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

AGIS SOFTWARE DEVELOPMENT, LLC, **Plaintiff,** **v.** **HTC CORPORATION,** **Defendant.**	**CASE NO. 2:17-CV-0514-JRG** **(LEAD CASE)** **JURY TRIAL DEMANDED**

DEFENDANT HTC CORPORATION'S REPLY IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT OF NO PRE-SUIT INDIRECT INFRINGEMENT

conceding in its Opposition that it cannot establish pre-suit indirect infringement because HTC Corp. had no pre-suit knowledge of the asserted patents, AGIS claims that it can nevertheless pursue pre-suit damages all the same. [redacted]. But AGIS's lack of a viable pre-suit indirect infringement theory precludes it from seeking pre-suit damages unless it can prove direct infringement. AGIS's arguments to the contrary are without merit, and this Court should enter judgment foreclosing AGIS from advancing an indirect infringement claim on pre-suit sales.

I. AGIS CLAIMS TO BE DROPPING ITS INDIRECT INFRINGEMENT CLAIM ON PRE-SUIT SALES, BUT IT IS ACTUALLY PLANNING TO CONTINUE THAT CLAIM UNDER A DIFFERENT NAME.

HTC Corp. urges the Court to grant the Motion (Dkt. No. 109) and enter summary judgment of no pre-suit indirect infringement. While at first blush AGIS appears to be dropping its pre-suit indirect infringement claim, AGIS really is not. AGIS repeatedly asserts that even without a pre-suit indirect infringement theory, it is nevertheless entitled to seek "the full scope of damages," *i.e.*, both pre-suit and post-suit damages, based on HTC Corp.'s alleged ***post-suit acts***. (Dkt. No. 182, p. 3 ("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.") ("Opposition").) This is simply a pre-suit indirect infringement claim by another name, while omitting any evidence of actual pre-suit culpability. The Court should not permit AGIS's shell game, and HTC Corp. respectfully requests that the Court grant summary judgment against AGIS on pre-suit indirect infringement, no matter how AGIS may try to label it.[1]

[1] While AGIS initially states that it is entitled to all pre-suit damages because it will still proceed with both a post-suit indirect infringement case and a direct infringement case (*see* Opposition at pp. 1–2), it is clear from statements later in the Opposition that AGIS thinks it is entitled to all

The motivations behind AGIS's indirect infringement shell game are rooted in several key facts about its damages case. [redacted] Hence, AGIS can only hope for a significant payday if it can keep pre-suit damages as a viable remedy.

Several facts about AGIS's infringement case further illuminate the purpose of AGIS's shell game. First, as HTC Corp. presented in its Motion for Summary Judgment of No Direct Infringement and No Indirect Infringement of U.S. Patent 8,213,970 (Dkt. No. 120), AGIS's direct infringement case against HTC Corp. is fatally flawed because the software that AGIS accuses of practicing the '970 patent's claims—the only claims issued before 2016— is never actually installed on the smartphones that HTC Corp. allegedly makes, uses, sells, offers to sell, or imports. (*Id.* at 8–12.)[4] It is the end user's choice to download that software application after

---

pre-suit damages based on ***solely*** its post-suit induced infringement claim (*see id.* at p. 3 ("AGIS is entitled to the full scope of its damages at least based on HTC's post-complaint acts."). [redacted]

[4] While AGIS purported to present evidence to the contrary in its opposition (Dkt. No. 199), HTC Corp. demonstrates in its concurrently filed reply to that opposition that none of the

purchasing the phone, if the user so chooses. Hence, the totality of HTC Corp.'s potential liability before 2016 is its alleged inducement of end users to install and use the accused software applications on their smartphones. Second, as demonstrated by AGIS's total acquiescence on the point in the Opposition, AGIS has no possibility of showing that HTC Corp. knew of the patents prior to this lawsuit. Hence, pre-suit indirect infringement is a legal impossibility. Therefore, while AGIS needs to keep pre-suit damages in this case in order to obtain any significant payout, the facts and the law preclude AGIS from legitimately doing so.

In sum, AGIS knows that its best odds of establishing infringement will be on an inducement theory, but that theory does not align with the period when HTC Corp. had significant sales. For that reason, AGIS carefully states in its Opposition that "AGIS does not intend to present a theory of pre-suit indirect infringement at trial" (Opposition at p. 1), while at the same time stating that "AGIS is entitled to the full scope of its damages at least based on HTC's post-complaint acts" (*id.* at p. 3). [redacted] The Court should not countenance this game.

If AGIS were not playing a shell game, then this caveat that "AGIS is entitled to the full scope of its damages at least based on HTC's post-complaint acts" (*id.* at p. 3) would not even be necessary. If recovery of pre-suit damages based on post-suit indirect infringement were actually a viable theory, then AGIS would not need to make that statement at all. AGIS could simply concede the Motion, as it purports to do, and pursue its legal theory in the ordinary course of trial. But AGIS knows that its theory of pre-suit damages based on post-suit indirect infringement has no merit. And hence it makes the caveat—not once, but four times in as many

---

evidence that AGIS points to actually shows any pre-installation of the accused software application.

pages (*see* Opposition at pp. 1, 3, 4)—with the hope that the Court will dismiss the Motion as moot without formally rejecting AGIS's bogus legal theory. HTC Corp. again urges the Court to reject AGIS's game, grant summary judgment against AGIS, and prohibit AGIS from seeking an indirect infringement claim for pre-suit damages.

Lastly, even if AGIS's time-traveling inducement theory were based in law (which it is not), AGIS has not mustered any evidence to actually prove it. AGIS has no evidence that even a single user who purchased an accused HTC Corp. phone pre-suit downloaded the accused apps post-suit, much less that HTC Corp. induced the user to do so. ***Not a single piece of evidence.*** So even under AGIS's legally deficient theory, HTC Corp. is still entitled to summary judgment because AGIS has not brought forth any facts to support its theory. *ACCO Brands, Inc. v. ABA Locks Mfrs. Co., Ltd.*, 501 F.3d 1307, 1313–14 (Fed. Cir. 2007) ("ACCO must prove specific instances of direct infringement or that the accused device necessarily infringes the patent in suit, in order to sustain the jury verdict of induced infringement. Hypothetical instances of direct infringement are insufficient to establish vicarious liability or indirect infringement."); *see also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986) ("[T]here is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party.").

II. CONCLUSION

With AGIS's Opposition, the devil is in the details. While the Opposition appears to concede the issue of indirect infringement for pre-suit sales, it actually does not. AGIS is in fact using the Opposition to lay the groundwork for a legally flawed and factually unsupported end-run on the Motion. HTC Corp. respectfully requests that the Court grant summary judgment against AGIS and prohibit AGIS from seeking pre-suit damages on any indirect infringement theory.

DOCKET ALARM

Explore Litigation Insights

Docket Alarm provides insights to develop a more informed litigation strategy and the peace of mind of knowing you're on top of things.

Real-Time Litigation Alerts

Keep your litigation team up-to-date with **real-time alerts** and advanced team management tools built for the enterprise, all while greatly reducing PACER spend.

Our comprehensive service means we can handle Federal, State, and Administrative courts across the country.

Advanced Docket Research

With over 230 million records, Docket Alarm's cloud-native docket research platform finds what other services can't. Coverage includes Federal, State, plus PTAB, TTAB, ITC and NLRB decisions, all in one place.

Identify arguments that have been successful in the past with full text, pinpoint searching. Link to case law cited within any court document via Fastcase.

Analytics At Your Fingertips

Learn what happened the last time a particular judge, opposing counsel or company faced cases similar to yours.

Advanced out-of-the-box PTAB and TTAB analytics are always at your fingertips.

API

Docket Alarm offers a powerful API (application programming interface) to developers that want to integrate case filings into their apps.

LAW FIRMS
Build custom dashboards for your attorneys and clients with live data direct from the court.

Automate many repetitive legal tasks like conflict checks, document management, and marketing.

FINANCIAL INSTITUTIONS
Litigation and bankruptcy checks for companies and debtors.

E-DISCOVERY AND LEGAL VENDORS
Sync your system to PACER to automate legal marketing.