



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.

§
§
§
§
§
§
§
§
§
§

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

AGIS SOFTWARE DEVELOPMENT LLC,

Plaintiff,

v.

APPLE INC.,

Defendant.

§
§
§
§
§
§
§
§
§
§

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

**APPLE’S REPLY BRIEF IN SUPPORT OF ITS MOTION TO STRIKE PORTIONS OF
THE OPENING EXPERT REPORT OF MR. JOSEPH MCALEXANDER THAT RELY
ON UNTIMELY-DISCLOSED INFRINGEMENT THEORIES**



TABLE OF CONTENTS

	<u>Pages</u>
I. AGIS FAILED TO DISCLOSE THE NEW THEORIES OF INFRINGEMENT IN ITS PATENT RULE CONTENTIONS.....	1
A. AGIS’s September 2018 Contentions Did Not Identify The “Family Sharing” Feature As The “Predetermined Network” Of The ’970 Patent Claims.	1
B. AGIS’s September 2018 Contentions Did Not Identify The “Notify” Feature As The “User-Specified Symbol” Limitation Of The ’055 Patent Claims.	3
C. AGIS’s September 2018 Contentions Did Not Disclose That The Name Of A Group Message In Apple’s Messages Application Meets The “Identifier Corresponding To The Group” Limitation Of The ’838 Patent Claims.	3
II. AGIS’S FAILURE TO DISCLOSE NEW THEORIES PRIOR TO ITS EXPERT REPORT WAS NEITHER SUBSTANTIALLY JUSTIFIED NOR HARMLESS.	4



TABLE OF AUTHORITIES

Pages

Cases

Anascope, Ltd. v. Microsoft Corp.,
No. CIV.A. 9:06-CV-158, 2008 WL 7180756 (E.D. Tex. May 1, 2008)..... 4

LML Patent Corp. v. JPMorgan Chase & Co.,
2011 WL 5158285 (E.D. Tex. Aug. 11, 2011) 5

Tyco Healthcare Grp. LP v. Applied Med. Res. Corp.,
No. CIV.A. 9:06-CV-151, 2009 WL 5842062 (E.D. Tex. Mar. 30, 2009) 2, 4, 5

TABLE OF EXHIBITS

<u>Exhibit Number</u>	<u>Description</u>
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
Ex. 16	US Patent 8,213,970
Ex. 17	September 2018 Contentions Ex. D ('838 patent)
Ex. 18	September 2018 Contentions Ex. C ('251 patent)
Ex. 19	September 2018 Contentions Ex. E ('829 patent)
Ex. 20	AGIS Production Document bearing production number AGISTX_00007018-AGISTX_00007034
Ex. 21	US Patent 9,408,055
Ex. 22	September 2018 Contentions Ex. B ('055 patent)

[REDACTED]

AGIS asserts that its September 21, 2018 Infringement Contentions (the “September 2018 contentions”) sufficiently disclosed three new infringement theories introduced in its expert report (the “McAlexander Report”). But AGIS does not—and cannot—identify any such disclosures. Indeed, AGIS previously acknowledged that it added the new theories introduced in its October 2018 expert report to contentions in November 2018—weeks after the close of discovery—based on purportedly new and unforeseeable constructions in the Court’s October 10, 2018 Claim Construction Order. (Dkt. No. 251 at 2; Ex.10 at 1.) That alone belies AGIS’s current position that those theories were *already disclosed* in contentions served *before* the issuance of that Order.

AGIS failed to timely disclose the new infringement theories. Its opposition merely identifies disclosures unrelated to the relevant limitations. And that failure is neither substantially justified nor harmless: AGIS fundamentally seeks to change its infringement case just months before trial. Thus, the new infringement theories should be stricken from the McAlexander Report.

I. AGIS FAILED TO DISCLOSE THE NEW THEORIES OF INFRINGEMENT IN ITS PATENT RULE CONTENTIONS.

A. AGIS’s September 2018 Contentions Did Not Identify The “Family Sharing” Feature As The “Predetermined Network” Of The ’970 Patent Claims.

Claim 1 of the ’970 patent requires a “predetermined network of participants.” (Ex. 16 at 9:1-4.) The McAlexander Report identifies Apple’s “Family Sharing” feature—which allows users with *different* Apple IDs to share certain information—as meeting this limitation. (Ex. 1 at A-2.) But AGIS’s September 2018 contentions for this limitation lack a single reference to “Family Sharing.” (Ex. 11 at A-3, A-4.) Instead, those contentions state that “each ‘Apple ID’ is a *personal* account. . . .” (*Id.*) As such, AGIS’s contentions list a number of services accessed with an individual’s Apple ID and *not* the “Family Sharing” feature. (Dkt. No. 251, Ex. A at A-3.) Notably, unlike its contentions for “predetermined network” of the ’970 patent, AGIS’s

Explore Litigation Insights

Docket Alarm provides insights to develop a more informed litigation strategy and the peace of mind of knowing you're on top of things.

Real-Time Litigation Alerts



Keep your litigation team up-to-date with **real-time alerts** and advanced team management tools built for the enterprise, all while greatly reducing PACER spend.

Our comprehensive service means we can handle Federal, State, and Administrative courts across the country.

Advanced Docket Research



With over 230 million records, Docket Alarm's cloud-native docket research platform finds what other services can't. Coverage includes Federal, State, plus PTAB, TTAB, ITC and NLRB decisions, all in one place.

Identify arguments that have been successful in the past with full text, pinpoint searching. Link to case law cited within any court document via Fastcase.

Analytics At Your Fingertips



Learn what happened the last time a particular judge, opposing counsel or company faced cases similar to yours.

Advanced out-of-the-box PTAB and TTAB analytics are always at your fingertips.

API

Docket Alarm offers a powerful API (application programming interface) to developers that want to integrate case filings into their apps.

LAW FIRMS

Build custom dashboards for your attorneys and clients with live data direct from the court.

Automate many repetitive legal tasks like conflict checks, document management, and marketing.

FINANCIAL INSTITUTIONS

Litigation and bankruptcy checks for companies and debtors.

E-DISCOVERY AND LEGAL VENDORS

Sync your system to PACER to automate legal marketing.