

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF TEXAS  
AUSTIN DIVISION

FINTIV, INC.,  
*Plaintiff,*

v.

APPLE INC.,  
*Defendant.*

1:21-CV-896-ADA

PUBLIC VERSION

**ORDER GRANTING MOTION  
FOR SUMMARY JUDGMENT [ECF No. 270]**

Before the Court is Defendant Apple Inc.’s (“Apple”) Motion for Summary Judgment of Non-Infringement. ECF No. 270. Plaintiff Fintiv, Inc. (“Fintiv”) filed a Response. ECF No. 300. Apple then replied. ECF No. 348. After originally denying the motion, the Court heard further oral argument on the Motion on June 13, 2023. ECF Nos. 465–66. At the hearing, the Court granted Apple’s Motion and vacated its prior decision. This opinion memorializes that ruling.

**I. BACKGROUND**

On December 21, 2018, Fintiv filed its complaint alleging infringement of U.S. Patent No. 8,843,125 (“the ’125 patent”). ECF No. 1 ¶ 3. Fintiv alleges Apple infringes independent claims 11, 18, and 23 and dependent claims 13, 14, 20, 24, and 25 (“asserted claims”). ECF No. 270-2 (“Shamos Report”) ¶ 2. All the asserted claims relate generally to “card provisioning.” ECF No. 270-3 (“Shamos Depo.”) at 31:21–24; ECF No. 273-1 (“’125 patent”) claims 11, 18, 23. Card provisioning is a process whereby a user “load[s] data concerning a payment instrument, such as a credit card, onto a mobile device for the purposes of making payment transactions.” Shamos Report ¶ 71. Independent claim 11 recites a method for card provisioning, specifically a “method for provisioning a contactless card applet in a mobile device comprising a mobile wallet application.” Independent claim 18 recites a system for card provisioning, specifically a “wallet

management system (WMS) in a non-transitory storage medium to store and manage mobile wallet account information.” Independent claim 23 recites a “mobile device” for card provisioning. ’125 patent, claims 11, 18, 23.

Fintiv accuses each of the Apple iPhone, Watch, iPad, and Mac products of infringing at least one claim of the ’125 patent. Shamos Report ¶¶ 102–03. Every asserted claim recites a “widget.” Claim 11 requires “retrieving a widget . . . corresponding to a contactless card applet” and “provisioning the widget.” Claim 18 requires “a widget management component configured to store and to manage widgets” and “a rule engine configured to filter a widget.” Claim 23 requires “a mobile wallet application configured to store a widget” and “an over-the-air (OTA) proxy configured to provision . . . a widget.” The Court construed “widget” to have its plain-and-ordinary meaning, where the plain-and-ordinary meaning is “software that is either an application or works with an application, and which may have a user interface.” ECF No. 86 at 17, 34. The Court also ruled that “a POSITA would not understand that a widget is a stand-alone application, but rather as code, e.g., a ‘plug-in,’ that runs within an application.” *Id.* at 16.

## II. LEGAL STANDARD

Summary judgment is appropriate “if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” FED. R. CIV. P. 56(a); *Tolan v. Cotton*, 572 U.S. 650, 656–57 (2014). A material fact will have a reasonable likelihood to affect the outcome of the case. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). An issue is not genuine if the trier of fact could not, after an examination of the record, rationally find for the non-moving party. *Matsushita Elec. Indus., Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). As such, the burden of demonstrating a lack of a genuine dispute of material fact lies with the movant. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986).

A court must view the movant’s evidence and all factual inferences from such evidence in a light most favorable to the party opposing summary judgment. *Impossible Elecs. Techniques v. Wackenhut Protective Sys., Inc.*, 669 F.2d 1026, 1031 (5th Cir. 1982). Accordingly, the fact that the court believes that the non-moving party will be unsuccessful at trial is an insufficient reason to grant summary judgment in favor of the moving party. *See Jones v. Geophysical Co.*, 669 F.2d 280, 283 (5th Cir. 1982). Yet, “[w]hen opposing parties tell two different stories, but one of which is blatantly contradicted by the record, so that no reasonable jury could believe it, a court should not adopt that version of the facts for the purposes of ruling on a motion for summary judgment.” *Scott v. Harris*, 550 U.S. 372, 380–81 (2007).

Once the court determines that the movant has presented sufficient evidence that no genuine dispute of material fact exists, the burden of production shifts to the party opposing summary judgment. *Matsushita*, 475 U.S. at 586. The non-moving party must demonstrate a genuinely disputed fact by citing to parts of materials in the record, such as affidavits, declarations, stipulations, admissions, interrogatory answers, or other materials; or by showing that the materials cited by the movant do not establish the absence of a genuine dispute. FED. R. CIV. P. 56(c)(1)(A)–(B). “Conclusory allegations unsupported by concrete and particular facts will not prevent an award of summary judgment.” *Duffy v. Leading Edge Prods.*, 44 F.3d 308, 312 (5th Cir. 1995).

### III. DISCUSSION

Apple moves for summary judgment of non-infringement of the ’125 patent on four independent grounds. One of Apple’s grounds is that Fintiv and its technical expert, Dr. Michael Shamos, identified no software in the accused products that constitutes a “widget” under the Court’s construction of that term—a requirement of all asserted claims. As explained below, the Court finds that the record is devoid of evidence that the accused products practice the “widget” limitation under the Court’s construction. Because the Court finds that Apple has met its burden

on this ground, the Court need not address the other three grounds. Apple has therefore established that there is no genuine dispute of material fact that it does not practice the asserted claims, and it is entitled to summary judgment as a matter of law.

**A. Apple's Position**

Apple contends that it is entitled to summary judgment of noninfringement as to all asserted claims because (1) Fintiv identified no software code in the accused products that meets the “widget” limitations of the asserted claims, and (2) undisputed facts confirm the accused products do not use and are not configured to use a “widget.” ECF No. 270 at 12–13. *First*, Apple argues that Fintiv’s expert Dr. Shamos identified no Apple software code that constitutes a “widget” as construed by the Court. *Id.* at 14. Indeed, Apple points to Dr. Shamos’s deposition testimony that confirms this argument:

Q. So do we agree that your report does not cite the -- or identify the software that is the widget in the accused iPhone device?

A. Yeah. I think it -- I think it doesn't identify the source code of the widget.

*Id.* (citing Shamos Depo. at 73:12–74:5 (emphasis added)). After citing several occasions in Dr. Shamos’s deposition testimony establishing there is no source code that makes up the widget in the accused devices, Apple reiterates that Dr. Shamos confirmed under oath that “there is nowhere in [his] report that cites the source code that makes up the widget for any of the accused devices.” *See id.* at 15 (citing Shamos Depo. at 75:14–20).

*Second*, Apple asserts that Fintiv also failed to present evidence that the accused products practice other “widget”-related limitations of the asserted claims. *Id.* For example, asserted claim 11 requires “retrieving a widget.” Dr. Shamos agreed that during card provisioning a widget must be retrieved from an Apple server to an accused device, but Apple argues he could not identify any widget retrieved from any Apple server. *Id.* (citing Shamos Depo. at 56:23–25). And asserted claim 18 requires “a widget management component configured to store and to manage widgets,”

but Apple contends that Dr. Shamos could not identify which server allegedly stores the claimed “widget,” nor does he know which component is responsible for such storage. *Id.* at 16.

**B. Fintiv And Its Expert Failed To Identify The Claimed “Widget” In The Accused Products.**

Fintiv and Dr. Shamos failed to identify the claimed widget in the accused products. In Dr. Shamos’ expert report, only one paragraph discusses the “widget” limitation and contains citations to Apple’s source code—paragraph 309. Shamos Report ¶ 309. But when asked at his deposition, Dr. Shamos conceded that none of the source code cited in that paragraph is the claimed “widget”:

Q. So the software that you’re talking about in Paragraph 309 -- that is the widget, is that the software that’s cited in Paragraph 309?

A. I don’t think so.

Shamos Depo. at 53:11–14. When Dr. Shamos was asked about each of the source code files cited in paragraph 309 individually, he confirmed that none of those files is a “widget.” *Id.* at 61:21–23 ( [REDACTED] not the widget); 62:11–12 (“ [REDACTED] alone can’t be the widget”); 66:17–20 (“I can’t tell” if [REDACTED] is the widget); 69:20–24 (“not ready to say” [REDACTED] is the widget); 70:11–12 ( [REDACTED] not the widget); 70:16–22 ( [REDACTED] and [REDACTED] not the widget); 71:14–17 ( [REDACTED] not the widget); 71:18–24 ( [REDACTED] not the widget); 71:25–72:5 ( [REDACTED] not the widget). As explained above, Dr. Shamos also confirmed that none of the software files cited in other parts of his report constitutes a “widget”:

Q. But if we did the same exercise we just spent the last 30 minutes doing, we would find that there is nowhere in your report that cites the source code that makes up the widget for any of the accused devices. Is that right?

A. That’s right.

*Id.* at 75:14–20 (emphasis added).

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