

EXHIBIT D

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

4	LOGGERHEAD TOOLS, LLC,)	
5	Plaintiff,)	Docket No. 12 C 9033
6	vs.)	
7	SEARS HOLDINGS CORPORATION)	Chicago, Illinois
8	and APEX TOOL GROUP, LLC.,)	April 11, 2017
9	Defendants.)	10:14 a.m.

TRANSCRIPT OF PROCEEDINGS -
Final Pretrial Conference
BEFORE THE HONORABLE REBECCA R. PALLMEYER

APPEARANCES:

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1 APPEARANCES:

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1 THE CLERK: 12 C 9033, LoggerHead Tools versus
2 Sears Holdings for a pretrial conference.

3 THE COURT: Good morning.

4 We are here for a final pretrial conference.

5 Why don't I get your appearances. We can begin
6 with LoggerHead.

7 MR. SKIERMONT: Your Honor, Paul Skiermont on
8 behalf of LoggerHead.

9 THE COURT: Good morning.

10 MS. ABDULLAH: Sadaf Abdullah, also on behalf of
11 LoggerHead.

12 MS. SPIRES: Sarah Spires, also on behalf of
13 LoggerHead.

14 MS. SPENCER: Asha Spencer on behalf of LoggerHead.

15 MR. PELTZ: Good morning, your Honor.

16 Jason Peltz representing LoggerHead as well.

17 THE COURT: Okay. And for the defendants.

18 MR. SERNEL: Good morning, your Honor.

19 Marcus Sernel for Defendant Apex Tool Group.

20 MR. HAYES: Good morning, your Honor.

21 Eric Hayes, also for Apex Tool Group.

22 MR. BLOCK: Ian Block, also for Apex Tool Group.

23 MS. RHOADES: Katherine Rhoades, also for Apex Tool
24 Group.

25 MR. HILMERT: Good morning, your Honor.

1 clear that Mr. Bokhart's opinions are that the appropriate
2 reasonable royalty rate is, at a minimum, 5 to 6 per unit.

3 And if we turn to the actual report, which we have
4 submitted to you as Exhibit 1 to our opposition, and
5 specifically if we go to Page 34 --

6 THE COURT: Just a second.

7 MS. MS. ABDULLAH: Yes.

8 THE COURT: Are you withdrawing the statement in
9 your brief -- in your opposition to the *Daubert* motion that
10 price erosion, lost sales/business opportunities, and loss of
11 goodwill, that Mr. Bokhart factored those matters into the
12 royalty rate?

13 MS. MS. ABDULLAH: We admit that there is testimony
14 in his expert report that had that as one -- I guess three of
15 many considerations under Factor 50.

16 However, we do not -- Mr. Bokhart never links those
17 to any particular amount.

18 This example that's on the next few slides,
19 Slides 4 and 5, these come from LoggerHead's brief and were
20 presented as an example during the *Daubert* motion to justify
21 a plausible example of how you could come up with that.

22 Obviously it is something we put forth, but that's
23 not what Mr. Bokhart's reasonable royalty opinion is. That
24 can be found in the report. And he did testify -- or did
25 disclose in his report a range of 5 to 11 per unit.

1 THE COURT: I am asking, are you withdrawing those
2 statements in your opposition brief?

3 MS. MS. ABDULLAH: Your Honor --

4 THE COURT: Because really, the plain reading is,
5 here is how Mr. Bokhart came up with a reasonable royalty
6 opinion. He started out with the lost sales. He added
7 manufacturing cost changes. He added price erosion. He
8 added other factors, including lost sales to third parties,
9 loss of goodwill. And he came up with 5 and 6.

10 MS. MS. ABDULLAH: Your Honor, that's actually not
11 how it works. I mean --

12 THE COURT: It may not be. It may not be.

13 I am asking, are you withdrawing the statement in
14 your brief to that effect?

15 MS. MS. ABDULLAH: I mean, for the *Daubert* brief,
16 sure, we could.

17 I mean, the point is that this is just supposed to
18 be an example of one particular royalty within the range.
19 But that's -- I mean, Mr. Bokhart walked through the Georgia
20 Pacific analysis. He applied every one of those 15 factors.

21 And like I said, to the extent that that 15th
22 factor made reference to those three things, that's not
23 something we are arguing at this point, that we should still
24 be able to introduce.

25 Our reading of the *Daubert* ruling is that

1 Mr. Bokhart will not speak to those three items with respect
2 to his reasonable royalty analysis.

3 What the defendants are trying to do is tie that to
4 some specific number. And frankly, to the extent that they
5 have an issue with Mr. Bokhart's opinions on where in the
6 range he ends up, that's more appropriate for
7 cross-examination.

8 There is no argument to limit, based on the Court's
9 rulings about those three matters, that there is some sort of
10 numerical translation that has to happen at this stage.
11 That's a question for the jury based on the testimony
12 presented at trial.

13 THE COURT: But how could the defendants even
14 cross-examine?

15 What I understand you are going to be saying now
16 is, reasonable royalty, \$5 and \$6 or maybe higher. I don't
17 know. Let's say \$5 and \$6.

18 How will the defendants be permitted to
19 cross-examine on that under your theory? Because presumably
20 they would say, well, Mr. Bokhart, where did you come up with
21 this \$5 and \$6?

22 And he is not going to be permitted -- we all
23 agree, based on Judge Darrah's rulings, to say, well,
24 manufacturing cost changes, price erosion, loss of third
25 parties, loss of goodwill. He is not going to be able to say

1 There is really nothing in the Bokhart report that
2 links those particular three things to any number with
3 respect to a \$5 royalty or a \$12 royalty.

4 In fact, Mr. Bokhart's very point is that he is
5 unable to calculate what those numbers would be, and that's
6 why he switches from a lost profits analysis to a reasonable
7 royalty analysis.

8 So it's not even clear to us exactly what -- you
9 know, how a ruling could address exactly what would be
10 deducted from the numbers that he offers.

11 And again, the entire range is disclosed. And I
12 don't hear defendants disputing that the range is not
13 disclosed in the report. And based on where we end up in
14 that range, there is obviously cross-examination and it
15 ultimately goes to the jury.

16 THE COURT: You know, this is really problematic.
17 It may not be in Mr. Bokhart's report, but it clearly is in
18 your brief. These are factors that are relevant to the
19 lost -- to the reasonable royalty assessment and are properly
20 considered by Mr. Bokhart and can be quantified, at least in
21 a general way.

22 You are right that you could say, look, we don't
23 know precisely it was 37 cents, 42 cents, whatever. But
24 these are ballpark figures that factor into a determination
25 that a royalty of \$5 or \$6 is about right. I am looking at

1 it. I can't read it any other way.

2 Now, you are right that that's not the way the
3 witness necessarily testifies, but it just seems like it's a
4 meaningless victory for the defendants to have argued that
5 these factors are not properly considered and have gotten a
6 judge to say, you're right; and then for the plaintiffs to
7 come back and say, well, it doesn't make any difference,
8 because the number is going to be the same. We don't care
9 how it's calculated. There are other ways it could have been
10 calculated. There are other considerations and factors that
11 would go into this.

12 What was the point of this whole exercise at the
13 *Daubert* stage if not to say, no, you are not going to be able
14 to recover a reasonable royalty that's predicated on a number
15 of factors that the judge says are not factors?

16 MS. MS. ABDULLAH: Right. So I think part of the
17 issue is that we have a range that Mr. Bokhart is working
18 with here. And presumably, if he considered one thing in the
19 first instance, then his final trial presentation will have
20 to take into account that exclusion, right?

21 But the issue is, if the defendants feel that he is
22 overstating the per unit royalty, then again, that becomes an
23 issue of, well, you considered XYZ factors. That doesn't get
24 you to this number, does it? I mean, that's more of a
25 cross-examination issue.

1 What we are arguing is -- why we can't say it would
2 be reduced by this much is, Mr. Bokhart will have to opine
3 and testify as to the impact of Judge Darrah's exclusion on
4 his reasonable royalty opinions at the low, mid, and high
5 end.

6 My guess, having not talked to him about this
7 specific issue, is that he is very likely to make those
8 adjustments to account for things that have been excluded
9 that cannot be relied on in his reasonable royalty opinion.

10 Mr. Bokhart has not submitted a report that takes
11 account of the Court's order.

12 THE COURT: I am going to go further. I don't
13 think he is very likely to or he may or to the extent that he
14 will. I am telling you he will, because that was the ruling.
15 And to do otherwise is to make a mockery of the *Daubert*
16 process.

17 What was the judge doing if not determining there
18 are certain factors that this witness will not be permitted
19 to include?

20 And whether or not Mr. Bokhart himself said it,
21 your client, through his attorneys -- its attorneys said,
22 these are the factors that go into a \$5 calculation. So I am
23 taking your client at its word.

24 MR. SKIERMONT: But those are not the same --
25 that's one point in the range. It would not be, these are

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I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

/s/ Frances Ward April 18, 2017.

Official Court Reporter

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