

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

**PLAINTIFF AGIS SOFTWARE DEVELOPMENT LLC'S SUR-REPLY
IN FURTHER OPPOSITION TO DEFENDANT UBER TECHNOLOGIES, INC.,
D/B/A UBER'S MOTION FOR SUMMARY JUDGMENT OF
NO WILLFUL INFRINGEMENT, NO INJUNCTIVE RELIEF, NO PRE-SUIT
INDIRECT INFRINGEMENT, AND NO COPYING (DKT. 253)**

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Plaintiff AGIS Software Development LLC (“AGIS” or “Plaintiff”), by and through its undersigned counsel, hereby submits this sur-reply in further opposition to Defendant Uber Technologies, Inc., d/b/a Uber’s (“Defendant” or “Uber”) Motion for Summary Judgment of No Willful Infringement, No Injunctive Relief, No Pre-Suit Indirect Infringement, and No Copying (Dkt. 253) (the “Motion”).

I. SUMMARY JUDGMENT OF NO WILLFUL INFRINGEMENT, NO INJUNCTIVE RELIEF, AND NO COPYING IS NOT WARRANTED

As submitted in response to Uber’s Motion, AGIS has stated that it will not allege at trial that Uber willfully infringes any claim of the ’100 Patent, that AGIS is entitled to injunctive relief, and that Uber has copied any practicing products. Accordingly, summary judgment is not warranted on these grounds. *See, e.g., VirnetX, Inc. v. Apple Inc.*, 925 F. Supp. 2d 816, 849 (E.D. Tex. 2013), *rev’d on other grounds, VirnetX, Inc. v. Cisco Sys., Inc.*, 767 F.3d 1308 (Fed. Cir. 2014) (“The Court encourages and requires the parties to narrow their case for trial. Accordingly, the Court will not penalize such attempts to narrow issues by entering judgment on issues not presented at trial.”). AGIS has agreed to not allege claims for willful infringement, injunctive relief, or copying. *See Teva Pharm. Indus., Ltd. v. Dr. Reddy’s Labs., Ltd.*, No. 07-2894 (GEB) (JJH), 2008 WL 630050, at *4 (D.N.J. Mar. 5, 2008) (“The Court will deny DRL’s summary judgment to the extent it concerns claim 1 of the ’008 patent because there is no case or controversy as to that claim.”); *SanDisk Corp. v. Kingston Tech. Co., Inc.*, 695 F.3d 1348, 1353 (Fed. Cir. 2012) (“Thus, these claims do not present a current infringement controversy before this court. Without such a controversy, we lack Article III jurisdiction to decide these issues.”); *Core Wireless Licensing S.A.R.L. v. LG Elecs., Inc.*, No. 2:14-cv-911-JRG-RSP, 2016 WL 1106442, at *1 (E.D. Tex. Mar. 20, 2016). Accordingly, AGIS submits that because it is no longer seeking claims for willful infringement, injunctive relief, or alleging that Uber copied the practicing products,

summary judgment is not warranted.

II. THERE ARE GENUINE DISPUTES OF MATERIAL FACT PRECLUDING A FINDING OF SUMMARY JUDGMENT OF NO PRE-SUIT INDIRECT INFRINGEMENT

There are genuine disputes of material fact regarding Uber's pre-suit knowledge of the Asserted Patents. AGIS submitted the testimony of Uber's own witnesses, including Uber's Director of Patent Transactions and an Engineer of Uber, who testified that Uber has a policy of not monitoring or investigating the patents of others. Resp. at 4. A patentee may prove both indirect infringement and the corresponding direct infringement by circumstantial evidence. *Liquid Dynamics Corp. v. Vaughan Co.*, 449 F.3d 1209, 1219 (Fed. Cir. 2006). The "drawing of inferences, particular in respect of an intent-implicating question . . . is peculiarly within the province of the fact finder that observed the witnesses." *Rolls-Royce Ltd. v. GTE Valeron Corp.*, 800 F.2d 1101, 1110 (Fed. Cir. 1986). That Uber now disputes or attempts to walk back the sworn testimony of its own employees with irrelevant or conflicting statements is insufficient to warrant summary judgment and confirms the existence of a genuine dispute. Compare Dkt. 253 SOF with Dkt. 303, Responses to SOF. To the extent there is any contradictory testimony supporting competing positions, the jury must determine the credibility of the witnesses and their conflicting statements. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986) ("Credibility determination, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge, whether he is ruling on a motion for summary judgment or for a directed verdict. The evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor.").

AGIS presented evidence that Uber understood how its products worked, had notice of the patents after the suit was filed, and Uber has a clear pattern of behavior of not monitoring or investigating the patents of others. In *VirnetX Inc. v. Apple Inc.*, the Court held that plaintiff

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