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

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

PLAINTIFF AGIS SOFTWARE DEVELOPMENT LLC'S OPPOSITION TO DEFENDANT HTC CORPORATION'S MOTIONS *IN LIMINE* NOS. 1-12

Plaintiff AGIS Software Development LLC ("AGIS" or "Plaintiff") hereby submits its opposition to Defendant HTC Corporation's ("HTC" or "Defendant") Motions *in Limine* (Dkt. 151).

I. MIL No. 1 To Exclude Any Non-Factual or Potentially Prejudicial Commentary Regarding HTC's Nationality

Agreed.

II. MIL No. 2 To Exclude Any Argument or Testimony Concerning HTC Corp.'s Size, Wealth, Total Net Worth, Total Profits, and/or Ability to Pay Damages

HTC's motion should be denied because it is overly broad and would result in undue prejudice to AGIS. AGIS must reference HTC's financial information related to the accused products for at least the purpose of proving damages. Indeed, several courts have held that financial data, including total revenues from accused products, is relevant and admissible in patent infringement actions. *See, e.g.*, *Finjan, Inc. v. Blue Coat Sys., Inc.*, No. 13-CV-03999-BLF, 2015 WL 4129193, at *4 (N. D. Cal. July 8, 2015) (citing *Apple, Inc. v. Samsung Elecs. Co.,* No. 11–CV–01846–LHK, 2014 WL 549324, at *7 (N.D. Cal. Feb. 7, 2014)) ("As to

acquisition costs for technology containing the accused features and total revenues for the accused products, however, that information is relevant and probative if properly apportioned."); *See id.* ("Although it does not appear that Plaintiff's expert . . . actually relies on accused product revenues for any part of her analysis, the Court will permit Plaintiff to use such revenues and acquisition valuations as a *starting point* for a properly apportioned royalty base.").

Moreover, HTC's overall size, wealth, profits, and ability to pay damages are all relevant to its bargaining power, and should therefore be considered as part of factor 15 under *Georgia-Pacific Corp. v. U.S. Plywood Corporation*. *See* 318 F. Supp. 1116, 1140 (S.D.N.Y. 1970), *modified sub nom. Georgia-Pac. Corp. v. U.S. Plywood-Champion Papers, Inc.*, 446 F.2d 295 (2d Cir. 1971) (criticizing plaintiff's royalty rate evidence where "[t]here is an absence of meaningful evidence about such obviously pertinent factors as ***the relative economic positions of the licensor and licensee*** at the time the particular royalty was negotiated, in terms of their ***respective bargaining strength*** and their competitive status inter se . . . .") (emphasis added); *see also id.* at 1122 ("the Court must take into account the realities of the bargaining table").

HTC has not identified any prejudice that requires exclusion of opinions set forth in Mr. McAlexander's report. HTC has provided a rebuttal expert report and will have an opportunity to depose Mr. McAlexander about his opinions. Mr. McAlexander will be so limited in his testimony. There is no prejudice to HTC that necessitates exclusion at this stage.

Accordingly, HTC's MIL No. 1 should be denied.

III. MIL No. 3 To Exclude Any Argument or Testimony Regarding Google's Confidential Source Code That Was Not Included in AGIS's Infringement Contentions

HTC's motion should be denied because it would result in undue prejudice to AGIS, while HTC has not been prejudiced at all.

HTC cannot argue that it was left to guess what would be accused until it received AGIS's expert report; AGIS's infringement theories were disclosed completely in its contentions. *See, e.g.*, Exhibit A[1] at 7, 9, 11-15, 17-19. While the ***theories*** are required to be disclosed in the contentions, each and every piece of evidence that might ultimately support that theory is not. Infringement contentions "are not intended to require a party to set forth a *prima facie* case of infringement and evidence in support thereof." *Realtime Data, LLC v. Packeteer, Inc.*, No. 6:08-CV-144, 2009 WL 2590101, at *5 (E.D. Tex. 2009) ("[I]nfringement contentions are intended to frame the scope of the case in order to provide for 'full, timely discovery and [to] provide parties with adequate notice and information with which to litigate their case.'") (citing *Nike, Inc. v. Adidas Am. Inc.*, 479 F. Supp. 2d 664, 667 (E.D. Tex. 2007)). Here, HTC does not complain that AGIS failed to identify Android Device Manager and Google Maps in its infringement contentions, because it cannot. AGIS identified both of those features in its infringement contentions as early as January 19, 2018. AGIS specifically identified the portions of software responsible for performing each claimed step. *See, e.g.*, Exhibit A at 12-14. HTC argues simply that AGIS did not identify every piece of evidence on which its expert would ultimately rely in its contentions. There is no such requirement.

HTC's reliance on the Discovery Order is misplaced. The Discovery Order permits a plaintiff to ***defer*** its P.R. 3-1 disclosures until 30 days after source code is produced in the event that the claim element is a software element. Here, AGIS did not defer its infringement contentions pursuant to this provision of the discovery order; it disclosed its theories without reliance on this provision. Instead, AGIS identified the specific elements of software that meet each claim limitation.

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1 Excerpts from AGIS's Disclosure of Asserted Claims and Infringement Contentions, served on January 19, 2018, are attached hereto as Exhibit A.

[redacted] Notably, HTC did not move to strike Mr. McAlexander's expert report or to argue that Mr. McAlexander had exceeded the scope of AGIS's contentions, because he did not. HTC should not be permitted to eliminate large swaths of Mr. McAlexander's report *in limine*.

HTC cannot preclude AGIS's expert from identifying additional evidence in support of previously-disclosed infringement theories. Indeed, "[t]he Patent Rules intend to strike a balance of providing fair notice to defendants without requiring unrealistic, overly factual contentions from plaintiffs, but the burden of notice the Patent Rules place on plaintiffs is ***intended to be a shield for defendants, not a sword***." *Id.* at 818 (emphasis added). HTC cannot use them as a sword here where it has clearly not been prejudiced.

Accordingly, HTC's MIL No. 3 should be denied.

IV. MIL No. 4 To Exclude AGIS's Argument or Testimony Regarding Google Source Code That Was Produced After HTC Corp.'s Expert Served His Rebuttal Report

HTC's motion should be denied for the reasons discussed in AGIS's opposition to HTC's MIL No. 3. [redacted] To the extent HTC was prejudiced by these late productions by its co-defendants, AGIS was as well. [redacted]

V. MIL No. 5 To Exclude AGIS Argument or Testimony About Joint Infringement

HTC's motion should be denied. The proper place for HTC to raise this argument would have been in a *Daubert* motion or a motion to strike regarding AGIS's expert Joseph McAlexander's testimony, which HTC has not filed. Mr. McAlexander's testimony at trial will be limited to the topics in his expert report. HTC may cross-examine him at trial, but further limitation is unwarranted and improper.

In any event, HTC was clearly on notice of AGIS's intention to argue joint infringement. First, HTC acknowledges that AGIS's preliminary infringement contentions include "jointly-

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