

EXHIBIT A



VINCENT J. RUBINO III

DIRECT: 646.797.4345

FAX: 212.257.5796

VRUBINO@FABRICANTLLP.COM

August 18, 2021

The Honorable Roy S. Payne
U.S. Magistrate Judge
U.S. District Court for the Eastern District of Texas
Sam B. Hall, Jr. Federal Building and
United States Courthouse
100 East Houston Street
Marshall, Texas 75670

Re: *AGIS Software Development LLC v. WhatsApp, Inc.*,
Case No 2:21-cv-00029-JRG-RSP (E.D. Tex.)

Your Honor,

In accordance with the Court's Order (Dkt. 121), Plaintiff AGIS Software Development LLC ("AGIS") submits its reply to Defendant WhatsApp LLC's ("WhatsApp") responses and objections to AGIS's narrowed venue discovery requests.

WhatsApp improperly attempts to limit the scope of discovery to the arguments advanced in its motion to dismiss (Dkt. 63). But AGIS is entitled to all information and materials that are relevant to the activities and locations "of WhatsApp" in the Eastern District of Texas, and WhatsApp should have already produced these discoverables as responsive to the requirements of the Court's Discovery Order which requires the production of "all documents, electronically stored information. . .that are relevant to the pleaded claims or defenses involved in this action. WhatsApp does not dispute that venue is part of its defense in this case. In support of its motion to dismiss, WhatsApp has produced selective, pre-expansion discovery on land plats that exclude the current geographical bounds of the Like Way Data Center. However, at the time of the filing of the complaint in this action, the Like Way Data Center physically extended into the Eastern District of Texas (including the building, ingress/egress routes, and parking lots).

The Honorable Roy S. Payne
U.S. Magistrate Judge
August 18, 2021
Page 2



See Dkt. 82-11 and 82-13 (Sources: State of Texas, Tarrant County Appraisal District and State of Texas, Department of Transportation).

WhatsApp’s attempt to limit venue discovery raises concern. During the parties’ conference call, counsel for WhatsApp stated that WhatsApp need only produce information regarding whether WhatsApp “holds itself out” to have a presence in the District. This misinterpretation of the law underscores the need for a full factual inquiry, rather than a selective production of documents that do not accurately represent the activities and locations “of WhatsApp.” During the conference call with the Court, counsel for WhatsApp stated that WhatsApp had identified at least fifty WhatsApp employees residing or working in the Eastern District of Texas. This statement confirmed that WhatsApp has a significant presence in the District and AGIS should be given the opportunity to discover whether any of the individuals contravene the blanket statements made by WhatsApp under its misinterpretation of the law.

Places of WhatsApp (Interrogatory No 10 and Document Request No. 1):

AGIS seeks all discoverable information, documents, materials, and one or more witnesses to testify regarding “all physical property, offices, facilities, coworking spaces, warehouses, tangible and intangible property, equipment, servers, data centers, and other physical locations located in the EDTX and the counties adjacent to the EDTX, that are leased, owned, or otherwise used by WhatsApp, any affiliate of WhatsApp, or any employees, consultants, or any personnel of WhatsApp.” Each portion of this request is relevant to the venue analysis, *i.e.*, the determination of whether WhatsApp has a regularly established place of business in the Eastern District of Texas. On a more granular level, each portion of this request is relevant to whether there is a physical place in the District of WhatsApp and whether that place is a regular and established place of business.

WhatsApp’s carefully worded response fails to address the portion of AGIS’s request concerning whether WhatsApp, its affiliates, or its employees “use” any other “physical property, offices,

FABRICANT LLP

The Honorable Roy S. Payne
U.S. Magistrate Judge
August 18, 2021
Page 3

facilities, coworking spaces, warehouses, tangible and intangible property, equipment, servers, data centers, and other physical locations” located within or adjacent to the Eastern District of Texas. In doing so, WhatsApp does not object to or otherwise dispute that this request is appropriate.

WhatsApp’s primary objection focuses on whether it should be required to produce discovery on employee-owned properties. This is a mischaracterization of Plaintiff’s request. As to employees, consultants, and WhatsApp affiliates, Plaintiff seeks discovery on any “physical property, offices, facilities, coworking spaces, warehouses, tangible and intangible property, equipment, servers, data centers, and other physical locations” for which WhatsApp reimburses, pays, or otherwise provides remuneration for the “physical property, offices, facilities, coworking spaces, warehouses, tangible and intangible property, equipment, servers, data centers, and other physical locations.” To the extent WhatsApp provides any remuneration for the “physical property, offices, facilities, coworking spaces, warehouses, tangible and intangible property, equipment, servers, data centers, and other physical locations,” AGIS is entitled to the identity of the place(s), all agreements and terms related to the place(s), any documents relating to the place(s), and one or more testifying witnesses with knowledge of the place(s). Similarly, to the extent WhatsApp exerts any control over, conducts business from, has a hand in selecting, or conditions employment on an employee maintaining any “physical property, offices, facilities, coworking spaces, warehouses, tangible and intangible property, equipment, servers, data centers, and other physical locations,” AGIS is entitled to the identity of the place(s), all agreements and terms related to the place(s), any documents relating to the place(s), and one or more testifying witnesses with knowledge of the place(s). These requests fall squarely within the scope of the relevant requests and the legal analysis for venue under *TC Heartland* and *In re Cray*.

Further, WhatsApp questions whether it can provide discovery on equipment located at the Like Way Data Center or INAP Data Center. This information should be readily available to WhatsApp, especially considering that the Like Way Data Center is approximately six years old and WhatsApp claims it began migration of services from INAPP less than three years ago. WhatsApp has provided a blanket objection stating that its agreement ended with INAPP in 2018 but, WhatsApp has provided no discovery on any migration or legacy services at the INAPP Data Center. Even more, WhatsApp’s response proposes limiting the discovery of the equipment WhatsApp uses in the Eastern District of Texas to equipment in only two locations. To be clear, AGIS’s discovery requests are not, and should not be, limited to the INAPP and Like Way Data Centers of WhatsApp. WhatsApp has articulated no valid objection or reason why it believes all venue discovery should be limited to these two places.

Finally, WhatsApp objects to discovery “dating back to 2017.” This date was proposed by WhatsApp and accepted by AGIS during the parties’ meet-and-confer teleconference on August

FABRICANT LLP

The Honorable Roy S. Payne
 U.S. Magistrate Judge
 August 18, 2021
 Page 4

11, 2021. 2017 is appropriate because venue is proper in the District, if a defendant had a regular and established place of business at the time the cause of action accrued, and the action was brought a reasonable time thereafter. *See Welch Sci. Co. v. Human Eng'g Inst., Inc.*, 416 F.2d 32 (7th Cir. 1969); *Wi-LAN Inc. v. Lenovo (United States), Inc.*, 2017 WL 3194692 (S.D. Cal. July 27, 2017); *ParkerVision, Inc. v. Apple Inc.*, C.A. No. 3:15-cv-01477 (M.D. Fla. March 8, 2018). Of course, the statutory damages period for past damages is a sufficiently reasonable time to bring an action. Nevertheless, the scope of venue discovery should not exclude activities or agreements on the basis that such activities/agreements were also performed/effective prior to the filing date of the complaint or prior to the time the cause of action accrued. In a non-limiting example, if WhatsApp entered into an agreement to own, lease, or otherwise use a certain place prior to the filing of the complaint, or prior to the time the cause of action accrued, that agreement should not be excluded from production if the agreement was effective at the time of the filing of the complaint or the time the cause of action accrued. Similarly, WhatsApp's activities and agreements after the filing of the complaint (i.e., to present) are discoverable because WhatsApp's entrance into and departure from the District have probative value. WhatsApp has not provided a sufficient reason to exclude such discovery.

Agreements Related to Places of WhatsApp (Interrogatory No 11 and Document Request No. 2):

AGIS seeks “all agreements, leases, contracts, and any legal rights for all physical property, offices, facilities, coworking spaces, warehouses, tangible and intangible property, equipment, servers, data centers, other physical locations, communications services, utility services, and all vendor services located or performed in the EDTX and the counties adjacent to the EDTX.” Each portion of this request is relevant to the venue analysis, *i.e.*, the determination of whether WhatsApp has a regularly established place of business in the Eastern District of Texas and whether there is a physical place in the District of WhatsApp.

As explained above, WhatsApp's proposal to limit discovery to the INAPP facility alone is not sufficient because it restricts the scope of discovery to its own arguments and misinterpretation of the law. WhatsApp's proposal is improper because the requested information is relevant and WhatsApp has not identified a sufficient reason as to why it would be too burdensome or disproportionate to the needs of the case.

Further, WhatsApp objects to the geographical scope of the request because “adjacent to the Eastern District of Texas” is “outside the Eastern District of Texas.” Again, this objection comes as a surprise because WhatsApp proposed, and AGIS accepted, this exact geographical scope during the parties' meet-and-confer teleconference on August 11, 2021. This geographical scope is appropriate for at least two reasons. First, there remains an ongoing dispute as to the location

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.