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

PUBLIC VERSION

ANCORA'S OPPOSITION TO LG ELECTRONICS' *DAUBERT* MOTION TO EXCLUDE AND STRIKE CERTAIN OPINIONS OFFERED BY DR. DAVID MARTIN

LGE's four challenges to Dr. Martin's opinions mischaracterize Dr. Martin's opinions and are untethered to any legal standards governing expert testimony. They should be rejected.

First, LGE challenges the sources Dr. Martin relies on to opine that a competitor's software product (E-FOTA) is similar to LGEs infringing over-the-air (OTA) update functionality. Mot. at 1-2. But challenges to the sources relied on by an expert go to weight, not admissibility.

Second, LGE seeks to strike opinions that Dr. Martin does not offer—namely, the ultimate conclusion of whether LGE "directs" or "controls" third parties for purposes of divided infringement. *Akamai Techs., Inc. v. Limelight Networks, Inc.*, 797 F.3d 1020, 1022 (Fed. Cir. 2015) (en banc); *see* Mot. at 3-8. LGE's argument is a straw man. Consistent with the fact that "[t]he ultimate legal conclusions regarding direction and control" are "not a proper subject" of expert testimony, Dr. Martin has not and will not offer any such opinion. *Datatreasury Corp. v. Wells Fargo & Co.*, 2010 WL 3768105, at *5 (E.D. Tex. Sept. 13, 2010).

Third, LGE asserts that Dr. Martin contradicts the Court's *Markman* Order by opining that the "agent" (recited in the Claim 1 step of "using an agent to set up a verification structure in the erasable, non-volatile memory of the BIOS") must involve operating system (OS)-level software. Mot. at 8-9. LGE is flat-out wrong. Consistent with the parties' agreement during the *Markman* process that the "using an agent" step required use of OS-level software, the Court explained that the prosecution "history clearly recites an agent as a 'licensed program[] running at the OS level interacting with a program verification structure stored in BIOS.'" D.I. 93 at 34.

[redacted]. LGE's argument is factually incorrect and legally irrelevant. It should be rejected.

ARGUMENT

I. DR. MARTIN'S OPINION THAT SAMSUNG'S E-FOTA IS SIMILAR TO LGE'S OTA UPDATE FUNCTIONALITY IS AMPLY SUPPORTED AND RELIABLE.

Citing no legal authority, LGE attacks as "unsupported" and "unreliable" Dr. Martin's opinion that E-FOTA (a software product sold by LGE's competitor, Samsung) is technically similar to the LGE technology accused of infringing the '941 Patent. Mot. at 1-2.[1] LGE's attacks go to the weight of Dr. Martin's testimony, not its admissibility, and should be rejected.

LG's central complaint—that Dr. Martin's "opinion is not based on any source code" or confidential "technical documents" but rather "public websites," Mot. at 1-2—is not grounds for exclusion under Fifth Circuit law. Rather, "questions relating to the bases and sources of an expert's opinion affect the weight to be assigned [to] that opinion rather than its admissibility and should be left to the jury's consideration." *Primrose Operating Co. v. Nat'l Am. Ins. Co.*, 382 F.3d 546, 562 (5th Cir. 2004); *see Summit 6, LLC v. Samsung Elecs. Co.*, 802 F.3d 1283, 1299 (Fed. Cir. 2015) ("[D]isputes over the . . . the accuracy of the underlying facts are for the jury").

LG also challenges Dr. Martin's analysis as insufficiently "meaningful." Mot. at 2. This, too, is wrong. [redacted]

[1] Ancora asked Dr. Martin to assess the technical similarity between Samsung's E-FOTA product (which was sold on the open market) and LG's OTA Update solution so that Ancora's damages expert, Mr. Robert Mills, could determine if E-FOTA could serve as one benchmark for establishing the commercial value of the patented technology to LG. [redacted]

All exhibits are appended to the April 9, 2021 Declaration of Steven M. Seigel. All emphases added by Ancora unless otherwise stated.

[redacted] Notably, LG never states that Dr. Martin's analysis is incorrect. And regardless, LG's critiques go to weight and not admissibility. *See Bayer HealthCare LLC v. Baxalta Inc.*, 2019 WL 330149, at *5 (D. Del. Jan. 25, 2019) (holding that whether an expert has shown a "sufficient degree of technical comparability" with allegedly comparable technology is an issue to "be addressed through cross-examination, not exclusion").

[redacted]

In sum, Dr. Martin's E-FOTA opinions are well-supported, reliable, and admissible under *Daubert* and Fed. R. Evid. 702.

II. DR. MARTIN DOES NOT OPINE THAT LG DIRECTS AND CONTROLS THIRD PARTIES UNDER *AKAMAI*.

LG spends most of its Motion seeking to strike Dr. Martin's purported opinion "that LGE directs or controls various third parties in the over-the-air (OTA) update process rendering LGE liable for direct infringement." Mot at 3. To be clear, Dr. Martin has not and will not offer that opinion because—as Ancora always has argued—it is not proper for an expert to opine on ultimate conclusion of direction and control. *Datatreasury*, 2010 WL 3768105, at *5.[2]

What Dr. Martin has done is simply assume that the jury will agree at trial that—[redacted] such

[2] [redacted]

actions are attributable to LGE. Thus, Dr. Martin's opinion is that LGE directly infringed [redacted] The very references to "direct[ion] and control" that LGE cites make clear that Dr. Martin is not offering any opinion on the ultimate issue of direction and control; [redacted]:

> [redacted]

[redacted]

LGE knows this. Dr. Martin expressly confirmed at his deposition that he was not offering an affirmative opinion that [redacted]

> [redacted].

[redacted]

[redacted]

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