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14 UNITED STATES DISTRICT COURT
15 NORTHERN DISTRICT OF CALIFORNIA
16 SAN FRANCISCO DIVISION

18 FIRSTFACE CO., LTD.,
19 Plaintiff,
20 v.
21 APPLE INC.,
22 Defendant.

Case No. 3:18-cv-02245-JD

**DEFENDANT APPLE'S REPLY IN
SUPPORT OF ITS *DAUBERT*
MOTION TO EXCLUDE
TESTIMONY OF NIGEL A. JONES**

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1 **I. INTRODUCTION**

2 Mr. Jones’s opinions on the accused Apple iOS source code (versions 8 to 15) should be
3 excluded because he relied on a subjective and untestable methodology. Cognizant of his failure
4 to articulate a clear standard for his “Differences” ranking, Firstface now argues that this
5 “Differences” ranking is “not particularly relevant.” (D.I. 253 (“Opp.”) at 9.) But Mr. Jones’s
6 flawed “Differences” ranking directly impacts the reliability of his opinions. He relied on this
7 ranking to determine whether to review and analyze source code files. As Mr. Jones’s exemplary
8 errors show, his flawed methodology led to him to miss substantial differences in later versions of
9 the code. It also led him to miss errors that he should have caught, had he actually reviewed
10 subsequent versions of the code files instead of relying on his “Differences” ranking.

11 Mr. Jones’s opinions also should be excluded as unreliable because he does not explain
12 the reasoning underlying his determinations that source code file differences were “Significant.”
13 Firstface contends that Mr. Jones made this determination by analyzing whether source code
14 changes “materially affect[] the operation of the device[’s] functionality” at issue, with “the basic
15 yardstick [being] whether the code fundamentally operated differently.” (Opp. at 10.) But his
16 explanation for what it means to “fundamentally operate[] differently” was both circular and
17 subjective: “is it fundamentally different such that things operate in a fundamentally different
18 way.” (D.I. 253-3, 102:1-4.) Mr. Jones’s characterization of a “significant” change as one that is
19 “material” or “fundamentally different” underscores the absence of an objective standard.

20 The Court also should exclude Mr. Jones’s opinions regarding iOS versions 12 to 15, as
21 he neither personally reviewed those versions nor adequately supervised the work of his non-
22 testifying assistant, Michael Wilk. Mr. Jones did not disclose Mr. Wilk in his report. Mr. Jones’s
23 belated identification of Mr. Wilk as the person who actually reviewed the code during his
24 deposition one day before the discovery deadline prejudiced Apple. Apple was unable to depose
25 Mr. Wilk on what he had done and on his discussions with Mr. Jones. And because Mr. Jones
26 never produced any of the raw outputs that form the basis of Mr. Jones’s opinions and Mr. Wilk’s
27 analysis, Apple is unable to review or properly respond to Mr. Jones’s work.

28

1 **II. THE FACTS NEEDED TO DECIDE THIS MOTION ARE UNCONTESTED**

2 **A. Firstface Does Not Dispute That Mr. Jones Did Not Personally Review the**
 3 **iOS Source Code For Versions 12 Through 15**

4 Mr. Jones admits, and Firstface does not dispute, that he did not personally review the
 5 source code for iOS versions 12 through 15. (D.I. 217-3, 58:8-25 (“Q. [S]ticking with the
 6 AppleBiometricSensor code . . . , have you reviewed this code on the source code computer?
 7 A: . . . [S]o the stuff that was produced after 2019, I have not reviewed . . .”))

8 **III. MR JONES’S OPINIONS RELATING TO APPLE’S IOS SOURCE CODE**
 9 **SHOULD BE EXCLUDED**

10 **A. Mr. Jones’s Opinions Relating to iOS Versions 8 to 15 Should Be Excluded**

11 **1. Mr. Jones’s methodology is unreliable.**

12 **Failure to identify tools or produce results.** Firstface contends that Mr. Jones identified
 13 the two tools he used to compare code versions and that Apple should know about these tools
 14 because Apple provided them. (Opp. at 7-8.) This ignores that he never identified which of these
 15 tools (or what combination) he used to generate which results. Nor did Mr. Jones ever provide
 16 the raw output of his differencing analysis using these tools. (Opp. at 8.) His disclosure of the
 17 tools he used and a general description of their use is insufficient. (*Id.*) Mr. Jones’ failure to
 18 specify which tools were used to generate each of his results and provide the raw output of his
 19 analysis leaves Apple unable to test and confirm his results. (D.I. 217 (“Mot.”) at 5-6.) As
 20 Mr. Jones’s testimony confirms, he was unable to specify which tool he used for which
 21 comparison, underscoring the unreliability of his methodology:

22 Q. [W]hat differencing tool or tools did you use to obtain the differences
 23 between the source code file? . . .

24 A. Yeah, so obviously the stuff I’ve been referring to about the graphical
 25 interface is from Beyond Compare; and sometimes -- having done an
 assessment, sometimes the command line diff is more convenient to work
 with. Other times, the graphical interface is.

26 (D.I. 253-3, 95:10-96:4.) Firstface should not be allowed to place the onus on Apple to guess
 27 which tool Mr. Jones used for his analysis. Apple cannot recreate or test his comparisons, when
 28 Mr. Jones himself does not know which tool he used. (Opp. at 8.)

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