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IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

NETWORK PROTECTION SCIENCES,  
LLC,

Plaintiff,

v.

FORTINET, INC.,

Defendant.

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No. C 12-01106 WHA

**OMNIBUS ORDER DENYING  
SUMMARY JUDGMENT,  
DENYING MOTION TO STRIKE  
REPORT AND TESTIMONY OF  
DR. KEROMYTIS, AND  
GRANTING MOTION TO STRIKE  
REPORT AND TESTIMONY OF  
MR. JAROSZ**

**INTRODUCTION**

In this patent infringement action involving network firewalls, defendant moves for summary judgment and moves to strike the reports and testimony of plaintiff's infringement and damages experts. For the reasons stated below, the motion for summary judgment is **DENIED**. The motion to strike the expert report and exclude the testimony of plaintiff's infringement expert is **DENIED**. The motion to strike the expert report and exclude the testimony of plaintiff's damages expert is **GRANTED**.

**STATEMENT**

**1. THE PARTIES.**

Fortinet was founded in 2000 and is headquartered in Sunnyvale. It manufactures and sells network security products. Fortinet employs over 2000 people, is publicly traded, and serves enterprises and government entities worldwide.

1 Plaintiff Network Protection Sciences (NPS) is one of 22 companies set up by Innovation  
2 Management Sciences, LLC. NPS appears to have virtually no assets apart from asserting the  
3 patent at issue in this action: U.S. Patent No. 5,623,601.

4 **2. THE '601 PATENT.**

5 The '601 Patent, entitled "Apparatus and Method for Providing a Secure Gateway for  
6 Communication and Data Exchanges Between Networks," was filed on November 21, 1994, and  
7 issued on April 22, 1997. NPS is the most recent of a long string of owners. In 2011, Fortinet  
8 filed a request for reexamination, and in May 2012 the USPTO issued a reexamination certificate  
9 for the patent confirming all claims (1–41) and adding new claims (42–59). The technology at  
10 issue in this action relates to firewall technology intended to improve network security and user  
11 convenience. NPS currently alleges infringement of claims 19, 29, and 57. Claims 19 and 29  
12 are independent claims. Claim 57 is dependent on claim 19.

13 **3. THE ACCUSED PRODUCTS.**

14 NPS accuses over 70 Fortinet applications and products of infringing five asserted claims  
15 in the '601 patent. NPS's infringement contentions are primarily crafted around a computer  
16 software product called FortiOS 4.0 MR2. The infringement contentions, however, purport to  
17 cover both software and hardware devices manufactured by Fortinet.

18 FortiOS 4.0 MR2 is a software operating system. In all instances except one, FortiOS 4.0  
19 MR2 (and other accused versions of the FortiOS operating system) is installed onto a hardware  
20 device such as a FortiGate device. The exception is FortiGate Virtual Appliances, which offers  
21 "virtualized" security services (*i.e.*, where the hardware portion is emulated by software). In all  
22 instances, the accused products contain both allegedly patented components and non-accused  
23 components.

24 Fortinet launched the first version of the FortiOS in 2002, and has released major and  
25 minor updates on a regular basis since then. The damages calculation period in this action runs  
26 from 2004 to 2012.



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**B. CLAIMS 10 AND 43.**

Following the close of briefing on the instant motion, NPS abandoned its assertion of claims 10 and 43 in this action. This will constitute *res judicata* as to these claims.

**C. CLAIMS 19 AND 57.**

Fortinet moves for summary judgment of non-infringement on claims 19 and 57 on the ground that the accused products do not practice a limitation. Specifically, both claims contain the following limitation: “a kernel of the operating system having been modified so that the operating system . . . cannot forward any communications packet.” The parties disagree over the correct construction of the term “modified.” The term was not raised by the parties or construed during the claim construction phase of this action.

Although the parties are entitled to a construction of all disputed and litigated claim terms before the jury is instructed, this order declines to construe the term at this time. After evidence is heard at trial, the judge will be in the best position to construe this term. Summary judgment on this issue is **DENIED**.

**D. INFRINGEMENT THEORIES FOR THE ACCUSED PRODUCTS.**

Fortinet contends that NPS has failed to advance infringement theories for any products other than FortiOS 4.0 MR2 (*i.e.*, products or services sold in combination with FortiOS 4.0 MR2). Thus, Fortinet argues that summary judgment should be granted as to all of Fortinet’s other products. This order disagrees.

NPS’s complaint, infringement contentions, and expert reports all focus on the FortiOS 4.0 MR2 product. Fortinet’s other accused products and services orbit around these core allegations and evidence. The issues, therefore, are (1) whether NPS’s infringement contentions comply with the notice requirements in our patent local rules and (2) whether the allegations and evidence in the record are sufficient to allow the case to proceed to trial on *all* of the accused products.

It is notable that Fortinet itself has resorted to collective disclosures on invalidity and specifically regarding the so-called “Janus” refernce (Dkt. No. 191-3). Fortinet is trying to have

1 it both ways. Fortinet will not be allowed to insist on a higher standard of disclosure than the  
2 standard it has used itself.

3         Apart from that, NPS contends that it was not obligated to provide 70+ separate claim  
4 charts. Instead, it listed all of the accused products individually and used the FortiOS 4.0 MR2  
5 product as a representative example. NPS says this satisfies the notice requirements under the  
6 local patent rules. In support, NPS cites several decisions from this district where representative  
7 infringement contentions were permitted. *See, e.g., Infineon Techs AG v. Volterra*  
8 *Semiconductor*, No. 11-6239, 2013 U.S. Dist. LEXIS 109165, at \*15–18 (N.D. Cal. July 8, 2013)  
9 (Magistrate Judge Donna Ryu) (approving representative infringement contentions supported by  
10 analysis and collecting cases). This order agrees that, when supported by adequate analysis  
11 showing that the accused products share the same critical characteristics, representative  
12 infringement contentions may suffice.

13         Fortinet cites *L & W, Inc. v. Shertech, Inc.*, 471 F.3d 1311 (Fed. Cir. 2006), for the  
14 proposition that a single product cannot be used as a stand-in for other products. Fortinet  
15 misstates the holding of this decision. In *L & W*, the Federal Circuit concluded that an  
16 infringement expert could not assume “without support” that one accused product was “typical”  
17 of all the accused products. 471 F.3d at 1317–18. NPS’s typicality showing was sufficient  
18 under our local rules subject to proof at trial.

19         The next issue is whether, apart from the local rule disclosure, NPS has advanced  
20 sufficient evidence to go to the jury to prove up typicality. NPS relies on a passing reference to  
21 proxy processes in the deposition transcript of Fortinet’s Rule 30(b)(6) witnesses, and five  
22 paragraphs from Dr. Keromytis’ infringement report. The report first states that “all versions of  
23 the code literally infringe all of the elements of the asserted claims.” The next three paragraphs  
24 lump all of the accused products into three different time periods and discuss the technical  
25 features used in each time period. The fifth paragraph provides excerpts from four Fortinet  
26 engineering documents that allegedly establish that all the accused products all practice the  
27 patented technology (Keromytis Rpt. ¶¶ 81–85).

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1 This evidence and analysis by Dr. Keromytis does not analyze typicality for accused  
2 products other than FortiOS 4.0 MR2 on a element-by-element or product-by-product basis.  
3 Yet, Fortinet does not contend that NPS has failed to argue infringement on an element-by-  
4 element basis for the representative FortiOS 4.0 MR2 product. Although somewhat lacking in  
5 detail, Dr. Keromytis' report evinces an effort to analyze the relevant features of all the accused  
6 products. On its face, it does not show that Dr. Keromytis used a flawed methodology or made a  
7 set of impermissible assumptions.

8 Fortinet objects that "NPS cannot credibly assert that all FortiOS versions operate in the  
9 same manner" in light of admissions that FortiOS has also changed over time. Fortinet's logic  
10 on this point is flawed. It does not necessarily follow from these admissions that the FortiOS  
11 products changed in a manner relevant to the patent claims at issue. At the hearing, the Court  
12 asked Fortinet counsel to give an example of an earlier version of FortiOS that operated  
13 differently from FortiOS 4.0 MR2 insofar as the claim limitations were concerned. Fortinet  
14 counsel skillfully changed the subject and never answered the question.

15 Fortinet also objects that Dr. Keromytis' report does not identify which source code he  
16 reviewed in forming his expert opinions. The report *implies* that Dr. Keromytis reviewed all of  
17 the relevant source code, but does not specifically so state. The report also states that Dr.  
18 Keromytis relied on an assistant to review at least some of the source code. Whether Dr.  
19 Keromytis' implicit assertion and alleged comprehension of the source code are believable is a  
20 matter for the jury. Moreover, Dr. Keromytis relied on both source code and technical  
21 documentation in support of his opinion that the accused products are the same in all material  
22 respects. Exhaustive citation of source code is not necessary when equivalent information is  
23 available from other sources.

24 While the items advanced by NPS seem general and conclusory, it is exceedingly  
25 difficult in the haze and maze of this technology to say, as a matter of law, that NPS has not  
26 supplied enough evidence to persuade a jury that all of the operating versions worked like  
27 FortiOS 4.0 MR2 insofar as claim limitations are concerned. Accordingly, Fortinet's motion for  
28 summary judgment on this issue is **DENIED**. Be aware that at trial the evidence may come in (or

1 not come in) in a different way with a different record, particularly with the benefit of cross-  
2 examination, such that Fortinet may then prevail on a Rule 50 motion, notwithstanding its loss  
3 on this Rule 56 motion.

4 **2. FORTINET’S MOTION TO STRIKE AND EXCLUDE THE EXPERT TESTIMONY OF**  
5 **DR. KEROMYTIS.**

6 Fortinet raises numerous objections to the testimony and expert report of NPS’s  
7 infringement expert Dr. Keromytis. Fortinet requests that his report be stricken and that he be  
8 precluded from testifying. The motion is **DENIED**.

9 Fortinet’s motion for summary judgment (discussed above) regarding NPS’s failure to  
10 address versions of the FortiOS software other than FortiOS 4.0 MR2 raises two key issues: (1)  
11 whether NPS complied with its discovery disclosure obligations under the patent local rules, and  
12 (2) whether NPS has carried its burden to adduce sufficient evidence of infringement, via the  
13 expert report of Dr. Keromytis and otherwise, for this action to proceed to trial on all of the  
14 accused products. Fortinet’s motion to strike, in contrast, addresses the admissibility of Dr.  
15 Keromytis’ expert opinions given the same failure to address specific versions of FortiOS other  
16 than FortiOS 4.0 MR2. Fortinet’s numerous objections to Dr. Keromytis’ report and testimony  
17 will now be analyzed in turn.

18 *First*, in parallel with its summary judgment motion Fortinet objects that Dr. Keromytis’  
19 report did not indicate which version(s) of the FortiOS source code it was based on. On this  
20 basis, Fortinet contends that the report should be stricken as methodologically flawed. This  
21 order disagrees. Standing alone, Dr. Keromytis’ failure to cite particular versions of the FortiOS  
22 source code does not prove that Dr. Keromytis’ methodology was flawed. Fortinet’s argument  
23 presupposes that the source code for the accused products differs in ways that are relevant to the  
24 asserted claims. NPS and Dr. Keromytis, however, contend that the source code is functionally  
25 identical for all the accused products. If this is true, citing particular versions of the code would  
26 be unnecessary and redundant. The veracity of Dr. Keromytis’ position shall be resolved at trial.

27 Fortinet’s repeated citation to *L & W, Inc. v. Shertech, Inc.*, 471 F.3d 1311 (Fed. Cir.  
28 2006), is again misplaced. Fortinet contends that “Dr. Keromytis has simply assumed, without  
basis, that all versions of the accused products operate in the same manner as version 4.0 MR2”

1 (Dkt. No. 249 at 17). Unlike *L & W*, however, there is no *admission* in the present record that  
2 Dr. Keromytis relied on any such assumptions. *See L & W*, 471 F.3d at 1316–18 (expert  
3 reviewed “approximately all” of the accused products and provided conclusory analysis). To the  
4 contrary, NPS maintains that “Dr. Keromytis inspected all versions of the source code [Fortinet]  
5 produced.”

6 *Second*, Fortinet similarly contends that Dr. Keromytis’ testimony should be limited to  
7 FortiOS MR2 because his report and accompanying claim charts were based on that product.  
8 Again, Fortinet presumes (without showing) that the accused products differed in material  
9 respects, which is a disputed issue of fact. It would be premature to limit or strike Dr.  
10 Keromytis’ testimony before this question is resolved. Fortinet’s contention that NPS has shifted  
11 the burden on infringement on this issue is also incorrect. NPS still carries the burden at trial to  
12 prove that all of the accused products are functionally identical in all material respects.

13 *Third*, Fortinet argues the merits of whether the accused products have changed  
14 materially over time, as well as the merits of how various deposition testimony relied on by NPS  
15 should be interpreted. These merits questions shall be resolved at trial. They are not appropriate  
16 to resolve on a motion to strike.

17 *Fourth*, Fortinet objects that source code for the accused products was also reviewed by  
18 an assistant to Dr. Keromytis. Dr. Keromytis admitted this fact in his report, and further stated  
19 that he relied on information provided by the assistant (Keromytis Rpt. ¶ 15). Fortinet provides  
20 no authority that this methodology is improper as a matter of law and this order will not so hold.  
21 If, as NPS contends, it is proven that all of the accused products function identically with respect  
22 to the asserted patent claims, it might not be necessary for one individual to inspect 73 products’  
23 worth of source code. On the other hand, factors that are not apparent in the current record could  
24 render Dr. Keromytis’ use of an assistant problematic. These issues are proper topics for cross-  
25 examination.

26 *Fifth*, Fortinet objects that Dr. Keromytis never personally operated any of the accused  
27 products in an infringing manner. Again, Fortinet provides no authority that this fact renders Dr.  
28 Keromytis’ analysis flawed as a matter of law. It is undisputed that Dr. Keromytis reviewed at



1 least some source code for the accused products, technical documentation, and the deposition  
2 transcripts of Fortinet’s Rule 30(b)(6) witness. And, on the present record, it cannot be  
3 determined whether Dr. Keromytis’ review overlooked any particular accused product(s).

4 *Sixth*, Fortinet objects that Dr. Keromytis was unable to recall at his deposition which  
5 specific version numbers of the FortiOS source code he reviewed. He also could not recall the  
6 FortiOS file names. The extent to which Dr. Keromytis’ memory failures at his *deposition*  
7 affect his credibility as an expert is an issue for the jury to consider. It does not necessarily mean  
8 that the analysis in his *report* was flawed.

9 Finally, Fortinet’s motion takes issue with Dr. Keromytis’ discussion of EO Johnson and  
10 Qdoba customer configuration files. This order notes that NPS has withdrawn its indirect  
11 infringement claims and further stated that it does not intend to rely on the EO Johnson and  
12 Qdoba evidence for that purpose. If Dr. Keromytis testifies regarding the EO Johnson and  
13 Qdoba files at trial for some other purpose, the admissibility of the evidence may be raised at  
14 that time.

15 For the foregoing reasons, Fortinet’s motion to strike and exclude the testimony of Dr.  
16 Keromytis is **DENIED**.

17 **3. FORTINET’S MOTION TO STRIKE THE EXPERT REPORT AND TESTIMONY OF**  
18 **EXPERT JOHN JAROSZ.**

19 Fortinet objects to the report and testimony of NPS’s damages expert John Jarosz on  
20 multiple grounds. It is only necessary to address one of them here. Fortinet contends that Mr.  
21 Jarosz’s damages analysis improperly based royalties on the entire market value of the accused  
22 products. This order agrees. Because this flaw is integral to Mr. Jarosz’s analysis, the report and  
23 Mr. Jarosz’s opinion must be excluded in their entirety.

24 “When a patentee seeks damages on unpatented components sold with a patented  
25 apparatus, courts have applied a formulation known as the ‘entire market value rule’ to  
26 determine whether such components should be included in the damage computation, whether for  
27 reasonable royalty or for lost profits purposes.” *Rite-Hite Corp. v. Kelley Co., Inc.*, 56 F.3d  
28 1538, 1549 (Fed. Cir. 1995).

1 The entire market value rule — which has varied somewhat in formulation over time —  
2 has been a highly-criticized and highly-litigated methodology. In recent years, the Federal  
3 Circuit has restricted its use, most notably in *LaserDynamics v. Quanta Computer, Inc.*, 694 F.3d  
4 51, 67 (Fed. Cir. 2012). In that action, the Federal Circuit explained it as follows (per Judge  
5 Jimmie Reyna):

6 Where small elements of multi-component products are  
7 accused of infringement, calculating a royalty on the entire product  
8 carries a considerable risk that the patentee will be improperly  
9 compensated for non-infringing components of that product. Thus,  
10 it is *generally required* that royalties be based *not* on the entire  
11 product, *but instead on the smallest salable patent-practicing unit.*

12 The entire market value rule is a *narrow exception* to this  
13 general rule. If it can be shown that the patented feature drives the  
14 demand for an entire multi-component product, a patentee may be  
15 awarded damages as a percentage of revenues or profits  
16 attributable to the entire product. The entire market value rule is  
17 derived from Supreme Court precedent requiring that “the patentee  
18 . . . must in every case give evidence tending to separate or  
19 apportion the defendant’s profits and the patentee’s damages  
20 between the patented feature and the unpatented features, and such  
21 evidence must be reliable and tangible, and not conjectural or  
22 speculative.” The Court explained that “the entire value of the  
23 whole machine, as a marketable article, [must be] properly and  
24 legally attributable to the patented feature.”

25 694 F.3d at 67 (emphasis added, citations and quotation marks omitted). Notwithstanding the  
26 high bar set on the use of the entire market value of an accused, multi-component product, Mr.  
27 Jarosz’s damages report used this very method in his calculation of a reasonable royalty for the  
28 alleged infringement of the ’601 patent.

Mr. Jarosz did not admit that he used the entire market value rule in his report. Instead,  
based on sales data and deposition testimony, Mr. Jarosz first determined that the FortiOS  
software was not sold separately from its hardware (or virtual machine) ‘chassis.’ The “smallest  
salable units,” therefore, were the accused Fortinet products (though they contain substantial  
non-accused components). Mr. Jarosz then stated: “Accordingly, when evaluating the  
quantitative evidence discussed below, I have used as the royalty base the price of the accused  
Fortinet hardware product or virtual machine that utilizes the FortiOS operating system” (Jarosz  
Rpt. at 35–36). His analysis was therefore based on the entire market value of the overall unit.

1 Mr. Jarosz then looked at different measures of the contribution the accused features  
2 made to the whole accused products. For example, Mr. Jarosz attempted to quantify the  
3 percentage of users who relied on the accused features and arrived at a rough estimate of fifty  
4 percent. He attempted to calculate the effects on Fortinet’s revenue if the accused features were  
5 disabled in its products between 2004 and 2012. He also considered the *Georgia Pacific* factor  
6 concerning the “profit credited to the invention as distinguished from non-patentable elements”  
7 and concluded that the non-accused features exerted “substantial . . . downward pressure” on the  
8 royalty calculation. He ended up with a running royalty rate of four percent of sales of the  
9 accused products (*id.* at 62–64, 75–77).

10 This order agrees with Fortinet that NPS has failed to provide sufficient evidence that the  
11 patented features drive demand for any Fortinet product, much less for all 70+ products.  
12 Therefore, use of the entire market value rule will not be allowed.

13 NPS replies that Mr. Jarosz “correctly performed the apportionment analysis required by  
14 the Federal Circuit by first ascertaining the smallest salable patent-practicing unit, and then  
15 analyzing the proportion of product value derived from the allegedly infringing technology”  
16 (Dkt. No. 261 at 5). Analytically, this statement is incomplete. When using a multi-component  
17 product as a royalty base, even if it is the smallest salable unit, a patentee must *still show* that the  
18 patented feature drives demand for the entire product.

19 *LaserDynamics* is controlling. There, the patented technology permitted an optical disk  
20 drive (ODD) to automatically distinguish between the type of disk inserted in the drive — for  
21 example, whether the disk was CD or a DVD. Since Quanta did not sell ODDs, the plaintiff  
22 LaserDynamics argued that the smallest salable units were defendant’s laptop computers. The  
23 district court granted a new trial on the ground that the LaserDynamics’ damages expert  
24 improperly relied on the entire market value of the accused product. On appeal, LaserDynamics  
25 argued that, given the lack of reliable information about the price of the ODD component,  
26 practical necessity compelled using the laptop as a royalty base. The Federal Circuit disagreed,  
27 stating:

28 LaserDynamics’ necessity argument also fails to address the  
fundamental concern of the entire market value rule, since

1 permitting LaserDynamics to use a laptop computer royalty base  
2 does not ensure that the royalty rate applied thereto does not  
3 overreach and encompass components not covered by the patent.  
4 That is, if difficulty in precisely identifying the value of the ODDs  
5 is what justifies using complete laptop computers as the royalty  
6 base, when it comes time to then apportion a royalty rate that  
7 accounts for the ODD contribution only, *the exceedingly difficult*  
8 *and error-prone task* of discerning the ODD’s value relative to all  
9 other components in the laptop remains.

10 *LaserDynamics*, 694 F.3d at 56, 60 (emphasis added).

11 Substantial risk of calculation error and impermissible speculation are not the only  
12 concerns addressed by the entire market value rule. The rule also prevents the creation of unfair  
13 jury prejudice:

14 Regardless of the chosen royalty rate, one way in which the error  
15 of an improperly admitted entire market value rule theory  
16 manifests itself is in the disclosure of the revenues earned by the  
17 accused infringer associated with a complete product rather than  
18 the patented component only. In *Uniloc*, we observed that such  
19 disclosure to the jury of the overall product revenues “cannot help  
20 but skew the damages horizon for the jury, regardless of the  
21 contribution of the patented component to this revenue.” *Id.* at  
22 1320 (noting that “the \$19 billion cat was never put back into the  
23 bag,” and that neither cross-examination nor a curative jury  
24 instruction could have offset the resulting unfair prejudice).  
25 Admission of such overall revenues, which have no demonstrated  
26 correlation to the value of the patented feature alone, only serve to  
27 make a patentee’s proffered damages amount appear modest by  
28 comparison, and to artificially inflate the jury’s damages  
calculation beyond that which is “adequate to compensate for the  
infringement.” *Id.*; see 35 U.S.C. § 284.

19 *LaserDynamics*, 694 F.3d at 68, citing *Uniloc USA, Inc. v. Microsoft Corp.*, 632 F.3d 1292, 1320  
20 (Fed. Cir. 2011).

21 NPS’s reliance on *Lucent Technologies, Inc. v. Gateway, Inc.*, 580 F.3d 1301 (Fed. Cir.  
22 2009), is misplaced. NPS contends that *Lucent* stands for the proposition that using the entire  
23 market value of a multi-component product is permissible “as long as the proportion of the  
24 product represented by the infringing feature is taken into account” (Dkt. No. 261 at 5). Yet, in  
25 *LaserDynamics* the Federal Circuit used the *Lucent* fact pattern as an example of the high bar set  
26 by the entire market value rule:

27 [In *Lucent*], the patent at issue involved a helpful and convenient  
28 “date picker” feature that was being used within the grand scheme  
of Microsoft’s Outlook email software. We held that because the  
patented feature was “but a tiny feature of one part of a much

1 larger software program,” a royalty could not be properly  
2 calculated based on the value of the entire Outlook program  
3 because “there was no evidence that anybody anywhere at any  
time ever bought Outlook . . . *because* it had [the patented] date  
picker.”

4 *LaserDynamics*, 694 F.3d at 68–69 (emphasis in original).

5 Here, NPS contends that because the accused products are the smallest salable unit, Mr.  
6 Jarosz “permissibly used the market value for the entirety of each Fortinet product that infringes  
7 . . . taking into account the proportion of the product represented by the allegedly infringing  
8 technology.” Applying *LaserDynamics* to the summary judgment record, this order disagrees.

9 Mr. Jarosz concluded in his report that the “patent in suit either directly or indirectly  
10 drives demand for products running the FortiOS operating system.” “Indirectly” is not good  
11 enough. And, Mr. Jarosz also admitted that “product attributes enabled by the patented  
12 technology are not the only drivers of demand for the accused products.” Mr. Jarosz further  
13 admitted that the accused Fortinet products contain numerous, valuable unpatented features, and  
14 that not all customers use the accused products in an infringing manner — *i.e.*, for some users,  
15 the accused features are not even *significant* (Jarosz Rpt. at 24–25, 62, 75–76). Accepting these  
16 admissions as true, it cannot be the case that the accused features drive demand for the accused  
17 products within the meaning of *LaserDynamics*. *Put differently, NPS has not shown (and a jury*  
18 *could not reasonably find on this record) that the patented components drive demand for any*  
19 *accused products*. Using the accused products as a royalty base therefore raises the same specter  
20 of error and jury prejudice as in *LaserDynamics* and runs afoul of the entire market value rule.  
21 Under a straightforward application of *LaserDynamics*, Mr. Jarosz’s analysis cannot be  
22 presented to the jury.

23 This leaves the follow-on question of whether NPS should be permitted an opportunity to  
24 have a second bite at the apple. Over the course of many years and more than a dozen patent  
25 trials, the undersigned judge has concluded that giving a second bite simply encourages  
26 overreaching on the first bite (by both sides). A second bite may be appropriate where the expert  
27 report can be salvaged with minimal disruption to an orderly trial, but where the report is not  
28 even close, there is a positive need to deny a second bite in order to encourage candor in the first


1 place. To this must be added the fact that the trial date is only four days away and the parties  
2 and the Court have built their calendars around that date. To start over with a new royalty  
3 analysis would impose prejudice on the defense as well and disrupt the Court's calendar, which  
4 is burdened with other trials set far into the future. Possibly, plaintiff can cobble together a  
5 royalty case based on other disclosed witnesses and evidence. Possibly not. If not, it is a  
6 problem clearly of plaintiff's own overreaching and it will not be allowed a second bite at the  
7 apple.

8 **CONCLUSION**

9 Fortinet's motion for summary judgment is **DENIED**. Fortinet's motion to strike the  
10 expert report and exclude the testimony of Dr. Keromytis is **DENIED**. Fortinet's motion to strike  
11 the expert report and exclude the testimony of Mr. Jarosz is **GRANTED**. Fortinet's related  
12 requests for evidentiary hearings on the motions to strike are **DENIED**.

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14 **IT IS SO ORDERED.**

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16 Dated: September 26, 2013.

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19 WILLIAM ALSUP  
20 UNITED STATES DISTRICT JUDGE  
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