

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

AGIS SOFTWARE DEVELOPMENT LLC,

Plaintiff,

vs.

HTC CORPORATION,

Defendant.

AGIS SOFTWARE DEVELOPMENT LLC,

Plaintiff,

vs.

LG ELECTRONICS, INC.,

Defendant.

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

JURY TRIAL DEMANDED

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**DEFENDANTS' HTC CORPORATION AND LG ELECTRONICS, INC. OPPOSITION
TO AGIS SOFTWARE DEVELOPMENT LLC'S MOTION TO STRIKE PORTIONS OF
EXPERT REPORT OF MR. SCOTT ANDREWS**

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Incredulously, AGIS moves to keep the '724 patent out of trial. Or at the very least, AGIS seeks to use the '724 patent affirmatively at trial while precluding Defendants from using it. Such gamesmanship should not be condoned.

The '724 patent is one of AGIS's principal patents. AGIS owns and prosecuted it. The inventors on the '724 patent are Malcom Beyer and Christopher Rice. Mr. Beyer is the primary owner of AGIS and inventor on all four asserted patents. He provided two days of 30(b)(6) testimony in this case and will almost certainly testify at trial. Mr. Rice is also an inventor on the asserted '251 and '838 patents.

That the '724 patent is critical to trial cannot be disputed. AGIS has known this for a long time, and its relevance did not surface on the eve of trial. AGIS must affirmatively rely on the '724 patent to establish written description support and earlier priority for the asserted '055, '251, and '838 patents. AGIS argued as much in early discovery responses and via amendment to their infringement contentions. Importantly, even though AGIS knew of the relevance of the '724 patent, and Defendants repeatedly put AGIS on notice of the patent's relevance and their intention to challenge the '055, '251, and '838 patents priority and their intention to use the '724 patent as prior art, AGIS never raised any issue with or objected to Defendant's intended use of the '724 patent at trial until now.

While this Court has not yet ruled on the priority dispute, the United States Patent and Trademark Office did. In a series of *inter partes* review institution decisions, the Patent Trial and Appeals Board held that the '251, '838, and '055 patents were not entitled to claim priority to the '724 patent and that the '724 patent qualified as prior art. The PTAB issued the first of these decisions in October 2018, months after Defendants had made their prior art elections. Afterwards, Defendants jointly served Mr. Andrews' report on December 14, 2018 using the

'724 patent in a nearly identical manner as in the *inter partes* reviews. That decision was made specifically to lessen the burden on all parties, and Mr. Andrews did not exceed the maximum number of prior art references allowed by the Court. In fact, he greatly reduced them.

AGIS has had ample time to prepare against Mr. Andrews' opinion. AGIS defended similar challenges using the '724 in the *inter partes* reviews half a year ago, and AGIS has also been afforded nearly 2.5 months to prepare for Mr. Andrews' deposition after he served his report.

Given this extended period of preparation, AGIS's knowledge of the '724 patent's relevance from the beginning of the case, and AGIS's failure to raise any issues regarding Defendants' use of the '724 patent until the last minute, there is no credible claim of prejudice that AGIS can make. To the contrary, allowing AGIS at trial to affirmatively claim an earlier priority date based on the '724 patent but precluding Defendants from challenging that claim and asserting that the '724 patent invalidates the asserted patents would be fundamentally unfair.

For all of these reasons, Defendants request the Court deny AGIS's motion.

I. THE '724 PATENT IS AGIS'S OWN PRINCIPAL PATENT

An important fact that AGIS neglects to present in its brief is that the '724 patent is owned and was prosecuted by AGIS. (Ex. 1, U.S. Pat. No. 7,630,724.). Mr. Beyer and Mr. Rice are its named inventors (*id.*), and Mr. Beyer is a named inventor on all asserted patents, while Mr. Rice is a named inventor on the '251 and '838 patents. (*See, e.g.*, Dkt. No. 1-1, 1-2, 1-3, 1-4). [REDACTED]

[REDACTED] The '724 patent is, and always has been, a key patent for AGIS.

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