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

AGIS SOFTWARE DEVELOPMENT LLC,	§ § §	Case No. 2:21-cv-00072-JRG
Plaintiff,	§ §	**(LEAD CASE)**
v.	§ § §	**JURY TRIAL DEMANDED**
T-MOBILE USA, INC. and T-MOBILE US, INC.,	§ § §	
Defendants.	§ §	
AGIS SOFTWARE DEVELOPMENT LLC,	§ § §	Case No. 2:21-cv-00026-JRG
Plaintiff,	§ § §	**(MEMBER CASE)**
v.	§ § §	**JURY TRIAL DEMANDED**
UBER TECHNOLOGIES, INC., d/b/a UBER,	§ § §	
Defendant.	§ §	

**PLAINTIFF AGIS SOFTWARE DEVELOPMENT LLC'S RESPONSE
IN OPPOSITION TO DEFENDANT UBER TECHNOLOGIES, INC.,
D/B/A UBER'S OPPOSED MOTION TO COMPEL
PRIOR LITIGATION DOCUMENTS (DKT. 196)**

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Plaintiff AGIS Software Development LLC ("AGIS" or "Plaintiff"), by and through its undersigned counsel, hereby submits this response in opposition to Defendant Uber Technologies, Inc., d/b/a Uber's ("Defendant" or "Uber") Opposed Motion to Compel Prior Litigation Documents (Dkt. 196) (the "Motion").

I.   INTRODUCTION

Uber's Motion seeks to compel production of prior litigation documents. However, AGIS has already produced documents it has within its possession, custody, or control or has permission to produce pursuant to the protective orders entered with third parties. AGIS has repeatedly informed Uber that it does not have access to certain experts reports from prior cases because AGIS properly destroyed such reports following the dismissal of those cases pursuant to the Protective Order, and upon request by those parties to destroy any confidential materials pursuant to the Protective Order. With regard to cases that are ongoing, AGIS has informed Uber that those third parties have *not* agreed to the disclosure of their confidential materials. Accordingly, AGIS does not have in its possession, custody, or control, the third-party confidential materials requested by Uber, or has not been given permission to disclose the third-party confidential materials. AGIS has repeatedly notified Uber that it should subpoena those parties for their confidential documents, as consolidated defendant Lyft, Inc. has done. Accordingly, AGIS respectfully requests that the Court deny Uber's Motion.

II.   LEGAL STANDARDS

Rule 26(b)(1) of the Federal Rules of Civil Procedure provides that "[p]arties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense . . ." Fed. R. Civ. P. 26(b)(1). While "discovery rules are to be accorded broad and liberal treatment to effect their purpose of adequately informing the litigants in civil trials" (*Herbert v. Lando*, 441 U.S. 153, 177 (1979)), discovery does have "ultimate and necessary boundaries." *Oppenheimer*

Fund, Inc. v. Sanders, 437 U.S. 340, 351 (1978). Courts "cannot compel [a party or non-party] to produce non-existent documents" because a party "cannot produce what it does not have." *ORIX USA Corp. v. Armentrout*, No. 3:16-mc-63-N-BN, 2016 WL 4095603, at *5 (N.D. Tex. Aug. 1, 2016).

On a motion to compel, "[t]he moving party bears the burden of showing that the materials and information sought are relevant to the action or will lead to the discovery of admissible evidence." *Van Dyke v. Retzlaff*, No. 4:18-CV-247, 2020 WL 1866075, at *1 (E.D. Tex. Apr. 14, 2020). "The federal rules follow a proportionality standard for discovery." *Id.* Under this standard, "the burden falls on both parties and the Court to consider the proportionality of all discovery in resolving discovery disputes." Fed. R. Civ. P. 26(b)(1), advisory committee note (2015).

III.   ARGUMENT

A.   AGIS Does Not Have Damages Expert Reports Within its Possession, Custody, or Control, or Third Parties Have Objected to the Production of Damages Expert Reports

AGIS cannot produce documents it does not have in its possession, custody, or control, or to which third-parties have objected to their disclosure. AGIS has repeatedly informed Uber that it does not have access to certain technical and damages reports and deposition transcripts of expert witnesses from prior cases because AGIS destroyed such reports following the dismissal of those cases pursuant to the Protective Order, and upon request by those parties to destroy any confidential materials pursuant to the Protective Order. While Uber misleads this Court by alleging that it did not seek permission from previous defendants, to the contrary, as is apparent by Uber's own recitation of the facts, AGIS has represented that it *does not have* access to these materials. This response is no surprise to Uber. AGIS has repeatedly informed Uber that such documents were either destroyed pursuant to a request from counsel from prior defendants

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