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 REGARDING SEALED MOTION FOR SUMMARY JUDGMENT OF NON-INFRINGEMENT OF U.S. PATENT NO. 8,213,970 (DKT. 228)

Plaintiff AGIS Software Development LLC ("AGIS") hereby submits its Sur-Reply to Defendant Apple Inc.'s ("Apple") Reply Regarding its Sealed Motion for Summary Judgment of Non-Infringement of U.S. Patent No. 8,213,970 (Dkt. 228).

I. APPLE FAILS TO ESTABLISH THERE ARE NO FACTUAL DISPUTES REGARDING NON-INFRINGEMENT OF THE '970 PATENT

Apple alleges that there is no dispute that the response list can be cleared without selecting a response from the response list. Dkt. 294 at 1. AGIS has provided evidence to the contrary, including Apple's expert report and testimony of Apple witnesses. Dkt. 262 at 8. Because genuine issues of material fact exist, AGIS requests that this Court deny Apple's motion for summary judgment.

A. Apple Fails to Establish that "Selecting 'Turn Off Lost Mode' From a Different Device" Clears the Display

Apple's motion fails to explain the inconsistencies between the testimony provided by its own witnesses and its alleged non-infringement theory, revealing key disputed facts that preclude summary judgment. Regardless of whether selecting "Turn Off Lost Mode" from a different device actually turns off "Lost Mode," [redacted] Dkt. 262-8 at 132:18-134:1; Dkt. 262- 8 at 121:7-122:3. Apple provides no evidence to suggest otherwise, other than mere conjecture. [redacted]

Instead, Apple argues that "AGIS abandons its contentions and expert report" to argue that even if Lost Mode is turned off and stopped, the locked device remains locked with a passcode, and "whether a device 'remains locked' has no bearing on the claim language." Dkt. 294 at 3. Apple thus concedes AGIS's point that whether Lost Mode is turned off or stopped

from a different device does not affect whether the device is unlocked and the response list is cleared. As AGIS pointed to in its opposition to Apple's motion, the response list is ***not*** cleared simply by turning off or stopping Lost Mode from a different device. Dkt 262 at 3-4. [redacted] [1] Apple fails to provide any evidence that the response list is cleared by taking the phone out of Lost Mode from a different device using the iCloud website.[2] Whether the response list is cleared by turning off or stopping Lost Mode from a different device is thus a factual issue that precludes a finding of summary judgment.

Moreover, Apple dismisses, without explanation, [redacted] Dkt. 294 at 1. Apple's failure to rebut this argument is fatal, as it effectively concedes that there exist materials facts at issue. To be clear, AGIS does not state that the structure does not have such a clearing requirement—rather [redacted] Dkt. 262 at 9. Apple presents no evidence to rebut that there exists a genuine factual dispute regarding the application of the claims to the allegedly infringing product.

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1 [redacted]

2 [redacted]

B. AGIS's Expert Declaration Is Not Untimely or Improper

Apple's attempt to advance to judgment this highly-disputed factual issue is prejudicial to AGIS and reeks of gamesmanship. Apple's motion is based on a new non-infringement theory raised for the first time in this case. Apple disclosed no meaningful non-infringement theories in response to AGIS's November 8, 2017 Interrogatory Request No. 6 which sought detailed non-infringement theories on a limitation-by-limitation basis. *See* Ex. A, Apple's Sixth Supplemental Responses to AGIS's First Set of Interrogatories. During discovery, AGIS raised to Apple the very prejudice of Apple's failure to provide meaningful non-infringement positions. [redacted]. Contrary to Apple's assertions, Mr. McAlexander's declaration is not untimely. Fed. R. Civ. P. Rule 56 permits the use of affidavits or declarations to support or ***oppose*** a motion for summary judgment. Mr. McAlexander's declaration does not contain "new opinions outside the scope of Mr. McAlexander's expert report." Dkt. 294 at 3, n. 5. Rather, Mr. McAlexander's declaration merely reiterates his opinions from his expert report, and therefore, does not offer any new theories as alleged by Apple. Dkt. 262-4. Mr. McAlexander's declaration was submitted in support of facts disputed by Apple and contains no additional facts. Furthermore, conflicting declarations and facts contained therein are a factual dispute which precludes a finding of summary judgment. *See Metropolitan Life Ins. Co. v. Bancorp Servs., L.L.C.*, 527 F.3d 1330, 1338-1339, 87 U.S.P.Q.2d 1140 (Fed. Cir. 2008) ("The conflict in declarations created a genuine issue of material fact that made summary judgment inappropriate."). Even if the Court does not allow Mr. McAlexander's declaration, Apple advances evidence provided by its own expert which is disputed by AGIS and Mr. McAlexander's expert report. Moreover, the disputed evidence advanced by Apple will be the subject of cross-examination and can be used to impeach Apple's witness.

II. APPLE FAILS TO ESTABLISH PROSECUTION HISTORY ESTOPPEL TO BAR ASSERTION OF INFRINGEMENT UNDER THE DOCTRINE OF EQUIVALENTS

Apple fails to establish any prosecution disclaimer, and AGIS has shown that it surrendered no claim scope during prosecution. AGIS has not surrendered claim scope related to the ability to cancel or withdraw a forced response from a device other than the targeted device, and [redacted] AGIS's opposition thus demonstrates that there is, at the very least, a factual dispute between parties regarding the infringement under the doctrine of equivalents.

Moreover, this is a question of literal infringement and Apple has not shown there is no question of fact with regard to literal infringement.[3] *See supra* Section I. Regardless, there still exist factual issues regarding prosecution history estoppel that must be resolved including, but not limited to, (1) whether the accused devices meet the claims; and (2) equivalence.[4]

III. CONCLUSION

For the foregoing reasons, AGIS respectfully requests that the Court deny Apple's Motion for Summary Judgment of No Infringement of the '970 Patent.

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[3] Apple cites to *Iris Connex, LLC v. Acer Am. Corp.* to support its argument that the amendment was made to overcome prior art. Dkt. 294 at 5, n. 12. AGIS notes that in the *Iris Connex* case, the court found no literal infringement, and plaintiff and its expert did not argue there was literal infringement under the court's construction of the claims for a single, physically removable camera. No. 2:15-CV-1909-JRG, 2016 WL 4596043, at *19-*20 (E.D. Tex. Sept. 2, 2016). Here, there is a factual dispute regarding whether there is literal infringement. Further, Apple's argument that AGIS has surrendered all equivalents is without merit and again, factual issues remain precluding a finding of summary judgment.

[4] "Whether an accused device or method infringes a claim with a § 112, ¶ 6 limitation, i.e., whether it performs the identical function with the same structure, materials, or acts described in the specification or an equivalent thereof, is a question of fact." *IMS Tech. Inc. v. Haas Automation, Inc.*, 206 F.3d 1422, 1429, 54 U.S.P.Q.2d 1129 (Fed. Cir. 2000) (where summary judgment was vacated because factual questions existed as to whether the accused device and its use was a § 112, ¶ 6 equivalent to the corresponding structure of a tape cassette).

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