

FILED UNDER SEAL PURSUANT TO PROTECTIVE ORDER

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

AGIS SOFTWARE DEVELOPMENT, LLC	§	CASE NO. 2:17-cv-514-JRG
	§	(Lead Case)
Plaintiff,	§	
	§	
v.	§	JURY TRIAL DEMANDED
	§	
HTC CORPORATION, et al.	§	
	§	
Defendant.	§	

AGIS SOFTWARE DEVELOPMENT, LLC	§	CASE NO. 2:17-CV-515-JRG
	§	(Member Case)
Plaintiff,	§	
	§	
v.	§	JURY TRIAL DEMANDED
	§	
LG ELECTRONICS INC.	§	
	§	
Defendant.	§	

**LG ELECTRONICS INC.'S SUR-REPLY TO AGIS'S MOTION TO STRIKE
PORTIONS OF THE JANUARY 11, 2019 EXPERT REPORT OF EDWARD R. TITTEL**

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LG Electronics Inc. (“LG Korea”) respectfully requests that the Court deny AGIS’s Motion to Strike the January 11, 2019 Expert Report of Edward R. Tittel (“Motion”) (D.I. 110).

First, AGIS does not dispute that, during the fact discovery window, it already had access to and reviewed the very Google source code that it now seeks to strike from Mr. Tittel’s report. Instead, AGIS asserts that Mr. Tittel had the code before AGIS did, which is both untrue and also no basis to exclude Mr. Tittel’s reliance on produced code.

Second, while AGIS asserts without explanation or support that it was prejudiced by Mr. Tittel’s reliance on Google witnesses, AGIS does not dispute that it was indeed aware that Google was a source of evidence from the very outset of this case. AGIS also does not dispute that it knew of LG Korea’s specific reliance on declaration testimony from Mr. Luh and Mr. Mason’s predecessor, Mr. Oplinger. Nor does AGIS even acknowledge that it served 30(b)(6) deposition subpoenas to Google that would have resulted in the depositions of the challenged Google witnesses, but simply chose not to take the depositions. Even now, AGIS has ignored Google’s offer to depose the witnesses. AGIS can show no prejudice from Mr. Tittel’s reliance on Google witnesses that AGIS declined the opportunity to depose.

I. THERE IS NO DISPUTE THAT AGIS INSPECTED THE CHALLENGED SOURCE CODE DURING THE FACT DISCOVERY PERIOD

AGIS does not dispute that Google’s source code, including the [REDACTED] file it seeks to strike, was made available for AGIS’s inspection during the fact discovery period, or that its reviewer, Mr. Rahul Vijh, inspected Google’s source code machine during the fact discovery period. It is also undisputed that while Mr. Vijh requested printouts of certain source code files, [REDACTED] was not among them, even though it was available at the time he inspected. Both AGIS and LG Korea had access to and

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reviewed the same source code, including the [REDACTED] file it seeks to strike. AGIS's assertion that it was "sandbagged" is entirely meritless.

AGIS, in its reply, pushes its case by mischaracterizing the testimony of LG Korea's technical expert, Mr. Tittel. (*See* D.I. 191 at 1.). At his deposition, Mr. Tittel confirmed that the [REDACTED] source code file was available to him in November. (D.I. 191-2, Ex. A at 97:17-98:3). But it does not follow, as AGIS claims, that Mr. Tittel 'admitted' having the source code months before AGIS did. (D.I. 191 at 1-2). AGIS reviewed the source code *at the same time* as LG Korea in November and December 2018. (D.I. 150-1 ¶¶ 3-5, 7), and it is undisputed that this file was available for its review at that time. AGIS's argument seems to rest on the premise that code is not actually produced until it is printed. But that flies in the face of the agreed protective order in this matter, which provides for production of source code on a secure computer available for inspection (Case No. 2:17-cv-00513, D.I. 119 at 11), and contains no requirement that the producing party (here, Google), must provide printouts of all the code it makes available on the source code computer. Nor is it true that Mr. Tittel had access to a printed version of the source code file at that time; rather, he had the same access to electronic source code that AGIS had during and around the weeks of November 15, 2018 and December 11, 2018. (D.I. 150-1 ¶¶ 3-5, 7; *see also* Berta Decl.¹, Ex. A at 117:23-118:7). Furthermore, both AGIS and LG Korea received the printed version of the source code file around the same time in January 2019. (D.I. 150-1 ¶¶ 8, 12).

AGIS's request to strike rests on the false premise that making code available for inspection is not production, and on the assertion that Mr. Tittel had a printout of certain code

¹ "Berta Decl." refers to the Declaration of Michael A. Berta in support of Defendant LG Electronics Inc.'s Sur-Reply, submitted herewith.

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