

**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



**AGIS SOFTWARE DEVELOPMENT LLC'S RESPONSE IN OPPOSITION TO
HTC CORPORATION'S SEALED MOTION FOR SUMMARY JUDGMENT
OF NO PRE-SUIT INDIRECT INFRINGEMENT (DKT. 109)**

Plaintiff AGIS Software Development LLC (“AGIS”) respectfully submits this Response in Opposition to HTC Corporation’s (“HTC” or “Defendant”) Sealed Motion for Summary Judgment of No Pre-Suit Indirect Infringement (Dkt. 109).

I. INTRODUCTION

AGIS does not intend to assert at trial pre-suit indirect infringement. Because there is no case or controversy regarding these issues, HTC’s motion should be denied.

II. STATEMENT OF ISSUES TO BE DECIDED

1. Whether HTC can be liable for pre-suit indirect infringement as a matter of law when it had no pre-suit knowledge of the asserted patents.

Response: Whether HTC is entitled to judgment as a matter of law that it is not liable for pre-suit indirect infringement as a matter of law when AGIS does not intend to present pre-suit indirect infringement at trial.

III. RESPONSE TO RECITATION OF UNDISPUTED FACTS

1. AGIS alleges that HTC induces infringement of the asserted patents and contributorily infringes the asserted patents.

Response: Disputed, however, AGIS does not intend to present a theory of pre-suit indirect infringement at trial.

2. AGIS seeks pre-suit damages for HTC’s alleged indirect infringement.

Response: Disputed, however, AGIS does not intend to present a theory of pre-suit indirect infringement at trial. As AGIS explained in correspondence with HTC, HTC has continued to support and update the accused HTC devices, even after AGIS filed its complaint, and after HTC had notice of the patents. Accordingly, HTC has induced its customers to infringe at least by causing their customers to upgrade their devices to newer versions of the Android Operating System, Google Maps app, and Find My Device app which include the accused

functionalities. Additionally, AGIS maintains its direct infringement case that HTC had directly infringed the patents by selling and/or offering the products for sale in the United States. As such, AGIS is entitled to seek the full scope of its damages at trial. *See* Ex. A, Letter to M. Bernstein from V. Rubino, dated November 28, 2018; Ex. B, Expert Report of Joseph McAlexander at ¶¶ 129, 134.

3. In the Complaint, AGIS's only allegation as to HTC's knowledge of the patents and knowledge of the alleged infringement is that HTC had knowledge "at least as of the date of this Complaint."

Response: Disputed, however, as stated above, AGIS does not intend to present a theory of pre-suit indirect infringement at trial.

4. On November 7, 2018, HTC served Interrogatory No. 17 on AGIS, for which AGIS responded: "Discovery in this case is still ongoing and AGIS continues to investigate this matter."

Response: Undisputed.

5. On November 7, 2018, HTC served Interrogatory No. 18 on AGIS, for which AGIS responded: "HTC received notice of the Patents-in-Suit, at least of [sic] the date of the Complaint."

Response: Undisputed.

6. On November 7, 2018, HTC served Request for Admission No. 1 on AGIS, for which AGIS responded: "Admitted."

Response: Undisputed.

7. HTC served other requests for admission as to any party providing pre-suit notice to HTC about the existence of the asserted patents or alleged infringement thereof, but AGIS responded only with objections.

Response: Undisputed.

8. None of AGIS's fact witnesses could recall any pre-suit notice to HTC of the asserted patents or alleged infringement thereof.

Response: Undisputed.

9. HTC's Rule 30(b)(6) witness testified that HTC first became aware of the asserted patents: "After HTC was sued."

Response: Undisputed that HTC was aware of the patents at least as of the filing of the Complaint.

10. On November 13, 2018, in an attempt to narrow the issues in this case, counsel for HTC sent a letter to counsel for AGIS asking AGIS to stipulate that HTC "does not induce infringement [of the '970 patent] prior to AGIS's filing of the complaint (June 21, 2017)."

Response: Undisputed.

11. The letter noted that discovery had no evidence of pre-suit knowledge of the '970 patent by HTC, and that as a result HTC had not committed *pre-suit* induced infringement as a matter of law.

Response: Disputed, however, AGIS does not intend to present a theory of pre-suit indirect infringement at trial. As AGIS explained in response to HTC's letter, AGIS is entitled to the full scope of its damages at least based on HTC's post-complaint acts.

12. Counsel for AGIS responded with a paragraph that seemingly argued that HTC could still be liable for *post-suit* induced infringement.

Response: Undisputed that HTC is liable for post-suit induced infringement. However, as AGIS explained in response to HTC's letter, AGIS is entitled to the full scope of its damages at least based on HTC's post-complaint acts.

13. Counsel for HTC made one last attempt to resolve the matter:

It is black letter law that there cannot be induced infringement without notice of the patents-in-suit. There was no pre-suit notice, and AGIS's pre-suit inducement claims are therefore frivolous as a matter of law.

Response: AGIS does not intend to present a theory of pre-suit indirect infringement at trial. Undisputed that HTC is liable for post-suit induced infringement. However, as AGIS explained in response to HTC's letter, AGIS is entitled to the full scope of its damages at least based on inducement based on HTC's post-complaint acts, as well as HTC's direct infringement of the patents.

IV. ARGUMENT

HTC seeks summary judgment on issues that are not in dispute. As AGIS explained in its November 28, 2018 letter, AGIS intends to pursue direct infringement and post-complaint inducement at trial which entitles AGIS to the full scope of its damages. Ex. A. AGIS does not contend and will not allege at trial that HTC indirectly infringes any claim of the Patents-in-Suit prior to the filing date of the Complaint. HTC's motion for summary judgment seeks dispositive judgments on issues for which there is no present case or controversy, and HTC cites to no case law holding that such relief is appropriate. To the contrary, case law in this District indicates that courts should not grant summary judgment on issues that are not to be presented at trial. *See e.g., VirnetX Inc. v. Apple Inc.*, 925 F. Supp. 2d 816, 849 (E.D. Tex. 2013) (*rev'd*, 767 F.3d 1308 (Fed. Cir. 2014)) on other grounds ("The Court encourages and requires the parties to narrow their case for trial. Accordingly, the Court will not penalize such attempts to narrow issues by

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