


**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
Plaintiff,	§	(LEAD CASE)
	§	
v.	§	<u>JURY TRIAL DEMANDED</u>
	§	
HTC CORPORATION,	§	
	§	
Defendant.	§	

**PLAINTIFF AGIS SOFTWARE DEVELOPMENT LLC'S REPLY RE
OPPOSED MOTION TO STRIKE PORTIONS OF THE JANUARY 11, 2019
EXPERT REPORT OF DR. ANDREW WOLFE (DKT. 107)**

In support of its Opposition to AGIS's Motion to Strike, HTC argues that (1) the Google source code files that HTC's expert, Dr. Wolfe, relies on were produced by Google to both parties; and (2) that HTC did not become "aware of the relevance" of the open-source source code files until after Dr. Wolfe analyzed and reviewed the Google source code.

HTC does not dispute that it violated the Court's discovery order. HTC does not dispute that it failed to seek leave to produce late discovery. HTC does not dispute that the non-produced source code printouts were relied on by Dr. Wolfe in his report and were not produced to AGIS until the day after this Motion was filed. Dkt. 152 at 1.

HTC attempts to sandbag AGIS by including [REDACTED]

[REDACTED] HTC's justification fails because HTC cannot dispute that AGIS would have no way of obtaining the files without seeking additional review of Google's source code review machine. [REDACTED]

[REDACTED] HTC's explanation is inconsistent with the facts. Dr. Wolfe cites to and includes excerpts of the non-produced source code printouts in his report. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] The origin of the source code excerpts at issue thus remains unanswered.

In an apparent attempt to improve its position without addressing the prejudice to AGIS, HTC and Google served new printouts of the non-produced source code files on the Monday following AGIS’s filing of the instant Motion. The new printouts were received by AGIS after this Motion without any accompanying explanation, including who requested such printouts, and AGIS was forced to investigate the contents and sources of the new printouts. HTC now admits that the code files corresponding to the non-produced source code printouts “were of interest at the time,” which underscores HTC’s knowledge of the importance of these files since at least November 13th and HTC failed to serve AGIS with printed copies of the code of interest. HTC’s concession—that it did not “realize” the code files needed to be printed and served to AGIS—does not correct the prejudice to AGIS. HTC instead tries to raise a strawman argument that the Google source code was “produced” to all parties, and AGIS suffers no prejudice because it merely cites to “two unprinted source code files” where AGIS printed “19 different source code files after the close of fact discovery.” [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] HTC has no such explanation for its delay, other than to prevent AGIS from reviewing the admittedly relevant information earlier

during the discovery period. Further, HTC fails to acknowledge that where any source code printouts were sought by AGIS from Google, counsel for AGIS notified HTC.

HTC discloses to AGIS for the first time, that it had reviewed the source code on four separate occasions, last reviewed by Dr. Wolfe on December 7, 2018. *See* Dkt. 152 at 4.

However, HTC provides no basis for why, had HTC felt this code was of importance, it did not seek printouts or inform AGIS that it intended to rely on such code. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Instead, HTC seems to focus on the actions of AGIS to argue that HTC's actions were not prejudicial, and "AGIS's motion reeks of hypocrisy" because (1) "AGIS waited nineteen days to inform HTC Corp. that AGIS had access to the Google source code files;" and (2) "AGIS has printed source code from approximately 19 different Google source code files after not only the end of fact discovery, but after all expert reports were already served." Dkt. 152 at 11-12. First, AGIS promptly informed HTC of the availability of Google source code for review following resolution of a potential conflict which prevented AGIS's expert from reviewing the source code. Second, as stated above, any delays in production of source code came not from AGIS, but from Google. Further, HTC's arguments seem to suggest that it had *ultimately* received printouts without admission that it was HTC itself who had sought the printouts following AGIS's motion. Dkt. 152 at 8. [REDACTED]

[REDACTED] HTC's assertions

that AGIS's allegations are not "grounded in fact," and "AGIS could have saved the Court and the parties a lot of time had AGIS actually met and conferred in good faith on this issue" again

[REDACTED]

[REDACTED]

[REDACTED]

HTC's argument with regard to the publicly-available source code are also without merit. HTC alleges that "its relevance was only realized based upon analysis of the Google source code." Dkt. 152 at 12. However, HTC has conceded that it had first inspected the Google source code on November 13, 2018, and Dr. Wolfe and HTC last inspected the source code on December 7, 2018. HTC's argument that it did not realize the significance of this file and its representation that it is a "publicly available website" does not excuse it from its discovery obligations. Further, HTC's attempts to divert attention to Mr. McAlexander's citations to publicly-available resources are without merit because several other addresses from the same publicly-available website, <https://developers.google.com/> were identified in AGIS's infringement contentions as early as January 19, 2018. *See* Ex. E, Exhibit B to Plaintiff's Disclosure of Asserted Claims and Infringement Contentions, dated January 19, 2018. Further, several pages from this publicly-available resource were produced to HTC prior to the close of fact discovery. *See* Ex. F, AGISTX_00278454; Ex. G, AGISTX_00278467; Ex. H, AGISTX_00278506. .

For the foregoing reasons, AGIS respectfully requests that the Court grant AGIS's motion to strike portions of the January 11, 2019 Wolfe Report based on unproduced source code.

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