

**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 DIRECT INFRINGEMENT**

HTC Corp.’s Motion for Summary Judgment of No Direct Infringement (Dkt. No. 116) presented two grounds of summary judgment: (1) that HTC Corp. does not directly infringe the method claims because there is no genuine dispute as to whether HTC Corp. uses the asserted method claims in the United States; and (2) that HTC Corp. does not directly infringe the system and device claims. AGIS’s Opposition (Dkt. No. 185) presents no evidence showing a genuine dispute of material fact on the former ground.

“[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.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986). Here, AGIS has identified *no evidence* that HTC Corp., or even the separate entity HTC America, Inc., uses the recited method claims in the United States.

In the Motion, HTC Corp. definitively showed that there was no evidence that HTC Corp. tests the accused devices in the United States, and thus AGIS cannot proceed to trial on this theory, under precedent of the Federal Circuit and this Court. (*See* Motion, p. 8–10 (citing *Finjan, Inc. v. Secure Computing Corp.*, 626 F.3d 1197, 1206 (Fed. Cir. 2010); *Convolve, Inc. v. Dell Inc.*, No. 2:08-CV-244-RSP, 2017 WL 2463398, at *7–8 (E.D. Tex. June 7, 2017); *Summit 6 LLC v. Research in Motion Corp.*, No. 3:11-cv-367-O, 2013 WL 12124321, at *4 (N.D. Tex. June 26, 2013)).) In response, AGIS now presents several *entirely new* theories of HTC Corp.’s alleged “use” of the asserted method claims.

First, AGIS alleges that HTC Corp. used the asserted method claims in the United States when HTC America’s employees “demonstrated the accused devices while representing HTC Corp.” (Opposition, p. 4; *see also id.* at 10–11.) And the entirety of the “evidence” that AGIS identified to support this supposed genuine dispute is the following, single, question and answer of HTC America employee Nigel Newby-House:

[REDACTED]

[REDACTED]

[REDACTED] *it says nothing about the*

method claims that AGIS asserts. AGIS asserts method claims that recite detailed steps performed by Google’s Find My Device application and the location sharing feature of the Google Maps application. AGIS elicited no testimony, or any other evidence, that HTC America’s employees demonstrated the accused Google software applications, or that the accused Google software applications were even installed on the phones during demonstrations, much less that the specific steps of the method claims were performed during those demonstrations. AGIS has simply failed to present any evidence on which a reasonable jury could conclude that HTC Corp. or even HTC America performs any, much less all, of the steps of the asserted method claims. AGIS has failed to show a genuine dispute of material fact based on this argument.

Second, AGIS seems to allege that any testing that HTC America performs in the United States can be imputed to HTC Corp., and thus HTC Corp. used the asserted method claims in the United States when HTC America performed its testing. (*See* Opposition, pp. 3, 10–11.) The following are the entirety of the statements that AGIS makes to support this allegation (no citations omitted):

[REDACTED]

that HTC Corp.’s engineers performed testing of the accused devices. AGIS disputes HTC Corp.’s statement that all testing was done in Taiwan. AGIS further disputes HTC Corp.’s statement that HTC Corp.’s witnesses were not questioned as to where testing was performed.

(Opposition, pp. 2–3.)

HTC Corp. argues on the basis that “testing” the accused products does not constitute infringement and, in the alternative, that testing is only carried out in the United States by HTC America. But whether carrying out the steps of the asserted method claims during testing constitutes infringement goes to the heart of this case; as reflected at least in AGIS’s infringement contentions and expert reports, there is a genuine dispute of material fact as to that issue.

(Opposition, pp. 10–11.) Note that AGIS cites *no evidence* to support any of these assertions.

As HTC Corp. pointed out in the Motion, the only evidence that AGIS elicited regarding testing is that HTC Corp. tests the devices, that it does so in Taiwan, [REDACTED]

[REDACTED]

[REDACTED] AGIS now says in its Opposition: We contest that. *But AGIS has no evidence* with which to contest the evidence cited in the Motion. AGIS has simply failed to present any evidence on which a reasonable jury could conclude that HTC Corp. or HTC America even opens the accused software applications during testing, much less that they perform any or all of the steps of the asserted method claims. This argument does not show a genuine dispute of material fact.

The final point to note regarding AGIS’s lack of evidence to support its claim of “use” of the method claims relates to the 2011 International Trade Commission stipulation cited by AGIS. (*See* Opposition, pp. 3, 7.) HTC Corp. will set aside for the moment the facts that this stipulation was made before issuance of the patents, was made in a separate case as part of a negotiation to streamline discovery in that case, and was made on behalf of HTC Corp. as well as HTC America and another third-party. Even setting aside those facts that call into question the relevance of the stipulation, that document also says absolutely nothing about whether HTC Corp., HTC America, or anyone actually performed any of the steps of the asserted method claims. As to “use” of the accused devices, the stipulation states as follows:

Apple and HTC have stipulated that HTC and its customers have powered on the HTC accused products, such that the devices have become functional for use in

the United States (by testing or otherwise)[.]

(Opposition, Ex. A, p. 8.) Thus, HTC Corp. was stipulating to nothing more than the fact that it turned the devices on in the United States, and that the devices were used in the United States, potentially by testing. But this says nothing about the Find My Device application—which did not even exist at the time—or the Google Maps application, which are required for AGIS’s infringement allegations for the asserted method claims. A reasonable jury simply could not look at the preceding sentence and reach the conclusion that HTC Corp. or even HTC America performed any, much less all, of the steps of the asserted method claims. Any such verdict based on this single sentence as evidence would be manifestly unreasonable. This stipulation alone or in combination with AGIS’s other bare allegations does not show a genuine dispute of material fact.

In conclusion, AGIS has wholly failed to present any evidence on which a reasonable jury could find for AGIS with respect to HTC Corp.’s alleged direct infringement of the asserted method claims. For this reason and those presented in the Motion, HTC Corp. respectfully requests the Court to enter summary judgment against AGIS.

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