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
	§	Civil Action No. 6:13-cv-252-LED
v.	§	CASES CONSOLIDATED FOR
	§	TRIAL
ALCATEL-LUCENT USA INC.; *et al.*,	§	
	§	JURY TRIAL DEMANDED
Defendants.	§	
	§	

WI-LAN'S RESPONSE TO DEFENDANTS' MOTION FOR JUDGMENT AS A MATTER OF LAW ON DAMAGES

I. INTRODUCTION

Defendants' move for judgment as a matter of law (JMOL) on damages, arguing essentially that because Mr. Jarosz did not give the jury a specific opinion on how to apportion his calculations between worldwide and U.S. patents, there is no evidence to support an award of any damages. Defendants' argument ignores the substantial factual evidence in the record from which the jury could make the necessary apportionment – including the testimony of Mr. Parolin and other documentary evidence – as well as other record evidence from which the jury could make a reasonable royalty determination. And Defendants' motion nowhere discusses the Federal Circuit's decision in *Dow Chemical Co. v. Mee Industries, Inc.*, 341 F.3d 1370 (Fed. Cir. 2003), which is directly contrary to the position taken in their motion for JMOL on damages. Indeed, even if for some reason the jury could not rely on the reasoning, analysis, and factual input provided by Mr. Jarosz for purposes of computing a reasonable royalty, there is other record evidence from which a jury could make a reasonable royalty award. Defendants' motion for JMOL on the ground that there is no evidence of damages should be rejected.

II. STANDARD FOR GRANTING JUDGMENT AS A MATTER OF LAW

Judgment as a matter of law is only appropriate when "a reasonable jury would not have a legally sufficient evidentiary basis to find for the party on that issue." FED. R. CIV. P. 50(a). "The grant or denial of a motion for judgment as a matter of law is a procedural issue not unique to patent law, reviewed under the law of the regional circuit in which the appeal from the district court would usually lie." *Finisar Corp. v. DirectTV Group, Inc.*, 523 F.3d 1323, 1332 (Fed. Cir. 2008). The Fifth Circuit "uses the same standard to review the verdict that the district court used in first passing on the motion." *Hiltgen v. Sumrall*, 47 F.3d 695, 699 (5th Cir. 1995). Thus, judgment as a matter of law may not be granted, unless "there is no legally sufficient evidentiary basis for a reasonable jury to find" in favor of the non-movant. *Id.* at 700. In ruling on a motion

for judgment as a matter of law, this Court reviews all evidence in the record and must draw all reasonable inferences in favor of the nonmoving party (here, Wi-LAN); however, a court may not make credibility determinations or weigh the evidence, as those are solely functions of the jury. *See Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 150–51 (2000).

III. ARGUMENT

In *Dow Chemical Co. v. Mee Industries*, 341 F.3d 1370 (Fed. Cir. 2003), the district court granted judgment in favor of the defendants, after excluding the testimony of Dow's expert on damages under *Daubert* and concluding, among other things, "Dow was not entitled to damages as a matter of law because it 'had not carried its burden to establish damages." *Id.* at 1373. On appeal, Dow did not even "appeal the district court's exclusion of its expert's reasonable royalty testimony," but argued instead that "reasonable royalty damages can be awarded even without such [expert] testimony; that there is a presumption of damages where infringement has been established; and that there is other evidence in the record, including the evidence supporting [the expert's excluded opinions]" that could support an award of a reasonable royalty. *Id.* The Federal Circuit "agree[d]" with Dow's argument that expert testimony was not required to establish a reasonable royalty, and noted that other evidence in the record – including one particular license agreement that used a "totally different pricing structure" – was sufficient to establish that at least some award of damages was required under 35 U.S.C. § 284. *Id.*

In this case, of course, this Court did not exclude Mr. Jarosz's testimony entirely, but instead excluded one part of the analysis in his supplemental report by which he used a 92% apportionment figure to account for the worldwide nature of the comparable licenses. Mr. Jarosz was permitted to testify, however, and did testify on a damages approach that explained in detail how the jury would go about determining a reasonable royalty using the well-accepted

hypothetical royalty construct that applies the *Georgia-Pacific* factors, and why the reasonable royalty in this case would be a lump-sum royalty. *See* July 10 (a.m.) Tr. at 36:18-45:25.

Mr. Jarosz detailed his quantitative analysis under the market approach which included, among other things, his analysis of the Wi-LAN lump-sum licenses with third parties that included rights to the patents-in-suit. Mr. Jarosz explained (a) why those licenses were most comparable; (b) his apportionment to account for the differences in market share between the licensees and the defendants; and (c) his apportionment to account for the fact that the licenses involved wireless patents other than the patents in suit. *See* July 10 (a.m.) Tr. at 56:14-59:12, 60:16-75:6. Mr. Jarosz also explained his consideration, for the handset defendants, of comparable "per-unit" running royalty rate licenses that included rights to the patents-in-suit, and his adjustments he made to account for, among other things, the fact that those licenses were for a larger portfolio than those involving the patents-in-suit. *See* July 10 (a.m.) Tr. at 75:7-80:10.

Mr. Jarosz also outlined his quantitative analysis income approach. Under the income approach, after considering whether there were acceptable non-infringing alternatives, Mr. Jarosz testified that for the base station defendants, and considering just the accused software sales for the smallest saleable unit, Alcatel-Lucent stood to lose $74.4 million in profits, although he acknowledged that the loss of profits would not all be due to the patents in suit. July 10 (a.m.) Tr. at 87:16-19. With respect to the handset defendants, Mr. Jarosz testified that under the income approach, the handset defendants stood to lose an incremental profit of $20 per unit sold, even though he acknowledged (again) that not all of that $20 would be attributable to the patents-in-suit. July 10 (a.m.) Tr. at 91:10-94:22.

In addition, Mr. Jarosz explained his qualitative approach considering the *Georgia-Pacific* factors. July 10 (a.m.) Tr. at 98:22-107:9. And he presented his overall conclusion with

respect to his evaluation of the market approach, the income approach, and the other inputs that included all of the analysis – except for a geographic adjustment factor to take into account the worldwide nature of the licenses he considered. July 10 (a.m.) Tr. at 107:19-108:8. Mr. Jarosz's overall conclusions, excluding the geographic adjustment for the worldwide nature of the licenses he considered and the license that would result from a hypothetical negotiation, suggested a lump-sum payment from the date suit was filed through April 2013 of: (i) $3.8 million for Alcatel-Lucent; (ii) $6 million for Ericsson; (iii) $3.4 million for HTC; ; and (iv) $0.5 million for Sony Mobile. July 10 (a.m.) Tr. at 108:5-8.

With respect to the geographic adjustment, Mr. Jarosz did not (in accordance with this Court's *Daubert* ruling) offer his specific opinion on what percentage adjustment should be made by the jury. July 10 (a.m.) Tr. at 108:10-20. But Mr. Jarosz did note that if the jury were to conclude, based on other evidence in the record (such as the testimony from Mr. Parolin) that all or virtually all of the value of Wi-LAN's worldwide licenses is associated with Wi-LAN's U.S. portfolios (*see* July 9 (p.m.) Tr. at 95:24-97:8), then there would not need to be a significant downward adjustment to his overall conclusions. July 10 (a.m.) Tr. at 108:14-23. On the other hand, Mr. Jarosz pointed out that if the jury were to conclude that only half of the value of the world-wide licenses was in the U.S. portfolio – based on, for example, Mr. Parolin's testimony that some 50% of Wi-LAN's wireless portfolio is in the U.S. (*see* July 9 (p.m.) Tr. at 168:16-19), then the jury should only award as damages half of the overall figures to which Mr. Jarosz testified. *See* July 10 (a.m.) Tr. at 108:24-109:2.

One way or another, there is legally sufficient evidence, between the testimony of Mr. Jarosz and Mr. Parolin to allow a reasonable jury to award *some amount of damages* for a reasonable royalty under the patent damages statute and controlling Federal Circuit precedent.

At the very least, Defendants would have to concede that the jury could award a reasonable royalty, for the patents-in-suit, based on the $13 million amount paid by Airspan for the acquisition that included patents in suit, or the $11 million amount that Wi-LAN paid for the Airspan patents (PX-187), or based on the $17.6 to $20.7 million valuation of the Airspan patents (and the corresponding projected royalty amounts for various players) suggested in the 2009 Houston Impairment Memorandum (PX-200). *See* July 10 (a.m) Tr. at 47:13-54:20; July 9 (p.m.) at 108:24-109:25. Defendants have not even objected to the admissibility of any of these payments, and in fact, one of Defendants' experts, Mr. Bakewell, bases a reasonable royalty calculation on the amount Wi-LAN paid for the patents in suit. Defendants' argument that there is no evidence to support an award of any damages is simply mistaken.

Dated: July 11, 2013

Respectfully submitted,

By: /s/ *David B. Weaver*

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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 11th day of July, 2013.

/s/ David B. Weaver
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