoting the plaintiff’s Supplemental Response to Interrogatory No. 9))

that such information would be relevant to the claims and defenses at issue in the case. *Id.*⁷

Other courts have upheld requests for similar (or even broader) discovery. *See Sonix Tech. Co. v. Yoshida*, Case No. 12cv380-CAB (DHB), 2014 WL 11878354, at *2 (S.D. Cal. Dec. 5, 2014) (limiting discovery to that requiring the defendant to identify which of its own products practice and do not practice the asserted claims); *Lakewood Eng'g & Mfg. Co. v. Lasko Prods., Inc.*, No. 01 C 7867, 2003 WL 1220254, at *5 (N.D. Ill. Mar. 14, 2003) (rejecting the accused infringer's request that the patentee identify where each element of each claim of its patent is found on each of its products, but noting that the patentee had already, in response to the request, identified which of its products practiced which of the asserted claims of the patent-in-suit); *cf. United Servs. Auto. Ass'n v. Mitek Sys., Inc.*, CIV. NO. SA-12-CV-282-HLH, 2014 WL 12496903, at *2–3 (W.D. Tex. Mar. 31, 2014) (ordering the patentee to provide “element-by-element claim charts” detailing “pinpoint citations” as to how its product practiced the claims of the patent-in-suit).

8. For the reasons stated above, the Court GRANTS Cox's motion to compel, and ORDERS that within 14 days of the date of this Memorandum Order, Sprint shall supplement its response to Cox's Interrogatory No. 22 to disclose “each and every Sprint Product or Service, that practices any [asserted] claim of any” patent-in-suit, (D.I. 538, ex. A at 14), on a claim-by-claim basis (that is, by identifying which asserted claims of the patents-in-suit are practiced by which Sprint products or services). *See Leader Techs.*, 2009 WL 3021168, at *2.

⁷ The *Leader Techs.* Court did not, however, require the patentee to: (1) disclose which of its products and services read on *non-asserted* claims of the patent-in-suit; or (2) produce detailed claim charts *showing precisely how* its products practiced its own patent. *Leader Techs.*, 2009 WL 3021168, at *2. In that regard, the Court reasoned that the case was “fundamentally about whether [the defendant] infringe[d] [the plaintiff's] patent, not about whether [the plaintiff] practices its own patent.” *Id.* As previously noted above, in this case, Cox is not now seeking any such information via its motion to compel.

9. Because this Memorandum Order may contain confidential information, it has been released under seal, pending review by the parties to allow them to submit a single, jointly proposed, redacted version (if necessary) of the Memorandum Order. Any such redacted version shall be submitted no later than **August 2, 2017** for review by the Court, along with a motion for redaction that includes a clear, factually-detailed explanation as to why disclosure of any proposed redacted material would “work a clearly defined and serious injury to the party seeking closure.” *Pansy v. Borough of Stroudsburg*, 23 F.3d 772, 786 (3d Cir. 1994) (internal quotation marks and citation omitted). The Court will subsequently issue a publicly-available version of its Memorandum Order.



Christopher J. Burke
UNITED STATES MAGISTRATE JUDGE