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10 Attorneys for Defendants
 11 *Blast Motion, Inc. and*
 12 *Taylor Made Golf Company, Inc.*

13 UNITED STATES DISTRICT COURT
 14 SOUTHERN DISTRICT OF CALIFORNIA
 15

16 NEWSPIN SPORTS, LLC,
 17 Plaintiff,
 18 v.
 19 BLAST MOTION, INC., and TAYLOR
 20 MADE GOLF COMPANY, INC.,
 21 Defendants.

Case No.: 3:18-cv-02273-BEN-JLB

**DEFENDANTS' OPPOSITION TO
 EX PARTE MOTION TO EXTEND
 CLAIM CONSTRUCTION
 DEADLINES**

Complaint Filed: Sept. 28, 2018

Judge: Hon. Roger T. Benitez
 Courtroom: 5A-5th Flr.

Magistrate Judge: Hon. Jill L.
 Burkhardt
 Courtroom: Suite 5140

Hearing Date and Time: N/A

1 **I. INTRODUCTION**

2 Pursuant to Magistrate Judge Jill Burkhardt’s Chambers Rules Section VI and VII,
3 Defendants Blast Motion, Inc. and Taylor Made Golf Company, Inc. (collectively,
4 “Defendants”) submit this opposition to Plaintiff NewSpin Sports, LLC’s (“NewSpin”) *ex parte*
5 motion to extend claim construction deadlines.

6 In its *ex parte* motion, NewSpin, for the first time in this litigation, asserts that it
7 lacks documents needed for *claim construction*. This assertion is both false and baseless.
8 NewSpin has all the documents necessary for claim construction. NewSpin has already
9 identified constructions for the terms it seeks to construe, identified constructions for
10 claim terms proposed by Defendants, and identified intrinsic and extrinsic evidence to
11 support its proposed constructions of the disputed claim terms. Indeed, NewSpin met and
12 conferred with Defendants concerning the scope of the constructions – all without access
13 to technical documentation it alleges is insufficient under Patent L.R. 3.4. NewSpin
14 never explains how Defendants’ internal documents would suddenly become relevant to
15 construe the terms of NewSpin’s patents. NewSpin’s position is wrong as a matter of
16 law. The Federal Circuit has expressly declared that it is legal error to interpret claims in
17 light of the accused products. *See SRI Int’l v. Matsushita Elec. Corp.*, 775 F.2d 1107,
18 1118 (Fed. Cir. 1985) (“A claim is construed in the light of the claim language, the other
19 claims, the prior art, the prosecution history, and the specification, *not* in light of the
20 accused device.”) (emphasis in original). Even if the documentation NewSpin claims it
21 needs was relevant, the time to identify such information and documents—all of which
22 would be extrinsic evidence—has long since passed. The Patent Local Rules prohibit the
23 introduction of any new extrinsic evidence at this stage.

24 Now, only a week before opening claim construction briefs are due and in
25 violation of Judge Burkhardt’s Chamber Rules, Plaintiff attempts to use Defendants’
26 forthcoming document production and the circumstances imposed by COVID-19 to argue
27 that it cannot electronically file its claim construction briefs. The Court should deny
28

1 NewSpin’s request because NewSpin fails to demonstrate good cause to move the case
2 schedule.

3 **II. NEWSPIN HAS NOT DEMONSTRATED GOOD CAUSE TO MOVE**
4 **THE CLAIM CONSTRUCTION DEADLINES**

5 **A. Claim Construction is Not Impacted by Defendants’ Document Production**

6 Until NewSpin’s *ex parte* motion, filed a week before opening claim construction
7 briefs are due, NewSpin did not make it known to Defendants that it would need
8 Defendants’ supplemental production to identify its claim construction positions.
9 NewSpin served Preliminary Claim Constructions on January 27, 2020, and Responsive
10 Claim Constructions on February 10, 2020. During counsels’ February 17, 2020
11 telephonic meet and confer—used to narrow the claim construction issues and finalize
12 preparation of the Joint Claim Construction Chart, Worksheet and Hearing Statement
13 pursuant to Patent L.R. 4.1(e)—NewSpin did not mention that it needed any
14 supplemental document production¹ in order to finalize its claim construction positions.
15 The parties filed their Joint Claim Construction Chart, Joint Claim Construction
16 Worksheet, and Joint Hearing Statement on February 24, 2020, identifying all of the
17 intrinsic and extrinsic evidence on which the parties would rely to support their proposed
18 claim constructions. *See* Dkt. Nos. 49, 50, 51.

19 NewSpin does not (and cannot) articulate why it would need Defendants’ internal
20 technical documents to construe terms of its asserted patents. Intrinsic evidence is the
21 best source for interpreting an asserted claim term. *See Vitronics Corp. v. Conception,*
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24 ¹ Defendants dispute that they are in violation of Patent L.R. 3.4 in light of their
25 production of documents sufficient to show the operation of the Accused Products,
26 which include engineering drawings, technical specifications and marketing documents
27 explaining the design and operation of the Accused Products. Defendants are also
28 preparing its supplemental production due on April 14, 2020 as discussed during the
March 18, 2020 telephonic discovery hearing with the Court.

1 90 F.3d 1576, 1582 (Fed. Cir. 1996). Even if extrinsic evidence is used, it “cannot be
2 used to vary the meaning of the claims as understood based on a reading of the intrinsic
3 record.” *Shinsedai Co. v. Nintendo Co.*, No. 11-cv-2799-IEG-MDD, 2013 U.S. Dist.
4 LEXIS 200944, at *10 (S.D. Cal. Apr. 26, 2013) (citing *Phillips v. AWH Corp.*, 415 F.3d
5 1303, 1319 (Fed. Cir. 2005)). Of the ten terms in dispute, NewSpin takes the position
6 that eight should be construed according to their plain and ordinary meaning. *See* Dkt.
7 No. 51. The only extrinsic evidence identified by NewSpin is (1) an expert declaration
8 that will explain the understanding of a person of ordinary skill in the art and a discussion
9 of the technological background or (2) third-party dictionary definitions or technical
10 papers. *See* Dkt. No. 50. NewSpin does not cite to any public or internal Blast Motion
11 documents in support of its claim construction positions. It does not need to because
12 claim construction is a separate analysis from infringement. *See Koninklijke Phillips*
13 *N.V. v. Zoll Lifecor Corp.*, No. 2:12-cv-1369, 2016 U.S. Dist. LEXIS 168547, at *113
14 (W.D. Pa. Feb. 3, 2016) (“claim construction is undertaken before the infringement
15 analysis, largely with a blind-eye to the effect of a particular construction on
16 infringement.”). Further confirmation that NewSpin does not need additional documents
17 to support its claim constructions is its position that none of disputed claim terms are case
18 dispositive. *See* Dkt. No. 49 at 2.

19 NewSpin’s request to the Court that Defendants supplement their document
20 production was made on the basis of its need to determine *infringement* positions.²
21 NewSpin does not mention the supposed lack of documents for claim construction. Ex. 1
22 at 2 (“None of these documents describe the operation of the Accused Products at the
23

24 ² While counsel for NewSpin and counsel for Defendants had discussed the possibility of
25 a stay of the case schedule, no agreement on the issue was ever reached. Nor can
26 NewSpin point to any. *See* Wojcio Decl. ¶ 5 (“Ms. Tolbert responded favorably to this
27 proposal and said she would discuss it with her client), ¶ 7 (noting that counsel for
28 Defendants never indicated whether Defendants would join or oppose a motion to stay).

1 level of detail required for purposes of determining **infringement**. . . These are all
2 relevant to Plaintiff’s claims of **infringement** in this case.”) (emphasis added).

3 Even if NewSpin wanted to amend its positions on claim construction at this point,
4 it would not be allowed to do so under this district’s Patent Local Rules because the
5 deadline to identify constructions and evidence in support has passed pursuant to the
6 Court’s Case Management Order Regulating Discovery and Other Pretrial Proceedings in
7 a Patent Case (Dkt. No. 43). The parties identified all of the intrinsic and extrinsic
8 evidence on which they would rely upon to support their proposed claim constructions on
9 February 24, 2020. *See* Dkt. Nos. 49, 50, 51. Claim construction discovery closed on
10 March 13, 2020. Dkt. No. 43 ¶ 7. If NewSpin wanted further discovery to assist in
11 formulating its claim construction positions, it should have made a timely request for
12 Defendants’ document production or filed a motion with the Court well before it was
13 required to identify supporting evidence on February 24, 2020.

14 **B. Claim Construction Briefing is Not Impacted by Current Office Closures**

15 While Defendants are mindful of the evolving nature and difficulties associated
16 with the restrictions associated with COVID-19, NewSpin does not present sufficient
17 justification to delay the proceedings at this time. Defendants’ counsel’s offices are
18 similarly closed until April 7, and Defendants’ counsel are also subject to “shelter in
19 place” restrictions. However, claim construction issues have already been identified,
20 submitted to the Court, and all that is left to do is file the claim construction briefs
21 electronically and attend the hearing.³ To argue that a claim construction brief cannot be
22 submitted remotely has the same effect of arguing that no court deadline can be met. But
23 this cannot be true, given that NewSpin filed the instant *ex parte* motion.

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26 ³ Defendants note that the currently-scheduled date for the claim construction hearing on
27 April 30, 2020 is not impacted by the Order of the Chief Judge No. 18, which has
28 continued jury trials to at least April 16, 2020.

1 Although NewSpin complains that Defendants cited to the same circumstances, it
2 misses a key distinction. Namely, that submission of briefing (of which the substance has
3 already been settled) through ECF is significantly less onerous than coordinating with
4 multiple individuals to collect documents, working with a third-party vendor to process
5 the documents, and ensuring that the law firm staff can produce the documents. It was
6 these reasons the Court permitted Defendants until April 14 to supplement.

7 **C. NewSpin’s Motion Violates Judge Burkhardt’s Chambers Rules**

8 Judge Burkhardt’s Chambers Rules provide that “any request to reschedule a court
9 proceeding or deadline shall be made in writing no less than **10 calendar days** before the
10 affected date. Untimely requests will be granted only upon a showing of both good cause
11 and excusable neglect for the party’s failure to act before time had expired.” *See*
12 Chambers Rules Section VII (emphasis in original). While the parties had discussed the
13 possibility of a stay of deadlines at least as early as March 12, 2020 during a meet and
14 confer and counsel for NewSpin had raised moving for a stay of deadlines during the
15 March 18, 2020 Discovery Conference with the Court, NewSpin never took any steps to
16 move forward with its proposal until it sought Defendants’ consent on March 23, 2020
17 (*See* Wojcio Decl. ¶ 8)—eight days before opening claim construction briefs are due.
18 Defendants have been diligently preparing to file its opening claim construction brief
19 next week, and there is no reason why NewSpin could not have made its request earlier.
20 NewSpin cannot demonstrate good cause, let alone excusable neglect to act within the
21 requisite 10-calendar day deadline.

22 **III. CONCLUSION**

23 For the foregoing reasons, Defendants respectfully request that the Court deny
24 NewSpin’s *ex parte* motion to extend the claim construction deadlines and proceed with
25 the claim construction deadlines set forth in the Court’s November 29, 2019 Case
26 Management Order [Dkt. No. 43].
27
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1 DATED: March 26, 2020

Respectfully submitted,

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3 WILSON SONSINI GOODRICH & ROSATI
Professional Corporation

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5 By: /s/ Sara L. Tolbert
6 Sara L. Tolbert

7 Attorneys for Defendants
8 *Blast Motion, Inc. and Taylor Made Golf*
9 *Company, Inc.*

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