IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
WACO DIVISION

ANCORA TECHNOLOGIES, INC., Plaintiff, v. LG ELECTRONICS INC. and LG ELECTRONICS U.S.A., INC., Defendants.	CIVIL ACTION NO. 6:19-CV-00384 JURY TRIAL DEMANDED
ANCORA TECHNOLOGIES, INC., Plaintiff, v. SAMSUNG ELECTRONICS CO., LTD. and SAMSUNG ELECTRONICS AMERICA, INC., Defendants.	CIVIL ACTION NO. 6:19-CV-00385 *CONSOLIDATED INTO CIVIL ACTION NO. 6:19-CV-00384* JURY TRIAL DEMANDED

JOINT MOTION FOR ENTRY OF SCHEDULING ORDER

On December 6, 2019, the Court conducted a conference in the above entitled and numbered cases. Following that conference, Plaintiff Ancora Technologies, Inc., and Defendants LG Electronics Inc., LG Electronics U.S.A., Inc., Samsung Electronics Co., Ltd. and Samsung Electronics America, Inc. met and conferred and have reached agreement on all but the following three Scheduling Order issues:

(1) the financial information Defendants will provide on February 3, 2020;

(2) the deadline by which each Defendant will identify any third party it reasonably believes possesses exclusive information regarding the over-the-air updates and related functionality identified in Plaintiff's infringement contentions;

(3) the deadline by which Defendants shall produce information regarding the identity and dates of any over-the-air updates released from June 21, 2013, through October 1, 2018, and the number of times each update was downloaded.

Pursuant to ¶ 4 of the Court's "Order Governing Proceedings – Patent Case," the parties briefly set forth below their respective positions on each of these items. The parties also attach their respective proposed orders as Exhibit A (Plaintiff) and Exhibit B (Defendants). The parties also attach as Exhibit C a redline document comparing the two proposed orders.

I. Plaintiff's Positions

1. Defendants Should Produce Profit and Cost Information by February 3, 2020

The parties' dispute as to this issue is narrow. Defendants have agreed to produce by February 3, 2020, quarterly sales information, including per-product revenue and units sold, for the period of October 1, 2012, to October 1, 2018. The parties disagree only as to whether such sales information also should include per-product profit and cost information.

Defendants should be ordered to produce such information for two reasons. *First*, such information is relevant to calculating a reasonable royalty. *Chembio Diagnostic Sys., Inc. v. Saliva Diagnostic Sys., Inc.*, 236 F.R.D. 129, 139 (E.D.N.Y. 2006) (holding that party was "entitled to the discovery sought concerning Chembio's sales and costs (including manufacturing) in order to enable SDS to prove damages," including "the amount of a reasonable royalty"); *Phase Four Indus., Inc. v. Marathon Coach, Inc.*, 2006 WL 1465313, at *7 (N.D. Cal. May 24, 2006) ("Documents related to the costs involved in sales of Waste Master products is relevant to an evaluation of damages.").

Second, Defendants have offered no explanation why producing such information now would be unduly burdensome. *Fractus, S.A. v. ZTE Corp.*, 2019 WL 2103698, at *3 (N.D. Tex.

May 14, 2019) (ordering Defendants to produce financials where "Defendants fail[ed] to provide any actual evidence of what that burden may actually be"). Defendants have not claimed that such information is stored in a system different from the one used to store product-specific quarterly unit counts and revenue information—information that Defendants already will be collecting and providing. Plaintiff's expectation thus is that it would not require much, if any, additional work to produce the requested per-product profit and cost information, including the costs of each good sold.

2. Defendants Should Be Ordered to Identify Relevant Third Parties By February 3, 2020

The parties' dispute as to this issue also is narrow: the parties have agreed that each Defendant will identify any third party it reasonably believes possesses relevant information that the Defendant does not possess regarding the accused "over-the-air" update functionality identified in Plaintiff's infringement contentions, including any third party that performs any step necessary to download or install the accused over-the-air updates or that possesses source code related to such download or installation. Plaintiff has asked Defendants to provide this information by February 3, 2020. Defendants have countered that they will provide it by the first week of March.

The Court should order Defendants to provide this information by February 3, 2020. As discussed at the December 6 hearing, obtaining discovery from third parties typically is a lengthy process—particularly if source code is involved—and Plaintiff wants to ensure that it begins that process as early as possible to ensure that there is no need to extend the Court's desired trial schedule. Further, Defendants have offered no reason why they cannot provide such basic information—which Plaintiff began requesting in November—by February 3. Nor can they. To the extent Defendants do not have this information readily available Defendants will have had more than two full months to investigate and obtain it by the February 3 deadline.

3. Defendants Should Be Ordered to Produce Summary Information Regarding the Identity and Timing of the Accused Updates.

The parties' final dispute concerns Plaintiff's request that Defendants provide by March 6, 2020, information related to the accused "over the air" update functionality, including the identity and date of each update released from June 21, 2013, through October 1, 2018, and the number of times each update was downloaded.

As Plaintiff explained at the hearing, such information is relevant to the infringement of the method claims Plaintiff has asserted against each Defendant. As a result, the requested information should be produced by Defendants' February 3, 2020 deadline to produce "technical documents, including software where applicable, sufficient to show the operation of the accused product(s)." As courtesy, however, Plaintiff has agreed to allow Defendants until March 6 to produce this information.

Other than asserting that producing this information "would be significantly more burdensome," Defendants have provided no information as to why they should not be required to produce this information by March 6. That is not enough to avoid production. *See* Order Governing Proceedings – Patent Case, ¶ 5; *see also Fractus*, 2019 WL 2103698, at *3. Plaintiff thus asks the Court to order Defendant to produce the requested information by March 6.

II. Defendants' Positions

1. Defendants Should Not Be Required to Produce Sales Information Beyond Quarterly Revenues and Units Sold.

The Court's "Order Governing Proceedings – Patent Case" sets forth, as a default, that Defendants shall produce "summary, annual sales information for the accused product(s) for the prior two years, unless the parties agree to some other timeframe." (D.I. 22 at 5). During the case management conference, Plaintiff requested additional years of sales data, extending back more than 6 years from the filing of the complaint to October 1, 2012. In the interest of compromise,

Defendants agreed to provide quarterly sales information, including per-product revenue and units sold, for the period of October 1, 2012 to October 1, 2018—significantly more information than what the default schedule requires. After the case management conference, Plaintiff now demands additional per-product profit and cost information, despite the fact that quarterly revenue and unit information is sufficient to value the case. Plaintiff has not articulated a reasonable basis for requesting such highly sensitive information at this time.

Plaintiff essentially seeks to open fact discovery in February, despite the fact that the Court has made a conscious decision to postpone discovery until after the Markman hearing in May. The only basis that Plaintiff has provided for deviating from the Court's default scheduling order is that such information may be relevant to calculating a reasonable royalty. But such information goes well beyond what is necessary for Plaintiff to assess the scope of the matters at this point. As the cases Plaintiff cites make clear, the additional information that Plaintiff is requesting is more relevant to the experts' ultimate conclusions regarding damages, which will be addressed in fact and expert discovery. *See Chembio Diagnostic Sys., Inc.*, 236 F.R.D. at 138–39; *Phase Four Indus., Inc.*, 2006 WL 1465313, at *7. Defendants have not refused to produce profit and cost information outright, but rather do not believe it is appropriate or necessary to provide such information in conjunction with their invalidity contentions.

For the above reasons, Defendants request that the Court deny Plaintiff's request.

2. The Identification of Third-Parties By March 6, 2020 Would Provide Ample Opportunity for Third-Party Discovery.

Plaintiff requested that Defendants provide an early identification of third-parties involved in the accused over-the-air update processes, so as to ensure ample time for discovery. According to the agreed terms of the Scheduling Order, fact discovery is set to begin on June 5, 2020. In an attempt to accommodate Plaintiff's request, Defendants have agreed to identify any third-parties

DOCKET ALARM

Explore Litigation Insights

Docket Alarm provides insights to develop a more informed litigation strategy and the peace of mind of knowing you're on top of things.

Real-Time Litigation Alerts

Keep your litigation team up-to-date with **real-time alerts** and advanced team management tools built for the enterprise, all while greatly reducing PACER spend.

Our comprehensive service means we can handle Federal, State, and Administrative courts across the country.

Advanced Docket Research

With over 230 million records, Docket Alarm's cloud-native docket research platform finds what other services can't. Coverage includes Federal, State, plus PTAB, TTAB, ITC and NLRB decisions, all in one place.

Identify arguments that have been successful in the past with full text, pinpoint searching. Link to case law cited within any court document via Fastcase.

Analytics At Your Fingertips

Learn what happened the last time a particular judge, opposing counsel or company faced cases similar to yours.

Advanced out-of-the-box PTAB and TTAB analytics are always at your fingertips.

API

Docket Alarm offers a powerful API (application programming interface) to developers that want to integrate case filings into their apps.

LAW FIRMS
Build custom dashboards for your attorneys and clients with live data direct from the court.

Automate many repetitive legal tasks like conflict checks, document management, and marketing.

FINANCIAL INSTITUTIONS
Litigation and bankruptcy checks for companies and debtors.

E-DISCOVERY AND LEGAL VENDORS
Sync your system to PACER to automate legal marketing.