MORRISON FOERSTER

425 MARKET STREET
SAN FRANCISCO
CALIFORNIA 94105-2482

TELEPHONE: 415.268.7000
FACSIMILE: 415.268.7522

WWW.MOFO.COM

MORRISON & FOERSTER LLP

AUSTIN, BEIJING, BERLIN, BOSTON, BRUSSELS, DENVER, HONG KONG, LONDON, LOS ANGELES, MIAMI, NEW YORK, PALO ALTO, SAN DIEGO, SAN FRANCISCO, SHANGHAI, SINGAPORE, TOKYO, WASHINGTON, D.C.

February 2, 2024

Writer's Direct Contact
(415) 268-7020
agonzalez@mofo.com

Via CM-ECF
The Honorable James Donato
United States District Judge
U.S. District Court for the Northern District of California

Re: *Firstface Co. v. Apple Inc.*, Case No. 3:18-cv-2245-JD

Dear Judge Donato:

Apple responds to Firstface's January 30, 2024 letter (Dkt. No. 314). Firstface's letter misleadingly suggests that Apple has "agreed" not to call Mr. Thomas at trial. Firstface knows this is untrue. Both in writing and during the parties' oral meet and confer, Apple made clear that it would not call Mr. Thomas *if* that would resolve the parties' dispute. Inexplicably, Firstface also falsely claims that Apple "agreed" not to offer "testimony from Dr. Cockburn regarding the source code on Apple's prior art iPhone 3GS and 4 products." But Apple never agreed that Dr. Cockburn could not provide any prior art source code-related opinions, especially as he reviewed and specifically opined on source code produced before the fact discovery close in his expert report.

On January 26, 2024, Apple conferred orally with Firstface. To try to reach a resolution, Apple proposed not to call Mr. Thomas as a witness. In response, Firstface asked that Apple propose related language for a stipulation. When sending the draft stipulation to Firstface on January 29, Apple noted: "attached are proposed edits to the stipulation *to resolve the outstanding disputes* re: Mr. Thomas's and Dr. Cockburn's testimony." (Ex. 1 at 1; emphasis added.)

Apple believes that its proposed stipulation (attached) fairly responds to the Court's order (Dkt. No. 305). Firstface's motion sought to limit the scope of Mr. Thomas's testimony. (Dkt. No. 198.) In response to the Court's order barring Mr. Thomas from testifying about "materials not disclosed before the discovery cut-off," Apple proposed not to call Mr. Thomas at all. Apple also proposed to preclude Dr. Cockburn from offering the opinions in paragraph 196 and the first sentence of paragraph 210 of his report, which addressed unproduced source code versions.

Firstface's requested relief, by contrast, vastly overreaches. It is not limited to undisclosed materials, and it seeks to preclude testimony even as to materials that Apple produced before the discovery cut-off. Firstface seeks to preclude Mr. Thomas from testifying about *any* prior art source code (including properly produced source code) and Dr. Cockburn from testifying about his related discussions with Mr. Thomas. (Dkt. No. 314 at 2.) Because source code produced before the discovery cut-off cannot constitute "materials not disclosed before the discovery cut-off" (D.I. 305), however, the Court's order precludes neither.

Apple indisputably produced versions of prior art source code for the iPhone 3GS and 4

before the fact discovery cut-off. (*Compare* Dkt. No. 198 at 5 and Dkt. No. 211 at 3, 9-10 *with* Dkt. No. 314 (Firstface falsely alleging that Apple did not "disclose the source code for its prior art 3GS and 4 products").) Although Apple could not locate the code for the specific iOS versions installed on its iPhone 3GS and 4 samples, it produced code for other iOS sub-versions used with the iPhone 3GS and 4 before 2011. Dr. Cockburn inspected and opined regarding that properly produced code in his report, and Firstface's expert did the same. Mr. Thomas, whom Apple disclosed as knowledgeable of the development of the accused products, testified at his deposition about his personal knowledge of iOS source code, including the produced prior art versions. (Dkt. No. 211-6 at 125:8-126:3 (testifying that *all* iOS code versions turned on the display in response to a Home button press).) Mr. Thomas's testimony about produced prior art code and Dr. Cockburn's reliance on discussions with Mr. Thomas about that code therefore are appropriate.

As further relief, Firstface asks the Court to preclude Dr. Cockburn from testifying "regarding the source code on [*sic*] Apple's prior art iPhone 3GS and 4 products," including testimony "comparing, or substituting, the 'functionality' of produced versions of source code to, or with, the 'functionality' of undisclosed source code implemented on the iPhone 3GS and 4 products." (Dkt. No. 314 at 2.) This, too, overreaches. Apple does not intend to have Dr. Cockburn testify about unproduced versions of code. Apple also will agree that he may not testify about paragraph 196 and the first sentence of paragraph 210 of his report, which discussed unproduced source code versions. But Dr. Cockburn's anticipated testimony about *produced* code is not subject to the Court's order.

The overbreadth of Firstface's requested relief is apparent from the paragraphs of his report[1] that Firstface seeks to preclude beyond 196 and the first sentence of 210:

Paragraphs 191 and 204-207 concern source code produced before the discovery cut-off; they explain that the produced versions were used in the iPhone 3GS and 4 before 2011.

Paragraphs 194 and 208 do not refer to Mr. Thomas or unproduced source code at all; they discuss the iPhone 3GS and 4's functionality based on Dr. Cockburn's review of produced code.

Paragraphs 195 and 209 concern Dr. Cockburn's testing of samples of the iPhone 3GS and 4 products; they explain that the functionality that Dr. Cockburn observed via testing is identical to that in the produced code that he reviewed.

In sum, Apple's proposal to not call Mr. Thomas and to strike the language in Dr. Cockburn's report referring to unproduced code corresponds to the relief contemplated by the Court's order. Apple asks that the Court enter an order consistent with its proposed stipulation.

Respectfully submitted,

/s/ Arturo J. González

cc: All Counsel of Record via CM/ECF

[1] The relevant paragraphs of Dr. Cockburn's report are available at Dkt. No. 199-6.