

**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.	§ FILED UNDER SEAL
	§
	§

**DEFENDANTS HTC CORPORATION AND LG ELECTRONICS INC.'S SUR-REPLY
TO AGIS'S MOTION TO STRIKE PORTIONS OF THE EXPERT REPORT OF MR.
SCOTT ANDREWS**

TABLE OF CONTENTS

	<u>Page</u>
I. Defendants Have Been Diligent in Putting AGIS on Notice	2
II. AGIS Does Not Need a Chart to Know How the '724 Patent Applies to the Location Sharing Patents.....	2
III. Any Combinations Involving the '724 Patent Would Not Be “New Combinations”.....	3
IV. Conclusion	5

TABLE OF AUTHORITIES

Page(s)

Cases

LML Patent Corp. v. JPMorgan Chase & Co.
No. 2:08-CV-448, 2011 WL 5158285 (E.D. Tex. Aug. 11, 2011).....1, 4, 5

Realtime Data, LLC v. Packeteer, Inc.
2009 WL 4782062 (E.D. Tex. Dec. 8, 2009).....3

Tyco Healthcare Group LP v. Applied Med. Res. Corp.,
No. 9:06-CV-151, 2009 WL 5842062 (E.D. Tex. Mar. 30, 2009).....1

AGIS's reply merely parrots the arguments in its Motion, arguing again that the portions of Mr. Andrews' report regarding the '724 Patent should be excluded based on the five factors listed in *LML Patent Corp. v. JPMorgan Chase & Co.* that courts consider when deciding whether to exclude evidence based on a party's failure to comply with the Patent Rules:

1. The danger of unfair prejudice to the non-movant;
2. The length of the delay and its potential impact on judicial proceedings;
3. The reason for the delay, including whether it was within the reasonable control of the movant;
4. The importance of the particular matter, and if vital to the case, whether a lesser sanction would adequately address the other factors to be considered and also deter future violations of the court's Scheduling Orders, Local Rules, and the Federal Rules of Civil Procedure; and
5. Whether the offending party was diligent in seeking an extension of time, or in supplementing discovery, after an alleged need to disclose the new matter became apparent.

No. 2:08-CV-448, 2011 WL 5158285, at *4 (E.D. Tex. Aug. 11, 2011) citing *Tyco Healthcare Group LP v. Applied Med. Res. Corp.*, No. 9:06-CV-151, 2009 WL 5842062, *1-*2 (E.D. Tex. Mar. 30, 2009).

Although Defendants dispute any allegation that they have not complied with the Patent Rules (*see* D.I. 154, Response at 3-5), AGIS has failed to show how these factors favor exclusion of the '724 Patent from Mr. Andrews' report. The inclusion of the '724 Patent in Mr. Andrews' report did not result in any prejudice to AGIS or any delay in this case. Nor could it. As the patent owner, AGIS not only knew of the '724 Patent, but relies on the '724 Patent to establish written description and priority date support for the '838, '055, and '251 Patents (collectively, the "Location Sharing Patents"). And, election of the '724 Patent as prior art is contingent on determination of the priority date for the Location Sharing Patents and the failure to incorporate the '724 Patent by reference in the Location Sharing Patents, which issue is pending before the Court. Therefore, the Court should deny AGIS's motion to strike the expert report of Mr. Scott Andrews ("Motion") (D.I. 108).

I. Defendants Have Been Diligent in Putting AGIS on Notice

Defendants have been diligent regarding disclosing their intent to rely on the '724 Patent. As explained in their opposition to AGIS's Motion, Defendants put AGIS on notice of the intent to use to the '724 Patent as prior art at least as early as the elections of prior art. Furthermore, as explained in Defendants' opposition, AGIS was aware that the '724 Patent would be a critical issue in this litigation well before the final elections of prior art were due. *See* D.I. 154, Response at 2-3. Given AGIS's knowledge of the importance of the '724 Patent and Defendants' disclosure of their intent to rely on the '724 Patent, AGIS suffers no prejudice from the inclusion of the '724 Patent in Mr. Andrews' Report.

II. AGIS Does Not Need a Chart to Know How the '724 Patent Applies to the Location Sharing Patents

AGIS argues that the '724 Patent should be excluded from Mr. Andrews' report because Defendants have not charted the '724 Patent. *See* Reply at 3. It is true that Mr. Andrews did not provide an analysis in chart form for the '724 Patent. But, he did provide a complete element-by-element analysis regarding invalidity over the '724 Patent in his report. *See, e.g.* Ex. A, Andrews Report at 370-372. And, in any event, the arguments here are nothing new to AGIS. AGIS had already taken the position that the '724 Patent provides written description support for the Location Sharing Patents.¹ Now, AGIS contends that it cannot understand how the claims of the Location Sharing Patents are disclosed by the '724 Patent without an analysis in chart form. AGIS cannot have it both ways. AGIS is either aware of what elements of the Location Sharing Patents are disclosed in the '724 Patent or the '724 Patent does not actually disclose any elements of the Location Sharing Patents and therefore does not provide written description

¹ *See* D.I. 173, AGIS's Response Regarding LG Korea's Motion for Summary Judgment 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 (D.I. 106).

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