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14 **ATTORNEYS FOR PLAINTIFF ADVANCED**
VOICE RECOGNITION SYSTEMS, INC.

15
16 **UNITED STATES DISTRICT COURT**
17 **FOR THE DISTRICT OF ARIZONA**

18 Advanced Voice Recognition Systems, Inc.,

19 Plaintiff,

20 v.

21 Apple, Inc.,

22 Defendant.
23

Case No. 2:18-cv-02083-DGC

**BRIEF IN SUPPORT OF PLAINTIFF'S
POSITION ON E-DISCOVERY
CUSTODIANS FOR PHASE 2 E-MAIL
PRODUCTION**

1 Pursuant to this Court’s Order of April 16, (Doc. 81), Plaintiff AVRS provides this
2 memorandum to assist the Court in resolving the current dispute centering on who can be a proper
3 custodian for Phase 2 e-mail searches.

4 I. Factual Background

5 On January 30, 2019, the Court entered an Order stating in part:

6 ESI discovery from Defendant will proceed in two phases. The first phase will
7 include 10 custodians and 10 search terms, and will include all ESI other than
8 email. Defendant should produce this ESI by March 1, 2019. The second phase
9 will include a number of search terms and custodians **to be determined on the
basis of the phase one results**, and will include email. . . . The parties shall agree
on the phase two custodians and search terms by April 12, 2019, and, if unable to
agree, shall promptly contact the Court. Phase two production shall occur by
June 3, 2019.

10 (Doc. 64) (emphasis added). The emphasized language is at the crux of the parties’ dispute.

11 Pursuant to the Court’s Order, on March 1, 2019, Apple produced the results from its
12 Phase 1 non-email search of previously identified custodians. AVRS immediately began to
13 review the production in accordance with this Court’s Order that indicated that Phase 2’s “number
14 of search terms and custodians [would] be determined on the basis of the phase one results, and
15 will include email.” *Id.* AVRS’ review of Apple’s Phase 1 results revealed several facts that are
16 at the heart of the parties’ current dispute. In particular, an individual by the name of Murray
17 Jason, whom Apple had not previously disclosed to AVRS in its MIDP Responses or otherwise,
18 appears to be a person who is very familiar with Siri—the technology at issue—as evidenced by
19 numerous PowerPoint presentations he has prepared on the subject. Similarly, AVRS’ analysis of
20 Apple’s Phase 1 results revealed another individual that appears to have substantial knowledge
21 about the aspects of Siri relevant to this case – Michael Sumner. Apple also did not disclose Mr.
22 Sumner to AVRS either.

1 Based on the results of AVRS' review of from Apple's Phase 1 ESI production, AVRS
2 identified its Phase 2 e-mail custodians and search terms on April 5. After extensive negotiations,
3 AVRS has identified the following Phase 2 custodians and search terms:

4 Custodians: (1) Jason Murray; (2) Jerome Bellegarda; (3) David Carson; (4)
5 Gunner Evermann; (5) Didier Guzzoni; (6) Michael Sumner; and (7) Nick
6 Treadgold.

7 Search Terms: (1) sirikit NEAR/10 speech; (2) protocol NEAR/10 translat*;
8 (3) dictat* NEAR/10 protocol; (4) I/O Processing Module; and (5) STT
9 Processing Module on each of the following seven identified Apple e-mail
10 custodians.

11 Apple has objected to AVRS' proposed list of custodians asserting that AVRS' "adding
12 new custodians is inappropriate [based on Apple's belief that] it was clearly contemplated by the
13 Court . . . that we would include only a subset of phase 1." Ex. 1. Apple raises this objection even
14 though AVRS agreed to Apple's Phase 2 custodians, which include a new custodian, Douglas
15 Holt. *Compare* Ex. 2 *with* Ex. 3.

16 The Court's Order on ESI Discovery and providing for two phases is clear. Phase 2 search
17 terms and custodians should be **based on** the results from Phase 1. As the Court stated: "The
18 second phase will **include** . . . custodians to be determined on the basis of the phase one results,
19 and will include email. Given the larger and more diffuse nature of email, it may well be that
20 fewer custodians and more focused search terms will be appropriate." (Doc. 64) (emphasis
21 added). The Court did not prohibit the parties from adding a custodian based upon the results of
22 Phase 1. Plaintiff AVRS has taken into account the "larger and more diffuse nature of email," *id.*,
23 and accordingly has identified "fewer custodians and more focused search terms." *Id.* In
24 particular, AVRS has identified 7 custodians—down from 10—and identified 5 search terms—

1 down from 10—with most of the search terms having additional limiters added to them. The
2 Court did not intend to preclude a party from identifying a different custodian in Phase 2 when the
3 results of Phase 1 indicate that such different custodian has e-mail directly relevant to this case.
4 This is especially so when the different custodian is someone who was not previously disclosed to
5 the other party. As this Court has indicated in other cases, “the broad parameters of relevance for
6 discovery purposes” should be employed when “witnesses possess relevant information.” *Wilson*
7 *v. Maricopa County*, No. CV 04-2873 PHX-DGC, 2006 WL 842247, at *1 (D. Ariz. Mar. 29,
8 2006).

9 II. AVRS’ Requested Relief

10 Plaintiff AVRS respectfully requests this Court approve AVRS’ list of Phase 2 custodians
11 as indicated above.¹

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23 ¹ Apple has not objected to AVRS’ proposed search terms.

1 Dated: April 17, 2019

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ADVANCED VOICE RECOGNITION SYSTEMS, INC.**

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CERTIFICATE OF SERVICE

I hereby certify that on April 17, 2019, I electronically transmitted the attached document(s) to the Clerk’s Office using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to the parties who are CM/ECF registrants.

/s/ Kenneth P. Kula
Kenneth P. Kula

EXHIBIT 1

From: [Ken Kula](#)
To: [Nina Nelson](#)
Subject: Ex. 1
Date: Wednesday, April 17, 2019 1:19:13 PM
Attachments: [image006.png](#)
[image008.png](#)

----- Original message -----

From: "Dawson, Shaelyn K." <ShaelynDawson@mofo.com>
Date: 4/11/19 6:59 PM (GMT-06:00)
To: Ken Kula <Ken.Kula@bjciplaw.com>
Cc: BJC-AVRS <BJC-AVRS@bjciplaw.com>, "AVRS v. APPLE" <AVRS_v_APPLE@mofo.com>
Subject: RE: 4 11 2019 - AVRS v. Apple - Phase 2 ESI Searches - DISPUTE OVER CUSTODIANS & TERMS

Ken, thanks for your summary. That's not quite accurate:

For 1), you proposed your hypothetical and I asked if that was the situation at hand. You said "no." Given that is not the circumstance we are dealing with, adding new custodians is inappropriate when it was clearly contemplated by the Court and parties that we would include only a subset of phase 1. I also added that the timing of your proposal would be unworkable. It is not reasonable to add new custodians and expect Apple to get out email production within one month.

For 2), that's incorrect. I explained that just because what's produced is less than AVRS wants doesn't mean the term should be broadened. The court granted Apple's limiters for a reason. Using the term "protocol" without a limiter would be highly burdensome. When the word "protocol" is searched among the five custodians that you carried over from phase 1, there are about 115,000 hits.

For 3), again, you misrepresent what was said. I said we objected because the concept of ontology is no longer at issue in the case, as demonstrated by your infringement contentions. I made clear it was *not* based only on the word "ontology" being absent from those contentions.

You also said you did not object to Apple's custodians or terms. I said that Apple would include additional custodians and/or terms if the Court agreed with your position. I had asked you to provide metrics of documents for the custodians and search terms we provided. You did not yet provide those. Please do so as soon as possible.

Finally, we discussed calling the Court together on Monday and asking for short letter briefing. You agreed.

Best,
Shaelyn

SHAELYN DAWSON
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From: Ken Kula [<mailto:Ken.Kula@bjciplaw.com>]

Sent: Thursday, April 11, 2019 3:34 PM

To: Dawson, Shaelyn K.

Cc: BJC-AVRS

Subject: 4 11 2019 - AVRS v. Apple - Phase 2 ESI Searches - DISPUTE OVER CUSTODIANS & TERMS

- External Email -

Shaelyn,

Thank you for Meeting and Conferring with me on this issue. Just to summarize Apple's position from the Meet & Confer we just had 5 minutes ago:

1. Apple contends the Phase 2 Custodians MUST BE a subset of the Phase 1 Custodians. As you know, we have proposed 2 new custodians but 3 fewer custodians than the 10 original custodians in Phase 1 based upon a review of the non-eMail ESI Apple produced. I asked, is it Apple's position that if during Phase 1 a document revealed a smoking gun—a previous unknown Apple employee admitting Apple infringes AVRS's patent—we would be precluded from seeking eMail from him because he wasn't in the original list of custodians? You indicated, "yes".
2. Apple contends the Phase 2 Search Terms MUST BE at least as narrow as the Phase 1 Terms. I explored whether it is Apple's position that even though the initial search for "protocol w/3 transl!" did not produce ANY hits, we cannot expand that to something less narrow (e.g., "protocol w/4 transl!"). You indicated "yes".
3. Apple contends that because "ontology" is not in our Infringement Contentions it is not relevant. I asked whether it was Apple's position that we are not allowed to search for words that are not in our Infringement Contentions. You indicated, "Not just because it's not in your infringement contentions, but yes." I therefore asked whether Apple would agree to search for "dictat!" instead of "ontology" because "dictation" is in our infringement contentions. You said you would look into that.

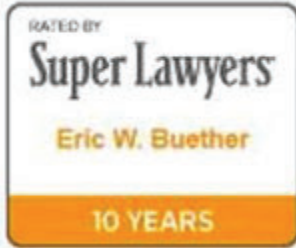
We plan to communicate tomorrow and then bring any remaining dispute to the Court on Monday.

KENNETH P. KULA

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EXHIBIT 2

From: [Ken Kula](#)
To: [Nina Nelson](#)
Subject: Ex. 2
Date: Wednesday, April 17, 2019 1:14:00 PM

From: Sabri, Nathan B. <NSabri@mofo.com>
Sent: Tuesday, January 22, 2019 9:26 PM
To: Ken Kula <Ken.Kula@bjciplaw.com>; Brewer, Robin L. <RBrewer@mofo.com>
Cc: AVRS v. APPLE <AVRS_v._APPLE@mofo.com>; BJC-AVRS <BJC-AVRS@bjciplaw.com>
Subject: RE: 1 22 2019 - AVRS v. Apple - List of ESI Search Terms & Custodians

Here is our current thinking on terms and custodians. Subject to revision, including based on our next meet and confer and our own internal discussions.

Custodians:

1. Michael Davis
2. Joseph Miglietta
3. Walter Geldenhuys
4. Diana Jakowchuck

Terms:

1. 7,558,730
2. 730 /3 patent
3. Digital Dictate
4. Interference
5. Allvoice
6. Apple
7. Siri
8. Adapt IP
9. Dominion
10. patent & valu!

NATHAN SABRI

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EXHIBIT 3

From: [Ken Kula](#)
To: [Nina Nelson](#)
Subject: Ex. 3
Date: Wednesday, April 17, 2019 1:12:00 PM

From: Dawson, Shaelyn K. <ShaelynDawson@mofo.com>
Sent: Tuesday, April 9, 2019 8:47 PM
To: Ken Kula <Ken.Kula@bjciplaw.com>; Brewer, Robin L. <RBrewer@mofo.com>; Sabri, Nathan B. <NSabri@mofo.com>
Cc: AVRS v. APPLE <AVRS_v_APPLE@mofo.com>; Eric M. Fraser (efraser@omlaw.com) <efraser@omlaw.com>
Subject: RE: 4 8 2019 - AVRS v. Apple - List of ESI Search Terms & Custodians - MEET & CONFER I

Ken, we expected to hear from you today about narrowing your custodians and search terms. As a reminder, we understand that the parties are limited to a subset of custodians that were proposed in phase 1. We also asked you to drop ontology as that is no longer at issue in the case; and asked you to limit protocol as it was limited in phase 1. You represented you would get back to us by today. Please get back to us as soon as possible but not later than noon PST tomorrow.

Below are Apple's custodians and search terms.

Proposed Custodians:

Michael Davis
Joseph Miglietta
Walter Geldenhuys
Diana Jakowchuck
[Douglas Holt](#)

Proposed search terms:

Dominion
Digital Dictate
Patent
Apple
patent & valu!

Best,

Shaelyn

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