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 IN OPPOSITION TO APPLE INC.'S *DAUBERT* MOTION TO EXCLUDE THE OPINIONS OF MR. ALAN RATLIFF RELATING TO DAMAGES (DKT. 231)

AGIS submits this sur-reply memorandum in further opposition to Apple's *Daubert* motion to exclude certain opinions of AGIS's damages expert Alan Ratliff (Dkt. 231). Apple's Reply in support of its motion is essentially a rehash of the arguments in its opening motion papers. For the reasons set forth below and in AGIS's opposition (Dkt. 250), Apple's motion should be denied.

I. ARGUMENT

A. Mr. Ratliff's "Technical Apportionment" is Not Arbitrary and is Properly Supported by the Opinions of AGIS's Technical Expert

Apple does not dispute that Mr. Ratliff apportions between the patented and non-patented features, and agrees that Mr. Ratliff's opinion is based on Mr. McAlexander's technical analysis of the value of the accused functions and patented features. Apple simply disagrees with Mr. McAlexander's conclusions about the relative significance of the patented technology and the resulting quantification of that in the damages context by Mr. Ratliff.

Apple again focuses on a single paragraph of Mr. McAlexander's report, ignoring the remainder of his analysis on which Mr. Ratliff relied. *See* Dkt. 250 at 5. Apple now labels as "arbitrary" (Dkt. 268 at 2) what is actually an estimate based on substantial qualitative analysis, an approach condoned by this Court in other similar cases, offering no additional authority, citing only cases that are clearly distinguishable and do not support the vague, alternative test which Apple seems to advocate. Apple attempts to distinguish the Federal Circuit's decision in *Chrimar Holding Co., LLC v. ALE USA Inc.*, 732 F. App'x 876, 2018 WL 2120618 (Fed Cir. 2018), Dkt. 250 at 7, arguing that the damages analysis in *Chrimar* was based on royalty rates from licenses the parties had previously entered and that the apportionment of unpatented versus patented features was with respect to a standards essential patent and based on descriptions in the standard itself. Dkt. 268 at 3. But nowhere in *Chrimar* did the Court limit its opinion to

comparisons involving previously-negotiated royalty rates, nor did the Court limit its holding to SEPs. *Chrimar* permits a damages expert to rely on a technical expert's analysis to estimate the relative values of patented versus non-patented features. *Chrimar*, 2018 WL 2120618, at *9.

Mr. Ratliff's 40% apportionment to the patented features - based on Mr. McAlexander's conclusion that the patented features are almost if not as important as the non-patented features - is not, as Apple contends, a "black box." Dkt. 268 at 2. Apple's own damages expert, Paul Meyer, apportioned the value of the price paid by Apple for a patent portfolio for what he deems a comparable license by quantifying similar language. [redacted] AGIS should not be held to a higher standard of precision than Apple's own expert.

Apple also reargues that "AGIS . . . failed to account for several critical technologies in the Accused Apps, including battery life-saving features, the apps' 'look-and-feel,' and technology covered by Apple's own patents." Dkt. 268 at 3. Apple again misses the point. Apple does not dispute that fee-based device and friend-finding apps offered by the wireless carriers, xFi and Family Tracker, which have tens-of-millions of downloads combined, offer the same ***core*** functions and features as Apple's Find My iPhone and Find My Friends apps. It is these core functions and features that are accused by AGIS of infringing, not the other features and functions ***of its devices*** that are the baseline technology which all of the accused and comparable third-party apps are built upon, and therefore need not be apportioned out since the upfront fees are paid for the apps, not their common, shared device platforms.

B. The Market Price of the Family Tracker App Was a Reliable Starting Point for the Hypothetical Negotiation

Attacking Mr. Ratliff's choice of the Family Tracker app as a starting point for his analysis, Apple argues that "AGIS does not identify any evidence showing that Apple made a ***single*** additional sale, received a ***single*** additional dollar in 'advertising' revenue, or received a ***single*** additional dollar in any 'other way' that is attributable to the Accused Apps." Dkt. 268 at 1. Apple then claims that "AGIS provides no objective evidence correlating the price of the third-party Family Tracker app to the alleged 'ecosystem' value of the Accused Apps." Dkt. 268 at 4. But Apple does not dispute that it did not produce *any* data or metrics reflecting, under its ecosystem monetization model, claiming that it "does not track financial information for apps that it distributes for free." Despite Apple's internal decision to not track this data, Apple does not and cannot deny that popular, highly-used apps, such as these, *do* have value and that this value can be estimated based on market information relating to comparable apps that use a different monetization model. For Apple to claim otherwise would mean that Apple includes such apps in every single one of the millions of accused iPhones, iPads, iPods and Apple watches it sells out of sheer benevolence. Such a claim is simply not credible.[1]

Apple also injects a new "Economics 101" argument into this issue, arguing without citing to any authority that no consumer would pay for an app if a similar app is given away free. Apple then declares the only possible explanation is that those who purchased the fee-based third-party apps must have been paying for some feature the third-party apps have that the

1 [redacted]

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