

United States District Court  
For the Northern District of California

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
SAN JOSE DIVISION

CORNING OPTICAL )  
COMMUNICATIONS WIRELESS LTD., )  
 )  
Plaintiff, )  
 )  
v. )  
 )  
SOLID, INC., et al., )  
 )  
Defendants. )  
\_\_\_\_\_ )

Case No. 5:14-cv-03750-PSG  
**ORDER DENYING MOTION TO  
EXCLUDE EXPERT TESTIMONY OF  
MICHELE RILEY**  
**(Re: Docket No. 327-4)**

Before the court is Defendants SOLiD, Inc. and Reach Holdings LLC’s motion to exclude the expert testimony of Michele Riley. Riley is the designated damages expert of Plaintiff Corning Optical Communications Wireless Ltd. At issue is whether Riley’s reasonable royalty and lost profits opinions are based upon “unreliable principles or methods [or] legally insufficient facts and data,” or are “not sufficiently tied to the facts of the case,” such that exclusion is required under Fed. R. Evid. 702 and 703.<sup>1</sup>

Defendants challenge a variety of Riley’s considerations, ranging from her identification of a starting royalty “reference range” in estimating a hypothetical royalty rate to her demand analysis in estimating Corning’s lost profits. While Defendants raise legitimate questions about Riley’s

<sup>1</sup> See *Summit 6, LLC v. Samsung Elecs. Co., Ltd.*, Case Nos. 2013-1648, -1651, 2015 WL WL5515331, at \*9-10 (Fed. Cir. Sept. 21, 2015) (citing *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 150 (1999); *i4i Ltd. v. Microsoft Corp.*, 598 F.3d 831, 854 (Fed. Cir. 2010)).

1 work, they fail to establish that Riley’s opinions are methodologically unreliable, as opposed to  
2 simply not credible or even just plain wrong. This is not enough to keep Riley from the witness  
3 stand. Defendants’ motion is DENIED.

4 **I.**

5 “[E]stimating a reasonable royalty is not an exact science.”<sup>2</sup> Truer words may never have  
6 been spoken, and this case offers further evidence.

7 In her report, Riley set out to “determine the amount of damages due to Corning Wireless in  
8 the event that” the Patents-in-Suit are found valid and infringed by Defendants.<sup>3</sup> As to the ‘837  
9 Patent, Riley says Corning is entitled to collect \$33.1 million in damages—\$18.7 million in lost  
10 profits and \$14.4 million in reasonable royalties.<sup>4</sup> Riley also says that “[i]f the Court determines  
11 that lost profits is not an appropriate measure of damages,” Corning is entitled to reasonable  
12 royalties of \$23.5 million for alleged infringement of the ‘837 Patent.<sup>5</sup>

13 To reach these numbers, Riley starts with a reasonable royalty rate “reference range.”<sup>6</sup>  
14 These percentages represent SOLiD and Reach’s combined operating margin on the distributed  
15 antenna systems accused of infringement and the blended incremental profit margin of Corning and  
16 its parent, respectively.<sup>7</sup> Riley adjusts this starting range to “credit” Defendants for the “normal”  
17 profits earned by computer and electronics distributors.<sup>8</sup> She then looks to the desired share of  
18 profits as estimated by the parties’ relative market shares to further reduce the range.<sup>9</sup> Riley finally  
19  
20

---

21 <sup>2</sup> *Id.* at \*10.

22 <sup>3</sup> Docket No. 327-29 at 4.

23 <sup>4</sup> *See id.* at 7.

24 <sup>5</sup> *Id.*

25 <sup>6</sup> *Id.* at 50.

26 <sup>7</sup> *See id.* at 46-47.

27 <sup>8</sup> *See id.* at 56, 59-60.

28 <sup>9</sup> *See id.* at 60.

1 adjusts the range to account for Corning’s extant license to the asserted patent to a third party.<sup>10</sup>

2 This brings her to her final rate.<sup>11</sup>

3 Riley then turns to the royalty base. Relying on revenue spreadsheets produced by  
4 Defendants reflecting sales of all “Alliance” DAS components, she concludes that all components  
5 would be subject to the hypothetical license.<sup>12</sup>

6 As for lost profits, among other elements of her *Panduit* analysis, Riley opines that “there is  
7 demand for embodying DAS products and installations” based on her read of the patent and the  
8 parties’ financial results.<sup>13</sup>

## 9 II.

10 This court has jurisdiction under 28 U.S.C. §§ 1331 and 1338. The parties further consent  
11 to the jurisdiction of the undersigned under 28 U.S.C. § 636(c) and Fed. R. Civ. P. 72(a).

12 In *Summit 6*, the Federal Circuit summarized the standards for evaluating expert testimony  
13 generally, and patent damages expert testimony in particular. Rather than recast this summary, the  
14 court simply repeats it, with full attribution:

15 Whether proffered evidence is admissible at trial is a procedural issue not unique  
16 to patent law, and we therefore review the district court's decision to admit expert  
17 testimony under the law of the regional circuit, here the Fifth Circuit. The Fifth  
18 Circuit reviews the admissibility of expert testimony for abuse of discretion. The  
19 question here, therefore, is whether the district court abused its discretion in  
20 deciding that Summit's expert testimony was admissible. We conclude that it did  
21 not.

22 In *Daubert*, the Supreme Court set out the requirements for admissibility of  
23 expert testimony. The Supreme Court stated that the trial judge plays a  
24 “gatekeeping role,” which “entails a preliminary assessment of whether the  
25 reasoning or methodology underlying the testimony is scientifically valid and of  
26 whether that reasoning or methodology properly can be applied to the facts in  
27 issue.” The Court emphasized that the focus “must be solely on principles and  
28 methodology, not on the conclusions that they generate.” This admissibility  
assessment, while a flexible one, may consider the following factors: (1) whether

---

25 <sup>10</sup> *See id.*

26 <sup>11</sup> *See id.*

27 <sup>12</sup> *See id.* at 40-44.

28 <sup>13</sup> *Id.* at 22.

1 the methodology is scientific knowledge that will assist the trier of fact; (2)  
2 whether the methodology has been tested; (3) whether the methodology has been  
3 published in peer-reviewed journals; (4) whether there is a known, potential rate  
4 of error; and (5) whether the methodology is generally accepted.

5 The admissibility of expert evidence is also governed by Rules 702 and 703 of  
6 the Federal Rules of Evidence. Rule 702 was amended in response to *Daubert*  
7 and cases applying it, including *Kumho Tire*. Rule 702 states:

8 A witness who is qualified as an expert by knowledge, skill, experience,  
9 training, or education may testify in the form of an opinion or otherwise if:

10 (a) the expert's scientific, technical, or other specialized knowledge will  
11 help the trier of fact to understand the evidence or to determine a fact in  
12 issue;

13 (b) the testimony is based on sufficient facts or data;

14 (c) the testimony is the product of reliable principles and methods; and

15 (d) the expert has reliably applied the principles and methods to the facts  
16 of the case.

17 Rule 703 states:

18 An expert may base an opinion on facts or data in the case that the expert  
19 has been made aware of or personally observed. If experts in the particular  
20 field would reasonably rely on those kinds of facts or data in forming an  
21 opinion on the subject, they need not be admissible for the opinion to be  
22 admitted. But if the facts or data would otherwise be inadmissible, the  
23 proponent of the opinion may disclose them to the jury only if their  
24 probative value in helping the jury evaluate the opinion substantially  
25 outweighs their prejudicial effect.

26 Under these rules, a district court may exclude evidence that is based upon  
27 unreliable principles or methods, legally insufficient facts and data, or where the  
28 reasoning or methodology is not sufficiently tied to the facts of the case. But the  
question of whether the expert is credible or the opinion is correct is generally a  
question for the fact finder, not the court. Indeed, vigorous cross-examination,  
presentation of contrary evidence, and careful instruction on the burden of proof  
are the traditional and appropriate means of attacking shaky but admissible  
evidence.

This court has recognized that estimating a reasonable royalty is not an exact  
science. The record may support a range of reasonable royalties, rather than a  
single value. Likewise, there may be more than one reliable method for  
estimating a reasonable royalty. A party may use the royalty rate from  
sufficiently comparable licenses, value the infringed features based upon  
comparable features in the marketplace, or value the infringed features by  
comparing the accused product to non-infringing alternatives. A party may also  
use what this court has referred to as the analytical method, focusing on the  
infringer's projections of profit for the infringing product.

All approaches have certain strengths and weaknesses, and, depending upon the  
facts, one or all may produce admissible testimony in a particular case. Because

1 each case presents unique circumstances and facts, it is common for parties to  
2 choose different, reliable approaches in a single case and, when they do, the  
3 relative strengths and weaknesses of each approach may be exposed at trial or  
4 attacked during cross-examination. That one approach may better account for  
5 one aspect of a royalty estimation does not make other approaches inadmissible.

6 In sum, while all approximations involve some degree of uncertainty, the  
7 admissibility inquiry centers on whether the methodology employed is reliable.  
8 A distinct but integral part of that inquiry is whether the data utilized in the  
9 methodology is sufficiently tied to the facts of the case. Hence, a reasonable or  
10 scientifically valid methodology is nonetheless unreliable where the data used is  
11 not sufficiently tied to the facts of the case. Likewise, ideal input data cannot  
12 save a methodology that is plagued by logical deficiencies or is otherwise  
13 unreasonable. But where the methodology is reasonable and its data or evidence  
14 are sufficiently tied to the facts of the case, the gatekeeping role of the court is  
15 satisfied, and the inquiry on the correctness of the methodology and of the results  
16 produced thereunder belongs to the factfinder.<sup>14</sup>

### 17 III.

18 Defendants' first issue with Riley is her failure to consider Corning's own royalty estimate  
19 in its response to Defendants' interrogatory No. 11. It is true, as Defendants note, that in its  
20 response Corning stated that "Corning Wireless would have been willing to accept," and the  
21 hypothetical negotiation between the parties would have resulted in, a rate lower than Riley's  
22 estimate.<sup>15</sup> But as the court noted in its order compelling Corning's response, "new information  
23 may come to light as the case proceeds that might drastically alter Corning's positions."<sup>16</sup> The day  
24 may yet come for damages contentions that bind parties to their responses, but no local rule or case  
25 law yet imposes such a strict standard.

26 Defendants' second issue is with the upper limit of Riley's "reference range." Defendants  
27 take exception to Riley blending the incremental profit of both Corning and its U.S. parent,  
28 Corning Optical Communications Wireless, Inc. But Corning is right that there is no rule against  
considering a related company in the hypothetical negotiation, particularly where, as here, a license

---

<sup>14</sup> *Summit 6*, 2015 WL 5515331, at \*9-11 (citations omitted).

<sup>15</sup> Docket No. 327-24 at 9, 13.

<sup>16</sup> Docket No. 191 at 4.

1 would impact the related entity's finances. Corning also is right that this very court has ruled that  
2 consideration of a related entity is proper in estimating a reasonable royalty.<sup>17</sup>

3 Defendants' third issue is with Riley's credit for "normal" profits earned by electronics and  
4 computer distributors. Riley drew this credit from a transfer pricing study Corning commissioned  
5 to justify its internal inventory allocation.<sup>18</sup> Defendants correctly point out that the technological  
6 range of such distributors goes beyond the technological scope of the distributed antenna systems  
7 at issue in this case. But computer and electronics distributors include DAS distributors, and there  
8 is no dispute that Corning itself has relied on these studies and the credit as representative of the  
9 normal profits earned by a DAS distributor. Whatever differences in context exist may be  
10 addressed through cross-examination.

11 Defendants' fourth issue is with Riley's use of market shares as a proxy for the parties'  
12 relative bargaining strength. But Defendants offer a variety of third-party sources suggesting that  
13 market share can be used to estimate bargaining position.<sup>19</sup> This is not a misapplication of the  
14 Nash Bargaining Solution of the kind criticized in *VirnetX, Inc. v. Cisco Sys., Inc.*<sup>20</sup> or the 25%

---

16 <sup>17</sup> See *Accessories Marketing Inc. v. Tek Corp.*, Case No. 11-cv-04773, 2013 WL 1409887, at \*1  
17 (N.D. Cal. Apr. 2, 2013) (denying motion to exclude "[b]ecause SSI [related entity] and TEK are  
18 competitors in the tire kit repair market, a license to TEK could very well impact SSI's profits,  
19 which could itself impact AMI's [plaintiff] profits from SSI's sales"); see also *Union Carbide  
20 Chemicals & Plastics Tech. Corp. v. Shell Oil Co.*, 425 F.3d 1366, 1378 (Fed. Cir. 2005) (where  
21 the patent holder was a holding company whose parent company was a competitor of the infringer,  
22 the patent holder properly introduced evidence regarding the impact of the infringer's sales on the  
23 parent company's sales in evaluating a hypothetical negotiation between the holding company and  
24 the infringer), *overruled on other grounds by Cardiac Pacemakers, Inc. v. St. Jude Medical, Inc.*,  
25 576 F.3d 1348 (Fed. Cir. 2009) (en banc); *Synthes USA, LLC v. Spinal Kinetics, Inc.*, Case No. 09-  
26 cv-01201, 2012 WL 4483158, at \*12 (N.D. Cal. Sept. 27, 2012) ("[The patentee] is a mere holding  
27 company and any negotiation on its behalf would be conducted by and for the benefit of its  
28 corporate parent.").

<sup>18</sup> See Docket No. 258-62 at COCW00159531.

<sup>19</sup> These include Helen Meek & Richard Meek, *Strategic Marketing Management: Planning and Control*, at 98 (2003) ("Competitive/business strength criteria include measures such as: market share . . ."); Tze-Minn Tham, *Essays in Agency, Incentives and Contracting*, at 74 (2008) (Ph.D. dissertation, University of Michigan) (discussing use of "market share of sales to proxy for market power"); Kenneth Ahern, *Bargaining Power and Industry Dependence in Merger*, at 11 (Ross School of Business, University of Michigan, August 2009), available at Docket No. 343-8.

<sup>20</sup> 767 F.3d 1308, 1332-33 (Fed. Cir. 2014).

1 Rule junked in *Uniloc USA, Inc. v. Microsoft Corp.*<sup>21</sup> Here, whatever her other shortcomings,  
2 Riley grounds her analysis in the relative market shares of the parties, the DAS industry, the  
3 asserted patent, the parties' profitability, competition between the parties, and Coming's  
4 unwillingness to relinquish market share.<sup>22</sup>

5 Defendants' fifth issue is with Riley's final downward adjustment of the royalty rate based  
6 on an existing third-party license that would preclude any exclusivity in the licensee's hypothetical  
7 rights. But Defendants' own expert agreed that the presence of the existing license would decrease  
8 the royalty rate,<sup>23</sup> and for good reason. *Georgia-Pacific* factor 3 specifically requires consideration  
9 of the nature and scope of the license. Exercising judgment as to the significance of the decrease is  
10 not fatal to the reliability of the overall estimate.<sup>24</sup>

11 Defendants' sixth issue is the tie between Riley's estimated royalty base and the sales  
12 alleged to infringe. Defendants say that Riley swept in all sales of Alliance DAS components  
13 without considering whether they were installed in an infringing way. But Riley relied on financial  
14 spreadsheets produced by Reach Holdings and its predecessor Tri-Power Group in response to an  
15 interrogatory asking for revenue from sales of the accused products.<sup>25</sup> To the extent these  
16 spreadsheets were overinclusive, Defendants can highlight this through Riley's testimony. In any  
17 event, where approximate apportionment between infringing and noninfringing items is not  
18 possible, the accused infringer bears the burden and risk.<sup>26</sup>

19 <sup>21</sup> 632 F.3d 1291, 1311-17 (Fed. Cir. 2011).

20 <sup>22</sup> See Docket No. 327-29 at 38-60.

21 <sup>23</sup> See Docket No. 343-9 at 57.

22 <sup>24</sup> See *Riles v. Shell Exploration & Prod. Co.*, 298 F.3d 1302, 1311 (Fed. Cir. 2002) (noting that the  
23 reasonable royalty analysis "necessarily involves some approximation of the market as it would  
24 have hypothetically developed absent infringement"); see also *Del Mar Avionics, Inc. v. Quinton  
25 Instrument Co.*, 836 F.2d 1320, 1327 (Fed. Cir. 1987) ("The determination of a damage award is  
not an exact science, and 'the amount need not be proven with unerring precision.'" (quoting *Bio-  
Rad Laboratories, Inc. v. Nicolet 5 Instrument Corp.*, 739 F.2d 604, 616 (Fed. Cir. 1984))).

26 <sup>25</sup> See Docket No. 343-11.

27 <sup>26</sup> See *TWM Mfg. Co. v. Dura Corp.*, 789 F.2d 895, 900 (Fed. Cir. 1986); see also *Electro Scientific  
28 Indus. Inc. v. General Scanning Inc.*, 247 F.3d 1341, 1353 (Fed. Cir. 2001) (where accused device  
could be put to infringing and noninfringing uses, denying remittitur because infringer failed to put  
forth evidence on extent of noninfringing use).

1 As for Defendants’ issues with Riley’s lost profits analysis, they largely repeat arguments  
2 rejected by the court in its order denying Defendants’ summary judgment.<sup>27</sup> The one unique issue  
3 concerns Riley’s analysis of demand for the patent products.<sup>28</sup> But Riley’s opinion on demand for  
4 the patented products, whatever its ultimate merit, is based on her review of the parties’ financial  
5 results, product literature, and independent third-party research reports.<sup>29</sup> She also spoke with the  
6 Vice President of Strategy for Coming’s DAS business unit, William Cune, and Controller, Robert  
7 Hutton, and reviewed relevant deposition testimony from the case.<sup>30</sup> She considered this evidence  
8 in light of her unchallenged background in finance, marketing and accounting to determine that  
9 consumers demand the patented products.<sup>31</sup> This is reliable enough to be presented to the jury,  
10 which of course has the last word.

11 Defendants’ cases do not support their argument. In *Good Tech. Corp. v. MobileIron, Inc.*,  
12 expert testimony from a technical expert on the commercial acceptability of noninfringing  
13 alternatives was barred.<sup>32</sup> Riley is not a technical expert, and her challenged testimony is not on  
14 the commercial acceptability of non-infringing alternatives. In *LaserDynamics* and *Imonex*, the  
15 court considered opinions on the entire market value rule.<sup>33</sup> Here, Defendants seek to exclude an  
16 opinion of the demand for the patented *product*—*not* demand for the patented *features*—rendering  
17 these decisions inapposite.

18 **IV.**

19 Defendants’ motion is DENIED.

20 <sup>27</sup> See Docket No. 347 at 12-14.

21 <sup>28</sup> See *DePuy Spine, Inc. v. Medtronic Sofamor Danek, Inc.*, 567 F.3d 1314, 1331 (Fed. Cir. 2009)  
22 (“[T]he focus on particular features corresponding to individual claim limitations is unnecessary  
23 when considering whether demand exists for a patented product under the first *Panduit* factor.”).

24 <sup>29</sup> See Docket No. 327-29 at 22-24.

25 <sup>30</sup> See *id.* at 17, 23, 33.

26 <sup>31</sup> See *id.* at 22-24.

27 <sup>32</sup> See Case No. 12-cv-05826, Docket No. 436 at 15-16 (N.D. Cal. July 16, 2015).

28 <sup>33</sup> See *LaserDynamics, Inc. v. Quanta Computer, Inc.*, 694 F.3d 51, 69 (Fed. Cir. 2012); *Imonex  
Srvs., Inc. v. W.H. Munzprufer Dietmar Trenner GmbH*, 408 F.3d 1374, 1380 (Fed. Cir. 2005).



1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

**SO ORDERED.**

Dated: September 24, 2015



PAUL S. GREWAL  
United States Magistrate Judge