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

GESTURE TECHNOLOGY PARTNERS, LLC, Plaintiff v. HUAWEI DEVICE CO., LTD., HUAWEI DEVICE USA, INC., Defendants.	§ § § § § § § § § § §	CASE NO. 2:21-cv-00040-JRG (Lead Case) JURY TRIAL DEMANDED

GESTURE TECHNOLOGY PARTNERS, LLC, Plaintiff v. SAMSUNG ELECTRONICS CO., LTD. AND SAMSUNG ELECTRONICS AMERICA, INC., Defendants.	§ § § § § § § § § § §	CASE NO. 2:21-cv-00041-JRG (Member Case) JURY TRIAL DEMANDED

DEFENDANTS' MOTION TO COMPEL
SUPPLEMENTATION OF PLAINTIFF'S PRIVILEGE LOG

I. INTRODUCTION

Pursuant to Rule 37, Defendants request the Court to compel Plaintiff Gesture Technology Partners ("GTP") to provide a privilege log that complies fully with Rule 26(b)(5) and this Court's Discovery Order, including at least (1) providing a description of each document sufficient to allow Defendants to assess whether privilege is applicable; (2) identifying and providing the affiliations of all authors, recipients, and custodians of each document; and (3) identifying the entries removed and the clawed-back documents added since GTP's initial privilege log.

Pursuant to the Court's Docket Control Order, GTP served its privilege log on August 15, 2021. On August 23, 2021, Defendants sent GTP a letter that described in detail the fundamental deficiencies in the privilege log, such as failing to provide adequate description of each document sufficient for Defendants to assess the claim of privilege. In the two months since, the parties have met and conferred twice and Defendants have sent repeated letters requesting a compliant privilege log. Although GTP supplemented and amended its privilege log once in that period, the changes did not correct the deficiencies Defendants raised, but instead added hundreds more insufficiently supported privilege claims. Defendants respectfully request that the Court order GTP to produce immediately a privilege log complying with Rule 26(b)(5).

II. FACTUAL BACKGROUND

On August 15, 2021, GTP served its privilege log. On August 23, Defendants sent GTP a letter identifying fundamental deficiencies in GTP's privilege log and requesting a supplemental privilege log that (1) provides a brief description of each document's subject matter; (2) provides a sufficient description of each document to allow Defendants to assess whether any privilege is applicable, including for any attachments; (3) identifies the affiliations of the authors, recipients, or custodians of each document; and (4) provides a complete list of all authors and recipients of each document. On August 31, GTP sent a claw-back letter requesting that Defendants delete

thirteen documents allegedly containing privileged information and destroy all copies. Defendants complied. However, GTP did not respond to the substance of Defendants' August 23 request for appropriate detail as to GTP's claim of privilege for each document. On September 9, Defendants sent GTP a letter confirming deletion and destruction of the clawed-back documents and again requesting a supplemental privilege log correcting the noted deficiencies. On September 24, the parties conducted a first meet and confer discussion in which GTP committed to supplementing its privilege log.

On September 28, 2021, GTP served a supplemental and amended privilege log, adding a column providing a boilerplate privilege description, adding 650 documents alleged to contain privileged information, and deleting numerous other documents. Like its initial privilege log, GTP's supplemental and amended privilege log did not provided sufficient description of each document to allow Defendants' to assess whether privilege is applicable; did not identify the affiliations of the authors, recipients, or custodians of each document; and did not provide a complete list of all authors and recipients of each document. On October 5, Defendants sent GTP another letter again highlighting these still-unaddressed deficiencies. Defendants also requested that GTP identify which documents had been removed from the initial privilege log and confirm those had been produced, and identify in the supplemental and amended privilege log the thirteen clawed-back documents so Defendants could assess those claims of privilege.

On October 6, 2021, rather than addressing any of the noted deficiencies, GTP requested that Defendants delete and destroy seven more documents on the basis of privilege and committed that GTP would provide a supplemental privilege log including those clawed-back documents. To date, GTP still has not served the promised supplemental privilege log nor has GTP committed to addressing the fundamental deficiencies first raised in Defendants' August 23 letter. On October

12, Defendants again requested that GTP provide a supplemental privilege log and again requested to meet and confer.

On October 15, the parties met and conferred for the second time on these issues. GTP committed to serving a further supplemented privilege log that identifies all documents removed from and the clawed-back documents added since GTP's initial privilege log, and identifies and provides the affiliations of all authors and recipients of the documents listed in GTP's most recent privilege log; however, GTP would not commit to serving this further amended privilege log by the close of fact discovery (*i.e.*, by October 15). (Later in the day on October 15, GTP nonetheless served a second supplemental privilege log containing additional entries but still failing to include all previously clawed-back documents.) Further, at the meet and confer GTP would not commit to resolving the other noted deficiencies. Thus, the parties are at an impasse.

III. LEGAL STANDARD

Should a party fail to produce documents or respond to discovery obligations under Rule 34, the court may compel production of the requested discovery. *See* Fed. R. Civ. P. 37(a)(3)(B); *Shumpert v. City of Tupelo*, 905 F. 3d 310, 325 (5th Cir. 2018). The party asserting privilege has the burden of proving its applicability and thus that discovery should not be allowed. *See id.* at *10–11; *U.S. v. Harrelson*, 754 F.2d 1153, 1167 (5th Cir. 1985). A party claiming privilege must (1) expressly claim privilege; and (2) sufficiently describe the nature of the subject documents or communications to allow the opposing party "to assess the claim." Fed. R. Civ. P. 26(b)(5)(A). A privilege log must "provide[] facts that would suffice to establish each element of the privilege or immunity that is claimed." *Smartphone Techs. LLC v. Apple, Inc.*, Case No. 6:10-cv-74, 2013 U.S. Dist. LEXIS 28220, at *12–13 (E.D. Tex. Mar. 1, 2013) (internal quotations omitted).

IV. ARGUMENT

GTP has failed to produce an adequate privilege log despite Defendants' repeated letters and two meet and confers between the parties, which has severely prejudiced Defendants' ability to conduct and complete discovery, including the deposition of GTP's principal and the named inventor on the Asserted Patents. GTP's September 28, 2021 supplemental and amended privilege log (excerpted in Exhibit A[1]) spans more than 1600 log entries (after dropping 86 documents from which it previously claimed privilege[2]) and suffers from at least the following fundamental deficiencies: (1) it does not provide sufficient description of each document to allow Defendants' to assess whether privilege is applicable, including for any attachments; (2) it does not identify the affiliations of the authors, recipients, or custodians of each document; and (3) it does not provide a complete list of all recipients and senders of each document. Indeed, GTP's recent removal of 86 previously-identified entries from its supplemental and amended privilege log only confirms that GTP has improperly withheld documents from discovery. Defendants respectfully request an order compelling GTP to provide a privilege log complying with Rule 26(b)(5).

A. GTP Has Failed to Provide Sufficient Descriptions to Allow Defendants to Assess GTP's Claims of Privilege

GTP's supplemental and amended privilege log does not provide sufficient description of the documents to allow Defendants to assess whether privilege is applicable. Over 200 entries provide mere boilerplate descriptions of why privilege applies and provide no information from which to evaluate why the document is privileged. *See, e.g.*, Exhibit A at Entries 73–84 (which only identify the date of the document and the applicable privilege, but do not identify the title of

[1] Defendants here supply only representative excerpts due to the Discovery Order's page limits for discovery motions.
[2] GTP has not identified how many documents it dropped from its initial privilege log, whether it has produced those documents, nor what the corresponding Bates ranges are.

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