IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
MARSHALL DIVISION

AGIS SOFTWARE DEVELOPMENT LLC,	§	Case No. 2:17-CV-0513-JRG
	§	(LEAD CASE)
Plaintiff,	§	
	§	**JURY TRIAL DEMANDED**
v.	§	
	§	
HUAWEI DEVICE USA INC. ET AL.,	§	[redacted]
	§	
Defendants.	§	

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

PLAINTIFF AGIS SOFTWARE DEVELOPMENT LLC'S RESPONSE IN OPPOSITION TO APPLE INC.'S SEALED MOTION TO STRIKE THE UNTIMELY DECLARATION OF AGIS'S TECHNICAL EXPERT, JOSEPH C. MCALEXANDER, ATTACHED TO DKT. 262 AS EXHIBIT 4 (DKT. 311)

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I. INTRODUCTION

Plaintiff AGIS Software Development LLC ("AGIS") hereby submits its Response in Opposition to Defendant Apple Inc.'s ("Apple") Motion to Strike the Untimely Declaration of AGIS's Technical Expert, Joseph C. McAlexander, Attached to Dkt. 262 as Exhibit 4 (Dkt. 311). The McAlexander declaration submitted in connection with AGIS's opposition to Apple's summary judgment motion does not contain any new opinions, but only clarifies the conclusions and opinions in Mr. McAlexander's expert report and deposition. Apple's motion to strike essentially reargues its summary judgment motion and focuses on the incorrect conclusion that selecting "Turn Off Lost Mode" on a sender device clears the required responses on the recipient device. As AGIS explained in its opposition to summary judgment, Apple's conclusion is not supported by its expert report and contradicts the testimony of its own witnesses. *See* Dkt. 262. Here, Apple's motion to strike relies on a misinterpretation of Mr. McAlexander's report and declaration. In response to Apple's summary judgment motion, Mr. McAlexander submitted his declaration to highlight the portions of both his report and Mr. Clark's rebuttal report that reflect Apple's incorrect factual assumptions, revealing questions of fact to be decided by the jury. There is no harm to Apple if the McAlexander declaration remains part of the record in this case as it merely repeats and clarifies the evidence and opinions found in Mr. McAlexander's report. Moreover, Apple has not sufficiently articulated how it is harmed by the three-page-long McAlexander declaration. Apple had a full and fair opportunity when it submitted its summary judgment reply to rebut the allegedly new opinions with its own expert declaration and will have the opportunity to cross-examine Mr. McAlexander at trial.

For these reasons, Apple's motion should be denied.

II. BACKGROUND FACTS

The Infringement Expert Report of Joseph McAlexander was served on October 29, 2018 in accordance with the Court's Docket Control Order. The Expert Rebuttal Report of Paul C. Clark was served on November 19, 2018. On December 14, 2018, Apple filed its motion for summary judgment of non-infringement of U.S. Patent No. 8,213,970. Dkt. 228. AGIS filed its opposition to that motion on January 4, 2019, along with a Declaration of Mr. McAlexander. Dkts. 262, 262-5.

[redacted]

III. LEGAL STANDARD

Fed. R. Civ. P. 26(a)(2)(A) requires that an expert's report "shall contain a complete statement of all opinions expressed and the basis and reason therefore." A party must disclose the opinions of its experts "at the times and in the sequence that the court orders." Fed. R. Civ. P. 26(a)(2)(D). Rule 26(a)(2)(C) requires that expert testimony that is intended to contradict or rebut evidence identified by another party must be done within thirty (30) days after disclosure by the other party. A "party that without substantial justification fails to disclose information required by Rule 26(a) or 26(e)(1) . . . is not, unless such failure is harmless, permitted to use as evidence at a trial, at a hearing, or on a motion any witness or information not so disclosed." Fed. R. Civ. P. 26(c)(1).

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