

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF TEXAS  
MARSHALL DIVISION**

AGIS SOFTWARE DEVELOPMENT LLC,	§	
	§	Case No. 2:17-CV-0513-JRG
Plaintiff,	§	(LEAD CASE)
	§	
v.	§	<b><u>JURY TRIAL DEMANDED</u></b>
	§	
HUAWEI DEVICE USA INC. ET AL.,	§	
	§	
Defendants.	§	
	§	
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APPLE, INC.,	§	Case No. 2:17-CV-0516-JRG
	§	(CONSOLIDATED CASE)
Defendant.	§	
	§	<b><u>JURY TRIAL DEMANDED</u></b>
	§	
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**PLAINTIFF AGIS SOFTWARE DEVELOPMENT LLC’S OPPOSED MOTION  
TO STRIKE PORTIONS OF THE EXPERT REPORT OF NEIL SIEGEL  
RELATING TO THE UNDISCLOSED INVALIDITY THEORY  
BASED ON “DYNAMICALLY ELECTING SERVERS”**

**TABLE OF CONTENTS**

	<b><u>Page No(s).</u></b>
I. INTRODUCTION .....	1
II. FACTUAL BACKGROUND.....	1
III. LEGAL STANDARD.....	3
IV. ARGUMENT .....	4
V. CONCLUSION.....	6

**TABLE OF AUTHORITIES**

	<b>Page(s)</b>
<b>Cases</b>	
<i>Betzel v. State Farm Lloyds</i> , 480 F.3d 704 (5th Cir. 2007) .....	3
<i>DataQuill Ltd. v. Huawei Techs. Co. Ltd.</i> , 2015 WL 9450821 (E.D. Tex., June 11, 2015).....	5
<i>Keranos, LLC v. Silicon Storage Tech., Inc.</i> , 797 F.3d 1025 (Fed. Cir. 2015).....	3
<i>LML Patent Corp. v. JPMorgan Chase &amp; Co.</i> , 2011 WL 5158285 (E.D. Tex., Aug. 11, 2011) .....	3
<i>Tyco Healthcare Group LP v. Applied Medical Resources Corp.</i> , 2009 WL 5842062 (E.D. Tex., Mar. 30, 2009) .....	3, 5, 6
<b>Other Authorities</b>	
Rule 3-3.....	2, 4

## **I. INTRODUCTION**

Plaintiff AGIS Software Development LLC (“Plaintiff” or “AGIS”) submits this Motion to Strike Portions of the October 29, 2018 Expert Report of Neil Siegel (“Siegel Report”) relating to Defendant Apple Inc.’s (“Apple”) new invalidity theory addressing the server-based claim limitations of the U.S. Patent Nos. 9,408,055 (“the ’055 patent”), 9,445,251 (“the ’251 patent”), 9,749,829 (“the ’829 patent”), and 9,467,838 (“the ’838 patent”) (collectively, the “Location Patents”). The Siegel Report contends, for the first time in this case, that the server-based limitations are disclosed by the Force XXI Battle Brigade and Below (“FBCB2”) system’s alleged feature of “dynamically electing servers.” This alleged feature is absent from Apple’s December 1, 2017 invalidity contentions and April 16, 2018 amended invalidity contentions. Apple’s invalidity charts did not identify where in the FBCB2 system’s supporting evidence the alleged feature of “dynamically electing servers” is found. Because Apple failed to put AGIS on notice of the “dynamically electing servers” theory in accordance with the Court’s patent rules and docket control order (See Dkt. 85) in this case, AGIS respectfully moves the Court to strike the related portions of the Siegel Report as improperly based on a new, previously-undisclosed invalidity theory.

## **II. FACTUAL BACKGROUND**

Apple served invalidity contentions on December 1, 2017 and amended its invalidity contentions on April 16, 2018. Neither Apple’s invalidity contentions nor its accompanying charts identified any “dynamically electing servers” to disclose the server-based limitations of the asserted Location Patents. Instead, Apple’s invalidity contentions advanced a single theory based on an allegedly centralized server. Ex. A<sup>1</sup>, Exhibit D-14 to Apple’s Amended Invalidity

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<sup>1</sup> References to Exs. A–G refer to the exhibits submitted with the Declaration of Alfred R. Fabricant in support of this motion and attached hereto.

Contentions, at pp. 23-24, 30. Particularly, Apple's invalidity charts set forth a theory that "first server" claim limitations were allegedly met by an FBCB2 system's command center server installed at the "battalion task force headquarters" in Bosnia and Kosovo, and that "second server" claim limitations a command center server at USAREUR Headquarters in Hiedelberg, Germany. Ex. A, Exhibit D-14 to Apple's Amended Invalidity Contentions, at pp. 23-24. Apple maintained this exact position in its April 16, 2018 Amended Invalidity Contentions. Apple reiterated its centralized server theory when it served its final election of prior art references, electing FBCB2 ". . . as described in at least the materials identified in Exhibit B-14 to Apple's Patent Rule 3-3 Invalidity Contentions served December 1, 2017, Apple's Amended Patent Rule 3-3 Invalidity Contentions served April 16, 2018." Ex. B, Apple's Final Election of Prior Art References, at p. 5. Apple has not sought leave to amend its contentions as required by P.R. 3-6.

The Siegel Report is the first instance in which Apple has disclosed any theory related to "dynamically electing servers." Ex. C, Siegel Report, at ¶¶ 71, 100, 104, 164, 168, 183, 219, 235, 243, 265, 273, 418, and 470. In fact, the only evidence relied upon by Dr. Siegel in support of "dynamically electing servers," documents bearing production numbers SIEGEL000794-5 and SIEGEL001003-5, was produced on October 26, 2018—over six months after Apple's April 16, 2018 Amended Invalidity Contentions. Ex. D-F. The charted centralized server theory—which did not change in substance from Apple's December 1, 2017 invalidity contentions and its April 16, 2018 amended contentions—bears no semblance and relation to the new "dynamically electing servers" theory set forth for the first time by Dr. Siegel. Cf. Ex. A, Exhibit D-14 to Apple's Amended Invalidity Contentions, at pp. 23-24, 30; Siegel Report at ¶ 100.

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