

United States District Court
For the Northern District of California

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**UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION**

GOLDEN BRIDGE TECHNOLOGY,)	Case No. 5:12-cv-04882-PSG
)	
Plaintiff,)	ORDER GRANTING DEFENDANT’S
v.)	MOTION TO EXCLUDE OPINIONS
)	AND TESTIMONY OF KARL J.
APPLE INC.,)	SCHULZE
)	
Defendants.)	(Re: Docket No. 299)

Karl Schulze is a damages expert. He has been designated as such in over four hundred matters, and has testified at trial or deposition over one hundred fifty times. In this case, Schulze has been tendered by Plaintiff Golden Bridge Technology Inc. for his opinion regarding the proper measure of damages adequate to compensate GBT for Defendant Apple Inc.'s infringement of claims 5, 6 or 7 of United States Patent No. 6,075,793.

Apple does not challenge Schulze's expertise, but rather, his methodology in calculating both the royalty base and the royalty rate that would have resulted from a hypothetical license negotiation between the parties in June 2010. Schulz opines that as compensation for Apple’s right to practice the ‘793 patent, a patent GBT deems essential to the “3GPP” or “WCDMA” standard, Apple and GBT would have agreed to a fair, reasonable and nondiscriminatory (“FRAND”) royalty

1 of between 0.05 and 0.07% of the sales price of each and every infringing iPhone 4, 4S and 5 and
2 iPad 2nd generation, without any cap or upper limit on total royalties owed.

3 Because the court agrees with Apple that Schulze’s methodology as to both base and rate
4 violate the standards of Fed. R. Evid. 702 and 703 and *Daubert v. Merrell Dow Pharms, Inc.*,¹ the
5 court GRANTS Apple’s motion. Schulze’s testimony must be excluded.

6 I. BACKGROUND

7 The ‘793 patent describes “a multichannel spread-spectrum system for communicating a
8 plurality of data-sequence signals from a plurality of data channels using parallel chip-sequence
9 signals in which few than all of the channels include header information.” The ‘793 patent was
10 filed on February 6, 1998 by Donald Schilling and Joseph Garodnick, issued on June 13, 2000 and
11 was assigned to GBT.

12 With the assumption that Apple infringed at least one asserted claim of the ‘793 patent, that
13 the ‘793 patent is essential to the 3GPP standard, and that each such claim is “not invalid,” Schulze
14 initially considered the appropriate means for measuring GBT’s damages.² Recognizing GBT does
15 not manufacture any products that compete with Apple’s accused products, Schulze dismissed the
16 idea of calculating any lost GBT profits.³ He then embraced a theory of reasonable royalties
17 calculated using the well-worn *Georgia-Pacific* factors.⁴

18 With respect to royalty base, Schulze determined “the hypothetical negotiation in this case
19 yields a reasonable royalty that would necessarily have involved a discussion of a rate to be paid
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24 ¹ 509 U.S. 579 (1993),

25 ² See Docket No. 300-6 at 94.

26 ³ See *id.* at 93.

27 ⁴ See *id.*

1 per handset (terminal) unit.”⁵ Schulze chose the handset as the base even though the accused High
2 Speed Uplink Packet Access (“HUSPA”) protocol of the Universal Mobile Telecommunications
3 System Release 6 is just one of many features of the baseband processor of the accused products.
4 Schulze noted that Apple in the business of selling handsets, not baseband processors and certainly
5 not implementations of HUSPA. Schulze did not further apportion the royalty base to account for
6 the non-patented features of the accused products.

7
8 Schulze then turned to calculating the royalty rate, which comprised the vast majority of his
9 analysis. Regarding *Georgia-Pacific* factor 1, he observed that going back to 1996 GBT has
10 extended multiple licenses to multiple parties, and where it has licensed the ‘793 patent, it did so
11 simultaneously with all its other standard-essential patents.⁶ A few of these portfolio licenses were
12 licensed outside the context of settling litigation; most were not.⁷

13 Regarding factor 2, Schulze found none of Apple’s patent license agreements “informative”
14 for his rate calculation.⁸ Apple’s licenses were dismissed either largely because they cover broad
15 portfolios, included cross-licenses, or did not relate to the WCDMA standard.⁹

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17 Regarding factor 3, Schulze opined that the license would be non-exclusive and within the
18 United States, with no restrictions on sub-territory or buyers of the final product.¹⁰

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⁵ *Id.* at 101.

23 ⁶ *See* Docket No. 300-6 at 100.

24 ⁷ *See id.* at 100-10.

25 ⁸ *Id.* at 110.

26 ⁹ *See id.* at 110-11.

27 ¹⁰ *See id.* at 112.

1 Schulze dismissed factors 4 and 5, because in December 1998 GBT committed to license
2 on FRAND terms.¹¹ This meant that GBT could not exercise its right to exclude, and was
3 contractually obligated to license the ‘793 patent on fair, reasonable and non-discriminatory basis.

4 Regarding factor 6, Schulze affirmed his royalty base as all sales of the infringing products,
5 but disclaimed any derivative or convoyed sales.¹²

6 Regarding factor 7, Schulze found “little influence” from the term of the patent because of
7 the significant time between the issuance of the patent in 2000 and its expiration on 2020.¹³

8 Regarding factor 8, Schulze focused on the “dramatic increase” of iPhone unit sales since
9 infringement began and Apple’s entire royalty burden on the entire iPhone product line.¹⁴ Schulze
10 opined that this burden “is far below the industry standard cumulative royalty rates.”¹⁵

11 Regarding factors 9, 10 and 11, Schulze relied on the technical report of Dr. Branimir
12 Vojcic and concluded that “the technology and techniques offered by the patent-in-suit were
13 greatly superior to technologies utilized prior to the implementation of the patented invention
14 through HSUPA in the 3GPP standard. The lack of viable alternatives, both technically and
15 commercially, illustrates the intrinsic value associated with the patent-in-suit.”¹⁶ He also
16 highlighted evidence that “Apple not only implemented HSUPA on its devices, but also marketed
17 the HSUPA feature as a selling point for its devices.”¹⁷

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¹¹ *See id.*

22 ¹² *See id.*

23 ¹³ *See id.* at 113.

24 ¹⁴ *Id.*

25 ¹⁵ *Id.*

26 ¹⁶ *Id.* at 114.

27 ¹⁷ *Id.* at 115.

1 The heart of Schulze’s rate analysis dealt with factor 12. Based on his study of the 1999
2 UMTS Intellectual Property Association proposed maximum global royalty rate, and various
3 academic studies regarding cumulative rates for standard-essential patents, Schulze opined that the
4 participants in the market for 3G technology would have settled on a certain cumulative royalty
5 rate for all 3G standard-essential patents.¹⁸ He then calculated a royalty for the ‘793 patent alone
6 as follows. Looking to the declared WCDMA standard essential patent families provided by Sipro
7 Lab Telecom,¹⁹ and Sipro’s classification of those families, he determined the percentage of the
8 families related to terminals like the accused products.²⁰ Schulze then multiplied the number of
9 WCMA standard essential patents identified in one article by the percentage to determine the
10 number of patent families, including the ‘793 patent, that read on terminals.²¹ Dividing his
11 estimated cumulative royalty rate by number of terminal-related essential patents, he arrived at a
12 rate for the ‘793 patent.²²

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14 Regarding factor thirteen, Schulze assumed that each standard essential patent shares an
15 equivalent value to each other standard essential patent within the overall standard.²³ Schulze’s
16 “support for this assumption comes from the UMTS IPR Working Group charged with developing
17 the standard as well as Apple’s own public comments regarding its belief as to the proper
18 methodology for determining the value of a standard essential patent under a FRAND context.”²⁴

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21 ¹⁸ *See id.* at 123.

22 ¹⁹ Sipro Lab Telecom is a major licensing company specializing in patent pool creation and
23 administration, particularly for telecommunications standards. Sipro Lab Telecom, About Us,
available at <http://www.sipro.com/About-Sipro.html>.

24 ²⁰ *See* Docket No. 300-6 at 125.

25 ²¹ *See id.* at 125-26.

26 ²² *See id.*

27 ²³ *See id.* at 127.

28 ²⁴ *Id.*

1 of one expert over another. These tasks are solely reserved for the fact finder.”³³ The inquiry into
2 the admissibility of expert opinion is a “flexible one,” where “[s]haky but admissible evidence is to
3 be attacked by cross examination, contrary evidence, and attention to the burden of proof, not
4 exclusion.”³⁴

5 III. DISCUSSION

6 The Federal Circuit recently affirmed that “questions regarding which facts are most
7 relevant or reliable to calculating a reasonable royalty are ‘for the jury.’”³⁵ This court has itself
8 repeatedly deferred such questions to a jury.³⁶ But a critical prerequisite to this deference to jury
9 wisdom is that the “the methodology is sound.”³⁷ Here, it is not. In calculating the royalty base,
10 Schulze did not even try to link demand for the accused product to the patented feature, and failed
11 to apportion value between the patented feature and the vast number of non-patented features in the
12 accused products. Schulze had no basis to ignore the fundamental teaching of the entire market
13 value rule, which permits a royalty based on the entire market value of an accused product only
14 where “the patent-related feature is the basis for customer demand.”³⁸ In calculating the royalty
15 rate, Schulze impermissibly relied on licenses without any showing of comparability, relied on a
16 maximum, cumulative royalty rate without any showing that anyone had committed to such a
17 notion and failed to allocate particular value to the invention claimed in the ‘793 patent.

18 A. Reasonable Royalty Basics

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22 ³³ *Apple Inc. v. Motorola, Inc.*, Case No. 12-4882, slip op. at 40 (Fed. Cir. Apr. 25, 2014).

23 ³⁴ *Primiano v. Cook*, 598 F.3d 558, 564 (9th Cir. 2010) (citing *Daubert*, 509 U.S. at 594, 596).

24 ³⁵ *Apple Inc.*, slip op. at 41 (quoting *i4i*, 598 F.3d at 856).

25 ³⁶ See, e.g., *HTC Corp. v. Technology Properties Ltd.*, Case No. 5:08-cv-00882-PSG, Docket No.
26 563 at 5 (N.D. Cal.).

27 ³⁷ *Id.*

28 ³⁸ *Lucent Techs. Inc. v. Gateway, Inc.*, 580 F.3d 1301, 1336 (Fed. Cir. 2009).

1 35 U.S.C. § 284 provides that “[u]pon finding for the claimant, the court shall award the
2 claimant damages adequate to compensate for the infringement, but in no event less than a
3 reasonable royalty for the use made of the invention by the infringer, together with interest and
4 costs as fixed by the court.”

5 The goal of the damages award is not to punish the infringer, but rather to make the
6 patentee whole by ascertaining what the patent holder would have made “had the infringer not
7 infringed.”³⁹ Infringement compensation can be the patentee’s “lost profits” or the “reasonable
8 royalty he would have received through arms-length bargaining.”⁴⁰ “The burden of proving
9 damages falls on the patentee.”⁴¹

10 Here, GBT seeks compensation based only on the reasonable royalty approach. A
11 reasonable royalty is the amount that Apple would have paid GBT for a license to the ‘793 patent
12 in a hypothetical world “just before infringement began.”⁴² In this hypothetical negotiation, the
13 parties are presumed (1) to be willing to give and take a license and (2) to accept that the asserted
14 patent claims are valid and infringed.⁴³

15 The calculation of the reasonable royalty is a two-step process. First, it requires the
16 determination of a royalty base, “or the revenue pool implicated by the infringement.”⁴⁴ The
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22 ³⁹ *Lucent*, 580 F.3d at 1324.

23 ⁴⁰ *Id.*

24 ⁴¹ *Id.*

25 ⁴² *Id.*

26 ⁴³ *See id.* at 1324-25.

27 ⁴⁴ *Cornell Univ. v. Hewlett-Packard Co.*, 609 F. Supp. 2d 279, 286 (N.D.N.Y.).

1 second determination is the royalty rate, or “the percentage of that pool ‘adequate to compensate’
2 the plaintiff for that infringement.”⁴⁵

3 The case involves an additional consideration of FRAND licensing terms. FRAND
4 licensing practices have been addressed in three recent cases: *Microsoft Corp. v. Motorola, Inc.*,⁴⁶
5 *In re Innovatio IP Ventures, LLC Patent Litig.*⁴⁷ and *Realtek Semiconductor Corp. v. LSI Corp.*⁴⁸
6 Generally, when a standard setting body incorporates patented technology into an industry-wide
7 standard, the FRAND licensing commitment prevents patentees from “extort[ing] their competitors
8 or prevent[ing] competitors from entering the marketplace.”⁴⁹ Commentators have termed these
9 problems “patent hold-up” or “royalty stacking.” To prevent these problems, a FRAND license
10 should compensate a patentee for their technical contribution to the technology embodied in a
11 standard, but should not compensate them for mere inclusion in the standard.⁵⁰ Courts and experts
12 have applied modified the *Georgia-Pacific* factors to FRAND hypothetical negotiations.⁵¹

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14 **B. Schultze’s Flawed Royalty Base: To Escape the Clutches of the EMVR Requires
15 Evidence of Industry Practice**

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19 ⁴⁵ *Id.*

20 ⁴⁶ Case No. 10-cv-1823 JLR, 2013 WL 2111217 (W.D. Wash. Apr. 25, 2013).

21 ⁴⁷ MDL 2303, 2013 WL 5593609 (N.D. Ill. Oct. 3, 2013).

22 ⁴⁸ Case No. 5:12-cv-03451-RMW, 2014 WL 46997 (N.D. Cal. Jan. 6, 2014).

23 ⁴⁹ *Microsoft Corp. v. Motorola, Inc.*, 864 F. Supp. 2d 1023, 1027 (W.D. Wash. 2012).

24 ⁵⁰ See *RealTek*, Docket No. 298 at 15, 17 (Final Jury Instructions) (instructing the jury that “[y]ou
25 should not consider [the patentee’s] advantage resulting from the standard’s adoption, if any.
26 However, you may consider any advantage resulting from the technology’s superiority” and
calculating a FRAND based on (1) the standard’s value to the product and (2) the patent’s value to
the standard.”).

27 ⁵¹ See *Microsoft*, 2013 WL 211217 at *14-15; *Innovatio*, 2013 WL 5593609 at *5; *RealTek*, 2014
28 WL 46997 at *1-2.

1 Calculating a royalty is no small challenge where one component “may be covered by an
2 asserted patent, while other components are not.”⁵² In *Lucent*, the Federal Circuit held that if the
3 patentee seeks a royalty base equivalent to the “entire market value” of the accused product, “the
4 patentee must prove that ‘the patent-related feature is the ‘basis for customer demand.’”⁵³ *Lucent*
5 struck the jury’s damages award where the royalty was based on the “entire market value” of the
6 accused product, Microsoft Outlook, where there plaintiff presented no evidence to establish that
7 the allegedly infringing smaller-component, the date-picker tool, was a substantial basis for
8 consumer demand for Outlook.⁵⁴ *Lucent* thus stands for the proposition that, in the absence of
9 evidence that the infringing feature drives demand, the royalty base must be somehow apportioned
10 to reflect the value of the patent-related feature in the absence of the non-infringing features.⁵⁵

11 Here, there is no dispute that Schulze did not apportion the royalty base. In his report he
12 says without qualification that the base is “sales of the infringing products.”⁵⁶ Although he asserts
13 that Apple “marketed the HSUPA feature as a selling point for its devices,” his testimony makes
14 clear that he did nothing to analyze whether demand for those devices was actually based on the
15 invention claimed the ‘793 patent.⁵⁷ Try as it might, the court cannot square this no-base-
16 apportionment, no-demand-analysis methodology with *Lucent*’s central holding.

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20 ⁵² *LaserDynamics, Inc. v. Quanta Computer, Inc.*, 694 F.3d 51, 75 (Fed. Cir. 2012).

21 ⁵³ *Lucent*, 580 F.3d at 1336.

22 ⁵⁴ *Id.* at 1337-38.

23 ⁵⁵ *See id.*

24 ⁵⁶ Docket No. 300-6 at 112.

25 ⁵⁷ *See* Docket No. 300-6 at 174 (“Q: And in your report in this case you did not present any
26 analysis attempting to show that the ‘793 patent drives demand for iPhones or iPads, correct? A.
27 We’re not in any way making that assertion, no.”); *see also id.* (“Q: You did not perform a separate
28 analysis to show that the ‘793 patent drives demand for the accused products and thus the entire
market value applies, correct? A: No, we’re not in any way asserting that the ‘793 patent in any
way is responsible for driving ultimate demand in-- in and of itself for the final product, no.”).

1 As its primary defense, GBT urges that Schulze relied on industry practice in using the unit
2 price of each accused product as a base for an uncapped royalty. But although the court has
3 carefully studied the record looking for any hard evidence of such a practice or custom, it could
4 find none. None of the third-party papers Schulze cites provides that any industry participant, let
5 alone the industry as a whole, has agreed that the entire market value of a smartphone or tablet may
6 serve as the base for a royalty for use of a patent on a particular feature without any cap or limit on
7 the total royalties owed. At most, the papers offer the authors' proposals or aspirations, not actual
8 practice in the field. Nor does Schulze point to any license in which Apple agreed to pay an
9 uncapped royalty based on a percentage of the entire market value of any iPhone or iPad.
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11 “[N]othing in either *Daubert* or the Federal Rules of Evidence requires a district court to admit
12 opinion evidence that is connected to existing data only by the ipse dixit of the expert. A court may
13 conclude that there is simply too great an analytical gap between the data and the opinion
14 proffered.”⁵⁸

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16 As a secondary defense, GBT highlights the iPhone and iPad as the smallest saleable unit
17 available for consideration. But throughout this litigation, GBT has taken the position that the
18 entire infringing functionality lies in the baseband processor, not the accused product as a whole.⁵⁹
19 The proper view of the smallest saleable unit cannot change at a different stage of the litigation
20 simply because it may now serve a different purpose.

21 Even if the accused products were the smallest saleable unit, this court has previously
22 explained that, under the Circuit's case law, relying on the smallest saleable unit does not relieve a
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26 ⁵⁸ *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 146 (1997).

27 ⁵⁹ *See, e.g.*, Docket No. 189 at 16 (“the infringing instrumentality resides in the Baseband
28 Processor”).

1 patentee of the burden of apportioning the base.⁶⁰ In *LaserDynamics*, the Federal Circuit
2 “reaffirm[ed] that in any case involving multi-component products, patentees may not calculate
3 damages based on sales of the entire product, as opposed to the smallest salable patent-practicing
4 unit, without showing that the demand for the entire product is attributable to the patented
5 feature.”⁶¹ This language affirms that the smallest salable unit must be closely tied to the patent to
6 suffice. Later in the opinion, the court specifically addresses *LaserDynamics*’ argument that
7 defendant Quanta was in the business of marketing and selling only entire computers, rather than
8 the independent purportedly infringing feature called “ODD,” and thus the entire computer was the
9 only product for which accurate market data was available.⁶² The court rejected this argument,
10 concluding that if the smallest salable unit was in fact the entire computer, “the exceedingly
11 difficult and error-prone task of discerning the ODD’s value relative to all other components in the
12 laptop remains.”⁶³

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14 **C. Schulze’s Flawed Royalty Rate: Rates Can’t Rely on Other Licenses Not Shown to Be**
15 **Comparable, and the Particular Value of the Asserted Patent to the Standard Cannot**
16 **be Ignored**

17 Schulze’s analysis of the royalty rate fares little better. Three particular errors render his
18 analysis unreliable.

19 First, Schulze erred in his use of portfolio licenses secured in settlement of various GBT
20 patent infringement cases in the District of Delaware. These cases did not involve the ‘793 patent
21 but rather various “RACH” patents. After an extended mediation with the court, GBT entered into
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23 ⁶⁰ See *Dynetix Design Solutions, Inc. v. Synopsys, Inc.*, Case No. 5:11-cv-05973 PSG, 2013 WL
4538210, at *3 (N.D. Cal. Aug. 22, 2013).

24 ⁶¹ *LaserDynamics*, 694 F.3d at 67-68.

25 ⁶² *Id.* at 69-70.

26 ⁶³ *Id.* at 70; see also *Uniloc v. Microsoft*, 632 F.3d 1292, 1319-20 (Fed. Cir. 2011) (“The Supreme
27 Court and this court’s precedents do not allow consideration of the entire market value of accused
products for minor patent improvements simply by asserting a low enough royalty rate.”).

1 fully-paid lump-sum licenses with eight defendants. Using data from GBT’s Delaware counsel,
2 Schulze included the effective royalty rates from these lump-sum licenses as part of his analysis.
3 But neither Schulze nor the Delaware counsel did any comparison of the value of the RACH
4 patents to the accused products in the Delaware litigation (for example, GPS devices) to the value
5 of the ‘793 patent to the accused product here. Nor does he account for the portion of the lump
6 sum settlements that would cover future sales. Especially in the absence of any hard evidence the
7 Delaware licenses are comparable to the proposed license in this case,⁶⁴ their incorporation flies in
8 the face of the Federal Circuit’s explicit teaching that parties may not rely on licenses that have “no
9 relationship to the claimed invention” or are not “commensurate with” the accused products.⁶⁵

11 Second, Schulze erred in relying on a maximum, cumulative royalty rate for WCDMA
12 patents. The papers Schulze relies on attempt to predict what such a rate would be, but he identifies
13 no evidence that any party ever agreed to such a rate. Schulze himself admitted at deposition that
14 “[n]o one licensee is going to say, yes, that’s what I paid because they’re not paying directly.”⁶⁶

16 Third, Schulze erred in assuming the value of the ‘793 patent was no different than the
17 value of each of the other WCDMA standard-essential patents considered. GBT identifies no case
18 law supporting the notion that a claimed standard-essential patent gets a free pass on the
19 fundamental notion that a patent damages methodology must be “tied to the relevant facts and
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25 ⁶⁴ Cf. *HTC Corp. v. Technologies Properties Ltd.*, Case No. 5:08-cv-00882-PSG, Docket No. 502
at 3-4.

26 ⁶⁵ *ResQNet.com v. Lansa*, 594 F.3d 860, 870 (Fed. Cir. 2010).

27 ⁶⁶ Docket No. 300-6 at 183.
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1 circumstances of the case at issue.”⁶⁷ If anything, the case law is clear that mere patent counting
2 and dividing is not enough.⁶⁸

3 **IV. CONCLUSION**

4 Schulze’s opinions will not be admitted in their current form. However, following Chief
5 Judge Rader’s example in *Cornell*, the court will give him another shot.⁶⁹ GBT may tender a new
6 damages expert report in accordance with the guidance in this order no later than May 23, 2014.
7 Apple may update its own damages expert report, but only for purposes of responding, no later
8 than May 30, 2014. By this same date, Apple may also depose Schulze on any new expert report.

9 **IT IS SO ORDERED.**

10 Dated: May 18, 2014

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12 PAUL S. GREWAL
13 United States Magistrate Judge
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24 ⁶⁷*Uniloc*, 632 F.3d at 1315.

25 ⁶⁸ See *Microsoft Corp. v. Motorola, Inc.*, Case No, 10-cv-1823-JLR, 2013 WL 2111217, at *80
26 (W.D. Wash. Apr. 25, 2013); *In re Innovatio IP Ventures, LLC Patent Litig.*, MDL 2303, 2013 WL
27 5593609, at *39 (N.D. Ill. Oct. 3, 2013).

28 ⁶⁹ See 609 F. Supp. 2d at 284 (offering a patentee one further opportunity with similarly defective
damages expert testimony even in the middle of a trial.); *cf. Dynetix*, 2013 WL 4538210, at *5.