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

AGIS SOFTWARE DEVELOPMENT LLC, Plaintiff, v. HUAWEI DEVICE USA INC. ET AL., Defendants.	§ § § § § § § § § § §	Case No. 2:17-CV-0513-JRG (LEAD CASE) **JURY TRIAL DEMANDED**
APPLE, INC., Defendant.	§ § § § §	Case No. 2:17-CV-0516-JRG (CONSOLIDATED CASE) **JURY TRIAL DEMANDED**

AGIS SOFTWARE DEVELOPMENT LLC'S MOTION FOR PARTIAL SUMMARY JUDGMENT OF NO INVALIDITY OVER THE FBCB2 SYSTEM

Pursuant to Fed. R. Civ. P. 56, L.R. CV-56, and the Court's Docket Control Order of October 29, 2018 (Dkt. 217), Plaintiff AGIS Software Development LLC ("AGIS") respectfully moves the Court for partial summary judgment of no invalidity over the FBCB2 system with respect to 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 record contains no evidence that the FBCB2 system meets each and every limitation of the Patents-in-Suit. AGIS respectfully submits as follows:

I. STATEMENT OF UNDISPUTED MATERIAL FACTS

1. AGIS asserts, in part, the Location Patents against Apple in this case. *AGIS Software Development LLC v. Apple Inc.*, 2:17-cv-00516, Dkts. 32-B through 32-E.

2. Apple contends that the FBCB2 system is prior art to the Location Patents. Dkts. 233-2, 233-3.

3. Apple alleges that the Location Patents are anticipated and rendered obvious by the FBCB2 system. Dkts. 233-2, 233-3.

4. Apple relies solely on the expert testimony of Dr. Neil Siegel for its FBCB2 system-based contentions. Dkt. 233-4.

5. AGIS filed two motions to strike the Siegel Report on December 14, 2018. See Dkts. 233, 234.

II. STATEMENT OF THE ISSUE TO BE DECIDED BY THE COURT

Whether AGIS is entitled to judgment as a matter of law that the asserted claims of the Location Patents are not invalid over the FBCB2 system, where the record contains no evidence that the alleged prior art references meet each and every limitation of the asserted claims of the Location Patents.

III. LEGAL STANDARD

A. Prior Art

There is a presumption that a patent is valid. *Ruiz v. A.B. Chance Co.*, 234 F.3d 654, 662 (Fed. Cir. 2000). Under 35 U.S.C. § 102(a), a person shall be entitled to a patent unless

> (1) the claimed invention was patented, described in a printed publication, or in public use, on sale, or otherwise available to the public before the effective filing date of the claimed invention; or (2) the claimed invention was described in a patent issued under section 151, or in an application for patent published or deemed published under section 122(b), in which the patent or application, as the case may be, names another inventor and was effectively filed before the effective filing date of the claimed invention."

35 U.S.C. § 102(a).

An anticipating prior art reference "must disclose each and every limitation of the claimed invention, must be enabling, and must describe the claimed invention sufficiently

to have placed it in possession of a person of ordinary skill in the field of invention." *Helifix Ltd. v. Blok-Lok, Ltd.*, 208 F.3d 1339, 1346 (Fed. Cir. 2000); *Finisar Corp. v. DirecTV Grp., Inc.*, 523 F.3d 1323, 1334 (Fed. Cir. 2008) ("To anticipate a claim, a single prior art reference must expressly or inherently disclose each claim limitation.").

Under 35 U.S.C. § 103, a patent is invalid for obviousness if "the differences between the claimed invention and the prior art are such that the claimed invention as a whole would have been obvious before the effective filing date of the claimed invention to a person having ordinary skill in the art to which the claimed invention pertains." Obviousness is a legal question that is assessed according to the following underlying inquiries: "(1) the scope and content of the prior art; (2) the level of ordinary skill in the art; (3) the differences between the claimed invention and the prior art; and (4) secondary evidence of nonobviousness." *Ivera Med. Corp. v. Hospira, Inc.*, 801 F.3d 1336, 1344 (Fed. Cir. 2015).

B. Summary Judgment

Summary judgment should be granted "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). Summary judgment is proper when there is no genuine dispute of material fact, *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986), viewing any evidence in the light most favorable to the non-movant. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). Rule 56 of the Federal Rules of Civil Procedure "mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp.*, 477 U.S. at 322.

IV. ARGUMENT

No genuine dispute of material fact exists as to whether the FBCB2 system fails to meet each and every limitation of the Location Patents. Thus, even viewing the evidentiary record in the light most favorable to Apple, the Court should find that Apple has not established that the FBCB2 system anticipates or renders obvious the Location Patents.

A. The Evidentiary Record Fails to Show that the FBCB2 System Discloses the Server-Based Limitations of the Location Patents

On December 14, 2018, AGIS filed a motion to strike portions of the Siegel Report related to a new invalidity theory based on "dynamically electing servers." Dkt. 233. In summary, the asserted claims of the Location Patents each include one or more server-based limitations. Dkt. 233 at 1-2. The Siegel Report advances a single, albeit new and previously undisclosed, invalidity theory involving "dynamically electing servers" with respect to the server-based limitations in support of Apple's anticipation and obviousness contentions. Dkt. 233 at 1-2. Should the Court grant AGIS's December 14, 2018 motion to strike the portions of the Siegel Report relating to "dynamically electing servers" as improperly based on a new, previously-undisclosed invalidity theory, the record would contain no evidence that the FBCB2 system meets each and every limitation (i.e., the server-based limitations) of the Location Patents. Dkt. 233 at 4-6. AGIS respectfully submits that it is entitled to partial summary judgment that the Patents-in-Suit are not invalid over the FBCB2 system.

B. The Evidentiary Record Fails to Show that the FBCB2 System-based Combinations Disclose or Suggest the Asserted Claims of the Location Patents

On December 14, 2018, AGIS filed a motion to strike the entirety of the Siegel Report related to new obviousness combinations based on the FBCB2 system in view of U.S. Patent Nos. 6,212,559 ("the '559 patent"); 5,672,840 ("the '840 patent"); 6,904,280 ("the '280 patent");

and/or 7,278,023 ("the '023 patent") (collectively, the "Siegel Patents"). Dkt. 234. In summary, the asserted claims of the Location Patents each include one or more limitations for which the Siegel Report alleges, in the first instance for this case, non-elected obviousness combinations based on the FBCB2 system in view of U.S. Patent Nos. 6,212,559; 5,672,840; 6,904,280; and 7,278,023. Dkt. 234 at 1-3. Apple never identified the Siegel Patents as anticipatory or obviousness-type prior art references in its amended invalidity contentions, and failed to provide any citations or evidence in support of its new invalidity theories as required by P.R. 3-3. Dkt. 234 at 1-3. Apple did not elect any of the Siegel Patents in its final election of prior art references. Dkt. 234 at 1-3. In fact, Apple specifically identified a combination based on the FBCB2 system with U.S. Patent Application No. 2002/0115453 ("Poulin") or U.S. Patent No. 7,353,034 ("Haney"). Dkt. 234 at 4-6. The Siegel Report departs from Apple's representations and presented new, undisclosed combinations based on the FBCB2 system and the Siegel Patents. Dkt. 234 at 4-6. In one example, the Siegel Report combines the FBCB2 system with the '559 patent filed in 1994, which pre-dates the FBCB2 project and which Siegel admits describes a separate and distinct project, the FAAD C2I system. Dkt. 234 at 4-6.

Should the Court grant AGIS's December 14, 2018 motion to strike the Siegel Report in its entirety for alleging non-elected obviousness combinations based on the FBCB2 system and the Siegel Patents, the record would contain no evidence that the FBCB2 system meets each and every limitation (i.e., the server-based limitations) of the Location Patents. Dkt. 234 at 5. AGIS respectfully submits that it is entitled to partial summary judgment that the Patents-in-Suit are not invalid over the FBCB2 system.

Like the case *Cheese Systems, Inc. v. Tetra Pak Cheese and Powder Systems, Inc.*, where the Federal Circuit affirmed a finding of no invalidity based on the alleged prior art that failed to

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