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

AGIS SOFTWARE DEVELOPMENT LLC, Plaintiff, v. HTC CORPORATION, Defendant.	§ § § § § § § § §	Case No. 2:17-CV-0514-JRG (LEAD CASE) **JURY TRIAL DEMANDED** [redacted]
LG ELECTRONICS INC., Defendant.	§ § § § §	Case No. 2:17-CV-0515-JRG (CONSOLIDATED CASE) **JURY TRIAL DEMANDED**

AGIS SOFTWARE DEVELOPMENT LLC'S OPPOSED MOTIONS *IN LIMINE*
FOR THE *AGIS SOFTWARE DEVELOPMENT LLC V. HTC CORPORATION* TRIAL

Plaintiff AGIS Software Development LLC ("AGIS" or "Plaintiff") hereby submits its Opposed Motions *in Limine* to prevent Defendant HTC Corporation ("HTC" or "Defendant") from introducing improper evidence and characterizations at trial.

1. MOTION *IN LIMINE* TO PRECLUDE HTC FROM INTRODUCING TESTIMONY OR EVIDENCE RELATED TO AGIS'S FINANCES

AGIS moves for an order precluding HTC from introducing any argument, reference, evidence, suggestion, testimony (including expert testimony), or elicitation of any testimony regarding Plaintiff's finances, or the finances of its parent company, predecessors-in-interest, or related entities. Testimony, evidence, and argument regarding Plaintiff's financial condition (such as the revenues, expenses, profits, losses, assets, liabilities, and stockholders' equity of AGIS or its affiliated companies), other than a financial valuation of the asserted patents, are irrelevant and should be prohibited under Federal Rules of Evidence 401 and 402. Such

evidence should also be excluded under Federal Rule of Evidence 403, as any relevance would be substantially outweighed by the dangers of misleading and confusing the jury, and of unfair prejudice to AGIS.

2. MOTION *IN LIMINE* TO PRECLUDE THE USE OF DEROGATORY, DISPARAGING, AND/OR PEJORATIVE REFERENCES ABOUT NON-PRACTICING ENTITIES INCLUDING AGIS SOFTWARE DEVELOPMENT LLC AND AGIS, INC.

Only terms whose probative value outweighs unfair prejudicial implications should be permitted to be used at trial. *See*, *e.g.*, *Personalized User Model*, *L.L.P. v. Google Inc.*, No. 09-525-LPS, 2014 WL 807736, at *3 (D. Del. Feb. 27, 2014) (granting motion *in limine* to preclude use of "the term 'patent troll' or other similar pejorative terms"); *Intellectual Ventures I LLC v. Symantec Corp.*, No. 10-1067-LPS, 2015 WL 82052, at *1 (D. Del. Jan. 6, 2015) (holding defendant may not refer to plaintiff as a "patent troll . . . as such disparagement is irrelevant"); *Rembrandt Wireless Techs. LP v. Samsung Electrs. Co., Ltd.*, No. 2:13-CV-213-JRG-RSP, 2015 WL 627430, at *1 (E.D. Tex. Jan. 31, 2015) (precluding defendants from making derogatory, disparaging, and/or pejorative references to plaintiff, including "patent troll" or other similar terms); *Mobile Telecomms. Techs., LLC v. Zte (USA) Inc.*, No. 2:13-CV-946-JRG, 2016 WL 8260584, at *3 (E.D. Tex. July 22, 2016). Accordingly, AGIS moves for an order precluding HTC from making prejudicial statements at trial about AGIS Software Development LLC and AGIS, Inc. as non-practicing entities. Non-exhaustive examples of such references include the terms (1) "patent troll," (2) "pirate," (3) "patent assertion entity," (4) "non-practicing entity," (5) "NPE," (6) "shell corporation," (7) "privateer," (8) "bounty hunter," (9) "bandit," (10) "paper patent," (11) "stick up," (12) "shakedown," (13) "playing the lawsuit lottery," (14) "corporate shell game," (15) "company that doesn't make anything," (16) "company that doesn't sell anything," (17) "company that doesn't do anything," (18) "toll collector," (19) "being in the

business of filing lawsuits," (20) "engaging in a litigation-based licensing program," (21) "litigious," or any other suggestion that it is inappropriate for AGIS to bring its patent claims in Court. *See, e.g.*, *Rembrandt*, 2015 WL 627430, at *1 (precluding "patent troll," "pirate," "bandit," "paper patent," "stick up," "shakedown," "playing the lawsuit lottery," "patent assertion entity," "company that doesn't make anything," and "company that doesn't sell anything," among other pejorative terms); *Mobile Telecomms.*, 2016 WL 8260584, at *3 (precluding "toll collector," "being in the business of filing lawsuit," and "any other ad hominem attack on the business practices of MTel or any pejorative reference to MTel or its representatives, affiliates or employees").

3. MOTION *IN LIMINE* TO PRECLUDE DISPARAGING THE UNITED STATES PATENT AND TRADEMARK OFFICE

AGIS moves for an order preventing HTC from disparaging the United States Patent and Trademark Office ("PTO"), suggesting that the PTO is prone to error, not diligent, or not competent, and from arguing that the U.S. patent system is flawed and requires reform. Generalized, unsupported indictments of the PTO and the patent system are irrelevant, serve no legitimate purpose at trial, confuse juries, are highly prejudicial, and should be excluded. *Droplets, Inc. v. Overstock.com, Inc.*, No. 2:11-CV-401-JRG-RSP, 2014 WL 11515642, at *1 (E.D. Tex. Dec. 10, 2014) (granting motion "to preclude Defendants from offering any argument, evidence, testimony, insinuation, or reference regarding the workload of the PTO (or its examiners), any attempt to disparage the PTO (or its examiners)"); *DNT, LLC v. Sprint Spectrum, LP*, No. 3:09-CV-21, 2010 WL 582164, at *4 (E.D. Va. Feb. 12, 2010) (excluding from trial as inappropriate, anything tending to disparage the patent and trademark office "which the court took to mean either a negative, direct, or individualized attack on the patent examiner, performance, or a generalized attack on the entire PTO"); *Bright Response, LLC v. Google Inc.*,

No. 2:07-CV-371-CE, 2010 WL 11057072, at *1 (E.D. Tex. Jul. 30, 2010) ("Defendants may not speculate about the time spent reviewing the '947 patent's application or discuss the average time the PTO spends reviewing patent applications. Further, the parties may not state or imply the PTO examiners were incompetent."); *EZ Dock, Inc. v. Schafer Sys.*, Inc., No. 98-2364 (RHK/AJB), 2003 WL 1610781, at *13 (D. Minn. Mar. 8, 2003) ("As for assertions that the PTO and its examiners are not diligent or are prone to error, the Court can find no relevance in either evidence to that effect or argument."); *Tap Pharm. Prods., Inc. v. Owl Pharms., LLC*, No. 1:99-CV-2715, 2003 WL 25695241, at *1 (N.D. Ohio Feb. 18, 2003) ("Testimony . . . about the relative shortage of patent examiners at the PTO is inadmissible. The only purpose such testimony would serve would be to undermine the presumption of validity about the patents-in-suit.") (internal citation omitted); *Bausch & Lomb, Inc. v. Alcon Labs.*, Inc., 79 F. Supp. 2d 252, 255–56 (W.D.N.Y. 2000) (the only purpose served by offering disparaging evidence about the PTO is to "invit[e] the jury to speculate about the possible defects, errors or omissions in the application process that led to the issuance of the patent[s]-in-suit," thereby undermining the patents' presumption of validity; "generalized testimony about 'problems' in the PTO is not admissible"); Fed. R. Evid. 401, 402, 403.

4. MOTION *IN LIMINE* TO PRECLUDE HTC FROM REFERENCING PENDING *INTER PARTES* REVIEW PROCEEDINGS OR SUCCESS RATES OF SUCH PROCEEDINGS

AGIS moves for an Order precluding HTC from introducing any argument, reference, evidence, testimony (including expert testimony), or eliciting any testimony concerning (1) the IPR proceedings filed by HTC and ZTE, Apple, and Google (regardless of whether they have been denied or granted), (2) the percentages of patents that are invalidated in re-exams or *inter partes* review, or (3) the quality of the PTO's examination process. The mention of IPR proceedings would be prejudicial because a jury would be influenced by the existence of the

pending proceedings when making its own validity determination. *See Callaway Golf Co. v. Acushnet Co.*, 576 F.3d 1331, 1343 (Fed. Cir. 2009) ("The non-final re-examination determinations were of little relevance to the jury's independent deliberations of the factual issues underlying the question of obviousness. In contrast, the risk of jury confusion if evidence of the non-final [PTAB] proceedings were introduced was high."). HTC and ZTE have filed 3 petitions for IPR against the Patents-in-Suit.[1] In 2018, Apple and Google cumulatively filed 15 IPRs against the Patents-in-Suit. While 11 of those petitions have been denied institution, with all five petitions filed against the '251 Patent denied in full, reference to either the denials or the grants of IPR petitions would be confusing to a jury and the prejudicial potential of this evidence substantially outweighs any probative value it may have. Fed. R. Evid. 403. *See also Ivera Med. Corp. v. Hospira*, No. 14-cv-1345-H-RBB, 2015 WL 11529819, at *1 (S.D. Cal. July 21, 2015).

Statements regarding the percentages of patents that are invalidated in re-examinations or *inter partes* review or the quality of the USPTO's examination process are irrelevant and unfairly prejudicial or distracting from the relevant standard. *See Applied Materials, Inc. v. Advanced Semiconductor Materials Am., Inc.*, No. C 92-20643 RMW, 1995 WL 261407, at *3 (N.D. Cal. Apr. 25, 1995) (finding irrelevant and inappropriate testimony about "overwork, quotas, awards or promotions at the Patent Office . . . or insinuating that the Patent Office does not do its job properly"); *Fujifilm Corp. v. Motorola Mobility LLC*, No. 12-CV-03587-WHO, 2015 WL 12622055, at *2 (N.D. Cal. Mar. 19, 2015) ("Motorola will not be allowed to make generalized comments about the quality of the PTO's examination process or otherwise insinuate that, as a general matter, the PTO does not do its job properly."). The law mandates that patents are presumed valid, but may be found invalid if proved by clear and convincing evidence. 35 U.S.C.

[1] Additional IPR petitions have been filed by Google, Apple, and HTC and ZTE since the beginning of this year.

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