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
SUR-REPLY TO SEALED MOTION OF LG ELECTRONICS INC.
TO EXCLUDE THE OPINIONS OF MR. JOSEPH C. MCALEXANDER, III
RELATING TO INFRINGEMENT (DKT. 111)

Plaintiff AGIS Software Development LLC ("AGIS") hereby submits its Sur-Reply in Opposition to the Sealed Motion of LG Electronics Inc. ("LGEKR") to Exclude the Opinions of Mr. Joseph C. McAlexander, III Relating to Infringement (Dkt. 111).

I. MR. MCALEXANDER'S OPINIONS ON INFRINGEMENT THROUGH THE DOCTRINE OF EQUIVALENTS ARE ADMISSIBLE

LGEKR's motion to exclude is a malformed summary judgment motion masquerading under *Daubert* that misapplies the doctrine of equivalents test. LGEKR's primary attack focuses the *Akzo* case, which pertains to summary judgment and thus does not apply to the instant *Daubert* motion. Dkt. 178 at 2-3. FRE 702 concerns admissibility of expert opinions based on the expert's evaluation of relevant facts, whereas summary judgment concerns the resolution of legal issues based on undisputed facts in the case. LGEKR could not have brought a summary judgment because there remain unresolved factual disputes concerning equivalence and importation. Because there is no legitimate issue with Mr. McAlexander's methodology or analysis, LGEKR's motion must fail.

In arguing that Mr. McAlexander's report should be excluded under the summary judgment standard, LGEKR applied the incorrect doctrine of equivalents test. Mr. McAlexander opined on equivalence in the relevant paragraph using the "function, way, result" formulation. LGEKR concedes that its motion merely attacked straw-men; LGEKR analyzed several passages under the "insubstantial difference" test, which is not the test McAlexander applied in the relevant portions of his report. Dkt. 178 at 1; Dkt. 111 at 3. LGEKR's reliance on *Warner-Jenkinson* is inapposite. The significance of *Warner-Jenkinson* is that the "function, way, result" and "insubstantial difference" tests both separately go to the ultimate issue of equivalence; *Warner-Jenkinson* does not stand for the proposition that the "function, way, result" test must also satisfy the "insubstantial difference" test as LGEKR would have it. Dkt. 178 at 1; *Warner-*

Jenkinson Co., Inc. v. Hilton Davis Chemical Co., 520 U.S. 17, 40 (1997). Indeed, in the sentence after LGEKR's citation, the Supreme Court noted that "[d]ifferent linguistic frameworks may be more suitable to different cases, depending on their particular facts;" *Warner-Jenkinson's* holding did not contemplate mixing and matching tests. *Id.*

LGEKR admits that it excluded Mr. McAlexander's claim chart from its Motion. Dkt. 178 at 2. LGEKR raises a new, albeit cursory, argument that Mr. McAlexander's chart "suffers from the same defects in the main body of [his] report," without addressing whether Mr. McAlexander's analysis for any one limitation is conclusory. *Id*. But LGEKR ignores that Mr. McAlexander's chart showed how the accused devices literally meet every limitation of the asserted claims, also tending to prove "insubstantial difference" in every instance. Dkt. 149 at 11. The new paragraphs that LGEKR takes issue with are plainly the product of Mr. McAlexander's preceding literal infringement analysis given their parenthetical references to that analysis, their colocation in claim cells with that analysis, and their evident foundation on that analysis. *Id.* LGEKR's new standard would effectively require duplicating the contents of a claim cell for every related argument. That is not the requirement under Rule 702. Mr. McAlexander

Because LGEKR has failed to show that the full extent of Mr. McAlexander's opinions pertaining to the doctrine of equivalents are not supported by relevant facts and are not the product of reliable methods, LGEKR's motion to exclude those opinions must be denied.

II. MR. MCALEXANDER'S OPINIONS ON DIRECT INFRINGEMENT THROUGH IMPORTATION ARE ADMISSIBLE

LGEKR does not dispute the relevance of the evidence Mr. McAlexander considered in forming his opinions, despite basing their argument on that assertion. Dkt. 178 at 3; Dkt. 111 at 6-7. LGEKR does not dispute the relevance of [redacted]

LGEKR doubles down on its argument that Mr. McAlexander was unqualified to read a shipping label, but this argument is inconsistent with the record and its own expert's opinion of Mr. McAlexander's qualifications. Mr. McAlexander's report disclosed extensive qualifications probative of his ability to read and comprehend the plain English words written on a shipping label. Dkt. 149 at 2. Mr. McAlexander further showed a thorough understanding of the law on direct infringement, and the significance of importation as a mode of infringement. *Id.* LGEKR's expert, Mr. Edward R. Tittel, reviewed and submitted a rebuttal non-infringement report to Mr. McAlexander's infringement report. When asked at his deposition whether he had any reason to challenge Mr. McAlexander's qualifications in this case, Mr. Tittel stated unequivocally that he did not object to the qualifications of Mr. McAlexander and offered that Mr. McAlexander's qualifications were consistent with those of other experts in patent infringement cases under U.S. law. Ex. A at 17:6-19. Mr. Tittel's concession confirms that such issues are appropriately handled by "vigorous cross-examination, presentation of contrary evidence, and careful

1 [redacted]

instruction on the burden of proof. *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 596 (1993).

Aside from Mr. McAlexander's qualifications, LGEKR argues against the merits of Mr. McAlexander's conclusions, alleging misinterpretation." Dkt. 178 at 3. But this is no grounds for exclusion: "The focus, of course, must be solely on principles and methodology, not on the conclusions that they generate." *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 595 (1993). Moreover, that LGEKR enters its name in the "exporter" field of its shipping labels does not render Mr. McAlexander's assessment incorrect. Whether the Accused Devices cross the U.S. border before their sale to LGEKR's American subsidiaries is a hotly-disputed issue in this case. [redacted]

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