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** [redacted]
APPLE, INC., Defendant.	§ § § § §	Case No. 2:17-CV-0516-JRG (CONSOLIDATED CASE) **JURY TRIAL DEMANDED**

PLAINTIFF AGIS SOFTWARE DEVELOPMENT LLC'S SUR-REPLY TO APPLE INC.'S REPLY RE SEALED PATENT MOTION TO STRIKE PORTIONS OF THE OPENING EXPERT REPORT OF MR. JOSEPH MCALEXANDER THAT RELY ON UNTIMELY DISCLOSED INFRINGEMENT THEORIES (DKT. 232)

I. INTRODUCTION

The facts tell a story of ample notice of AGIS's long-disclosed infringement theories, and Apple's Reply (Dkt. 267) fails to show otherwise. Apple does not identify any specific prejudice it would suffer if its motion were denied. Instead, AGIS would be severely prejudiced by the relief sought in Apple's over-reaching motion because AGIS would be precluded from addressing central theories set forth in its earliest contentions despite compliance with the rules.

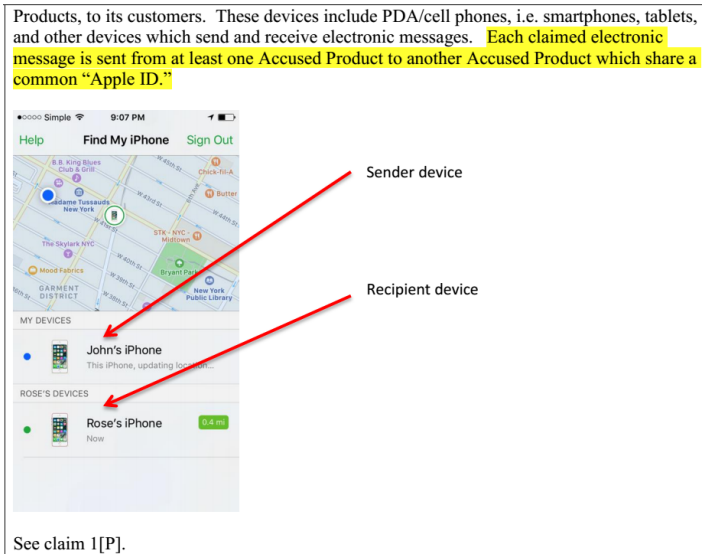
II. AGIS DISCLOSED FAMILY SHARING IN ITS EARLIEST CONTENTIONS

Apple's Reply acknowledges that the focus of the "predetermined network of participants" is the ***Apple ID***. Dkt. 267 at 1. Apple's Reply further admits that AGIS's September 2017 contentions gave Apple notice that AGIS accused the family sharing feature in the context of the "predetermined network of participants limitation." *Id*. Apple's motion must fail because it cannot dispute that AGIS's contentions placed Apple on notice that AGIS accused Apple's Find My iPhone application using the Apple ID.

Apple's Reply raises a new argument; that Mr. McAlexander identifies family sharing with multiple "different Apple IDs" to meet the predetermined network limitation. Dkt. 267 at 1. However, Apple's Reply is inconsistent with its own Motion and its own documents. Apple's Motion originally framed the issue as: "The predetermined network of participants is a group of Apple devices all **using the same** 'Apple ID,' including Family Sharing utilizing at least the organizer's Apple ID." Dkt. 232 at Tables 1 and 2. Now that AGIS has demonstrated this theory, Apple attempts to characterize the theory as based on multiple Apple IDs. Dkt. 276 at 1.

[redacted]

[redacted] Indeed, this is the exact scenario AGIS depicted in its original September 2017 contentions, which include a screen shot of Family Sharing between "John" and "Rose.":



Dkt. 251-2 at A-6 (emphasis added). Apple essentially seeks to preclude Mr. McAlexander from discussing this figure which depicts two devices using a "common Apple ID" i.e. family sharing even though it was disclosed in September 2017. Dkt. 232 at 1-3.

Thus, AGIS's original contentions, Mr. McAlexander's report, and every shred of evidence in this case indicate that the alleged infringer's ***Apple ID*** is utilized to determine the scope of the predetermined network whether or not family sharing is activated. *See e.g.* Dkt. 251-5 at A-1, A-5; 250-6 at ¶¶170-172. Apple cannot dispute that the disclosure of the Apple ID is broad enough to encompass uses of the Apple ID whether or not family sharing is activated. Apple has known that the Apple ID functionality implicates family sharing and does not dispute that family sharing has been accused in the scope of the '970 Patent since 2017. Dkt. 267 at 2. Apple does not dispute that extensive discovery was conducted regarding the family sharing feature in the context of the '970 Patent. *Id.*

As evidence by Apple's shifting theory, the true intent of Apple's motion appears to be broader relief to preclude Mr. McAlexander from discussing family sharing in the context of the '970 Patent ***entirely***. Such relief would be highly prejudicial to AGIS as AGIS would be prevented from addressing (1) the full scope of the undisputed Apple ID identifier (which was disclosed in 2017), and (2) family sharing in the context of "forced message alert software application," of the '970 Patent, which is undisputed. Because AGIS disclosed the use of the Apple ID as defining the network, and because AGIS disclosed family sharing as a component of the "forced message alert software application program," which operates on the predefined network of the '970 Patent, Apple cannot claim that it was not on notice of AGIS's positions regarding "family sharing" and the Court should deny Apple's motion.

III. AGIS'S SEPTEMBER 2018 CONTENTIONS DISCLOSE THE NOTIFY ME FEATURE IN CONNECTION WITH THE '055 PATENT

Apple's motion appears to misapprehend AGIS's contentions and the McAlexander report. Apple does not dispute that AGIS's September 2018 '055 contentions disclosed the "notify me" feature, nor that AGIS put Apple on notice of its theories regarding the accused software mechanism – which is representative of Apple map-based products. Dkt. 267 at 3. Apple cannot point to any indication that it misunderstood AGIS's identification of "notify me." *Id.* Apple only contends that "notify me" was not explicitly mentioned with regard to a single limitation: t**he identification of a user specified symbol**. *Id.*

However, the "identification" limitation relates to how a user interacts with symbols on Apple's map-based display. Apple does not dispute that AGIS's contentions set forth the software mechanisms for interacting with Apple's map-based displays to select symbols and points on a map. Dkt. 267 at 3. Additionally, Apple does not dispute that the source code identified by AGIS is used in the context of both the general map functionality and the "notify-

me" sub-feature. Dkt. 267 at 3-4. Instead, Apple complains that AGIS did not include the "notify-me" feature in the "identification of a user specified symbol" claim-chart box. *Id.* As the mechanism for accepting touch-screen input related to symbols described by AGIS is representative of all Apple map-based applications, AGIS was not required to discuss the "notify-me" feature in that specific box of its contentions. It appears that Apple has again sought to exclude all reference to the "notify-me" feature by setting up a straw-man limitation. Apple cannot claim that it was not on notice of AGIS's positions and the Court should deny Apple's motion with regard to the "notify me" feature.

IV. AGIS'S SEPTEMBER 2018 CONTENTIONS DISCLOSED THE "NAME OF A GROUP MESSAGE" AS THE IDENTIFIER CORRESPONDING TO THE GROUP OF THE '838 PATENT

On Reply, Apple admits that AGIS's messages theory was disclosed. Dkt. 267 at 3-4. Apple shifts its argument to allege, for the first time, that AGIS's theory was "buried."[1] Dkt. 267 at 3-4. However, Apple should not be permitted to wait until this late stage to raise issues with AGIS's contentions when Apple was silent for over a year.

Apple also cannot point to any prejudice. It admits that it was on notice of the "messages" theory in the context of the other asserted patents (which have very similar, if not identical, claim limitations). Furthermore, Apple does not dispute that it conducted discovery into the messages feature and had a full and fair opportunity to address it up to this point in the case. The only party who could suffer any prejudice is AGIS, who would suffer severe prejudice if the Court were to strike, on the eve of trial, portions of its contentions that had been disclosed in early 2018.

V. THE RELIEF APPLE SEEKS IS EXTREME AND AGIS WOULD SUFFER SEVERE PREJUDICE

[1] Apple mentions AGIS's "six theories," however Apple fails to tell the Court that AGIS was not "burying" its primary theory, but instead, AGIS has maintained each of these theories throughout discovery and has included them in its expert report.

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