



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.*

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Civil Action No. 2:17-CV-513-JRG  
(LEAD CASE)

AGIS SOFTWARE DEVELOPMENT LLC,

*Plaintiff,*

v.

APPLE INC.,

*Defendant.*

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Civil Action No. 2:17-CV-516-JRG  
(CONSOLIDATED CASE)

**DEFENDANT APPLE INC.'S MOTION TO STRIKE PORTIONS OF THE OPENING  
EXPERT REPORT OF MR. JOSEPH MCALEXANDER THAT RELY ON UNTIMELY  
DISCLOSED INFRINGEMENT THEORIES**



**TABLE OF CONTENTS**

|  | <b><u>Pages</u></b> |
|--|---------------------|
| I. INTRODUCTION .....  | 1                   |
| II. FACTUAL BACKGROUND.....  | 1                   |
| III. LEGAL STANDARD.....   | 5                   |
| A. Requirements For Infringement Contentions And Amendments Without Leave.....   | 5                   |
| B. Expert Reports May Not Introduce Theories Not Previously Disclosed In Infringement Contentions. ....  | 7                   |
| IV. STATEMENT OF THE ISSUE TO BE DECIDED BY THE COURT.....   | 7                   |
| V. ARGUMENT .....  | 7                   |
| A. The Amended Contentions Served After The McAlexander Report Were Improper And Cannot Retroactively Support Disclosure Of The New Infringement Theories Contained In The McAlexander Report..... | 8                   |
| B. The New Theories of Infringement Introduced For The First Time In The McAlexander Report Should Be Stricken.....  | 10                  |
| VI. CONCLUSION.....  | 13                  |

**TABLE OF AUTHORITIES**

**Pages**

**Cases**

*Anascape, Ltd. v. Microsoft Corp.*,  
No. CIV.A. 9:06-CV-158, 2008 WL 7180756 (E.D. Tex. May 1, 2008)..... 7, 10, 12

*Koninklijke KPN N.V. v. Samsung Elecs. Co.*,  
No. 2:14-CV-1165-JRG, 2016 WL 7042222 (E.D. Tex. July 25, 2016)..... 6, 8

*Mears Techs., Inc. v. Finisar Corp.*,  
No. 2:13-CV-376-JRG, 2014 WL 12605571 (E.D. Tex. Oct. 6, 2014)..... 8, 12

*Opal Run LLC v. C & A Mktg., Inc.*,  
No. 2:16-CV-24-JRG-RSP, 2017 WL 3381344 (E.D. Tex. May 15, 2017)..... 7, 10, 12

*Parallel Networks, LLC v. Abercrombie & Fitch*,  
No. 6:10CV111, 2011 WL 13098299 (E.D. Tex. Dec. 5, 2011) ..... 10

*Realtime Data, LLC v. Packeteer, Inc.*,  
No. 6:08-cv-144, 2009 WL 2590101 (E.D. Tex. 2009) ..... 6

*Sycamore IP Holdings LLC v. AT&T Corp.*,  
No. 2:16-CV-588-WCB, 2018 WL 1695231 (E.D. Tex. Apr. 6, 2018) ..... passim

*UltimatePointer, LLC v. Nintendo Co.*,  
No. 6:11-CV-496, 2013 WL 12140173 (E.D. Tex. May 28, 2013) ..... 5

*Zix Corp. v. Echoworx Corp.*,  
No. 2:15-CV-1272-JRG, 2016 WL 3410367 (E.D. Tex. May 13, 2016) ..... 6

**TABLE OF EXHIBITS**

| <b><u>Exhibit Number</u></b> | <b><u>Description</u></b>                      |
|------------------------------|--|
| Ex. 1                        | McAlexander Report Attachment A ('970 patent)  |
| Ex. 2                        | McAlexander Report Attachment B ('055 patent)  |
| Ex. 3                        | McAlexander Report Attachment D ('838 patent)  |
| Ex. 4                        | November 2018 Contentions Ex. A ('970 patent)  |
| Ex. 5                        | November 2018 Contentions Ex. B ('055 patent)  |
| Ex. 6                        | November 2018 Contentions Ex. D ('838 patent)  |
| Ex. 7                        | 2018-05-18 Plaintiff's Rule 4-2 Disclosures    |
| Ex. 8                        | 2018-09-13 Transcript of Markman Hearing       |
| Ex. 9                        | 2018-05-18 Defendant's Rule 4-2 Disclosures    |
| Ex. 10                       | Correspondence Between Counsel                 |
| Ex. 11                       | September 2018 Contentions Ex. A ('970 patent) |
| Ex. 12                       | September 2018 Contentions Ex. B ('055 patent) |
| Ex. 13                       | September 2018 Contentions Ex. D ('838 patent) |
| Ex. 14                       | September 2018 Contentions Cover Pleading      |
| Ex. 15                       | November 2018 Contentions Cover Pleading       |

[REDACTED]

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## I. INTRODUCTION

On October 29, 2018, AGIS served a technical expert report (“the McAlexander report”) that introduced three new theories of infringement that AGIS never before disclosed to Apple. In an apparent effort to justify introducing those new theories through its expert report, on November 12, 2018—two weeks *after* serving the report—AGIS served “amended infringement contentions” attaching claim charts nearly identical to those submitted with the McAlexander report. But those November 2018 amendments cannot remedy AGIS’s failure to previously disclose its new infringement theories. Critically, AGIS’s November 2018 infringement contentions were improper under Patent Rule 3-6(a) because they were untethered to any claim construction by the Court that was “unexpected or unforeseeable” during claim construction briefing, and furthermore, untimely. Because AGIS failed to timely disclose in its infringement contentions the three new infringement theories introduced in the McAlexander report, Apple respectfully requests that opinions in that report relating to the three new theories be stricken.

## II. FACTUAL BACKGROUND

AGIS first served its Patent Rule (“P.R.”) 3-1 Infringement Contentions on September 18, 2017. AGIS then served amendments to those contentions in February, April, and September 2018. AGIS failed to disclose any of the infringement theories described in Table 1, below, in any of those four sets of infringement contentions.

The Court issued its claim construction order on October 10, 2018. (Dkt. No. 205.) Fact discovery closed on October 26, 2018. (Dkt. No. 220 at 3.)

AGIS served the McAlexander report on October 29, 2018. That report introduced at least three new infringement theories that were not included in any of AGIS’s previously served infringement contentions, as described below in Table 1.

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