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**
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 INVALIDITY OF U.S. PATENT NOS. 9,467,838; 9,445,251; 9,408,055; AND 9,749,829 UNDER 35 U.S.C. § 101 (DKT. 229)

Plaintiff AGIS Software Development LLC ("AGIS") hereby submits its Sur-Reply to Defendant Apple Inc.'s ("Apple") Reply to Sealed Motion for Summary Judgment of Invalidity of U.S. Patent Nos. 9,467,838; 9,445,251; 9,408,055; and, 9,749,829 Under 35 U.S.C. § 101 (Dkt. 229).

Apple's Reply fails to establish that the asserted claims are invalid under 35 U.S.C. § 101 by clear and convincing evidence because (1) the claims are not directed to an abstract idea, even under Apple's shift in argument in its Reply, (2) the claims are directed to an inventive concept, and (3) there exist numerous factual disputes that undercut the very facts Apple alleged were material in its opening brief.

I. THE CLAIMS ARE NOT DIRECTED TO AN ABSTRACT IDEA

Regarding the allegedly abstract idea, as AGIS explained in its opposition, a "Map Room" is not an abstract idea. Dkt. 261 at 7. Apple does not directly address whether "map rooms" are physical constructs, but instead, shifts its argument on Reply to argue that the allegedly abstract idea is "situational awareness, communications, and command-and-control functionality." Dkt. 291 at 1. However, even this shift in Apple's argument for an "abstract idea" fails.

AGIS explained, and Apple did not refute, that the asserted claims are directed to, among other things, interacting with user-selectable symbols on a map. Dkt. 261 at 7. These limitations take the inventions of the patents-in-suit out of any alleged "abstract idea." In response, Apple walks back its preemption argument and states that claims may be abstract even though they are not preemptive. Dkt. 291 at 1. Apple uses phrases such as "bulk of each claim" when characterizing the allegedly abstract idea, all but ignoring the numerous highlighted features identified by AGIS in its Response. (*Compare* Dkt. 291 at 4 *with* Dkt. 261 at 10). Further, Apple fails to distinguish *Enfish* or *Finjan*, which apply here. As was the case in *Enfish*, Apple

attempts to over-generalize (i.e., by relying on the "bulk of each claim") and falls into the trap identified by the Federal Circuit. *Enfish, LLC v. Microsoft Corp.*, 822 F.3d 1327, 1337, 118 U.S.P.Q.2d 1684 (Fed. Cir. 2016). The claims of AGIS's patents, like those in *Finjan*, contain numerous algorithmic steps, as confirmed by the Court in its *Markman* Order. *Finjan, Inc. v. Blue Coat Systems, Inc.*, 879 F.3d 1299, 1305-1306, 125 U.S.P.Q.2d 1282 (Fed. Cir. 2018).

One example of Apple's overzealous application of the "map room" is its failure to account for the "user-selectable symbols." Apple only attempts to reconcile this failure by alleging that it is "undisputed" that the user-selectable symbols were known in the art. Dkt. 291 at 1-2. [redacted] Apple treats this failure in a footnote, where it claims this dispute only relates to novelty. Dkt. 291 at 6, n. 3. Apple forgets that it had relied on these alleged "material facts" in its opening brief. Dkt. 229 at 6.

Another example of Apple's "map room" failure is with regard to the "wherein the first device does not have access to respective Internet Protocol addresses of the second devices." This limitation proved to be critical in the denial of numerous *Inter Partes* Review Petitions, *albeit*, in the context of patentability. *See e.g.*, IPR2018-00817; IPR2018-00818; IPR2018-01081. This limitation sets forth yet another example of a specific implementation of a solution to a technological problem, not an abstract idea. *See Enfish*, 822 F.3d at 1339 (specific implementation of a solution to a problem is not an abstract idea); *see also Intellectual Ventures II LLC v. Fedex Corp. et al.*, No. 2:16-cv-00980, Dkt. No. 526 at 20-21 (E.D. Tex. May 10, 2018) (holding that invention directed towards overcoming technological problem with machine

scanners was not patent ineligible). Accordingly, because the claims are not directed to an abstract idea, Apple's Motion should be denied

II. THE CLAIMS CONTAIN AN INVENTIVE CONCEPT

In its Response, AGIS identified an inventive concept in the claims. Dkt. 261 at 13-14. On Reply, Apple merely sets up straw men arguments, such as requiring that the claims include language such as "without opening a separate application" in order to be inventive. Dkt. 291 at 2. Apple cannot dispute that at least the inventive claim elements directed to the use of "user-selectable symbols" provide a patent eligible inventive concept. Indeed, as AGIS points out in its Response, the claim language that supports this portion of the inventive concept was ***ignored*** by Apple in its Motion. *See* Dkt. 261 at 10; *see also* Dkt. 291 at 4 ("bulk of each claim").

Additionally, Apple refers to AGIS's expert at claim construction, Dr. Carbonell; however, Apple's characterizations of Dr. Carbonell's testimony are incorrect. Apple generalizes Dr. Carbonell's testimony as related to "creating the software described in AGIS's claims." Dkt. 291 at 5. However, Dr. Carbonell's testimony related to each claimed step. As explained above, the Court found that the claims of AGIS's patents include algorithms made up of steps. Dkt. 205. Whether each step could have been programmed goes towards enablement, not inventiveness. *See* Dkt. 261 at 13. Dr. Carbonell did not say that each step was known, let alone that the algorithm was known or that the algorithm was not inventive. If Apple were correct, any claim that recites an enabled algorithm would be invalid under 35 U.S.C. §101.

III. APPLE'S MOTION DOES NOT RELY ON UNDISPUTED MATERIAL FACTS

Apple concedes that there are disputes of fact; however, on Reply, Apple contends that "most" disputed facts are not "***material***." Dkt. 291 at 5. Apple's argument fails for two reasons. First, even if Apple were correct, it admits that it does not address ***all*** of AGIS's factual disputes, only "most" or "many." Dkt. 291 at 5-6. Second, Apple ignores that AGIS disputes the very facts that Apple relied on as **material** in its original Motion. *See* Dkt. 229 at 1 ("Statement of Undisputed Material Facts"); *see also* Dkt. 229 at ¶ 9 (citing to *disputed* testimony from named inventor Christopher Rice).

Accordingly, because there exist disputes of material fact, summary judgment is inappropriate and Apple's Motion should be denied.

IV. CONCLUSION

For the foregoing reasons, AGIS respectfully requests that the Court deny Apple's Motion for summary judgment in its entirety.

Dated: January 22, 2019

BROWN RUDNICK LLP

/s/ Alfred R. Fabricant

Alfred R. Fabricant
NY Bar No. 2219392
Email: afabricant@brownrudnick.com
Lawrence C. Drucker
NY Bar No. 2303089
Email: ldrucker@brownrudnick.com
Peter Lambrianakos
NY Bar No. 2894392
Email: plambrianakos@brownrudnick.com
Vincent J. Rubino, III
NY Bar No. 4557435
Email: vrubino@brownrudnick.com
Alessandra C. Messing
NY Bar No. 5040019
Email: amessing@brownrudnick.com
Shahar Harel
NY Bar No. 4573192

DOCKET ALARM

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.