

their agreement that they would not make “reference to the cost of defense or argument that the fact that this case is being defended is evidence of the value of the accused features”. Indeed, Plaintiffs proposed their own motion *in limine* topic to preclude any argument, evidence, testimony, or reference to legal and expert fees and expenses incurred by the parties in prosecuting and defending this litigation and/or incurred in a typical patent litigation, including but not limited to SI267566-578, to which five of the Defendants agreed—including CDW LLC—in modified forms (*see* Dkt. No. 1191 at pp. 4-5). Accordingly, Plaintiffs agree that the Plaintiffs’ expenditures in litigating this action and Defendants’ expenditures defending this case are no reflection of the value of the accused features, given that a defendant’s decision to defend the case may be based on factors unrelated to how the defendant values the invention and, thus, such evidence is irrelevant. FED. R. EVID. 402. It is also unfairly prejudicial to both Plaintiffs and Defendants.

The same cannot be said regarding any evidence regarding the cost or burden of removing the accused features/functionality. *Georgia-Pacific* factor 11 is “the extent to which the infringer has made use of the invention; and any evidence probative of the value of that use.” *See Finjan, Inc. v. Secure Computing Corp.*, 626 F.3d 1197, 1211 (Fed. Cir. 2010) (citation omitted). A number of the Defendants corporate representatives have provided deposition testimony that Defendants receive no value from having included the accused features/functionality in their websites or products. Thus, evidence showing the low cost of removing the accused features/functionality would be clearly relevant, as it is countervailing evidence for such testimony (*i.e.*, if the accused features/functionality provide no value and the cost of removing the accused features/functionality is so low, wouldn’t the Defendants remove such accused features/functionality?) and provides an indication of the value of the accused

features/functionality. Defendants cannot argue that the features/functionality bring no value to their accused websites/products, but at the same time, preclude Plaintiffs from presenting evidence—in the form of the Defendants’ own documents and testimony—that removing the accused features/functionality would be relatively inexpensive.

Aside from such evidence being clearly relevant to a damages analysis under the *Georgia-Pacific* factors, the Federal Circuit’s holding in *Broadcom Corp. v. Qualcomm, Inc.*, 543 F.3d 683 (Fed. Cir. 2008) demonstrates that such evidence is also relevant to inducement and should not be precluded. There, the court found that “Qualcomm does not dispute that it was on notice of Broadcom’s patents and infringement contentions. And it concedes that it ‘worked closely with its customers to develop and support the accused products, and that **Qualcomm did not make changes to those products** or give its customers [instructions regarding how to avoid infringement] after this lawsuit was filed.’” *Id.* at 700 (internal citation omitted) (emphasis added). Based on such evidence, the Federal Circuit held that it would “not disturb the jury’s inference that Qualcomm possessed the specific intent necessary to induce the infringement of Broadcom’s patents.” *Id.* at 701. Granting Defendant CDW LLC’s Motion would result in the exclusion of evidence that is relevant to the specific intent prong of inducement.

II. CONCLUSION

Based on the foregoing, Plaintiffs respectfully request that the Court deny Defendant CDW LLC’s Motion in Limine to Exclude Plaintiffs’ Suggestion, Argument or Evidence that CDW Could Completely Remove or Disable Accused Features at Minimal Cost [Dkt. No. 1202].

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CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing document, attachment, and exhibits were filed electronically in compliance with Local Rule CV-5(a) and, thus, served on all counsel of record on January 13, 2011.

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