PUBLIC VERSION

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

AIRE TECHNOLOGY LTD., Plaintiff, v. APPLE INC., Defendant.	Civil Action No. 6:21-cv-1101-ADA **JURY TRIAL DEMANDED** [redacted]

DEFENDANT APPLE INC.'S SEALED REPLY IN SUPPORT OF ITS MOTION FOR LEAVE TO SUPPLEMENT THE RECORD ON APPLE'S MOTION TO TRANSFER

Plaintiff Aire Technology Ltd.'s ("Aire") opposition to Apple Inc.'s ("Apple") Motion to Supplement the Record (Dkt. 40, "Motion") misapplies the law and, perhaps most importantly, fails to identify any prejudice to Aire that would result from Apple's requested supplementation. That is because no such prejudice exists. Apple demonstrated the requisite good cause for supplementation in its opening brief, and Aire has not rebutted that showing.

I. AS APPLE'S MOTION ESTABLISHED, THE GOOD CAUSE STANDARD GOVERNS THE MOTION

Contrary to Aire's assertion, good cause governs motions to supplement under Fifth Circuit law. *Al-Khawaldeh v. Tackett*, No. 20-cv-01079, 2021 WL 2322930, at *1 (W.D. Tex. June 7, 2021) (citing *Shepherd ex rel. Estate of Shepherd v. City of Shreveport*, 920 F.3d 278, 287 (5th Cir. 2019)) (holding that Rule 16(b)(4) governs request to supplement evidence in opposition to summary judgment motion, and granting leave to supplement). Aire's reliance on *Aghili v. Ashcroft* is misplaced—that case concerned a Board of Immigration Appeal regulation for supplementing a motion to reopen deportation proceedings, a regulation with no relevance here. 32 F. App'x 130 (5th Cir. 2002) (unpublished). Aire's other cited case is consistent with applying a good cause standard here, as it explains that "[t]here may be occasions . . . when additional supporting materials should be presented to the court," and in those instances "[i]f no injustice is likely to result," the parties should agree to a modified briefing schedule to allow the parties to address the additional materials and to "avoid . . . litigating a collateral determination." *Springs Indus. Inc. v. Am. Motorists Ins.*, 137 F.R.D. 238, 240 (N.D. Tex. 1991) (internal quotations omitted); Opp'n 3 (citing *Springs Indus.*). Here, no injustice would occur from Apple's requested supplementation, nor has Aire shown otherwise.

Apple expressly brought its Motion under Rule 16, yet Aire erroneously contends that Rule 16 and its good cause standard do not apply to the Motion because Apple did not request

amendment of any deadlines. Opp'n 6. But this Court's standing orders imposed a deadline for Apple to file its motions to transfer, which deadline had passed prior to Apple's request to supplement the record. *See* Second Am. Standing Order Regarding Motions for Inter-District Transfer entered on Aug. 18, 2021 (governing cases filed on or before March 7, 2022); *see also* Standing Order Governing Proceedings (OGP) 4.1 – Patent Cases entered on Apr. 14, 2022.[1]

II. AIRE'S OPPOSITION FAILS TO REBUT THE GOOD CAUSE THAT APPLE ESTABLISHED IN ITS OPENING BRIEF

Aire fails to address the good cause that Apple identified: until shortly before Apple brought the present Motion, Apple did not yet have the benefit of the Court's Order in *Scramoge*, and thus did not yet know of the Court's specific criticisms of Mr. Rollins. *See* Mot. 3-4. While Aire contends that Apple should have known that Mr. Rollins's testimony was unacceptable to this Court, even the cases Aire cites shows courts relying on Mr. Rollins's testimony. For example, in *In re Apple Inc.*, the Federal Circuit concluded that the district court erroneously found that the access to sources of proof factor in a transfer motion was neutral, citing "Apple's . . . sworn declaration"—a declaration submitted by Mark Rollins. *In re Apple Inc.*, No. 2022-128, 2022 WL 1196768, at *4 (Fed. Cir. Apr. 22, 2022) (granting mandamus relief in action pending at *CPC Patent Technologies Pty. Ltd. v. Apple Inc.*, No. 21-cv-00165-ADA, Dkt. No. 82 (W.D. Tex. Feb. 8, 2022)); *see also CPC Pat.*, No. 21-cv-00165-ADA, Dkt. No. 22-2

[1] Aire's remaining cited cases (*see* Opp'n 3-4) do not address the applicable standard. *See In re Apple Inc.*, 743 F.3d 1377, 1379 (Fed. Cir. 2014) (not addressing what standard governs motions to supplement; analyzing instead order on motion to supplement filed after the court denied transfer motion); *Astute Tech., LLC v. Learners Digest Int'l LLC*, No. 12-cv-689, 2014 WL 12596468, at *8-10 (E.D. Tex. Apr. 28, 2014) (neither ruling on nor considering a motion to supplement record for a motion to transfer); *In re Google Play Store Antitrust Litig.*, 556 F. Supp. 3d 1106, 1109 (N.D. Cal. 2021) (denying a second request to seal documents—not ruling on a motion to supplement the record); *Scramoge Tech. Ltd. v. Google LLC*, No. 21-cv-00616-ADA, Dkt. No. 72, at 16-17 (W.D. Tex. May 20, 2022) (not ruling on a motion to supplement the record).

(May 4, 2021) (Rollins Declaration In Support of Apple's Motion to Transfer); *see also In re Apple Inc.*, No. 2022-108, 2022 WL 1196768, at * 2 (Fed. Cir. Nov. 15, 2021). As another example, in *GUI Global Products, Ltd. v. Samsung Electronics Co.*, the Court relied on Mr. Rollins's testimony for the location and identity of certain witnesses. No. 20-cv-2624, 2021 WL 3705005, at *4-5 (S.D. Tex. May 28, 2021) (relying on Rollins's testimony for the identity of certain witnesses, those witnesses' roles in relation to the accused products, and those witnesses' locations). Mr. Rollins's testimony was relied upon in other decisions, too, and thus Apple had no reason to know of the Court's specific criticisms of Mr. Rollins before the *Scramoge* order. *See, e.g., Cub Club Inv., LLC v. Apple, Inc.*, No. 20-cv-856-ADA, Dkt. No. 28 (W.D. Tex. Sept. 7, 2021) (granting motion to transfer to N.D. Cal. and relying on facts provided by Mr. Rollins). As such, this Court's May 20, 2022 adverse credibility finding against Mr. Rollins, coming two months after Apple's transfer motion was filed here, presents sufficient explanation for Apple's motion to supplement with additional declarations.

Aire's remaining arguments fail to address Apple's fundamental good cause explanation. For example, Aire erroneously contends that the supplemental declarations are "duplicative" or "not important." Opp'n 5. While the declarations establish facts consistent with the information provided in Mr. Rollins's declaration, the supplemental declarations are not duplicative in one critical respect: they are from witnesses that provide firsthand knowledge of many of the established facts. Further, the declarations are important: they present facts central to the transfer analysis. If the declarations were not important, as Aire contends, it is unlikely that Aire would have any reason to oppose their submission now. Nor are the declarants "new"—each was identified in Mr. Rollins's declaration, with the exception of [redacted]. Dkt. 24-2, at 3-7. Further, Aire's criticisms of Apple's substitution of [redacted] for [redacted] are

inappropriate—[redacted] no longer works at Apple, and Aire's supposition that Apple must have known before filing its transfer motion that [redacted] is unsupported attorney argument (and also is incorrect). Apple would have had no reason to identify as a witness an employee that it knew would be out on leave.

Apple also did not delay in providing Aire with the declarations nor in filing its motion to supplement. This Court found Mr. Rollins's testimony to be not credible on May 25 and Apple filed its motion to supplement less than a month later, on June 22, 2022. Apple diligently prepared the declarations to provide an alternative form of evidence for the evidence it already submitted to support its motion to transfer.

Finally, Apple is not "guess[ing]" as to the Court's fact-finding process. Opp'n 8. The Court made an adverse credibility finding against Mr. Rollins in *Scramoge* that was not limited to that case. *Scramoge Tech. Ltd. v. Apple Inc.*, No. 21-cv-00579-ADA, Dkt. No. 82 (W.D. Tex. May 25, 2022). Apple is simply responding to the Court's findings there. And if the Court nevertheless finds Mr. Rollins's declaration credible here, then of course the Court may find good cause lacking for the present Motion as there would be no need to supplement the record on Apple's transfer motion.

III. AIRE'S OPPOSITION FAILS TO IDENTIFY ANY ACTUAL PREJUDICE FROM APPLE'S REQUEST TO SUPPLEMENT

While Aire contends it will be prejudiced by the supplementation, it does not identify ***how*** it would be prejudiced. *See* Opp'n 8-9. Conclusory and unsubstantiated allegations of prejudice are entitled to little if any weight. *See NFC Tech., LLC v. HTC Am., Inc.*, No. 13-cv-1058, Dkt. No. 152, at 5-6 (E.D. Tex. Mar. 11, 2015); *Facebook, Inc. v. Blackberry Ltd.*, No. 18-cv-05434, Dkt. No. 105, at 17-18 (N.D. Cal. Feb. 13, 2020). Tellingly, Aire does not identify any additional discovery, including by deposition, that it would have taken, or investigation that

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