IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
MARSHALL DIVISION

AGIS SOFTWARE DEVELOPMENT LLC, Plaintiff, v. HTC CORPORATION, Defendant.	§ § § § § § § § §	Case No. 2:17-CV-0514-JRG (LEAD CASE) **JURY TRIAL DEMANDED** [redacted]
LG ELECTRONICS INC., Defendant.	§ § § §	Case No. 2:17-CV-0515-JRG (CONSOLIDATED CASE) **JURY TRIAL DEMANDED**

PLAINTIFF AGIS SOFTWARE DEVELOPMENT LLC'S OPPOSITION TO DEFENDANT LG ELECTRONICS INC.'S MOTIONS *IN LIMINE*

Plaintiff AGIS Software Development LLC ("AGIS" or "Plaintiff") hereby submits its opposition to Defendant LG Electronics Inc.'s ("LG" or "Defendant") Motions *in Limine* (Dkt. 158).

I. MIL No. 1 To Exclude Testimony and Evidence Related to Accused Applications for Which AGIS Has Not Proffered Evidence or Advanced Substantive Allegations of Infringement

LG's motion should be denied because it is inaccurate, overly broad, and would result in undue prejudice to AGIS. The proper place for LG to raise this argument would have been in a *Daubert* motion or a motion to strike regarding AGIS's expert Joseph McAlexander's testimony, which LG has not filed. Mr. McAlexander's testimony at trial will be limited to the topics in his expert report. LG may cross-examine him at trial, but further limitation is unwarranted and

improper. To exclude this evidence at this stage would unduly prejudice AGIS as it attempts to set forth its case.

In any event, to say that Mr. McAlexander focuses on accused functionality in only two Google applications significantly oversimplifies his opinions. AGIS and Mr. McAlexander have advanced contentions, evidence, and analyses that address or implicate each of the accused applications. For example, as Mr. McAlexander explains, [redacted] Moreover, AGIS notes in its infringement contentions that "the Find My Device method also uses and/or works in conjunction with functionalities associated with Google Maps, Google Messages, Android Messenger, Location Access, Google Chrome, and other features which come pre-installed on the Accused Products." AGIS goes on to explain, "[f]or the purposes of avoiding needlessly presenting cumulative and duplicative evidence, AGIS sets forth the Find My Device feature of the Accused Products as representative of this first exemplary method." LG Exhibit 4 at D-3.

LG has not identified any prejudice that requires exclusion of opinions set forth in Mr. McAlexander's report. LG has provided a rebuttal expert report and will have an opportunity to depose Mr. McAlexander about his opinions. Mr. McAlexander will be so limited in his testimony. There is no prejudice to LG that necessitates exclusion at this stage.

Accordingly, LG's MIL No. 1 should be denied.

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1 Excerpts from the Expert Report of Joseph C. McAlexander III Regarding Infringement of U.S. Patent Numbers: 8,213,970; 9,408,055; 9,445,251; and 9,467,838 are attached hereto as Exhibit A.

II. MIL No. 2 To Preclude AGIS from Introducing Argument, Testimony, or Evidence That Actions of Third-Party LG U.S. Companies Can Be Imputed Onto LG Electronics Inc.

LG's motion should be denied because argument, testimony, or evidence that actions of third-party LG U.S. companies can be imputed onto LG is relevant in this case, is factually supported, and is legally supported.

This overbroad attempt to exclude evidence regarding third-party LG companies is premature. LG does not deny that such evidence is relevant. "Evidence should not be excluded in limine unless it is clearly inadmissible on all potential grounds." *Orchestrate HR, Inc. v. Trombetta*, No. 3:13-CV-2110-KS, 2017 WL 273669, at *1 (N.D. Tex. Jan. 20, 2017). LG argues that AGIS has not disclosed such a theory and that doing so at trial would be prejudicial to LG. In fact, [redacted] it is clear that LG Electronics USA is an agent of LG. *See Munro v. Lucy Activewear, Inc.*, No. A-15-CA-00771-SS, 2016 WL 4257750, at *3 (W.D. Tex. Jan. 14, 2016) (Under Texas law, an agency

2 [redacted]

relationship exists where the "principal has both the right: (1) to assign the agent's task; and (2) to control the means and details of the process by which the agent will accomplish that task.") (citations omitted). Moreover, [redacted] *See also Insituform Techs., Inc. v. CAT Contracting, Inc.*, 385 F.3d 1360, 1381 (Fed. Cir. 2004) (Under Texas law, a subsidiary's acts of infringement may be imputed through the corporate veil to a parent corporation "'where a corporation is organized and operated as a mere tool or business conduit' for another entity."). The actions of LG's U.S. subsidiaries are certainly relevant here and any objection to their admission should be addressed at trial.

Accordingly, LG's MIL No. 2 should be denied.

III. MIL No. 3 To Exclude Any Reference To Overall Financial Data for LG, Google, or Apple

LG's motion should be denied because it is overly broad and would result in undue prejudice to AGIS. AGIS must reference LG's financial information related to the accused products for at least the purpose of proving damages. Indeed, several courts have held that financial data, including total revenues from accused products, is relevant and admissible in patent infringement actions. *See, e.g.*, *Finjan, Inc. v. Blue Coat Sys., Inc.*, No. 13-CV-03999-BLF, 2015 WL 4129193, at *4 (N. D. Cal. July 8, 2015) (citing *Apple, Inc. v. Samsung Elecs. Co.,* No. 11–CV–01846–LHK, 2014 WL 549324, at *7 (N.D. Cal. Feb. 7, 2014)) ("As to acquisition costs for technology containing the accused features and total revenues for the accused products, however, that information is relevant and probative if properly apportioned."); *See id.* ("Although it does not appear that Plaintiff's expert . . . actually relies on accused

product revenues for any part of her analysis, the Court will permit Plaintiff to use such revenues and acquisition valuations as a *starting point* for a properly apportioned royalty base.").

Moreover, LG's ability to pay damages and related financial data are all relevant to its bargaining power, and therefore may be considered appropriately as part of the *Georgia-Pacific* analysis. *See Georgia-Pacific Corp. v. U.S. Plywood Corporation*, 318 F. Supp. 1116, 1140 (S.D.N.Y. 1970), *modified sub nom. Georgia-Pac. Corp. v. U.S. Plywood-Champion Papers, Inc.*, 446 F.2d 295 (2d Cir. 1971) (criticizing plaintiff's royalty rate evidence where "[t]here is an absence of meaningful evidence about such obviously pertinent factors as ***the relative economic positions of the licensor and licensee*** at the time the particular royalty was negotiated, in terms of their ***respective bargaining strength*** and their competitive status inter se . . . ") (emphasis added); *see also id.* at 1122 ("the Court must take into account the realities of the bargaining table"). Further, the profitability of such large operating system and mobile app stores, Apple and Google, are directly relevant to *Georgia-Pacific* factor 12: the portion of profit or selling price that may be customary in a particular business or in comparable business. *See* 318 F. Supp. at 1120.

LG has not demonstrated that any potential confusion or prejudice that it purports may be caused by admission of this evidence cannot be cured by an appropriate limiting instruction to the jury. Because the financial data that LG seeks to exclude is relevant and LG has not demonstrated that such information is more prejudicial than probative, LG's MIL No. 3 should be denied.

IV. MIL No. 4 To Exclude Testimony and Evidence Related to [redacted]

LG's motion should be denied. This attempt to exclude evidence of the calculation of a license or agreement with Huawei that has not yet been executed is entirely premature.

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