

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

AGIS SOFTWARE DEVELOPMENT LLC,

Plaintiff,

v.

HTC CORPORATION,

Defendant.

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Case No. 2:17-CV-0514-JRG  
(LEAD CASE)

**JURY TRIAL DEMANDED**

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**AGIS SOFTWARE DEVELOPMENT LLC'S OPPOSED MOTION  
TO STRIKE PORTIONS OF THE JANUARY 11, 2019  
EXPERT REPORT OF DR. ANDREW WOLFE**

**I. INTRODUCTION**

Plaintiff AGIS Software Development LLC (“AGIS”) submits this Motion to Strike Portions of the January 11, 2019 Expert Report of Dr. Andrew Wolfe (“Wolfe Report”) relating to [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] relevant to HTC’s defenses (Dkt. 118 at 3-4) and P.R. 3-4 which requires HTC to produce source code with its invalidity contentions. HTC did not identify any Google source code printouts or the non-produced source code libraries in its discovery response to AGIS’s Interrogatory Request No. 8 seeking detailed non-infringement contentions. HTC could have and should have notified AGIS about any source code printouts produced by Google and any other discovery from Google, as well as the non-produced source code libraries. Because HTC failed to abide by the Court’s discovery order and P.R. 3-4, and failed to produce the source code printouts and libraries during the discovery period, AGIS respectfully moves the Court to strike the portions of the Wolfe Report including and related to the same.

**II. FACTUAL BACKGROUND**

On August 29, 2018, AGIS served deposition and document subpoenas on Google requesting, among other things, [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] Proper notice was provided to HTC of the subpoena to Google. Id. at 1. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] The protective order in this case is restrictive; it limits reviewers' requests for printouts by number of total pages, number of consecutive pages, number of copies, and even the number of lines to be included for each page. Dkt. 119 at 14-16. [REDACTED]

[REDACTED]

[REDACTED]

On November 26, 2018 and December 13, 2018, AGIS notified HTC in writing that, responsive to AGIS's subpoena, Google had made available source code for inspection, that AGIS had reviewed the code, and that Google produced to AGIS printouts of requested portions of the code. Ex. C, D. AGIS provided HTC with Google's counsel's contact information so that HTC could obtain copies of the source code printouts and requested that HTC copy AGIS on all correspondence with Google's counsel. Id. AGIS received no response to its November 26, 2018 and December 13, 2018 correspondence to HTC about the Google source code productions. HTC did not notify AGIS about any communication with Google's counsel. HTC did not notify AGIS about any discovery or productions from Google to HTC. HTC provided no notice to

AGIS that HTC had reviewed the Google source code or that HTC had requested any source code printouts from Google. HTC did not produce any Google source code printouts to AGIS.

On December 14, 2018, AGIS served the Opening Expert Report of Mr. Joseph McAlexander regarding infringement of the patents-in-suit by HTC (“McAlexander Report”). On January 11, 2019, HTC served the rebuttal expert report of Andrew Wolfe regarding non-infringement (“Wolfe Report”). Ex. E. Nearly a month after the McAlexander Report and virtually concurrently with the Wolfe Report, on January 13, 2019, Google made available new source code for inspection. Ex. F. AGIS promptly notified HTC of the availability of the new Google source code. Ex. G. AGIS reviewed the code and requested additional source code printouts from Google. Ex. G, H. Google objected to AGIS’s printing request and produced only portions of the requested printouts of the new source code. Ex. H. [REDACTED]

[REDACTED] HTC did not notify AGIS about any communication with Google’s counsel. HTC did not notify AGIS about any discovery or productions from Google to HTC. HTC provided no notice to AGIS that HTC had reviewed the Google source code or that HTC had requested any source code printouts from Google. HTC did not produce any Google source code printouts to AGIS.

AGIS served Interrogatory Request No. 8 on March 8, 2018 which specifically requested HTC’s detailed non-infringement contentions, and AGIS pursued Google source code for the accused functionalities in order ensure HTC’s disclosure of any and all non-infringement theories based on Google source code. HTC’s non-infringement contentions made no reference to any Google source code or additional source code libraries. Ex. I. In fact, HTC’s response to AGIS’s requests for its non-infringement contentions includes an objection to any requirement

for “information about applications designed and made by Google,” and a representation that HTC does not design or modify Google code and products. Ex. J at 4. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] The non-compliant source code printouts and libraries should be excluded from the Wolfe Report and HTC should be precluded from relying on the late code.

### III. LEGAL STANDARD

P.R. 3-4 requires that “with the ‘Invalidity Contentions,’ the party opposing a claim of patent infringement must produce or make available for inspection and copying: (a) Source code, specifications, schematics, flow charts, artwork, formulas, or other documentation sufficient to show the operation of any aspects or elements of an Accused Instrumentality identified by the patent claimant in its P. R. 3-1(c) chart.”

The Court’s discovery order requires that “[a] party receiving documents from a third party will provide copies of those documents to each other party within 5 business days of receiving those documents,” and that each party produce all documents, electronically stored information, and tangible things in the possession, custody, or control of the party that are relevant to the pleaded claims or defenses involved in this action “without awaiting a discovery request.” Dkt. 118 at 3-4 and 9.<sup>1</sup>

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<sup>1</sup> HTC has represented to AGIS that it believes the Huawei discovery order is the operative order. Nevertheless, the discovery order in the HTC case contains substantially similar provisions. *AGIS Software Development LLC v. HTC Corporation*, Case No. 2:17-cv-00514, Dkt. 38 at 3-4 and 10.

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