

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

AGIS SOFTWARE DEVELOPMENT LLC,	§	Case No. 2:22-cv-00263-JRG-RSP
	§	
Plaintiff,	§	<u>JURY TRIAL DEMANDED</u>
	§	
v.	§	
	§	
SAMSUNG ELECTRONICS CO., LTD. and	§	
SAMSUNG ELECTRONICS, AMERICA,	§	
INC.,	§	
	§	
Defendants.	§	
	§	

**SAMSUNG'S SUR-REPLY IN FURTHER SUPPORT OF ITS OPPOSITION TO
PLAINTIFF AGIS SOFTWARE DEVELOPMENT LLC'S OPPOSED MOTION FOR
LEAVE TO REQUEST SUPPLEMENTAL CLAIM CONSTRUCTION**

AGIS’s argument, raised for the first time in reply, that the construction of “remote control” is important to its allegations against *non*-Google software—specifically Samsung’s “Knox” applications (Knox Asset Intelligence, Knox Manage) and U.S. government’s “TAK” applications (TAK, ATAK, CivTAK)—is waived, unsupported, and disingenuous. Before its reply, the only basis AGIS offered for construing “remote control” was that it was also being construed in the *AGIS I* NDCA case against *Google*, where its meaning is relevant to AGIS’s allegations against the location sharing feature of Google Maps for Mobile (“Google Maps”). Google Maps has never been part of this case. And now that AGIS and Google “have reached an agreement in principle to settle all matters related to Google products,” Dkt. 175, it cannot be part of this case or the basis for AGIS’s Motion.

To the extent the construction of “remote control” has any relevance to AGIS’s allegations against Knox and TAK, which it does not, AGIS cannot meet the good cause factors. Knox and TAK have been accused since the outset of this litigation. Thus, if “remote control” were important to Knox and TAK, AGIS should have raised a dispute over its meaning when claim construction proceedings in this case started in April 2023—rather than now, eight months later. Moreover, AGIS’s newfound reliance on Knox and TAK only heightens the prejudice against Samsung. Samsung is not and was not a party to the *AGIS I* NDCA claim construction proceeding, had no input on Google’s construction of the term in *AGIS I*, and has never had an opportunity to consider the term’s meaning in the context of AGIS’s allegations about Knox and TAK. Yet, under AGIS’s proposed expedited schedule, Samsung would be forced to defend a construction that Google proposed in another case addressing different issues. AGIS’s Motion should be denied.

I. CONSTRUCTION OF “REMOTE CONTROL” IS NOT IMPORTANT

In its opening Motion, AGIS’s sole basis for seeking construction of “remote control” in this case was that the NDCA court was also construing the term in the *AGIS I* case, where only

Google software was accused. Dkt. 163 (“Mot.”). With AGIS and Google having settled in principle, which resulted in a stay of the *AGIS I* case and the portion of this case relating to Google software, Dkt. 176, AGIS’s reply takes a new tact that is waived and has no merit.

AGIS now asserts that the meaning of “remote control” is relevant to its accusations against Knox and TAK. But AGIS did not even mention Knox or TAK in its opening Motion, much less argue any alleged relevance of “remote control” to those applications. *See* Mot. AGIS’s belated argument that “remote control” is relevant to Knox and TAK was, therefore, waived. *E.g.*, *His Americas Foundation LP v. DK Joint Venture I*, No. 4:09-cv-611, 2010 WL 3632763, at *3 n.2 (E.D. Tex. Sept. 10, 2010) (“Issues raised in a reply brief for the first time are waived”) (citing *Richards v. Quarterman*, 566 F.3d 553, 562 n. 2 (5th Cir. 2009)).

It is not surprising that AGIS did not raise Knox and TAK before because the meaning of “remote control” is irrelevant to whether those products infringe. AGIS’s reply fails to show otherwise. Indeed, beyond merely noting that “remote control” appears in claims of the ’829 Patent asserted against Knox and TAK, AGIS provides no explanation for how the term’s construction could impact the infringement analysis. *See* Reply at 2. AGIS also proposes having Samsung defend and argue the construction of “remote control” that **Google** proposed in the *AGIS I* NDCA case, in lieu of Samsung proposing its own construction via a Local P.R. 4-2 disclosure in this case. But AGIS fails to explain how Google’s construction, proposed in connection with infringement allegations for **Google Maps**, could affect the infringement analysis for Knox and TAK in this case. Nor does AGIS contend that Knox and TAK operate in a materially similar way to Google Maps’s location sharing feature with respect to the “remote control” limitation.

At bottom, the meaning of “remote control” is not relevant, let alone important, to AGIS’s infringement allegations against the Knox and TAK applications accused in this case. AGIS’s

request that the Court give an advisory construction of the term should be rejected.

II. AGIS DELAYED FOR MONTHS IN RAISING THE DISPUTE

AGIS's arguments on diligence contradict its new arguments under the importance factor and are wrong. While AGIS now cites exclusively to *non*-Google software (Knox and TAK) under the importance factor, AGIS continues to cite the *AGIS I* NDCA case concerning Google software and the supplemental claim construction proceedings in that case as a recent, intervening development under the diligence factor. AGIS cannot have it both ways.

On the one hand, to the extent AGIS argues that the meaning of “remote control” is important to Knox and TAK, AGIS has no excuse for its delay. Reply at 2. Knox and TAK have been accused since December 2022 as part of AGIS's original infringement contentions. Thus, AGIS should have known about any dispute over “remote control” since at least December 2022 and should have raised that dispute as part of claim construction proceedings in this case that started in April 2023—not now, eight months later and two weeks before the close of fact discovery. AGIS also cannot point to *AGIS I* to justify supplemental claim construction here because the *AGIS I* case has nothing to do with Knox and TAK.

On the other hand, to the extent AGIS contends that it has been diligent in filing its Motion following recent developments in *AGIS I*, that case addresses only Google software. AGIS cannot, at the same time, justify supplemental claim construction in this case by pointing to different, *non*-Google software under the importance factor. And if AGIS's Motion is based on Google software, its Motion should be stayed pursuant to this Court's order staying all proceedings “involving Google products” pending settlement between AGIS and Google. Dkt. 176.

Regardless, even if AGIS's and Google's dispute over the term “remote control” is the relevant intervening development (which it is not), AGIS was not diligent. AGIS argues that it diligently filed its Motion just days after the dispute over the meaning of “remote control”

materialized on December 15, 2023, when *Google* and AGIS exchanged proposed constructions for the term in the *AGIS I NDCA* case. Reply at 2. That is incorrect. As explained in Samsung’s Opposition, the dispute was apparent since at least June 16, 2023, when Google filed its summary judgment motion in the *AGIS I NDCA* case, which presented a non-infringement defense based on the meaning of “remote control.” Ex. 1 at 17 (“[AGIS’s argument] relies on an unreasonably broad interpretation of ‘remote control’....”). The dispute was confirmed by the NDCA court’s October 10, 2023 summary judgment order that explicitly found a dispute over the meaning of the term. Ex. 2 at 25-26 (finding a “genuine issue of material fact as to whether ‘one device [can] ‘remotely control’ any other device’” and applying AGIS’s construction of “remote control” for summary judgment purposes only). Given these facts, AGIS’s claim that the dispute only materialized in December 2023 is baseless. Rather, AGIS delayed for several months to raise its dispute, which is far from diligent, particularly given the late stage of this case with *Markman* proceedings having concluded in November 2023, and fact discovery ending in two weeks.

III. GRANTING LEAVE WOULD PREJUDICE SAMSUNG

Like with diligence, AGIS’s arguments on prejudice also rely on the *AGIS I NDCA* case concerning Google software and, thus, contradict its untimely reply argument that the construction of “remote control” is important to the *non*-Google software (Knox and TAK) that are at issue in this case. Indeed, AGIS’s reliance on Knox and TAK for importance only highlights the prejudice. Samsung has never had an opportunity to consider the meaning of “remote control” in the context of the allegations and defenses at issue in this case. Yet AGIS seeks to deny Samsung an opportunity to even propose its own construction for the term, assuming the Court agrees to proceed with claim construction in the first place, by foregoing the Local P.R. 4-2, 4-3, and 4-4 disclosures. AGIS, thus, proposes to force Samsung to waste time and resources defending a construction that Google proposed in the NDCA for a term that is not material in this case.

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