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**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TEXARKANA DIVISION**

PANTECH CORPORATION and PANTECH
WIRELESS, LLC,

Plaintiffs,

v.

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

Defendants.

Case No. 5:22-cv-00113-RWS

JURY TRIAL DEMANDED



**PLAINTIFFS' RESPONSE TO DEFENDANTS' RULE 72 OBJECTIONS
TO THE ORDER DENYING DEFENDANTS' MOTION FOR
DISQUALIFICATION**

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I. Introduction

In an attempt to show that the Magistrate Judge’s Order Denying Defendants’ Motion to Disqualify Mayer Brown LLP (“Order”) was erroneous, LGE strings together numerous arguments, clearly hoping something will resonate. In doing so, however, LGE attempts to rewrite the Order to fit its narrative, mischaracterizing or simply ignoring the Order’s findings and analysis:

- LGE argues that the Order rewrites the terms of the waiver to cover all matters “substantially unrelated to the [claimed] technology involved” rather than only those matters “substantially unrelated to the technology involved” as stated in the agreement. Yet, the Order analyzes the waiver beyond even the “technology”: “Even if the Court were to ignore the specific waiver’s language and broaden its analysis beyond the ‘technology involved’...to consider *any* technology disclosed in the documents exchanged during that representation, LGE still fails to show a substantial relationship.” Order at 40 (emphasis added).
- LGE argues that the Order fails to consider the overlap in products and source code/confidential information between the instant action and prior representations. Wrong. The Order considers each and finds LGE’s evidence inadequate: “Simply showing product overlap is not sufficient to show both cases involve substantially related technology. Nor is it sufficient to allege that some aspects of the confidential information...relate to the patents asserted by Pantech.” Order at 42 (emphasis added).
- LGE argues that the Order “disregard[s]” “portions of the cellular standards” when finding that the technologies were not substantially related. Untrue. The Order

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considers LGE’s argument and finds that “[r]eliance on cellular standards to satisfy the substantial relationship test requires more than showing both matters involve the same standard technical specifications.” Order at 43 (emphasis added).

- LGE claims that the Order improperly shifts the burden to them to show that the prior matters are not substantially related, when the burden should be on Mayer Brown LLP to show that the waiver applies. Wrong again: “Nowhere in its briefing does LGE argue the specific waiver is ineffective for lack of informed consent. Even if it had, the Court would find Pantech has met its burden of showing LGE gave informed consent for Mayer Brown to represent other clients in future matters adverse to LGE....” Order at 26 (emphasis added).
- LGE argues that the Order is internally inconsistent in how it treats three cases: *MTT*, *Core*, and *CCE*. LGE argues that the Order correctly finds that *MTT* and *Core* are substantially related to the present case (a finding Pantech disputes), but incorrectly finds that *CCE* is not, despite the fact that Mayer Brown gained access to LGE’s confidential information in *CCE*. Yet, the Order specifically considers this evidence and rejects it: “LGE’s argument focuses on the fact that Mayer Brown received confidential information in CCE, including product documentation and source code, concerning products that are also accused in the Pantech matter. LGE’s argument fails for the same reasons outlined above with respect to *Jenam*: Simply showing product overlap is not sufficient to show both cases involve substantially related technology.” Order at 42 (emphasis added, record cites omitted).
- LGE also argues that the Order errs in finding that disqualification is not necessary

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in the case of *Core*, despite the finding that it is substantially related to the present case. But the Order does not find that *Core* is substantially related for the purpose of its disqualification analysis. To be sure, the Order finds that “LGE fail[ed] to ‘delineate with specificity the subject matters’ that are ‘common to prior and current representations’ as required to warrant disqualification based on the matters’ substantial relationship.” Order at 55 (emphasis added).

- Finally, LGE argues that the Order errs in relying on the societal interest factors to override disqualification. This argument, however, ignores controlling precedent holding that “whereas the relevant local and national ethical canons provide a useful guide for adjudicating motions to disqualify, they are not controlling. ... Such inflexible application of a professional rule is inappropriate because frequently it would abrogate important societal rights[.]” *F.D.I.C. v. U.S. Fire Ins. Co.*, 50 F.3d 1304, 1314 (5th Cir. 1995)(emphasis added).

Ultimately, LGE has not shown that the Order is clearly erroneous or contrary to law. *See* Fed. R. Civ. P. 72(a). LGE failed to demonstrate that disqualification is warranted. And while Pantech disputes that LGE met its burden to show that *MTT* and *Core* have a substantial technical relationship to the instant matter, the Order is otherwise well reasoned, correctly applies the rules and precedent, and rightfully finds that Mayer Brown should not be disqualified.

II. Argument

A. The Order Does Not Expand the Scope of the Waiver

In arguing that the Order erroneously expands the scope of the waiver, LGE asserts that the term “technology” should be interpreted in light of ethical rules, with “[t]he focus on [LGE’s] confidential information.” Objs. at 1. LGE’s argument, however, conflates the applicability of LGE’s consent to adverse representations with the separate question of disqualification. While

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there is no dispute that the specific waiver adopted the substantial relationship test, as applied to the “technology” in the matters, this analysis is simply the first step, which the Order acknowledges. Here, the Order applies the waiver that the parties negotiated: in exchange for Mayer Brown’s expertise and representation, LGE consented to future adverse representations where the technology is substantially unrelated to the prior matters described in the *Jenam* Engagement. Conversely, LGE reserved the right to seek disqualification in future matters with a “substantial” technical nexus. In the latter instance, LGE would of course still bear the burden to prove a basis for disqualification, *i.e.* a substantial relationship between the prior and current matters.

The Court analyzed the technology at issue and faithfully applied the parties’ agreement to determine that LGE waived its ability to request disqualification based on Mayer Brown’s prior representations in *Jenam*, [REDACTED] and *CCE*. While Pantech disputes the finding that the technologies in *Core* and *MTT* substantially relate to those at issue here (*see* Pantech’s Objections, Dkt. No. 103), the Order appropriately first determined the scope and applicability of the waiver, and then considered whether LGE met its burden to prove that disqualification was justified. The Court did not erroneously expand the scope of LGE’s consent.

In addition, the Order’s analysis of the waiver is not limited to “claimed” technology. Contrary to LGE’s arguments, the Order correctly adopts the “substantial relationship” test, which LGE does not dispute—properly putting the burden on LGE to establish a substantial relationship¹—and applies the test consistent with relevant precedent. In doing so, the Order

¹ Citing cases that stand for the proposition that it is Pantech’s burden to show informed consent (an issue LGE did not contest), LGE implies that it was Pantech’s additional burden to show a substantial relationship. Obj. at 3. This is a blatant mischaracterization of the law, which unquestionably places the burden on the moving party to establish a substantial relationship. *See, e.g., Soverain Software LLC v. CDW Corp.*, 2010 WL 1038731, at *1 (E.D. Tex. Mar. 18, 2010);

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considers the documents, source code, and cited standards relied on by LGE but concludes that this evidence does not show a substantial relationship. *See* Order at 40-41 (finding “confidential” documents submitted by LGE failed “to show the requisite level of relatedness”); *see also* Order at 43 (“Reliance on cellular standards to satisfy the substantial relationship test requires more than showing both matters involve the same standard technical specifications.”); Order at 50 (noting that LGE failed to show a substantial relationship by simply pointing to “an overlap of products and cellular standards.”) To the extent that LGE’s evidence demonstrated that the matters may involve the same generic subject matter or area of law, that was simply not enough. *See Secure Axxess, LLC v. Dell Inc.*, 2012 WL 12919543, at *3 (E.D. Tex. Feb. 23, 2012); *see also Biac Corp. v. Fujitsu Computer Sys. Corp.* 2007 WL 1466638, *2 (E.D. Tex. May 16, 2007). The Order clearly considers *all* of LGE’s evidence and finds it fails to show a substantial technical relationship for *Jenam*, [REDACTED] and *CCE*.

B. Finding that the Technology in *Core* is Substantially Related Does Not Necessarily Require Disqualification

LGE maintains that the Order errs in not disqualifying despite finding that the technology at issue in *Core* is substantially related to the technology at issue in this case. In making this argument, however, LGE ignores that the Order did not find that *Core* was substantially related for the purpose of its disqualification analysis. Separately applying the substantial relationship test for its disqualification analysis, the Order finds no substantial relationship between *Core* and the present case. Specifically, the Order finds “LGE fail[ed] to ‘delineate with specificity the subject

see also Galderma Labs, L.P. v. Actavis Mid Atlantic, LLC, 927 F.Supp. 390, 398 (N.D. Tex. 2013) (“on a motion to disqualify, the movant bears the ultimate burden of proof.”). And while the analysis is first applied narrowly for assessing the applicability of the waiver, the findings, while alone not enough to establish disqualification, were considered for that analysis as well. In fact, LGE relies on these very findings (incorrectly) to attempt to establish a substantial relationship. Thus, shifting the burden to Pantech for any portion of the substantial relationship test is improper.

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matters’ that are ‘common to prior and current representations’ as required to warrant disqualification based on the matters’ substantial relationship.” Order at 55 (quoting *In re Am. Airlines, Inc.*, 972 F.2d 605, 614 (5th Cir. 1992)). The Order was consistent with its analysis for *MTT* as well. See Order at 56 (emphasis added) (“Although *MTT* is substantially related to the technology involved in at least one of the seven asserted patents in this case, the question remains whether Mayer Brown’s prior representation of LGE in *MTT* was “substantially related” to this much larger proceeding such that continued representation of Pantech would be a conflict of interest.”). This broader analysis for disqualification was warranted given the language in the waiver agreement limiting the substantial relationship test there to the “technology.”

To be sure, courts have identified more than just an analysis of the technology is required for determining if a substantial relationship exists. See *Power Mosfet Techs, L.L.C. v. Siemens AG*, 2002 WL 32785219, at *2 (E.D. Tex. 2002) (citing *Home Ins. Co. v. Marsh*, 790 S.W.2d 749 (Tex.App.—El Paso 1990, mandamus overruled) (“The Court must examine the issues that arose in the previous representation and the issues likely to arise in the current one.”). Factors considered include: “(1) the factual similarities between the current and former representations, (2) the similarities between the legal questions posed, and (3) the nature and extent of the attorney’s involvement with the former representation.” *Id.* (citing *Dieter v. Regents of Univ. of California*, 963 F.Supp. 908 (E.D. Cal. 1997)). Thus, after determining that the *Core* matter falls outside the specific waiver due to a nexus in the technologies, the Order properly considers all the relevant facts to assess the purported bases for disqualification. First, the Order finds that disqualification is unwarranted due to the limited scope of Mayer Brown’s involvement in *Core*.² Order at 54-55. Next, the Order explains that LGE failed to meet the required burden “to warrant disqualification

² The scope of Mayer Brown’s role is undisputed. And it is undisputed that LGE was represented in *Core* by another firm, Greenberg Traurig, LLP.

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based on the matters’ substantial relationship.” *Id.* at 55. The Order then finds that *Core* presents no threat that LGE’s confidential information will be misused in the present case, and that “LGE has not identified information related to that technology that flowed to or from Beaver, any pleading he worked on, any advice he gave, or any time he spent on the matter at all.” *Id.* at 55-56. Last, the Order correctly concludes that LGE cannot rely on an irrebuttable presumption that Beaver received confidential information when LGE has failed to show that Beaver gave advice in *Core* or that it substantially relates to the present matter. *Id.* at 55. The logic of this analysis is straightforward and neither erroneous nor contrary to law.

C. Societal Interest Factors Can and Should Override Disqualification

Lastly, LGE argues that the Order erred in considering the societal interest once *MTT* was found to be substantially related. This, however, is simply a misstatement of Fifth Circuit precedent. In particular, in *In re Dresser Indus., Inc.*, 972 F.2d 540, 543 (5th Cir. 1992), the Fifth Circuit held “standards such as ABA canons are useful guides but are not controlling in adjudicating such motions.” *Id.* at 543–44 (citing *Woods v. Covington Cnty. Bank*, 537 F.2d 804 (5th Cir. 1976)). Whether it be the Texas Rules or the Model Rules, the Fifth Circuit has stated “inflexible application of a professional rule is inappropriate because frequently it would abrogate important societal rights, such as the right of party to his counsel of choice and an attorney’s right to freely practice her profession.” *U.S. Fire*, 50 F.3d at 1314 (citing *Woods*, 537 F.2d at 813). For instance, societal rights considered and balanced in *Woods* were whether a conflict has (1) the appearance of impropriety in general or (2) a reasonable possibility that a specific impropriety has occurred, and (3) the likelihood of public suspicion from the impropriety outweighs any social interests which will be served by the lawyer’s continued participation in the case. *Dresser*, 972 F.2d at 543 (citing *Woods*, 537 F.2d at 812–13).

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This Court addressed a similar situation in *DataTreasury Corp. v. Wells Fargo & Co., et al.*, No. 2:06-cv-00072-DF (Dkt. No. 1814) (E.D. Tex., Dec. 30, 2009) (mandamus denied at *In re DataTreasury Corp.*, 2010 WL 3074395 (Fed. Cir. Aug. 5, 2010)). There, the Court found that a substantial relationship existed, invoking the presumption, but denied the motion to disqualify based on a “balancing of the likelihood of public suspicion against the interest in retaining counsel of one’s choice.” *Id.* at 18. The Federal Circuit denied mandamus, finding that “[t]he Fifth Circuit has on multiple occasions conducted a similar balancing analysis after reaching the conclusion that a substantial relationship test had been met.” *In re DataTreasury Corp.*, 2010 WL 3074395, *2 (citing *In re Corrugated Container Antitrust Litigation*, 659 F.2d 1341, 1348 (5th Cir. 1981) and *United States v. Kitchin*, 592 F.2d 900 (5th Cir.1979)). Thus, the Order’s consideration of societal interests was proper and should not be disturbed.

The Order finds that the limited amount of time attributable to the Mayer Brown attorneys (143 hours), “especially considering that LGE has only shown that one of the seven asserted patents is the case ... is substantially related,” “does not have the appearance of impropriety in general[.]” Order at 59. It also finds that the *MTT* matter was remote in time, concluding in March 2016, and that LGE identified only a very limited amount of confidential information that may be implicated. *Id.* Lastly, the Order notes that LGE’s “contractual consent to a waiver of future conflicts of interest for much more substantial matters, diminishes the possibility of public suspicion. *Id.* at 60. These facts are more than sufficient to sustain the Magistrate Judge’s Order.

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CERTIFICATE OF SERVICE

The undersigned certifies that all counsel of record who are deemed to have consented to electronic service are being served this 25th day of May, 2023, with a copy of this document via electronic mail pursuant to Local Rule CV-5(d).

/s/ James Fussell

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[REDACTED]