

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA**

CASE NO: 1:10-CIV-24063-MORENO

MOTOROLA MOBILITY, INC.,)
)
)
 Plaintiff,)
)
 vs.)
)
 MICROSOFT CORPORATION,)
)
 Defendant.)

**MICROSOFT CORPORATION’S MOTION TO EXCLUDE TESTIMONY
OF MICHAEL WAGNER CONCERNING NON-INFRINGEMENT
ALTERNATIVES AND MEMORANDUM OF LAW IN SUPPORT**

PLEASE TAKE NOTICE that Defendant Microsoft Corporation (“Microsoft”) moves to exclude the testimony of Plaintiff Motorola Mobility Inc’s (“Motorola”) expert on damages, Michael Wagner, as his testimony relates to non-infringing alternatives to the Microsoft Patents-in-Suit.

MEMORANDUM OF LAW

Michael Wagner is Motorola’s expert who Motorola “retained to provide an opinion regarding damages resulting from Motorola’s alleged infringement of Microsoft’s...U.S. patent numbers 6,791,536, 6,897,853, 7,024,214, 7,493,130, 7,383,460, 6,897,904 and 6,785,901.” (*See* Expert Report of Michael J. Wagner, July 7, 2011, Vol. 1 (the “Wagner Report” or “Report”), p. 1, attached hereto as Ex. 1). In particular, Mr. Wagner was asked to “review and comment upon

the Expert Report of Matthew R. Lynde,” who is Microsoft’s damages expert. According to his C.V., Mr. Wagner is an expert in the “calculation of commercial damages,” and has testified on the subject of alter ego. (*See* Wagner Report, Tab 4). In his Report, Mr. Wagner offers the following three opinions: 1) Microsoft is not entitled to lost profits as a damage remedy; 2) assuming Microsoft is entitled to lost profits, Dr. Lynde’s calculation of lost profits is incorrect; and 3) Dr. Lynde has not properly calculated Microsoft’s reasonable royalty measure of damages. (*See generally*, Wagner Report).

As part of his opinion that Microsoft is not entitled to lost profits as a damages remedy, Mr. Wagner opines that Dr. Lynde “does not sufficiently consider the existence of acceptable, non-infringing substitutes” pursuant to Panduit Factor No. 2. (Wagner Report, pp. 20-25). Mr. Wagner then offers opinions on his “understanding of commercially acceptable non-infringing alternatives for all of the Mobile Device Patents-in-Suit.” *Id.*, p. 20-21. Mr. Wagner states that his “understanding of Motorola’s non-infringing alternatives is based on *discussions* with Motorola technical experts including Mr. Jean Renard Ward (‘536 and ‘853 Patents), Mr. Frank Koperda (‘460 Patent), and Dr. Tal Lavian (‘214 and ‘130 Patents).” *Id.* (emphasis added). Mr. Ward, Mr. Koperda and Dr. Lavian are Motorola technical experts, none of whom offered opinions on non-infringing alternatives in their expert reports. Mr. Wagner, Motorola’s damages expert, then proceeds to offer technical opinions on non-infringing alternatives for each of Microsoft’s Patents-in-Suit, which opinions are based on nothing more than his “*discussions*” with these technical experts. *Id.* pp. 21-25.

Likewise, as part of his opinion that Dr. Lynde has not properly calculated Microsoft’s reasonable royalty measure of damages, Mr. Wagner opines that Dr. Lynde does not consider the “availability of non-infringing alternatives” – one of the *Georgia Pacific* factors – in Dr. Lynde’s

analysis of Baseline Royalty Rates. (Wagner Report, pp. 34-37). Mr. Wagner proceeds to offer opinions on non-infringing alternatives, as above, based on nothing more than “discussions” he had with Motorola’s technical expert, Michael Barr. *Id.*

Mr. Wagner, however, does not have the expertise to render opinions on non-infringing alternatives to Microsoft’s Patents-in-Suit, nor do his “discussions” with Motorola’s technical experts provide a sufficient foundation for these opinions. Mr. Wagner’s opinions on non-infringing alternatives, therefore, should be excluded. *McClain v. Metabolife Int’l, Inc.* 401 F.3d 1233, 1255 (11th Cir. 2005) (excluding experts’ opinions that “were not the product of reliable methods”).

LEGAL STANDARD

Rule 702 permits expert testimony only where it is “based upon sufficient facts or data,” is “the product of reliable principles and methods,” and where “the witness has applied the principles and methods reliably to the facts of the case.” Fed. R. Evid. 702. In *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993), the U.S. Supreme Court “made abundantly clear” that Rule 702 “compels the district courts to perform the critical ‘gatekeeping’ function concerning the admissibility” of expert evidence.” *U.S. v. Frazier*, 387 F.3d 1244, 1260 (11th Cir. 2004). The Eleventh Circuit has observed that “[t]he importance of *Daubert*’s gatekeeping requirement cannot be overstated” in part because of the “talismanic significance” that experts can have “in the eyes of lay jurors.” *Id.* at 1260, 1263. Trial courts are therefore required to “conduct an exacting analysis of the *foundations* of expert opinions to ensure they meet the standards for admissibility under Rule 702.” *Id.* at 1260. In undertaking this analysis, courts apply a “rigorous three-part inquiry,” considering whether (1) the expert is qualified to testify competently regarding the matters he intends to address; (2) the methodology by which the expert reaches his

conclusions is sufficiently reliable as determined by the sort of inquiry mandated in *Daubert*; and (3) the testimony assists the trier of fact, through the application of scientific, technical, or specialized expertise, to understand the evidence or to determine a fact in issue.” *Id.* The Eleventh Circuit has opined that “the requirement of reliability found in Rule 702 [is] the centerpiece of any determination of admissibility.” *Rider v. Sandoz Pharms Corp.*, 295 F.3d 1194, 1197 (11th Cir. 2002).

In order to satisfy the requirements of Rule 702, an “expert must carry out some independent analysis” of the issues upon which he is offering an opinion. *Barrueto v. Fernandez Larios*, No. 99-0528-CIV, 2003 WL 25782075, at *7 (S.D. Fla. Sept. 18, 2003) (excluding expert testimony where plaintiffs could not show the expert applied any methodology where the expert “indicated that he has not investigated” the specific issues); *see also U.S. v. Masferrer*, 367 F.Supp.2d 1365, 1379-80 (S.D. Fla. 2005) (excluding expert testimony where the expert “did not conduct an independent analysis” of the subject matter of his testimony such that the testimony was “merely conclusory and fail[ed] to specifically identify the methodology or reasoning” the expert used).

ARGUMENT

In his Report, Michael Wagner offers a number of opinions on acceptable, non-infringing alternatives to Microsoft’s Patents-in-Suit. (*See* Wagner Report, pp. 20-25, 34-37). There is, however, no foundation for these opinions sufficient to meet the standards for admissibility under Rule 702. As an initial matter, Mr. Wagner does not have the technical expertise to render these opinions. He is Motorola’s expert on “damages resulting from Motorola’s alleged infringement of Microsoft’s” patents, and is qualified to testify to the “calculation of commercial damages.” *Id.*

p, 1, Tab 4. Nothing in Mr. Wagner's Report or in his C.V. suggests that he is competent to testify to non-infringing alternatives to the Microsoft Patents-in-Suit.

Moreover, Mr. Wagner has failed to show that he has applied any methodology whatsoever (much less a reliable one) in rendering his opinion on non-infringing alternatives. He has undertaken no "independent analysis" to determine whether in fact there are acceptable, non-infringing alternatives to Microsoft's Patents-in-Suit. Mr. Wagner merely refers to "discussions" he alleges he had with Motorola's technical experts Tal Lavian, Jean Renard Ward, Frank Koperda, and Michael Barr as the basis for these opinions. *Id.* Motorola's technical experts did not offer opinions on non-infringing alternatives to Microsoft's Patents-in-Suit in their expert reports. Mr. Wagner, therefore, does not even have the expert reports of technical experts upon which to base his opinion on non-infringing alternatives, but only these alleged "discussions." Because he does not possess the expertise necessary to render an opinion on non-infringing alternatives, and because he fails to make any showing whatsoever that these opinions are based on a reliable methodology, Mr. Wagner's testimony on non-infringing alternatives should be excluded. *McClain v. Metabolife Int'l, Inc.* 401 F.3d 1233, 1255 (11th Cir. 2005).

CONCLUSION

For the foregoing reasons, the Court should exclude the testimony of Michael Wagner as it relates to non-infringing alternatives to Microsoft's Patents-in-Suit.

CERTIFICATE OF GOOD FAITH COMPLIANCE

As required by this Court's Local Rule 7.1(A)(3)(a), counsel for Defendant hereby certifies that on July 21, 2011, counsel for Defendant made reasonable efforts to confer in good faith with counsel for all parties who may be affected by the relief sought in the motion, and has been advised that Plaintiff will contest this motion.

DATED this 21st day of July 2011.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 21st day of July 2011, I filed the foregoing document by CM/ECF, which will cause it to be served on all counsel of record on the below Service List.

s/ Curtis Miner

Curtis B. Miner

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