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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

Advanced Voice Recognition Systems, Inc., Plaintiff/Counter-Defendant, vs. Apple Inc., Defendant/Counterclaimant.	No. CV-18-02083-PHX-DGC **DEFENDANT APPLE INC.'S MEMORANDUM REGARDING PHASE TWO OF ELECTRONIC DISCOVERY**

I. Background

On January 30, 2019, the Court held a conference regarding discovery of electronically stored information (ESI). Apple argued that e-mail discovery is, in the majority of patent cases, unnecessary. Because it is also burdensome, Apple proposed phased discovery starting with non-email ESI. AVRS argued that e-mail discovery should not be deferred.

The Court adopted a phased approach, with phase one involving non-email ESI from ten custodians based upon ten search terms. The Court gave AVRS a month to digest that production and then required the parties to discuss the number of custodians and terms for the second phase. The Court aptly noted that the second phase could be "informed by really how relevant the information appeared to be from the various custodians." (March 30, 2019, Telephonic Discovery Conference 20:6-7.) The Court's order acknowledged "the larger and more diffuse nature of email" and that "it may well be that fewer custodians and more focused search terms will be appropriate." (Dkt. No. 64.) The parties subsequently contacted the Court with a dispute regarding certain of AVRS's proposed ESI terms (*i.e.*, 730, 534, Siri, and Protocol). AVRS refused to provide any limiters, so Apple proposed limiters for the problematic terms. The Court adopted Apple's proposed limiters, adding "w/3 patent" to the 3-digit patent number abbreviations, "w/3 valu!" to "Siri," and "w/3 translat!" to "protocol." (Dkt. No. 71.)

The current dispute relates to custodians for the second phase. Rather than utilizing the results from the first phase and narrowing its e-mail requests to the most relevant custodians identified from non-email ESI—as Apple and the Court contemplated it could do—AVRS has expanded its requests to five custodians from those originally disclosed and two new custodians. At the time they contacted the court about this dispute, the parties also disputed AVRS's e-mail search terms. AVRS refused to limit certain overbroad terms, resulting in hundreds of thousands of results. AVRS even insisted on the unlimited term "protocol" after the Court had ordered it be

limited. After the call to the Court, the parties appear to have reached a compromise: sirikit NEAR/10 speech; protocol NEAR/10 translat*; dictat* NEAR/10 protocol; I/O Processing Module; and STT Processing Module. To the extent this case merits e-mail discovery at all, AVRS's inclusion of new custodians defeats the purpose of phasing ESI discovery. The Court should reject AVRS's attempt.

II. Argument

A. AVRS Has No Need for E-mail Production

As an initial matter: E-mail production remains unnecessary in this case. To prove patent infringement, AVRS must compare the asserted claims to the accused functionalities. AVRS has stated no specific need for e-mail discovery, nor could it. Communications among the identified custodians are irrelevant. As former Federal Circuit Chief Judge Rader explained, "Generally, the production burden of expansive e-requests outweighs their benefits. I saw one analysis that concluded that .0074% of the documents produced actually made their way onto the trial exhibit list-less than one document in ten thousand. And for all the thousands of appeals I've evaluated, email appears more rarely as relevant evidence." *DCG Systems, Inc. v. Checkpoint Technologies*, LLC, 2011 WL 5244356, at *1 (N.D. Cal. Nov. 2, 2011) (quoting J. Rader); *see also Hoist Fitness Systems Inc. v. TuffStuff Fitness Int'l Inc.*, 2019 WL 121195, at *3 (C.D. Cal. Jan. 7, 2019) ("Email discovery is not presumptively relevant to litigation.") (citing *DCG Systems, Inc.*); *Northrop Grumman Corp. v. Factory Mut. Ins. Co.*, 2012 WL 12875772, at *2 (C.D. Cal. Aug. 29, 2012) (same).

In connection with the MIDP and the first phase of ESI discovery, Apple produced 961,682 pages of documents. Apple will also make relevant source code available to AVRS pursuant to the process agreed upon in the Protective Order. Source code is the definitive source regarding the accused functionalities. AVRS cannot credibly claim to need anything more.

B. AVRS Should Be Limited to Custodians Proposed in Phase One

AVRS's addition of new custodians abrogates the narrowing purpose of phasing

discovery and provides AVRS more than ten total custodians. The specific purpose of phased discovery is to narrow the more burdensome e-mail phase. Had the Court adopted AVRS's requested approach initially, Apple would have had to produce non-email and email ESI from ten custodians. Under the Court's approach, Apple produced non-email ESI first, giving AVRS an opportunity to evaluate whether it actually needs the more burdensome production of email from any of those custodians. It cannot be that AVRS is entitled to more custodians under the phased approach, but that is what AVRS is insisting. AVRS's attempt to switch custodians is an end-run around the Court's Order. AVRS's current proposal would allow it to obtain even more documents – e-mails and documents in the form of attachments – from custodians beyond the original ten. This is not a good faith approach to the phased ESI discovery.

Finally, AVRS's proposal also renders the schedule unworkable and has defeated Apple's ability to avail itself of the Court's approach to resolving disputes. The phase two schedule allows approximately seven weeks to raise any disputes with the Court; review for privilege, responsiveness, and relevance; process; and produce e-mails. Apple has been diligently contacting AVRS to seek its commitment to custodians and search terms, beginning on March 26. AVRS has delayed and has hindered Apple's ability to comply with the timing contemplated in the Court's order. Now, AVRS's disclosure of new custodians in the second phase has rendered it impossible for Apple to evaluate the burden with respect to those custodians by the now-passed April 12 deadline. This is a one-sided concern, and AVRS has no incentive to minimize it, because AVRS only has a few custodians in total and far fewer documents to review and produce than does Apple.

III. Conclusion

Apple requests that it not be required to produce e-mails in this case. To the extent e-mail production is required, Apple requests that the Court limit AVRS to at most five custodians from its originally disclosed ten.

DATED this 17th day of April, 2019.

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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/ Brenda Wendt