[redacted]

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 SURVEY EXPERT ANDREAS GROEHN

[redacted]

I. INTRODUCTION

An "independently commissioned" survey can go wrong when those commissioning the survey overstep and influence its reliability. That happened here. GTP admits its counsel directed Dr. Groehn to test [redacted].[1] Opp. at 7. But these features reflect GTP's rejected claim construction positions and do not relate to the Patents-in-Suit. GTP further admits that Dr. Groehn's 2021 survey tested these "patented features" only in 2021 smartphones. Opp. at 5. The survey thus calculated purported consumer preferences wholly outside the 2014–2020 period of alleged infringement. The survey was not "tied to the facts of the case." Mot. at 6-12.

Making matters worse, GTP's overreach yielded a report with "irrational results" that will unfairly prejudice Samsung at trial. *See Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 595 (1993) (considering Rule 403). The Groehn Report concluded that just two features—[redacted]—accounted for [redacted] ***of Samsung's total sales*** of Accused Products, and [redacted] ***of Samsung's total profit*** on those sales. When asked why his survey yielded these facially absurd results, Dr. Groehn testified that [redacted] Ex. M, Groehn Tr. at 202:15–203:3 [redacted]. Whether it was a problem with [redacted] or the fact that half of the survey attributes were "patented features," Mot. at 13-15, Dr. Groehn's survey and related analysis were doomed from the start and GTP cannot "fix the underlying issue." *Compare Earl v. Boeing Co.*, No. 4:19-cv-507, 2021 WL 3140545, at *5 (E.D. Tex. July 26, 2021). The Groehn Report is unreliable and prejudicial, and should be excluded.

[1] GTP still has not attempted to clarify what Samsung smartphone feature allegedly corresponds to [redacted] *See* Mot. at 4 n.3.

[redacted]

II. ARGUMENT

A. The Groehn Survey Did Not Measure Consumer Preferences Tied to the Date of Alleged Infringement

A 2021 study cannot offer reliable information on consumer behavior from years earlier, *i.e.*, 2014–2020, the period of alleged infringement. *See Saavedra v. Eli Lilly & Co.*, No. 2:12-cv-9366, 2014 WL 7338930, at *6 (C.D. Cal. Dec. 18, 2014). For example, in *Saavedra*, the court excluded a conjoint survey that sought to apply consumer preferences in 2014 to the preceding ten-year period (*i.e.*, 2004–2014). The court noted that "consumers have changed," and cited a handful of changes in the marketplace that "common sense tells [us] are potentially significant to consumer valuation," *e.g.*, consumer price sensitivity, new competitive entries, etc. *Id.*[2]

Saavedra confirmed what the law requires—a nexus between damages evidence and the time of alleged infringement. Mot. at 7. It is axiomatic that conjoint survey analysis must conform to the law of patent damages. *Compare* Opp. at 6 [redacted] *with* Mot. at 5 ("Legal Standard"). Despite GTP's alleged concerns, this requirement does not undermine conjoint surveys in all patent cases. Courts routinely permit conjoint survey analysis ***when infringement is ongoing***. *Cf.* Am. Compl., ¶ 24, *Odyssey Wireless, Inc. v. Apple Inc.*, No. 3:15-cv-01735 (S.D. Cal. Aug. 29, 2014), Dkt. 37 (alleging defendant "continues" to infringe); Am. Compl., ¶ 19, *Apple Inc. v. Samsung Elecs. Co.*, No. 5:12-cv-00630 (N.D. Cal. Aug. 31, 2012), Dkt. 261 (same); Am. Compl., ¶ 63, *TV Interactive v. Sony Corp.*, No. 3:10-cv-00475 (N.D. Cal. Sept. 16, 2011), Dkt. 333 (same). Here, the period of alleged infringement ended in

[2] It is undisputed that because of Samsung's late-2021 advertising efforts, at least AR Emoji is in the present day consumer consciousness. *See* https://www.youtube.com/watch?v= s8c3bQACz4. GTP has failed to carry its burden to show that consumer preferences for [redacted] in the period of alleged infringement were identical or even similar to those today. *See* Ex. N (No. 2:12-cv-09366, Dkt. 127 (Wind Decl. ¶ 32)).

[redacted]

July 2020 when the last Patent-in-Suit expired. Dr. Groehn's "shift in demand" calculations purporting to show what a consumer would pay ***in 2021*** for [redacted] on a smartphone sold ***in 2021*** are thus irrelevant and prejudicial, warranting exclusion.

B. The Groehn Survey Did Not Measure the Value of the Claimed Invention

Rather than measure the value of the claimed invention, Dr. Groehn tested three "patented features" relating to facial recognition. *See* Mot. at 10-12 (providing Groehn Survey's definitions). But facial recognition is not encompassed by the claims of the Patents-in-Suit. This is especially true for the '431, '949, and '079 Patents, which require determining or detecting a "gesture." This fundamental error resulted in a conjoint survey improperly "targeted at an invention other than the one at issue in this litigation." *Unwired Planet, LLC v. Apple Inc.*, No. 13-cv-04134-VC, 2017 WL 589195, at *1(N.D. Cal. Feb. 14, 2017).

GTP does not actually dispute that the surveyed features are unrelated to the Patents-in-Suit. Opp. at 7-8. Instead, GTP merely states that this issue [redacted] *Id.* GTP is wrong. As a matter of law, failure to measure the value of the claimed invention "is a problem of admissibility rather than weight." *Unwired Planet*, 2017 WL 589195, at *1 (citation omitted). *See also Fractus, S.A. v. Samsung*, Case No. 6:09-cv-203-LED-JDL, 2011 WL 7563820, at *1 (E.D. Tex. Apr. 29, 2011) (excluding survey that estimated consumer preferences "not tied to the alleged advantageous technical characteristics of the patents-in-suit"). GTP is also wrong that Dr. Groehn was [redacted] of which Samsung features allegedly infringe the Asserted Patents. Opp. at 7. Dr. Groehn cannot [redacted] when it directly contradicts this Court's *Markman* Order. Mot. at 9-10 (citing Dkt. 93 at 55-57). This methodological flaw is fatal to the Groehn Report; expert evidence not properly "tied" to the claimed invention's footprint in the marketplace "confuses the issues and must be excluded." *Fractus, S.A.*, 2011 WL 7563820, at *1.

[redacted]

C. The Groehn Survey "Warped" Respondents' Real-World Considerations

GTP's directive [redacted] cornered Dr. Groehn: either he ran the survey with the three "patented features" making up half of the six total attributes (Option 1), or he ran the survey with more than six total attributes (Option 2). Option 1 ran the risk of "warping" respondents' real-world considerations by forcing them to focus on the "patented features." *See Oracle Am., Inc. v. Google Inc.*, Case No. 3:10-cv-03561-WHA, 2012 WL 850705, at *9-10 (N.D. Cal. Mar. 13, 2012); *MacDougall v. Am. Honda Motor Co.,* No. SACV 17-1079 JGB (DFMx), 2020 WL 5583534, at *7-9 (C.D. Cal. Sept. 11, 2020). Option 2 ran the risk of departing from the "accepted methodology" of testing six or fewer attributes in a conjoint survey. Opp. at 9.[3]

Dr. Groehn (and/or GTP's counsel) chose Option 1, with consequences similar to those in *Oracle* and *MacDougall.* The disproportionate number of "patented features" artificially inflated respondents' preferences for those features. *See* Ex. O (Table 8). For example, because of this design flaw, Dr. Groehn concluded that Samsung would experience [redacted]. *Id.* at line [M]. This constitutes an [redacted] ***reduction*** in profit [redacted] Samsung actually earned from its sales of Accused Products. *Id.* at line [redacted] He also concluded that without [redacted], Samsung would sell [redacted] Accused Products, *id.* [redacted] which is [redacted] fewer than the [redacted] Samsung actually sold, *id.* [redacted] This constitutes a [redacted] ***reduction*** in sales [redacted] These results are "irrational" and will unfairly prejudice Samsung at trial. *See Virnetx, Inc. v. Cisco Sys.*, 767 F.3d 1308, 1333 (Fed.

[3] A more reliable option would have been to conduct a separate conjoint survey for each of the three "patented features."

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