

**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 SUR-REPLY IN OPPOSITION TO AGIS
SOFTWARE DEVELOPMENT LLC'S MOTION TO STRIKE PORTIONS OF THE
JANUARY 11, 2019 EXPERT REPORT OF DR. ANDREW WOLFE**

AGIS's Reply (Dkt. No. 194) is largely a reprise of its Motion (Dkt. No. 107) with several misstatements concerning HTC Corp.'s Opposition (Dkt. No. 152) added. HTC Corp. addresses AGIS's misstatements in turn.

AGIS states that "HTC does not dispute that it violated the Court's discovery order." (Reply, p. 1.) Yes, it does. HTC Corp. addressed every single discovery rule or order that AGIS alleged HTC Corp. to have violated and explained why HTC Corp. did not violate the provision, and if it had, then why any supposed violation was harmless. (Opposition at pp. 7–11.) HTC Corp. absolutely disputes that it violated any of the Court's orders.

AGIS states that: "HTC attempts to sandbag AGIS by including late-produced Google source code files in its expert report," which supposedly prejudiced AGIS because AGIS could not review those files without traveling to access the source code review computer at Arnold & Porter's offices. (Reply, p. 1.) This is absolutely wrong. First, HTC Corp. explained that the omission of printing the files cited in footnotes 108 and 109 was inadvertent and discovered only leading up to the expert report submission; it was not based on any attempt to sandbag AGIS. (See Reply, Ex. D.) Second, nothing required AGIS to travel to the source code computer to request printouts; AGIS had the filenames and filepaths and could have requested that the files be printed the day after it received Mr. Wolfe's report if AGIS felt it necessary. HTC Corp. requested source code printouts by email in every single instance that HTC Corp. received printouts. AGIS could have done the same.

AGIS states that: "HTC's explanation is inconsistent with the facts" because AGIS does not understand how Dr. Wolfe included "excerpts" from the files cited in footnotes 108 and 109 in his report if HTC Corp. did not have printouts of those files. (Reply, p. 1.) "The origin of the source code excerpts at issue thus remains unanswered." (Reply at p. 2.) There is nothing

unanswered about this situation. First, Dr. Wolfe did not include “excerpts” of the files cited in footnotes 108 and 109, he included a single URL value from one of those files. Second, HTC Corp.’s source code reviewers took notes during their review, as is permitted by the Protective Order and as is customary for source code review. [REDACTED]

[REDACTED] AGIS then moved on without asking any follow-up questions. If AGIS now feels that some question about this process went unanswered, then that is AGIS’s fault for not having asked it.

AGIS states regarding the January 28 source code printouts that: “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.” (Reply, p. 2.) This is patently false, which is demonstrated by one of AGIS’s own exhibits to its Reply. AGIS and HTC Corp. received the printouts on the same day, and counsel for HTC Corp. sent an email to AGIS reporting receipt of the printouts on the same day, without any previous inquiry from AGIS. (*See* Reply, Ex. D, p. 3.) Counsel for HTC Corp. identified specifically the Bates range corresponding to the files that it had requested to be printed. (*Id.*) AGIS did not have to “investigate the contents and sources” of the printouts; HTC Corp. told it specifically that information without prompting.

AGIS implies that HTC Corp. identified the relevance of the files cited in footnotes 108 and 109 as early as November 13, 2018. (Reply, p. 2.) Dr. Wolfe never even reviewed the source code until December 7. (Opposition, p. 4.) And HTC Corp. explained that the relevance of the files combined with the realization that they had not already been printed only became clear as Dr. Wolfe prepared his report. (*See* Reply, Ex. D.) HTC Corp. then identified those

files at the next available opportunity, the service of Dr. Wolfe's report. HTC Corp. was not trying to hide this information from AGIS.

AGIS suggests that it somehow was not bound by the Discovery Order when it printed 19 source code files in late-January 2019, apparently because Google had produced source code late after "months of correspondence" regarding source code production. (Reply, p. 2.) HTC Corp. cannot find any provision in the Discovery Order that somehow excuses AGIS's January printouts while also condemning HTC Corp.'s earlier January printouts. In any case, any late production by Google is attributable only to AGIS. It is common knowledge in litigations such as this one that a third-party does not readily turn over confidential information in response to a subpoena without thorough negotiation of the scope. That is all the more so with source code. If AGIS wanted Google to produce source code during fact discovery, then AGIS should not have waited until three months before the close of fact discovery to subpoena the material.

AGIS now admits that it waited 19 days to tell HTC Corp. that it had access to the first Google source code production but excuses this violation of the Discovery Order based on "resolution of a potential conflict" with AGIS's expert. (Reply, p. 3.) Again, there is no provision of the Discovery Order that excuses AGIS's delay.

AGIS states that: "AGIS raised issues with HTC's expert report and inclusion of unproduced source code during the required meet and confer, yet HTC did not take any steps to resolve any of these issues or provide any basis for its failure to comply with the discovery obligations of this Court." (Reply, p. 3.) First, AGIS did not seek to meet and confer until the afternoon before filing the Motion. AGIS filed the Motion the next day. AGIS then received the printouts of the complained-about files the next business day. HTC Corp. could at most have cut one business day off the delivery of the requested printouts. Second, AGIS did not disclose to

HTC Corp. *which* files it was complaining about during the meet and confer. Hence AGIS's supposed compliance with the Court's conferral requirements was nominal at best; HTC Corp. could not remedy the supposed non-production of source code files when AGIS did not tell HTC Corp. which files it was talking about.

With respect to the publicly-available RequestQueue.java file, AGIS again misconstrues the facts to suggest that HTC Corp. was aware of the relevance of that file since November 13, 2018. (Reply, p. 4.) Again, Dr. Wolfe realized the relevance of that webpage while preparing his report, and HTC Corp. identified it at the first opportunity when serving Dr. Wolfe's report.

AGIS excuses its own citation to publicly available websites for Android APIs because "several other addresses from the same publicly-available website, <https://developers.google.com/> were identified" in AGIS's earlier infringement contentions and in document productions. (Reply, p. 4.) This position has zero merit. A simple search shows that there are about 207,000 webpages on developers.google.com.¹ So AGIS's position is apparently that its identification of a handful of webpages from that domain put the onus on HTC Corp. to find the ones that it would not ultimately cite until service of Mr. McAlexander's report, among the 206,995 or so other webpages that AGIS did not cite. This argument truly illuminates the degree to which AGIS wants to live by "do what I say, not what I do."

And to make the point clearer, AGIS does not even respond to several of the most egregious violations of the Discovery Order that HTC Corp. identified in the Opposition: AGIS's 59 citation to source code files never included in its infringement contentions; and AGIS's 100 citations to source code files for claim features that HTC Corp. served a specific interrogatory on

¹ Determined by performing the following search: `site:developers.google.com`, which returns all indexed webpages from the indicated domain.

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