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

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

LG ELECTRONICS INC.,	§	Case No. 2:17-CV-0515-JRG
	§	(CONSOLIDATED CASE)
Defendant.	§	
	§	**JURY TRIAL DEMANDED**

PLAINTIFF AGIS SOFTWARE DEVELOPMENT LLC'S SUR-REPLY IN OPPOSITION TO LG ELECTRONICS INC.'S SEALED *DAUBERT* MOTION TO EXCLUDE THE OPINIONS OF MR. ALAN RATLIFF RELATING TO DAMAGES (DKT. 118)

Plaintiff AGIS Software Development LLC ("Plaintiff" or "AGIS") submits this sur-reply in opposition to the motion by Defendant LG Electronics Inc. ("Defendant" or "LG") to exclude certain opinions of AGIS's damages expert, Alan Ratliff, under *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993). For the reasons set forth below, LG's motion should be denied.

I. MR. RATLIFF'S "MARKET VALUE" IS A RELIABLE STARTING POINT FOR THE HYPOTHETICAL NEGOTIATION

LG's argument that Mr. Ratliff's market value is an unreliable basis for the hypothetical negotiation rests on LG's assumption that the Accused Apps are "free." *See* Dkt. 179 at 1. LG argues that the Accused Products would sell for the same price with or without the Accused Apps. *Id*. However, LG's assumption that the pre-installed software has no value leads to the erroneous conclusion that LG's Accused Products would sell for the same price without the Android operating system and pre-installed apps. The Accused Products in this case are comprised of hardware and software, and one without the other would not work. Moreover, expert opinion is not needed to comprehend the reality that as more software features are included in a smartphone, the higher the cost of the phone. LG's faulty assumption that the pre-installed software is "free" is fatal to its argument.

The demand for the Accused Apps is necessarily factored into the price of the Accused Products. As discussed, the Accused Products are comprised of both hardware and software, and the phone hardware would not function without the software which includes the Accused Apps. As explained in Mr. Ratliff's report, the Accused Apps promote the purchase of additional Android devices, including the LG Accused Devices. Dkt. 153-2 at ¶¶ 22-26, 33, 44, 52, 76-80. LG's argument that Mr. Ratliff "could have measured" other things does not make Mr. Ratliff's analysis unreliable. Dkt. 179 at 1. Mr. Ratliff's use of the market value of comparable

applications, while apportioning for the accused functionality within, is an accepted approach recognized by the Federal Circuit. That Mr. Ratliff didn't use the particular measurements in his damages analysis that LG prefers is not a basis on which to exclude Mr. Ratliff's testimony and LG's criticisms are arguments best left to cross-examination at trial.

In its reply, LG again tries to fit a square peg into a round hole by arguing that *Exmark Mfg. Co. v. Briggs & Stratton Power Prods. Group, LLC*, 879 F.3d 1332, 1350 (Fed. Cir. 2018) supports its argument that Mr. Ratliff's starting point of a market value of fee-based apps with similar features to the accused features is unreliable. Dkt. 179 at 2. The portion of *Exmark* cited by LG states that the expert had acknowledged that elements, such as durability, reliability, brand position, etc., affect sales of lawnmowers, but that the expert did not conduct an analysis on the impact of these elements on the market value or profitability of the mowers, making the analysis unreliable. *See* 879 F.3d at 1350. Here, Mr. Ratliff's starting value is the market value of comparable fee-based apps having the accused features, not the LG Accused Device. *Exmark* contains no discussion that suggests Mr. Ratliff's starting point is unreliable.

II. MR. RATLIFF'S "USAGE APPORTIONMENT" IS RELIABLE AND SUPPORTED

LG argues that Mr. Ratliff's "usage apportionment" is unreliable because it does not compare usage of accused functionality versus non-accused functionality, and because "nowhere does he assess demand or usage of *the accused features* themselves." Dkt. 179 at 2-3. First, Mr. Ratliff's usage apportionment is not meant to apportion for non-infringing versus infringing functionality; that apportionment comes later in the separate technical apportionment that considers the importance of infringing versus non-infringing features, and relies on Mr. McAlexander Dkt. 153-2 at ¶94; Dkt. 153-3 at StoneTurn Exhibit 2. Including the infringing versus non-infringing feature apportionment in the "usage apportionment" would

result in a double apportionment. Second, Mr. Ratliff did assess the usage of the accused features, as he considered the range of usage of the Accused Apps. *See* Dkt. 153-2 at ¶¶ 73-74; Dkt. 153-3 at StoneTurn Exhibit 4. LG argues that Mr. Ratliff only considered "user interest in non-accused features like navigation." Dkt. 179 at 3. LG is merely using Mr. Ratliff's terminology in Stoneturn Exhibit 4 to misconstrue the analysis. Dkt. 153-3 at StoneTurn Exhibit 2. Two of the surveys covered "Navigation Apps" which are apps such as the Accused App Google Maps. *Id*. The terminology "Navigation Apps" does not signify that Mr. Ratliff *only* considered user interest in "navigation," as LG would like the Court to believe. Dkt. 179 at 3. Mr. Ratliff's usage apportionment is tailored to the facts of the case and is based on reliable information and methods, and thus should not be excluded.

III. MR. RATLIFF'S "TECHNICAL APPORTIONMENT" IS RELIABLE AND SUPPORTED

Mr. Ratliff relies on Mr. McAlexander's opinions while forming his analysis, which is normal and acceptable in connection with apportionment analyses. *See, e.g.*, *Beneficial Innovations, Inc. v. Advance Publications, Inc.*, Case No. 2:11-cv-0029-JRG-RSP (E.D. Tex. July 9, 2014) at *5; *Freeny v. Murphy Oil Corp.*, Case No. 2:13-cv-791-RSP, Dkt. 151, at *4 (E.D. Tex. June 4, 2015). LG attempts to distinguish *Chrimar Holding Company, LLC v. ALE USA Inc.*, 2018 WL 2120618, at *9 (Fed. Cir. 2018) by stating that the expert in *Chrimar* provided statements describing the importance and success of the patented technology, and that Mr. Ratliff did not. Dkt. 179 at 4. However, LG misreads *Chrimar*, where it was the technical expert who provided the statements and the damages expert relied on those statements for the technical apportionment. *See* 2018 WL 2120618, at *9. Mr. Ratliff does the same here, basing his estimate on Mr. McAlexander's substantial analysis and ultimate opinion that the accused features are "very significant." *See* Dkt. 153-2 at ¶¶ 91-93; *see also* Dkt. 153-5 at §§ 9.3, 9.4.1-

9.4.4, 9.4.6, 9.5. While LG may differ with Mr. Ratliff and Mr. McAlexander's analyses and question the ultimate result, the proper time for addressing LG's concerns is at trial where LG will have an opportunity to cross-examine Mr. Ratliff and Mr. McAlexander.

A. Mr. Ratliff's "Mobile Telephone Industry" and "Profit Split" Factors are Relevant

LG argues that Mr. Ratliff used "irrelevant profitability data" and that his "profit split" has "no basis in fact." Dkt. 179 at 4. LG produced inconsistent and incomplete revenue and cost data, and LG's witnesses could not correct the deficiencies. Dkt. 153-2 at ¶¶ 39, 65-66; Dkt. 153-4, StoneTurn Second Supplemental Workpaper, at 14; Dkt. 153-7, Jang Dep., at 38:5-39:19, 40:12-41:16. In light of LG's discovery shortcomings, Mr. Ratliff performed an acceptable alternative computation specifically tied to the facts of the case as it is based on industry data for the Accused Devices. *See* Dkt. 153-2 at ¶¶ 68-69.

Regarding Mr. Ratliff's "profit split," even if the analysis is not "simple or direct," simplicity is not a prerequisite for admissibility. Dkt. 179 at 4. LG may disagree with the data points, but the proper time for addressing LG's concerns is at trial where LG will have an opportunity to cross-examine Mr. Ratliff. Moreover, Mr. Ratliff's "profit split" is not "fictional," but is based on arrangements between device makers, operating system providers, app providers, and wireless carriers, all of which are participants in the ecosystem discussed in his report. Dkt. 153-2 at ¶¶ 76-80.

IV. MR. RATLIFF'S REASONABLE ROYALTY ANALYSIS IS NOT BASED ON THE EMVR

In its reply, LG argues that Mr. Ratliff's analysis is based on the EMVR by merely quoting AGIS's opposition brief out of context, claiming AGIS stated the value of the Accused Apps is represented in the sales numbers for the Accused Devices. Dkt. 179 at 4. However, any alleged "error" was manufactured by LG, as AGIS's opposition clearly states that "decreased

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