

Exhibit 9

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
MARSHALL DIVISION**

VERSATA SOFTWARE, INC., ET AL.

§

vs.

§

CASE NO. 2:07-CV-153

§

SAP AMERICA, INC., ET AL.

§

§

ORDER

The following motions are pending before the court. The court's rulings on each are indicated herein.

1. Dkt. No. 225 Motion in Limine No. 1: to Limit Testimony of Versata's Expert, W. Christopher Bakewell, Under Federal Rule of Evidence 702

SAP argues that Mr. Bakewell should not be allowed to rely on the entire market value rule in his calculation of the royalty base. In support of its motion, SAP relies on *Cornell University v. Hewlett-Packard Co.*, 2008 WL 2222189 (N.D.N.Y. 2008).

The entire market value rule permits recovery of damages based on the value of the entire apparatus containing several features, where the patented feature is the basis for the customer demand. "This measure of damages arises where both the patented and unpatented components together are analogous to components of a single assembly, parts of a complete machine, or constitute a functional unit but not where the unpatented components have essentially no functional relationship to the patented invention and . . . may have been sold with an infringing device only as a matter of convenience or business advantage." *Rite-Hite Corp. v. Kelley Co.*, 56 F.3d 1538, 1550 (Fed. Cir. 1995). Once this initial question is satisfied (that there is a functional unit), it is then necessary to determine if the patented feature is the basis for customer demand.

The court has read the parties' briefs and has considered the arguments. The court will carry the motion with the case. Before Mr. Bakewell testifies, the court will allow Versata, in the absence of the jury, to establish the predicate necessary to utilize the entire market value rule.¹ Specifically, the court will expect Mr. Bakewell to identify reliable evidence and use sound economic analysis to show that the patented component drove demand for the entire ERP system. Upon a threshold showing by Versata, the court will allow the use of the entire market value rule. *See Cornell Univ.*, 2008 WL 2222189; *Spreadsheet Automation Control Corp. v. Microsoft Corp.*, 587 F. Supp. 2d 794 (E.D. Tex. 2007); *OPTi, Inc. v. Apple, Inc.*, Dkt. No. 132, Case No. 2:07-CV-021 (E.D. Tex. 2009). Otherwise, Versata's proof will be limited to a lesser alternative measure of damages. The court precludes any additional reference to the total sales of the accused products pending further order of the court.

2. Dkt. No. 238 SAP's Emergency Motion to Strike Versata's Belated Infringement Report

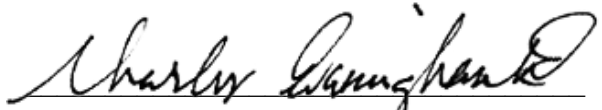
In its emergency motion, SAP seeks to strike Versata's "supplemental rebuttal" infringement report for generally two reasons: (1) it was filed too late pursuant to Rule 26 and the DCO; and/or (2) it improperly relies on an incorrect view of the claim construction opinion.

In this case, final infringement contentions were served in November 2008; the claim construction opinion issued on May 19, 2009; expert discovery closed on July 2, 2009; and the pretrial disclosure deadline passed on Jul 3, 2009. Versata did not seek leave to amend its infringement contentions within 30 days after the claim construction ruling issued. Versata filed its supplemental expert report on July 14, 2009.

¹ The parties agreed during the August 3, 2009, hearing that the patented component of the ERP system was inseparable and/or marketable from the system as a whole, thus establishing the first requirement.

The court finds SAP's first argument persuasive. The submission of the "supplemental rebuttal" report was untimely, and adding the new opinion works substantial prejudice to SAP. Accordingly, the court grants SAP's motion (Dkt. No. 238).

SIGNED this 7th day of August, 2009.



CHARLES EVERINGHAM IV
UNITED STATES MAGISTRATE JUDGE