

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.	§	
	§	

**PLAINTIFF AGIS SOFTWARE DEVELOPMENT LLC'S SUR-REPLY
IN FURTHER OPPOSITION TO DEFENDANTS' PARTIAL MOTION TO DISMISS
PLAINTIFF'S AMENDED COMPLAINT UNDER RULE 12(B)(6) (DKT. 39)**

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I. INTRODUCTION

Plaintiff AGIS Software Development LLC (“AGIS” or “Plaintiff”), by and through its undersigned counsel, hereby submits this sur-reply in further opposition to Defendants Samsung Electronics Co., Ltd. and Samsung Electronics America, Inc.’s (collectively, “Samsung” or “Defendants”) Partial Motion to Dismiss Plaintiff’s Amended Complaint Under Rule 12(b)(6) (Dkt. 39) (the “Motion”).

Even under Samsung’s incorrect interpretation of the law, Samsung’s unsupported allegation that certain Samsung Accused Products are “manufactured by” the United States is not dispositive of AGIS’s claims related to Tactical accused functionalities. Samsung does not dispute that the Samsung Accused Products are used, manufactured, sold, offered for sale, and imported into the United States *by Samsung*. This is because the Samsung Accused Products are Samsung’s own implementations of the claimed inventions (for example, the Samsung-manufactured Samsung Tactical S20 with the Samsung Tactical software and situational-awareness functionality of which ATAK-CIV is an example) which are not “manufactured by” the U.S. government. The law is not intended to permit Samsung to avoid claims by stripping down claims to a non-accused, isolated instance of a portion of the accused functionalities. Samsung’s arguments mischaracterize the analysis this Court must conduct in considering whether this suit should have been brought in the U.S. Court of Federal Claims.

Because the Government does not make Samsung products, it is undisputed that this analysis requires a determination of whether the Samsung Accused Products are developed exclusively “for the Government” and with the authorization and consent of the Government. Samsung has not met its burden here. Samsung neither points to any explicit authorization by the U.S. Government, a contract executed between Samsung and the U.S. Government, or any other authorization or consent clause which would reveal that the Samsung Accused Products are

exclusively developed for the U.S. Government and with the authorization and consent of the Government.

Samsung's claims of claim splitting are similarly unsupported. This case does not involve the same cause of action and no claims are "essentially the same" as those in the *AGIS-Samsung I* and *AGIS-ITC* litigations. As shown in AGIS's response and sur-reply to Samsung's motion to stay, the accused products and applications are not the same. Samsung has admitted that the issues in the *AGIS-Samsung I* case involved the "Accused Google Applications" which are also at issue in the *AGIS-ITC* case. Samsung has relied on this fact in its unopposed motion to stay the *AGIS-Samsung I* case pending resolution of the *AGIS-ITC* investigation.

Accordingly, AGIS respectfully requests that the Court deny Samsung's Motion in its entirety.

II. ARGUMENT

A. Samsung Has Not Met its Burden to Show 28 U.S.C. § 1498(a) Applies

Samsung relies *solely* on the language of 28 U.S.C. § 1498(a) to argue that this Court should dismiss AGIS's claims of infringement against the Samsung Accused Products that relate to the Tactical accused functionalities. *See* Dkt. 43, "Reply" at 1-2 ("Samsung's motion is based on scenario (2)—*i.e.*, **manufacture by** the United States Government of the allegedly infringing TAK suite of apps."); *see id.* ("AGIS's opposition instead rebuts an argument Samsung never made—that Samsung's Galaxy devices are **manufactured for** the United States Government."). In doing so, Samsung ignores that the proper analysis under § 1498(a) requires that the accused products must be manufactured at the direction of the Government or that it has received authorization or consent to manufacture the Samsung Accused Products exclusively for the Government.

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