

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION**

ANCORA TECHNOLOGIES, INC.,

Plaintiff,

v.

LG ELECTRONICS INC. and LG
ELECTRONICS U.S.A., INC.,

Defendants.

CIVIL ACTION NO. 1:20-CV-00034-ADA

JURY TRIAL DEMANDED

ANCORA TECHNOLOGIES, INC.,

Plaintiff,

v.

SAMSUNG ELECTRONICS CO., LTD.,
and SAMSUNG ELECTRONICS
AMERICA, INC.,

Defendants.

CIVIL ACTION NO. 1:20-CV-00034-ADA

JURY TRIAL DEMANDED

**DEFENDANT LG ELECTRONICS INC. AND LG ELECTRONICS U.S.A., INC.'S
DAUBERT MOTION TO EXCLUDE AND STRIKE
CERTAIN OPINIONS OFFERED BY MR. ROBERT MILLS**

PUBLIC VERSION

TABLE OF CONTENTS

I. INTRODUCTION 1

II. LEGAL STANDARDS 1

III. ARGUMENT 2

 A. Mr. Mills’s Opinions Relying on Samsung’s E-FOTA Should Be Excluded as Untimely 2

 1. Samsung’s E-FOTA is not important evidence. 2

 2. LGE is prejudiced by Ancora’s Late Disclosure. 3

 3. Ancora cannot show good cause for its failure to disclose Samsung’s E-FOTA and a continuance would reward Ancora’s late disclosure..... 4

 B. Mr. Mills’s Per-Update Theory Should Be Excluded..... 4

 1. Mr. Mills’s per-update theory is based on a flawed understanding of infringement that facilitates unreliable damages calculations..... 4

 2. Mr. Mills’s Reliance on [REDACTED] is Improper..... 6

 C. Mr. Mills’s Per-Unit Theory Should be Excluded..... 7

IV. CONCLUSION..... 10

TABLE OF AUTHORITIES

CASES	PAGE(S)
<i>Chicago Mercantile Exch., Inc. v. Tech. Research Grp., LLC</i> , 782 F. Supp. 2d 667 (N.D. Ill. 2011)	4, 6
<i>Daubert v. Merrell Dow Pharm., Inc.</i> , 509 U.S. 579 (1993).....	1
<i>Finjan, Inc. v. Secure Computing Corp.</i> , 626 F.3d 1197 (Fed. Cir. 2010).....	6
<i>Johnson v. Arkema, Inc.</i> , 685 F.3d 452 (5th Cir. 2012)	1
<i>Katrinecz v. Motorola Mobility</i> , No. A-12-CV-235-LY, 2014 WL 12160772 (W.D. Tex. Aug. 11, 2014).....	2
<i>Primrose Operating Co. v. Nat’l Am. Ins. Co.</i> , 382 F.3d 546 (5th Cir. 2004)	2
RULES	
FED. R. CIV. P. 33(d).....	3
37(c)(1)	2
FED. R. EVID. 702	1, 10

I. INTRODUCTION

Defendants LG Electronics Inc. and LG Electronics U.S.A., Inc. (collectively, “LGE”) move to exclude certain unreliable opinions offered by Plaintiff Ancora Technologies, Inc.’s damages expert, Mr. Robert Mills (Ex. A, “Mills Report”). Mr. Mills offers opinions on what damages Plaintiff is purportedly owed under two theories: (1) a “per-update” theory, which is based on the alleged number of successfully installed updates by each accused product (Ex. A, ¶¶ 210–12); and (2) a defective “per-unit” theory based on the number of sales of accused products (*Id.*, ¶¶ 185–209). As discussed herein, both theories are flawed in their conclusions and premised on unreliable information such that they should be excluded. The Court should assume its gatekeeping role now rather than allowing the jury to consider damages theories and evidence that is disconnected from the facts and circumstances of this case.

II. LEGAL STANDARDS

Rule 702 bars expert testimony unless: (1) “the testimony is based on sufficient facts or data;” (2) “the testimony is the product of reliable principles and methods;” and (3) “the expert has reliably applied the principles and methods to the facts of the case.” FED. R. EVID. 702. Rule 702 assigns to the trial judge the task of “ensuring that an expert’s testimony both rests on a reliable foundation and is relevant to the task at hand.” *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 597 (1993) (discussing Fed. R. Evid. 702). “The relevance prong [of *Daubert*] requires the proponent [of the expert testimony] to demonstrate that the expert’s reasoning or methodology can be properly applied to the facts in issue.” *Johnson v. Arkema, Inc.*, 685 F.3d 452, 459 (5th Cir. 2012) (internal quotations and citations omitted). “The reliability prong mandates that expert opinion be grounded in the methods and procedures of science and . . . be more than unsupported speculation or subjective belief.” *Id.*

III. ARGUMENT

A. Mr. Mills's Opinions Relying on Samsung's E-FOTA Should Be Excluded as Untimely.

Mr. Mills's opinion—to the extent that it relies on Samsung's E-FOTA technology—should be excluded because this theory was never disclosed to LGE during fact discovery. Ancora never disclosed Samsung's E-FOTA or its price—let alone that Mr. Mills intended to rely upon it. Nor had it been disclosed that Samsung's E-FOTA is a comparable service to LGE's OTA update functionality. To be clear, LGE did not learn that Ancora was taking the position that Samsung's E-FOTA was in any way comparable or even relevant to LGE's OTA update functionality until Ancora served its expert reports *after* the close of fact discovery.

A party may not use at trial information that was not timely disclosed during discovery unless such failure to disclose is “substantially justified or harmless.” FED. R. CIV. P. 37(c)(1); *see also Katrinecz v. Motorola Mobility*, No. A-12-CV-235-LY, 2014 WL 12160772, at *3 (W.D. Tex. Aug. 11, 2014). The Fifth Circuit evaluates four factors to determine if an error is harmless: (1) “the importance of the evidence;” (2) “the prejudice to the opposing party of including the evidence;” (3) “the possibility of curing such prejudice by granting a continuance;” and (4) “the explanation for the party's failure to disclose.” *Primrose Operating Co. v. Nat'l Am. Ins. Co.*, 382 F.3d 546 (5th Cir. 2004).

1. Samsung's E-FOTA is not important evidence.

Samsung's E-FOTA is primarily relied upon in Mr. Mills's alternate per-update theory for damages and is one of four purported indicators of value for the '941 Patent. Ex. A, ¶ 194. Ancora also never referenced Samsung's E-FOTA during discovery, underscoring its lack of importance.

That being said, Ancora had plenty of opportunities to disclose this information to LGE. During fact discovery, LGE served no less than six interrogatories seeking factual information in

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