IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION

WI-LAN INC.,	§	
	§	
Plaintiff,	§	
	§	Civil Action No. 6:10-cv-521-LED
v.	§	
	§	JURY TRIAL DEMANDED
ALCATEL-LUCENT USA INC.; *et al.*	§	
	§	**FILED UNDER SEAL**
Defendants.	§	
	§	

WI-LAN'S SUR-REPLY TO DEFENDANTS' *DAUBERT* MOTION TO EXCLUDE JOHN C. JAROSZ'S REPORT AND TESTIMONY REGARDING DAMAGES

A. The EMVR Is Not Implicated by Mr. Jarosz's Computation of a Lump-Sum Royalty That Considers All Relevant Circumstances.

Defendants' Reply says that "Wi-LAN ***concedes*** that its expert, [Mr.] Jarosz, uses a royalty rate applied to entire end-product revenues" to compute royalties. Reply at 1. Wi-LAN nowhere concedes any such thing. To the contrary, Wi-LAN's response makes clear that "[t]he form of damages for each Defendant is a <u>lump-sum royalty</u>, not a running royalty computed as a percentage of revenue." Wi-LAN's Response at 1; *see also id.* at 2-3 ("However, Mr. Jarosz did not conclude damages should be based on a 'running royalty.' Rather, as is plainly reflected in his report and testimony, Mr. Jarosz concluded damages should be based on a 'lump-sum' royalty.") (citing Exhibit A at 47 and Exhibit B at 134). Defendants apparently hope that this Court will not read Wi-LAN's response—or Mr. Jarosz's report and deposition testimony.

Nor does Wi-LAN argue that there is an "exception" to the EMVR whenever the expert "packages his conclusion as a 'lump sum.'" Reply at 1. Rather, Wi-LAN makes the common sense point, recognized by the court in *Phillp M. Adams & Assocs. v. Winbond Electronics Corp.*, 2012 WL 3522097 (D. Utah 2010), that the EMVR is not implicated by a lump-sum royalty calculation that does not compute royalties as a percentage of revenues generated by the entire product. The Federal Circuit's decision in *Lucent Technologies, Inc. v. Gateway, Inc.*, 580 F.3d 1301 (Fed. Cir. 2009), does not consider, much less reject this argument. Reply at 1. In *Lucent*, the plaintiff's damages expert opined only on a <u>running royalty</u> (not a lump-sum royalty) consisting of "8% of sales revenue for the accused software products." *Id.* at 1324, 1326. And the Court's decision in *Lucent* makes clear that it was the opinions of plaintiff's expert, based on a running royalty computed as 8% of sales revenue, which violated the EMVR. *Id.* at 1338.

Indeed, after *Lucent* the Federal Circuit has expressly distinguished a "running royalty" calculated as a percentage of revenues of an end-product (having the potential to violate the

EMVR) from "lump sum royalties that are not calculated as a percentage of *any* component or product." *LaserDynamics, Inc. v. Quanta Computer, Inc.*, 694 F.3d 51, 67 (Fed. Cir. 2012). Moreover, the issue in *LaserDynamics*, as in *Lucent*, was that the plaintiff's expert opined that damages should be solely on a "running royalty" computed as a percentage of the sales of the accused product. *Id.* at 68. Defendants have not cited any case from the Federal Circuit (or from any other court) where an expert's damages opinion, computed as a lump-sum royalty based on consideration of all available evidence, was found to implicate or violate the EMVR.[1]

Defendants' *real* complaint is that, as *one part of Mr. Jarosz's analysis* to determine the appropriate lump-sum royalty for each Defendant, Mr. Jarosz considered Wi-LAN licenses that included rights to the patents-in-suit, some involving lump-sum payments, and others involving running royalties. However, running royalty license agreements can be relevant to a lump-sum royalty calculation. *See Lucent*, 580 F.3d at 1330. Defendants play fast-and-loose with Mr. Jarosz's methodology and seek to transform one part of his analysis (consideration of running royalty licenses involving the patents-in-suit)[2] into the *sine qua non* of his opinions. Mr. Jarosz will opine on a lump-sum royalty for each Defendant based on all relevant circumstances.

B. Mr. Jarosz's Consideration of Lump-Sum and Running-Royalty Licenses Between Wi-LAN and Third Parties Was Economically Justified.

Even though Wi-LAN disputes that Mr. Jarosz's lump-sum royalty calculations could

[1] *Uniloc USA, Inc. v. Microsoft Corp.*, 632 F.3d 1292 (Fed. Cir. 2011), did not involve a damages opinion computed as a lump-sum royalty. Rather, the expert in *Uniloc* computed damages using a "25 percent rule of thumb" where he assumed that the plaintiff would be entitled to a running royalty consisting of 25% of the profits generated by the accused product.

[2] Notably, Defendants offer no legitimate response as to why it is permissible for their own expert, Dr. Becker, to employ a similar methodology. *See* Wi-LAN Response at 9-10 & n.4. Defendants suggest that Dr. Becker "attempted to apportion and adjust the various lump-sum and other licenses he used" (Reply at 4-5), but so did Mr. Jarosz. Dr. Becker and Mr. Jarosz merely have a *factual* disagreement as to how the lump-sum and running-royalty licenses should be adjusted to account for the unique circumstances of each Defendant—a disagreement that goes to the weight, not the admissibility, of Mr. Jarosz's testimony.

implicate or violate the EMVR, courts have found, after *Lucent*, that an expert may base royalties on the entire market value of an accused product where "economically justified." Wi-LAN Response at 6-7 (citing *Lucent Technologies*, 580 F.3d at 1339, and *Mondis Technology, Ltd. v. LG Electronics*, 2011 WL 2417367, at *2-3 (E.D. Tex. June 14, 2011)). Defendants claim that *Mondis* is contrary to *LaserDynamics,* which Defendants contend "rejected any 'practical' or 'economic necessity' exception to the EMVR." Reply at 2. In doing so, Defendants mischaracterize *LaserDynamics*. There, the expert attempted to justify use of a smaller royalty rate applied to the entire product based on economic necessity, but the Federal Circuit held that the expert had, in essence, "plucked [the smaller royalty rate] out of thin air." 694 F.3d at 69. Ultimately, the Court concluded that there was no need for "a necessity-based exception … for LaserDynamics *in this case*." *Id.* at 70 (emphasis added). Thus, *LaserDynamics* does not categorically reject an economic necessity exception and does not mention, must less reject, the court's analysis in *Mondis*.

Defendants also suggest that *Mondis* is distinguishable because "there were 13-16 licenses to the patents-in-suit that were relied on by ***all parties***." Reply at 2. But nothing in *Mondis* supports Defendants' assertion that an economic necessity exists only if the parties agree that certain licenses are most comparable. The Court in *Mondis* recognized that reasonable royalty calculations must be tethered to comparable licenses and thus concluded that where "the most reliable licenses are based on the entire value of the licensed product," the plaintiff's expert may use those licenses to compute royalties under the EMVR. *Id.* at *3. Here, of course, Mr. Jarosz did not compute a running royalty based on the entire market value of the accused products, but instead computed a lump sum royalty after (a) considering both lump-sum and running-royalty license agreements involving the patents-in-suit, and (b) adjusting those agreements to account for each Defendant's unique circumstances.

Defendants now complain that "Alcatel-Lucent and HTC contend that no comparable licenses exist, and Sony Mobile agrees that the majority of licenses considered by Mr. Jarosz are not usable." Reply at 2-3. But Defendants did not make this argument in their *Daubert* motion, and this Court should not consider arguments raised for the first time in a reply. *Bankhead v. Gregg County*, 2013 WL 124114, at *3 n.1 (E.D. Tex. Jan. 9, 2013). In any event, Defendants' factual arguments concerning the comparability of licenses should be resolved by the jury, not by the Court.[3] In this respect, it is telling that *not even Defendants' own experts* agree with each other on the question of whether Wi-LAN's licenses are comparable.

Defendants also complain about the adjustments made by Mr. Jarosz's to lump-sum licenses. Wi-LAN does <u>not</u> claim that Mr. Jarosz "compare[s] the EMV of the accused products to Defendants ***total revenues***." Reply at 3. Defendants fail to appreciate the purpose of Tab 79 of Mr. Jarosz's report—where he makes an additional (and perhaps too conservative) adjustment to account for the "magnitude of the products at issue relative to each Defendant's total activities." Wi-LAN Response at 8. This adjustment reduces the royalties owed by Defendants based upon their "extent of use" as compared to total handset or base station revenues.

C. There Is At Least a Factual Dispute as to Whether the Accused Features Drive Demand for the Accused Product.

Defendants do not dispute that their own representatives testified that customers, including AT&T, demand compliance with HSPDA. Wi-LAN Response, Exhibits F-K. Nor do Defendants dispute that Wi-LAN's technical expert, Dr. Wells, will opine that the patents-in-suit

[3]Defendants claim that Mr. Jarosz ignores "key provisions" of licenses, including RuggedCom, which Defendants say "actually uses the smallest saleable unit as a royalty base." Reply at 3. Defendants misread the RuggedCom license. The "Subject Products" to which the 0.4% royalty rate applies includes both "stand alone" products and "Other Products." *See* Reply, Exhibit 2, Schedule F, c(ii)-(iii). For the "stand alone" products, which include "Base Stations," the royalty is applied to the gross selling price minus certain charges (transport fees, levies, *etc*.).

are essential for compliance with HSPDA. *Id.*, Exhibit B at 53-54. This is not a case where the patented feature is only a minor or helpful but non-essential part of the accused product. *See Lucent*, 480 F.3d at 1332-33 (patent at issue involved a helpful and convenient "date picker" that was "but a tiny feature of one part of a much larger software program"); *LaserDynamics*, 694 F.3d at 68-69 (no evidence that demand for laptop computers was driven by patented technology for optical disc discrimination"). At the very least, there is a disputed fact issue as to whether the patented technology—which Dr. Wells opines is essential to compliance with HSPDA—drives the demand for customers like AT&T, which demand compliance with the HSPDA standards. *See Ergotron, Inc. v. Rubbermaid Commercial Prods.*, 2012 WL 3733578, at *4 (D. Min. Aug. 28, 2012)(denying *Daubert* motion based on EMVR where there was a factual dispute as to whether the patented feature drove product's demand).

D. Defendants' Other Complaints Are Meritless

With respect to pre-suit damages, Wi-LAN does not dispute that it bears the burden of proving that it complied with the marking statute, if applicable. But there are disputed fact issues that need to be resolved at trial and that are not properly resolved on a *Daubert* motion. (Defendants did <u>not</u> move for summary judgment on marking). In any event, contrary to Defendants' contention, Mr. Jarosz explained in his deposition (*see* Wi-LAN Response, Exhibit B, at 227-28), how he could readily adjust the lump-sum damages for HTC and Alcatel-Lucent should they prevail on their marking argument as a matter of law.

Defendants also mischaracterize Wi-LAN's position on future damages. Mr. Jarosz has computed future damages as part of his analysis of what would constitute a lump-sum damages report, and to the extent that the Court is inclined to hear Mr. Jarosz's opinions on future damages, Mr. Jarosz will present those opinions.

Defendants' *Daubert* motion is opposed in all respects and should be denied.

Dated: March 13, 2013

Respectfully submitted,

By: /s/ *David B. Weaver*

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CERTIFICATE OF AUTHORIZATION TO FILE UNDER SEAL

This is to certify that this motion should be filed under seal because it refers to material covered by the Agreed Protective Order approved and entered into this case on the 19th day of December, 2011 (Doc #145).

/s/ David B. Weaver
David B. Weaver

CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing document was filed electronically in compliance with Local Rule CV-5(a). As such, this document was served on all counsel who are deemed to have consented to electronic service on this the 13th day of March, 2013.

/s/ David B. Weaver
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