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

AGIS SOFTWARE DEVELOPMENT LLC	§ §	
v.	§ §	CASE NO. 2:21-cv-00072-JRG (Lead Case)
T-MOBILE USA, INC., AND T-MOBILE US, INC.	§ § §	

AGIS SOFTWARE DEVELOPMENT LLC	§ §	
v.	§ §	CASE NO. 2:21-cv-00026-JRG (Member Case)
UBER TECHNOLOGIES, INC., d/b/a UBER.	§ § § §	

**DEFENDANT UBER TECHNOLOGIES, INC.'S OPPOSITION TO AGIS
SOFTWARE DEVELOPMENT LLC'S OPPOSED MOTION FOR ENTRY OF
SIXTH AMENDED DOCKET CONTROL ORDER**

I.   INTRODUCTION

AGIS's Opposed Motion for Entry of Sixth Amended Docket Control Order demonstrates the little care and respect that AGIS has for this Court and the rules governing these proceedings. The case schedule was entered in June and modestly adjusted in early October through a joint motion—expressly to accommodate the "large number of depositions that need to occur, including expert depositions." Dkt. 163 at 1. AGIS and its expert had ample time to plan and prepare for depositions under the agreed schedule. That clearly did not happen. Instead, AGIS waited until six days before the expert discovery deadline to inform Uber that its sole technical expert—who submitted two reports—could not sit for deposition until nearly *two weeks after the deadline*, and well *after* the deadline for dispositive and *Daubert* motions.

AGIS's motion demonstrates a lack of diligence expected by this Court and absolutely necessitated by the very swift schedule AGIS clearly desired when it chose this forum. Indeed, the expert's unavailability was not unforeseeable—he is simply too busy with other cases. Dkt. 241-1. Either AGIS did not bother to check that its expert was available in the agreed time frame (or anything close to it), or AGIS knew he would not be and still asked the Court to enter a schedule it had no intention of following. Neither excuse warrants an unworkable schedule extension that would impede the Court's ability to consider the dispositive and *Daubert* motions before the Pretrial Conference and give AGIS a tactical advantage by delaying its expert's deposition until just before the motion deadline. AGIS's request to accommodate its lack of scheduling foresight and reasonable diligence—at the expense of this Court and Uber—should be denied.

Should the Court believe a schedule adjustment is appropriate, Uber respectfully requests that the Court adopt one of two proposals:

1. Adopt the compromise Uber proposed and AGIS rejected—shifting the dispositive /*Daubert* motion deadlines to December 17, 2021 (from December 13) and requiring AGIS's expert to complete his depositions by December 14, 2021;

2. Or, if AGIS's expert truly cannot make time for this case until the week of December 20, the Court should require AGIS to file its dispositive and *Daubert* motions on the current schedule (by December 13), while moving the deadline for Uber to file its motions to December 24. All oppositions would remain due on December 30 as currently scheduled.

Either of these compromises preserves the Court's ability to consider the fully briefed dispositive and *Daubert* motions before the Pretrial Conference. And either proposal reduces the tactical advantage AGIS would gain by delaying its expert's deposition. AGIS cannot reasonably complain about either approach, since this problem is entirely of its own making.

Should the Court desire, Uber is prepared to attend an in-person hearing this week to resolve this scheduling problem.

II.   BACKGROUND

The schedule in this case was originally entered on June 4, 2021, setting the close of expert discovery for December 3, 2021, the dispositive and *Daubert* motion deadline for December 9, 2021, and the Pretrial Conference for February 2, 2022. Dkt. 80. On October 7, 2021, the Parties filed a joint motion to make modest modifications to certain fact and expert discovery deadlines, as well as the deadlines to exchange expert disclosures and dispositive motion briefing. Dkt. 163.[1] On October 18, the Court entered an Amended DCO extending, *inter alia*, the deadline to complete expert discovery five days, to December 8, 2021, and the deadlines for dispositive and *Daubert* motions four days, to December 13, 2021. Dkt. 170. The Pretrial Conference remains scheduled for February 2, 2022. *Id.*

Consistent with that schedule, and before it served rebuttal reports, on November 22 and 24, Uber offered deposition dates for its three technical experts and one damages expert on

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[1] The parties subsequently filed an amended joint motion to amend the DCO on October 12, as the parties had inadvertently included the original *Markman* date in the previously proposed order. *See* Dkt. 165.

December 7, December 8, and December 8-10, respectively. Ex. 1 at 7. AGIS responded stating

that it would take Uber's damages expert's deposition on December 9 or 10, but that it was

"unavailable on December 7-8 due to previously scheduled travel and professional commitments"

and requested "later dates." *Id.* at 6. In the spirit of cooperation, Uber asked AGIS to provide a

new Docket Control Order with a proposed schedule adjustment, as well as proposed dates for the

depositions of AGIS's experts. *Id.* at 5–6. The parties scheduled the deposition of two of Uber's

experts (invalidity and damages) and one of AGIS's experts (damages). *Id.* at 2–4. AGIS,

however, still failed to provide deposition dates for its sole technical expert, James McAlexander.

After Uber twice followed up (*id.* at 1, 3), AGIS finally revealed that Mr. McAlexander was

allegedly unavailable for deposition until December 20 and December 22. *Id.* at 1.[2] AGIS further

proposed shifting the dispositive/*Daubert* motion deadline to December 23, with oppositions due

January 10, 2022. *Id.*

III.   ARGUMENT

A.   **AGIS's Proposal Unfairly Prejudices the Court and Uber**

While AGIS's proposed ten-day schedule shift may seem modest in the abstract, it is

unworkable here. Among other things, AGIS's proposal means that briefing on dispositive and

Daubert motions will not be complete until approximately one week before the Pretrial

Conference, leaving the Court limited time to consider the parties' papers. Also, AGIS's proposal

sets the deadline for dispositive and *Daubert* motions to the day after AGIS proposes that its

technical witness complete his depositions, leaving Uber virtually no time to prepare its motions

in light of AGIS's expert's testimony. The original schedule provided six days between the close

of expert discovery and the deadline for dispositive and *Daubert* motions, and the agreed amended

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[2] Mr. McAlexander provided two expert reports, one on infringement and one on validity, thus
Uber is entitled to two days of deposition pursuant to the Discovery Order. *See* Dkt. 79, ¶ 5(d).

schedule reduced that to five days. AGIS now wants Uber to file its motions *the day after* it takes Mr. McAlexander's deposition.[3]   Uber intends to file case-dispositive motions and serious challenges to AGIS's experts, and AGIS seeks to hinder both Uber's ability to prepare those motions and the Court's ability to consider them—all as a penalty for AGIS's inexcusable inability to meet the agreed schedule.

B.   AGIS Has No Excuse for Failing to Comply with the Deadlines

As explained, the expert discovery and motions deadlines in this case were entered in June and modestly adjusted in October by agreement of the parties. AGIS knew the schedule when it was selecting experts and disclosed Mr. McAlexander in August, well before it jointly moved to modify the schedule expressly to accommodate expert depositions. At no point did AGIS ever raise that its sole technical expert would not be available to be deposed during the entire period from the completion of expert reports to the filing of dispositive and *Daubert* motions. Also troubling is the professed excuse for Mr. McAlexander's lack of availability. Mr. McAlexander did not have unexpected circumstances arise; he simply prioritized his expert work on other cases. *See* Dkt. 241-1, ¶¶ 6–9. Notably, Mr. McAlexander does not say when AGIS asked for his availability or when he informed AGIS of his unavailability, or when his competing commitments were scheduled.   Indeed, despite Mr. McAlexander's statement that he was "unavailable for deposition the week of November 29, 2021" because of his other expert work (*Id.*, ¶ 6), Uber understands that Mr. McAlexander was scheduled to testify in a trial the week of November 29 in the Central District of California (in a case not identified in his declaration); on November 17,

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[3] Moreover, AGIS seeks the improper tactical advantage of back-loading its sole technical witness until the end of the discovery period, after most or all of Uber's experts. Not only would this give AGIS more time than Uber to prepare its motions, it would give AGIS the unfair advantage of putting up its expert on infringement—on which it bears the burden—until the end of expert discovery and potentially after Uber's rebuttal expert has been deposed.

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