

**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

JURY TRIAL DEMANDED

**HTC CORPORATION'S OPPOSED MOTION TO
SUPPLEMENT THE RECORD IN SUPPORT OF MOTION TO DISMISS
PURSUANT TO FED. R. CIV. P. 12(B)(2) OR, IN THE ALTERNATIVE,
TO TRANSFER VENUE TO THE NORTHERN DISTRICT OF CALIFORNIA**

Defendant HTC Corporation (“HTC” or “Defendant”) respectfully submits this opposed motion to supplement the record in support of its pending Motion to Dismiss Pursuant to Fed. R. Civ. P. 12(b)(2) or, in the Alternative, to Transfer Venue to the Northern District of California. D.I. 29.

I. BACKGROUND

On January 22, 2018, HTC moved to transfer the above-captioned action filed by AGIS Software Development LLC (“Plaintiff” or “AGIS”) to the Northern District of California. *See* D.I. 29. In support of a change in venue, HTC submitted evidence that the core of the accused applications in this case is provided by third-party Google LLC (“Google”), and the relevant witnesses and information about those functionalities are located in and around Northern California. *See* D.I. 29 at 6, 17-18; *see also* D.I. 47 at 2-6. HTC submitted declarations from Google witnesses establishing that, for the accused functionality for Google Maps for Mobile application and Google’s Find My Device (formerly known as Android Device Manager), the relevant source code and other information regarding these applications is confidential and proprietary, and that those documents and relevant Google witnesses are located in the Northern District of California. D.I. 29 at 6 (citing 2:17-cv-00513-JRG, D.I. 36-6, ¶¶ 1, 6-8); D.I. 29 at 5 (citing 2:17-cv-00513-JRG, D.I. 36-4 at ¶¶ 1, 4; 2:17-cv-00513-JRG, D.I. 36-5 at ¶ 1; and 2:17-cv-00513-JRG, D.I. 36-6 at ¶¶ 6-8). AGIS itself confirmed that these were the core accused applications for the case when it served its Disclosure of Asserted Claims and Infringement Contentions on January 19, 2018. D.I. 29-33.

At the time of briefing for the Motion to Transfer Venue, AGIS dismissed the relevance, location and convenience of non-party Google, arguing that “much of that information [concerning the accused functionality related to Google’s Android Operating System] is publicly available through either open source code or public application programming interfaces (‘API’).”

D.I. 40 at 2, 24. In fact, AGIS explicitly disputed Google’s possible role as a non-party and took the position that any discovery into Google’s confidential and proprietary source code and other information for Google Maps and Find My Device is irrelevant. D.I. 40 at 24-25. Plaintiff further argued that:

- “HTC also contends that potential non-party witnesses, such as Google, are located in and around the Northern District of California. [] However, HTC fails to identify how any evidence or testimony from Google witnesses will be relevant to this action.” D.I. 40 at 6.
- “HTC’s argument regarding the relevance of Google generally [] also fails. HTC contends that ‘Google’s publicly available open-source code is not what is actually relevant’ to this action. [] This argument is entirely ignores that AGIS’s infringement contentions rely significantly on Google’s publicly available source code.” D.I. 49 at 5.
- “In this case, AGIS accuses HTC’s mobile phone devices of infringing the Patents-in-Suit—not Google’s devices. Even if Google possesses relevant documents and employs individuals who have knowledge about the Accused Products and functionality, HTC has not demonstrated why any specific Google witness or document would necessitate transfer to the Northern District of California.” D.I. 40 at 2.
- “HTC has failed to meet this burden. HTC . . . failed to identify third party witnesses from . . . Google, let alone provide evidence as to the relevant and materiality of each witness or set forth evidence by each witness identifying any purported inconvenience.” D.I. 40 at 19.
- “HTC fails to identify any witnesses employed by Google, or provide evidence of their relevance and materiality.” D.I. 40 at 20.

New evidence has recently emerged confirming HTC’s argument that the location and convenience of non-party Google weighs in favor of transfer to the Northern District of California. On August 23, 2018 and August 29, 2018, AGIS served deposition and document subpoenas on Google in both of the consolidated cases against Android Defendants, *AGIS Software Development LLC v. Huawei Device USA Inc., et al.*, No. 2:17-cv-513-JRG (E.D. Tex.) and *AGIS Software Development LLC v. HTC Corp.*, No. 2:17-cv-514-JRG (E.D. Tex.). *See* Ex. A; *see also* D.I. 66-2 (Google subpoena submitted in 513 matter against Huawei).

AGIS's subpoena undermines the credibility of its previous efforts to discount the relevance of Google's witnesses, source code and other information to this action. Notwithstanding AGIS's representations that AGIS's infringement contentions rely only on "publicly available open source code or public APIs," D.I. 40 at 24 and D.I. 49 at 7, AGIS's subpoenas seek the confidential and proprietary source code for Google Maps and Find My Device. AGIS also seeks from Google other technical documents that show the operation, design, development, functionality, features, testing, and manufacture of Google Maps and Find My Device. Furthermore, AGIS also seeks the communication protocols used with Android Applications between one or more Google Servers and/or one or more other Android Devices and the source code for Google Servers.

Indeed, the subpoenas confirm that the key sources of evidence regarding the operation, design, and function of the applications identified in AGIS's Infringement Contentions reside with Google in and around the Northern District of California. Because Google's documents and witness testimony helps resolve critical issues regarding the accused applications, HTC respectfully submits that AGIS's service of the subpoenas on Google confirms the appropriateness of transferring the present litigation to the Northern District of California pursuant to 28 U.S.C. § 1404(a).

II. ARGUMENT

When resolving a challenge to the propriety of venue, this Court enjoys broad discretion to allow the moving party to supplement the record with additional facts and evidence. *See, e.g., Murungi v. Touro Infirmary*, No. 6:11-cv-0411, 2011 WL 3206859, at *2 (W.D. La. June 29, 2011) (noting the broad discretion to consider supplemental evidence when ruling on a motion to transfer venue); *accord Ambraco, Inc. v. Bossclip B.V.*, 570 F.3d 233, 238 (5th Cir. 2009) (noting the Court's broad discretion to consider supplemental evidence when ruling on a Rule 12(b)(1)

or 12(b)(3) motion). Exercise of such discretion is appropriate when new information emerges that can assist the Court's consideration of the transfer motion. *See, e.g., Nationwide Mutual Ins. Co. v. The Overlook, LLC*, No. 4:10-cv-00069, 2010 WL 2520973, at *10 (E.D. Va. June 17, 2010) (granting motion to supplement a transfer motion because it assisted the court's consideration of the matter).

In the present matter, HTC respectfully submits that the subpoena on Google will advance the Court's consideration of the transfer venue motion by, *inter alia*, demonstrating that the relative ease of access to sources of proof and convenience for witnesses factors favor transfer, and confirming that AGIS's arguments downplaying the relevance of Google's documents and witnesses was an argument of convenience during transfer briefing that AGIS has abandoned now that it actually must litigate the merits of its claims.

In HTC's Motion to Transfer Venue, HTC argued that relevant documents, including highly proprietary source code, and witnesses with knowledge relating to the operation, design, and function of the third-party Accused Applications are located in the Northern District of California or at locations far more convenient to the Northern District of California than to the Eastern District of Texas. *See* D.I. 29 at 6; *see also* D.I. 47 at 3-6. In its opposition, Plaintiff repeatedly suggested that the relevant Google documents are already publicly available, and thus should not be considered under the access to sources of proof factor. Dkt. 40 at 2 ("While AGIS has accused functionality related to Google's Android Operating System, much of that information is publicly available through either open source code or public application programming interfaces ('API'."); *id.* at 24-25 ("AGIS's infringement contentions rely on Google's open source code and/or application programming interfaces which are publicly

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.