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

AGIS SOFTWARE DEVELOPMENT LLC, Plaintiff, v. SAMSUNG ELECTRONICS CO., LTD. and SAMSUNG ELECTRONICS AMERICA, INC., Defendants.	CIVIL ACTION NO. 2:22-cv-263-JRG JURY TRIAL DEMANDED

SAMSUNG'S REPLY IN SUPPORT OF ITS MOTION FOR LEAVE TO AMEND ANSWER TO ADD ISSUE PRECLUSION AFFIRMATIVE DEFENSE

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AGIS cannot have it both ways, faulting Samsung for not filing its Motion for leave sooner and months before the NDCA's SJ Order, while also arguing that the Motion is premature because the NDCA has not yet issued final judgment. Neither contention is correct, and AGIS ignores that Samsung's Motion is explicitly contingent on the NDCA court granting Google's pending Rule 54(b) motion for final judgment based on the SJ Order's ruling of non-infringement. Briefing on that Rule 54(b) motion closed last week, so a decision is expected soon.[1]

Under the guise of "futility," AGIS also raises premature challenges to the merits of Samsung's issue preclusion defense. First, AGIS argues the NDCA SJ Order is not a final judgment. But this fact, which Samsung concedes in its Motion, will be cured if the NDCA court grants Google's pending Rule 54(b) motion. Second, AGIS puts forward the fiction that this case concerns a "new version" of FMD running on Samsung devices, versus the "old version" of FMD on Google devices at issue in the NDCA case. In truth, there is ***no*** difference in either the accused FMD functionality or in AGIS's allegations for the "sending data" limitation that the SJ Order found not infringed, and AGIS identifies none. Samsung's Motion should be granted.

I. THE GOOD CAUSE FACTORS FAVOR GRANTING LEAVE

Each of the good cause factors favors granting Samsung leave to amend under Rule 16(b).

Samsung Has Been Diligent: In faulting Samsung for not pleading issue preclusion in its Answers filed in May and June 2023 (Opp. at 8), AGIS ignores that diligence is measured from the date of the intervening development that precipitates the request for leave. *E.g.*, *Script Security Sol., LLC v. Amazon.com, Inc.*, 2016 WL 5916627, at *3-5 (E.D. Tex. Oct. 11, 2016). Here, the

[1] If the Court finds this Motion premature before the NDCA court issues a final judgment, Samsung requests denial without prejudice to renew the Motion when final judgment issues. Samsung has filed its Motion now, to avoid delay while waiting for the NDCA court's decision on Google's opposed Rule 54(b) motion.

NDCA did not issue its SJ Order finding non-infringement until October 10, months after those Answers. *See* Mot., Ex. D. Indeed, FMD was not even part of this case until the Court granted AGIS's motion for leave to add it on August 24. Dkt. 115. Thus, the possibility of adding issue preclusion did not exist in May or June, or at any point before the June 16 deadline for amending pleadings. And the intervening development needed to amend the answer—a final judgment based on the SJ Order—has not yet even occurred. Samsung's Motion is therefore timely.

The Amendment Is Important: While for the diligence factor, AGIS argues this Motion is too late, it simultaneously argues that the Motion is premature for the importance factor. AGIS contends that it is premature because the NDCA's "SJ Order … has no preclusive effect absent a final judgment." Opp. at 9 (citing *TQ Delta, LLC v. CommScope Holding Co.*, 2023 WL 2145502, at *7 (E.D. Tex. Feb. 21, 2023)). But Samsung's Motion acknowledges that final judgment has yet to issue and is necessary for issue preclusion to attach, which is why Samsung made this Motion contingent on entry of the final judgment. Mot. at 1, 5-6. As AGIS again ignores, Google has a pending Rule 54(b) motion for final judgment to create an appealable order and briefing on that motion completed last week, with a decision expected soon.

Dismissing as "speculative" Samsung's concern that it may be unable to raise the collateral estoppel defense later in this case, AGIS implies Samsung need not amend its Answer to assert collateral estoppel "[i]f the SJ Order is affirmed on appeal." Opp. at 9. AGIS is wrong. The Fifth Circuit has squarely held that "res judicata[] … is an affirmative defense which if not pled is considered waived." *Mozingo v. Correct Mfg. Corp.*, 752 F.2d 168, 172 (5th Cir. 1985).[2] Further,

[2] The *Colida v. Qualcomm Inc.* case cited by AGIS does not suggest otherwise. 128 F. App'x 765, 766 (Fed. Cir. 2005). The issue in *Colida* was not the waivability of the collateral estoppel defense. Rather it was a straightforward application of the defense. There, the Federal Circuit held that Colida was collaterally estopped from re-litigating an issue that it had presented in a prior appeal against a different party and lost. *Id.*

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