

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

AGIS SOFTWARE DEVELOPMENT LLC,

Plaintiff,

v.

SAMSUNG ELECTRONICS CO., LTD.,
ET AL.,

Defendants.

§
§
§
§
§
§
§
§
§
§
§

Case No. 2:22-cv-00263-JRG-RSP

JURY TRIAL DEMANDED

**PLAINTIFF AGIS SOFTWARE DEVELOPMENT LLC'S SUR-REPLY
IN FURTHER OPPOSITION TO SAMSUNG'S MOTION FOR LEAVE
TO AMEND ANSWER TO ADD CLAIM PRECLUSION AND
KESSLER DOCTRINE AFFIRMATIVE DEFENSES (DKT. 101)**

TABLE OF CONTENTS

	<u>Page(s)</u>
I. THE <i>GOOGLE I</i> DISMISSAL EXPRESSLY EXEMPTED THE '970 AMENDED CLAIMS AND DOES NOT HAVE PRELUSIVE EFFECT	2
II. PRECLUSION DOES NOT EXTEND TO SAMSUNG	4
III. CONCLUSION.....	5

TABLE OF AUTHORITIES

	<u>Page(s)</u>
<i>Adaptix, Inc. v. AT&T Mobility LLC</i> , 2015 WL 12696204 (E.D. Tex. May 12, 2015).....	5
<i>Aspex Eyewear, Inc. v. Marchon Eyewear, Inc.</i> , 672 F.3d 1335 (Fed. Cir. 2012)	3
<i>Fresenius USA, Inc. v. Baxter Int’l, Inc.</i> , 721 F.3d 1330 (Fed. Cir. 2013).....	3
<i>In re Clement</i> ,..... 131 F.3d 1464 (Fed. Cir. 1997)	3
<i>In re PersonalWeb Techs. LLC</i> , 961 F.3d 1365 (Fed. Cir. 2020).....	2
<i>Levi Strauss & Co. v. Abercrombie & Fitch Trading Co.</i> 719 F.3d 1367 (Fed. Cir. 2013).....	3
<i>Pactiv Corp. v. Dow Chem Co.</i> , 449 F.3d 1227 (Fed. Cir. 2006).....	2
<i>Realtime Adaptive Streaming LLC v. Netflix, Inc.</i> 2020 WL 7889048, at *5 (C.D. Cal. Nov. 23, 2020).....	3
<i>Rubber Tire Wheel Co. v. Goodyear Tire & Rubber Co.</i> , 232 U.S. 413 (1914).....	4
<i>Senju Pharm. Co. v. Apotex Inc.</i> , 746 F.3d 1344 (Fed. Cir. 2014)	3
<i>Seven Networks, LLC v. Motorola Mobility</i> , 2022 WL 4326589, at *6-*9 (N.D. Tex. Feb. 10, 2022)	5
<i>SpeedTrack, Inc. v. Office Depot, Inc.</i> 791 F.3d 1317 (Fed. Cir. 2015).....	4
<i>Target Training Int’l v. Extended Disc N. Am.</i> , 645 F. App’x. 1018 (Fed. Cir. 2016)	3
<i>Trs. of Bos. Univ. v. Kingbright Elec. Co.</i> , 427 F. Supp. 3d 246 (D. Mass. 2019)	5

Uniloc 2017 LLC v. Microsoft Corp.,
No. 18-CV-02053-JLS, Dkt. No. 101 (C.D. Cal. Sep. 9, 2019) 3

Uniloc 2017, LLC v. Ubisoft, Inc.,
No. 2021 1255605, at *6 (C.D. Cal. Mar. 18, 2021) 4

Other Authorities

Fed. R. Civ. P. 41(a)(1)(A)(ii) 3

Fed. R. Civ. P. 41(a)(1)(B) 1, 3

Defendants do not contest that this Court may deny a request for leave to amend pleadings on the basis of futility, and their Reply confirms that these are precisely the type of circumstances warranting denial of leave.

First, Defendants' proposed amendment fails to plead facts sufficient to plausibly allege the defense of claim preclusion. It is undisputed that none of the pre-reexamination claims of the '970 Patent are asserted in this case. Defendants rely on a prior dismissal against third-party Google that was expressly limited to pre-reexamination claims of the '970 Patent, and that expressly carved out the new reexamination-amended claims. Defendants' argument that the dismissal was made "with prejudice" is irrelevant because the "with prejudice" concerned only the pre-reexamination claims. *See* Ex. 2 at 1, n.2. Google has maintained that the pre-reexamination claims ceased to exist so as to remove subject matter jurisdiction, that the new claims were never accused in the Google case, and that the differences between the pre-reexamination claims and new reexamination-amended claims were substantive and material. *See* Exs. M, N. Accordingly, Samsung's proposed amendment is futile for failure to plead sufficient facts to support a defense of claim preclusion.¹

Second, Defendants' proposed amendment fails to plead facts sufficient to plausibly allege the defense related to the *Kessler* doctrine. This case concerns only Samsung devices. There is no overlap of devices or sales between Samsung and Google. Defendants cannot plausibly allege identity of a cause of action because the sale of Samsung devices accused in this case arises from different transactions from Google devices. AGIS has consistently maintained that it is accusing

¹ For the first time in a footnote to its Reply, Samsung relies on Rule 41(a)(1)(B) to contend that two successive dismissals have the effect of an adjudication on the merits. However, Rule 41(a)(1)(B) requires that the dismissals must be actions "based on or including the same claim." AGIS's arguments apply with equal force to Rule 41(a)(1)(B) because it is undisputed that the pre-reexamination claims are not the same as the new reexamination-amended claims, and AGIS never received leave to assert the new-reexamination-amended claims of the '970 Patent in the first-dismissed case.

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.