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

GESTURE TECHNOLOGY PARTNERS, LLC, Plaintiff v. HUAWEI DEVICE CO., LTD., HUAWEI DEVICE USA, INC., Defendants.	§ § § § § § § § § § §	CASE NO. 2:21-cv-00040-JRG (Lead Case) JURY TRIAL DEMANDED
GESTURE TECHNOLOGY PARTNERS, LLC, Plaintiff v. SAMSUNG ELECTRONICS CO., LTD. AND SAMSUNG ELECTRONICS AMERICA, INC., Defendants.	§ § § § § § § § § § §	CASE NO. 2:21-cv-00041-JRG (Member Case) JURY TRIAL DEMANDED

SAMSUNG DEFENDANTS' REPLY IN SUPPORT OF THEIR *DAUBERT* MOTION TO PRECLUDE THE OPINIONS AND TESTIMONY OF PLAINTIFF'S DAMAGES EXPERT DAVID KENNEDY

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I. INTRODUCTION

The Kennedy Report uses a sales-based damages model that does not distinguish between damages for infringement of apparatus and method claims. Mot. at 14-15. GTP confirms as much. Opp. at 12-13. The Court cannot send this "legally flawed damages model to the jury[.]" *Infernal Tech. LLC v. Sony Interactive Ent. LLC ("Sony")*, No. 2:19-cv-00248-JRG, Dkt. 281 at 5 (E.D. Tex. Feb. 26, 2021). Recognizing this approach is methodologically unsound, GTP now seeks a reprieve and requests leave to supplement. Opp. at 13. Not only is GTP's request untimely, but a supplement cannot cure the defect. Unlike *Sony*, the record here is devoid of any evidence that Samsung has used or tested the Asserted Method Claims. The only "appropriate resolution" for this failure is exclusion of the Kennedy Report. *Compare id.*

GTP's opposition does not remedy the Kennedy Report's other failings, either. If admitted, the jury will be presented with an apportionment model that does not account for the vast majority of uses of the camera(s) in the Accused Products. GTP's attempt to explain this methodological error conflates non-infringing alternatives and non-infringing uses. Opp. at 9-12. The jury will also hear about a hypothetical negotiation untethered to the facts of this case. For example, GTP concedes that Mr. Kennedy's hypothetical negotiation is founded entirely on *ex-post* data from wholly outside the period of alleged infringement. Opp. at 4-5. Further, GTP doubles down on Mr. Kennedy's "Samsung 51/49 Rule," a thinly disguised use of the discredited Rule of Thumb approach. GTP argues this profit "split" is admissible, Opp. at 7 (citing *Sanofi-Aventis Deutschland Gmbh v. Glenmark Pharm. Inc., USA,* No. 07-CV-5855 (DMC-JAD), 2011 U.S. Dist. LEXIS 10512 (D.N.J. Feb. 3, 2011). It is not. *See Virnetx, Inc. v. Cisco Sys., Inc.*, 767 F.3d 1308, 1332 (Fed. Cir. 2014) (overturning *Sanofi-Aventis*). Altogether, Mr. Kennedy's opinions are not merely "shaky," Opp. at 3, but are fatally flawed to the point of collapse. The Kennedy Report should be excluded in full.

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II. ARGUMENT

A. A Supplement Cannot Cure the Kennedy Report's Failure to Distinguish Between Damages for Apparatus and Method Claims

GTP asks the Court for a lifeline. Opp. at 13. The Court should reject this fruitless attempt to save the Kennedy Report. Unlike the plaintiff in *Sony*, GTP has not set forth a damages theory that implicates Samsung's use or testing of the Accused Products. *Compare Sony*, Dkt. 1 ¶ 27 ("SIE and SIEA are engaged in the business of developing, testing . . . video games."). And unlike in *Sony*, GTP's technical expert here has not attempted to establish that Samsung demonstrated and internally tested the Accused Products, much less whether or how any such activity constituted direct infringement. *Compare Sony*, Dkt. 281 at 2 (citing Expert Report of John C. Hart). Not only was any such theory waived long ago, but a "do over" permitting GTP to rewrite its expert reports at this stage would unfairly prejudice Samsung and set a dangerous precedent. The Court here is not faced with the "unenviable choice" presented in *Sony*. *See id.* at 6.

B. The Kennedy Report Failed to Apportion for Non-Infringing Use

Apportioning for non-infringing use is a legal requirement. *Finjan, Inc. v. Blue Coat Sys., Inc.*, 879 F.3d 1299, 1309-10 (Fed. Cir. 2018). GTP concedes that Mr. Kennedy did not conduct this apportionment. Opp. at 10 [REDACTED] (emphasis omitted). Instead, GTP claims apportionment for non-infringing use was [REDACTED] *Id.* (emphasis omitted). But apportionment must be "tangible" rather than "implicit." *See Garretson v. Clark*, 111 U.S. 120, 121 (1884).

Even if GTP were allowed to "implicitly" apportion for non-infringing use, the Groehn Report did not do this. The Groehn Report sought to calculate the consumer value of "the accused features only." *See Visteon Glob. v. Garmin Int'l, Inc.*, No. 10-cv-10578, 2016 WL 5956325, at *15 (E.D. Mich. Oct. 14, 2016) (finding conjoint survey analysis did not apportion for non-

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infringing use where it did not "determine the value of all features of the accused devices"). Put another way, the Groehn Report purports to show the value of "patented features" compared to non-infringing ***alternatives***, but ignores the significant non-infringing ***uses*** of the camera(s) in the Accused Products. Ex. H, Groehn Report ¶ 40. *Cf.* Mot. at 14 (Samsung Camera Features).

Mr. Kennedy's analysis is nowhere near "akin" to the analysis in *Summit 6*. Opp. at 11. In *Summit 6*, first the damages expert (like Mr. Kennedy) apportioned *i.e.*, the camera(s). Ex. I, Kennedy Report ¶ 124. Second, the expert (***unlike*** Mr. Kennedy) *Id.* Third, the expert (***unlike*** Mr. Kennedy) *Id.* With these three steps (versus Mr. Kennedy's single step), the expert in *Summit 6* apportioned for "the percentage of camera users who used the camera to perform the infringing methods ***rather than for other purposes***." Opp. at 11 (emphasis added). Not so here.[1]

GTP's other attempts to explain Mr. Kennedy's apportionment model are trivial. Opp. at 9-10.[2] Mr. Kennedy's failure to apportion for non-infringing use is dispositive, undermining the reliability of Mr. Kennedy's resulting damages estimation.

C. The Kennedy Report Adopted a Hypothetical Negotiation Not Tied to the Facts of the Case

1. The Kennedy Report Used an Incorrect Hypothetical Negotiation Date

GTP cites the "Kennedy Supplemental Report" to rebut that the ***Kennedy Report*** uses the

[1] GTP's assertion that apportionment for non-infringing uses was is belied by the fact that Mr. Kennedy applied an for the value of the camera(s) in the Accused Products. *See* Opp. at 10. Mr. Kennedy recognized the need to apportion to the camera(s), but failed to account for non-infringing uses.

[2]

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incorrect hypothetical negotiation date. Opp. at 4. GTP asserts that Samsung [redacted] [redacted]. These barbs are proven false by the fact that Samsung filed a motion to strike the supplement (and Dr. Groehn's supplement) on the same day as the instant motion. Dkt. 143. Besides correcting the date of the hypothetical negotiation, the supplement is immaterial to the Kennedy Report's unreliability. Mot. at 8.

2. Use of a 2021 Conjoint Survey for the Hypothetical Negotiation in 2017 (or 2014), *Without Further Analysis*, is Improper

GTP concedes that Mr. Kennedy did not endeavor to incorporate *ex ante* assumptions when applying Dr. Groehn's [redacted] calculations to the hypothetical negotiation. *See* Opp. at 5-7. Instead, Mr. Kennedy fully adopted those calculations, purporting to state precisely (to the dollar and cent) how consumers value the "patented features" today. *Id.* He did not provide any analysis of how those calculations might have differed during the period of alleged infringement. *Cf. Aqua Shield v. Inter Pool Cover Team*, 774 F.3d 766, 770 (Fed. Cir. 2014) (requiring a hypothetical negotiation wherein the parties "would have ***anticipated*** the profit-making potential of use of the patented technology"). But a proper damages estimation "necessarily involves some approximation of the market as it would have hypothetically developed[.]" *Riles v. Shell Expl. & Prod. Co.*, 298 F.3d 1302, 1311 (Fed. Cir. 2002). Exhibits 3-5 to the Kennedy Report do not meet this legal standard. Opp. at 6. Samsung does not broadly challenge the use of conjoint surveys, Opp. at 7, but the law required Mr. Kennedy to provide ***some analysis*** of what the parties "would have anticipated" as to the profit-making potential. Mot. 9–10. He failed to do so.

3. The "Samsung 51/49 Rule" is Arbitrary and Unfairly Prejudicial

It is telling that GTP's opposition cites *Sanofi-Aventis* to support its use of the "Samsung 51/49 Rule." Opp. at 7-8. The Federal Circuit expressly overturned *Sanofi-Aventis* because ***any discussion*** of an arbitrary "split" in profit skews the jury's damages calculation. *Virnetx, Inc.*, 767

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