

**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.	§	

LG ELECTRONICS INC.,	§	Case No. 2:17-CV-0515-JRG
	§	(CONSOLIDATED CASE)
	§	
Defendant.	§	<u>JURY TRIAL DEMANDED</u>

**PLAINTIFF AGIS SOFTWARE DEVELOPMENT LLC'S SUR-REPLY
IN OPPOSITION TO MOTION FOR SUMMARY JUDGMENT THAT U.S. PATENT
NO. 7,630,724 MAY NOT BE RELIED UPON TO SHOW THAT U.S. APPLICATION
NO. 14/027,410 PROVIDES WRITTEN DESCRIPTION SUPPORT FOR
U.S. PATENT NOS. 9,408,055; 9,445,251; AND 9,467,838**

LG agrees that the standard for incorporation by reference requires (1) clear intent to incorporate by reference, using, for example, “incorporated by reference,” and (2) a clear identification of the referenced patent. Dkt. 230 at 1. It is undisputed that the ’410 application satisfies the second part of this test and identifies the ’724 patent. Whether the ’410 application indicates a clear intent to incorporate the ’724 patent is a disputed material fact and the Court should consider how a person of ordinary skill in the art would have understood the content within the four corners of the document itself. *Apple, Inc. v. Samsung Elecs. Co. Ltd.*, No. 5:12-cv-00630-LHK, 2014 WL 252045, at *23 (N.D. Cal. Jan. 21, 2014).

The ’410 application itself provides sufficient evidence to establish incorporation. The incorporation statement unambiguously uses of the words “incorporated by reference,” and the record shows that a person of ordinary skill in the art would recognize the statement to be an incorporation by reference. LG’s main contention--that the express recitation within the incorporation statement of the “’724 patent” could pertain to something other than an incorporation--lacks factual support within the four corners of the ’410 application. LG does not identify any alternative theory as to intent and LG’s conclusory assertions fail to show any ambiguity. As noted in AGIS’ opposition, the ’410 application identifies cross references to familial applications in a preceding paragraph. Thus, LG cannot argue that the reference to the ’724 patent in the incorporation by reference statement is merely a cross reference. LG offers no additional evidence to support its allegation that the incorporation statement does not include the ’724 patent. Dkt. 173 at 4.

LG’s reliance on several cases is misplaced. In contrast to the plaintiff in *Northrop*, AGIS both identified the ’724 patent and expressly uses the language “incorporated by reference.” In fact, *Northrop* merely reinforces that the focus of the incorporation analysis is on

the document itself and how one of skill in the art would have understood it. *Northrop Grumman Info. Tech., Inc. v. United States*, 535 F.3d 1339, 1345 (Fed. Cir. 2008). As noted above, it is undisputed that the '410 application identifies the '724 patent within the incorporation statement. *See supra* 1. LG's citation to a *Markman* order in *Smartflash LLC v. Apple Inc.* is irrelevant because the citation is directed to interpreting the language of a claim term. 77 F. Supp. 3d 535, 561 (E.D. Tex. 2014). Similarly, LG fails to show the relevance of *Festo* which is a case concerning prosecution history estoppel. *Festo Corp. v. Shoketsu Kinzoku Kogyo Kabushiki Co., Ltd.*, 535 U.S. 722 (2002). LG submits no case assessing the sufficiency of incorporation by reference. Finally, LG's Reply provides no reason why the Board's preliminary findings in IPR2018-00817, IPR2018-00819, and IPR2018-00818 are relevant to this case. The Board's findings on written description and incorporation were based on a preliminary, incomplete record that did not include any expert testimony from AGIS and the case was dismissed before AGIS filed its statutory response. Accordingly, the evidence of record shows a clear intent to incorporate the '724 patent into the '410 application. LG fails to establish there are no genuine issues of material fact and, therefore, LG's motion for summary judgment should be denied.

Dated: February 27, 2019

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