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,	§	**JURY TRIAL DEMANDED**
v.	§	
SAMSUNG ELECTRONICS CO., LTD. and SAMSUNG ELECTRONICS, AMERICA, INC.,	§	
Defendants.	§	

PLAINTIFF AGIS SOFTWARE DEVELOPMENT LLC'S RESPONSE TO DEFENDANTS' OBJECTIONS TO THE MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION ENTERED APRIL 10, 2023 (DKT. 55)

Pursuant to Federal Rule of Civil Procedure 72 and Local Rule CV-72(b), Plaintiff AGIS Software Development LLC ("AGIS" or "Plaintiff") hereby responds to Defendants Samsung Electronics Co., Ltd. and Samsung Electronics America, Inc.'s (collectively, "Defendants" or "Samsung") request for reconsideration of the portion of the Report and Recommendation of U.S. Magistrate Judge (Dkt. 54) recommending denial of Samsung's motion to dismiss Counts III and IV of the Amended Complaint (Dkt. 55).

The Court's Report and Recommendation correctly found that "as AGIS made clear during the hearing, the instant action does not accuse mobile devices merely capable of running 'TAK' or related programs but rather mobile devices on which 'TAK' or related programs ha[ve] been loaded. In other words, infringement requires both the phone and the application in order to infringe." Dkt. 54 at 3.

Defendants fail to identify any error in the Report and Recommendation. Instead, Defendants attempt to manufacture a limitation on discovery based on a mischaracterization of the hearing record.

For example, Defendants incorrectly submit that AGIS represented that it accuses only devices "pre-loaded" with the applications. *See* Dkt. 55 at 1. This allegation is inconsistent with the hearing record in which AGIS expressly clarified that it was accusing devices "loaded" with the accused software and that AGIS was not limiting its contentions to devices "pre-loaded" with the accused software. Dkt. 55-1 at 53:17-18; *id.* at 54:2-5 ("So I just want to make sure that there is no confusion about the word 'pre-loading.' You know, we said loaded. It's the device with the software. We didn't say pre-loaded.").AGIS stated that it did not want to say, "that our allegations are narrowed to a version of the software assembled in Korea with ATAK on it that then crosses the border." *Id.* at 53:19-21. As submitted by AGIS, "[t]here may be a phone that is imported and

then loaded by a third party with the software at the direction of Samsung where the direct infringer is the one putting the software, installing the software, where Samsung is the induced infringer, inducing infringement." *Id.* at 53:22-54:1.

In response to AGIS's clarification during the hearing, both the Court and Samsung's counsel indicated their understanding of AGIS's position. The Court's Report and Recommendation correctly reflects the distinction that AGIS is not accusing the devices alone, as Samsung alleges, but rather the devices that are loaded with the accused services, including Samsung Tactical, TAK, ATAK, CivTAK, and Samsung Knox (Dkt. 54 at 2-3), ("as AGIS made clear during the hearing, the instant action does not accuse mobile devices merely capable of running 'TAK' or related programs but rather mobile devices on which 'TAK' or related programs ha[ve] been loaded. In other words, infringement requires both the phone and the application in order to infringe.").

AGIS submits that the Court's Report and Recommendation is appropriate because it correctly reflects the hearing record and because it does not prematurely close off any path to relevant discovery of the Accused Products. Defendants' attempt to limit discovery to devices shipped by Samsung ***pre-loaded*** with the accused applications and services is improper. For example, as AGIS made clear during the hearing, there may be third parties that load the relevant software to make and/or use the infringing Accused Products at the direction or with the assistance of Defendants. *See Nalco Co. v. Chem-Mod, LLC*, 883 F.3d 1337, 1355-56 (Fed. Cir. 2018) ("For an allegation of induced infringement to survive a motion to dismiss, a complaint must plead facts plausibly showing that the accused infringer 'specifically intended [another party] to infringe [the patent] and knew that the [other party]'s acts constituted infringement.") (citing *Lifetime Indus., Inc. v. Trim-Lok, Inc.*, 869 F.3d 1372, 1379 (Fed. Cir. 2017)).

Defendants have failed to demonstrate that the Magistrate Judge erred in the Report and Recommendation regarding its motion to dismiss. Accordingly, Defendants' objections should be overruled and Defendants' request that the Court should review and reconsider the Report should be denied.

Dated: May 8, 2023

Respectfully submitted,

/s/ Alfred R. Fabricant

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that, on May 8, 2023, all counsel of record who are deemed to have consented to electronic service are being served with a copy of this document via the Court's CM/ECF system per Local Rule CV-5(a)(3).

/s/ Alfred R. Fabricant
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