

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

**AGIS SOFTWARE DEVELOPMENT LLC,**

**Plaintiff,**

**vs.**

**HTC CORPORATION,**

**Defendant.**

**CASE NO. 2:17-CV-514-JRG  
(LEAD CASE)**

**JURY TRIAL DEMANDED**

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

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## I. INTRODUCTION

AGIS's Motion to Strike (Dkt. No. 107) portions of the non-infringement report of Dr. Wolfe is based on two complaints: (1) that HTC Corp. did not produce two source code files cited by Dr. Wolfe in his report, and (2) that Dr. Wolfe cited three publicly available websites in his report.

As to (1), these two files were produced by Google in mid-November 2018 to both AGIS and HTC Corp. HTC Corp. did not produce them because they are Google's proprietary source code to which HTC Corp. never had any access before Google's production. HTC Corp. could not produce these files because they were not in the possession, custody, or control of HTC Corp. This alone should be enough basis for the Court to deny the Motion. But even if HTC Corp. erred by not *printing* these two files earlier, AGIS was not harmed by this omission. AGIS ultimately received printouts of these files one business day after filing its Motion. AGIS received those printouts prior to the deposition of Dr. Wolfe. AGIS questioned Dr. Wolfe regarding his source code review. Thus, any alleged error by HTC Corp. is at most harmless.

As to (2), these three websites include one open-source source code file that Dr. Wolfe cited at its publicly-available location, and two webpages that provide additional information on the software library in which the source code file is included. HTC Corp. only became aware of the relevance of the source code file after Dr. Wolfe analyzed and reviewed the Google source code. HTC Corp. timely identified the source code file in Dr. Wolfe's analysis of the Google source code. Again, any alleged omission by HTC Corp. was at most harmless.

Of significance to both (1) and (2), AGIS's own infringement expert report contains many of the same infractions that AGIS now accuses HTC Corp. of committing. AGIS's expert report includes more than 59 citations to source code files that were never included in AGIS's

interrogatory responses or infringement contentions. AGIS's expert report includes more than 100 citations to source code files to show infringement of certain claim features, whereas AGIS did not identify any of those files in response to interrogatories directed to those specific claim features. AGIS printed 19 different source code files after the close of fact discovery, and even after the service of both parties' expert reports. AGIS cites publicly-available websites for the first time in its infringement expert report. What is good for the goose is good for the gander, and AGIS should not be heard to complain about a supposed discovery shortcoming by HTC Corp. when AGIS has not seen fit to meet the standards that it now seeks to enforce.

For the reasons explained below, HTC Corp. requests that the Court deny AGIS's Motion to Strike.

## II. FACTUAL BACKGROUND

### A. AGIS's Motion to Strike

The Motion is based on two distinct classes of materials: the source code files cited in footnotes 108 and 109 of Dr. Wolfe's Report, and the resources cited in footnotes 110, 111, 112, 117, and 118 of Dr. Wolfe's Report. (Motion at 5–6.)

The two source code files cited in footnotes 108 and 109 of Dr. Wolfe's Report are files produced by Google on a source code review computer at the offices of Google's legal counsel, Arnold & Porter Kaye Scholer LLP. This is evidenced by the fact that Dr. Wolfe references those files by the file path on the source code review computer, which is the same file path for other source code printed by the parties from the Google source code review computer.

(Compare Ex. 1, Wolfe Report, p. 119 n.108, n.109 with Ex. 2, McAlexander Report, p. A-a21

[REDACTED]

[REDACTED]

and Ex. 3, Google Source Code Production,

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