

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION

I/P ENGINE, INC.,)
v. Plaintiff,)
AOL, INC. et al.,)
Defendants.)
)

**PLAINTIFF I/P ENGINE, INC.'S OPPOSITION TO DEFENDANTS' RENEWED
MOTION FOR JUDGMENT AS A MATTER OF LAW ON DAMAGES OR A NEW
TRIAL**

Jeffrey K. Sherwood
(Virginia Bar No. 19222)
Frank C. Cimino, Jr.
Kenneth W. Brothers
Charles J. Monterio, Jr.
DICKSTEIN SHAPIRO LLP
1825 Eye Street, NW
Washington, DC 20006
Telephone: (202) 420-2200
Facsimile: (202) 420-2201

Dawn Rudenko Albert
DICKSTEIN SHAPIRO LLP
1633 Broadway
New York, NY 10019
Telephone: (212) 277-6500
Facsimile: (212) 277-6501

Donald C. Schultz (Virginia Bar No. 30531)
W. Ryan Snow (Virginia Bar No. 47423)
CRENSHAW, WARE & MARTIN PLC
150 West Main Street
Norfolk, VA 23510
Telephone: (757) 623-3000
Facsimile: (757) 623-5735

Counsel for Plaintiff I/P Engine, Inc.

January 25, 2013

TABLE OF CONTENTS

I.	INTRODUCTION	1
II.	A NEW TRIAL ON THE DOLLAR AMOUNT OF DAMAGES ONLY, NOT JMOL OR A COMPETE RETRIAL ON DAMAGES, IS THE PROPER REMEDY.....	2
	A. Neither JMOL Nor A Complete Retrial On Damages Is Appropriate.....	2
	B. The New Trial Should Be Limited to the Dollar Amount of Past Damages	4
III.	I/P ENGINE SUBMITTED SUFFICIENT EVIDENCE OF THE ROYALTY BASE	5
IV.	DEFENDANTS' DOUBLE COUNTING OF REVENUE ARGUMENT IS MERITLESS.....	11
	A. Defendants Waived Any Double-Counting Objection	11
	B. There Is No Legal or Factual Basis For Defendants' Double-Counting Argument	12
V.	DR. BECKER'S DAMAGES THEORIES AND RELATED EVIDENCE ARE PROPER, ADMISSIBLE AND CREDIBLE	14
	A. There Is Substantial Evidence Regarding Infringement	14
	B. The Jury's Findings Regarding Dr. Becker's Credibility Should Remain Undisturbed.....	16
	1. There is Substantial Evidence of Record Supporting the Jury's Verdict of a Running Royalty	17
	2. There Is Sufficient Evidence for the Jury to Have Found that the Overture Licenses Were Comparable	18
	C. Defendants' Thinly Disguised Entire Market Value Rule Argument Is A Red Herring.....	22
VI.	A NEW TRIAL IS WARRANTED ONLY ON THE DOLLAR AMOUNT OF PAST DAMAGES	28
VII.	CONCLUSION.....	30

I. INTRODUCTION

Defendants' motion amounts to this: a rehash of arguments repeatedly rejected by this Court, coupled with an attack on the credibility of I/P Engine's damages expert, Dr. Stephen Becker. But Defendants' 27-page effort to distort the record, misconstrue the law, and knock down straw men, is hardly sufficient to withdraw this case from the province of the jury. The evidence at trial amply supported the jury's finding that I/P Engine should receive a 3.5% running royalty on Defendants' infringing revenues. Dr. Becker's testimony was well-supported by the evidence, and the jury had ample basis to ignore Defendants' attack on his credibility. Defendants' arguments, including their assertions regarding apportionment and double dipping, either have no basis in fact, or were met with contrary evidence, leaving the decision to the jury. The appropriateness of the jury's decision is magnified by Defendants' decision to utterly abandon at closing the testimony of their own damages expert. Defendants' request for JMOL on damages should be denied.

The parties do agree, however, that a new trial is necessary based on the Court's mid-summation ruling that changed the basis of I/P Engine's damage claim. This new trial should be limited to the amount of past damages. Defendants' proposal to retry the entire damages case is nonsensical. The jury's decision to credit the testimony of Dr. Becker and award a 3.5% running royalty is supported by substantial evidence. Only I/P Engine's proposal for the scope of a new trial comports with the twin aims of preserving judicial economy while respecting as much of the jury's verdict as is possible. This narrow retrial is made possible by the Court's use of a special verdict form, which "enables errors to be localized so that the sound portions of the verdict may be saved and only the unsound portions be subject to redeterminations through a new trial."

Richardson-Vicks Inc. v. Upjohn Co., 122 F.3d 1476, 1484-85 (Fed. Cir. 1997) (quoting

Sunderland, Verdicts, General and Special, 29 Yale L.J. 253, 259 (1920)). The only “unsound portio[n]” of the verdict was the jury’s decision concerning past damages, and should be the singular focus of the new trial.

II. A NEW TRIAL ON THE DOLLAR AMOUNT OF DAMAGES ONLY, NOT JMOL OR A COMPETE RETRIAL ON DAMAGES, IS THE PROPER REMEDY

The primary thrust of Defendants’ motion is that JMOL is required because no portion of the jury’s damages findings was based on substantial evidence, and the award was tainted by unreliable and inadmissible expert testimony. Defendants alternatively argue (at 3, 29-30) that, if the Court denies their JMOL motion, then a new trial on “all” damages issues is necessary. The case law and evidence of record do not support either of Defendants’ demands.

A. Neither JMOL Nor A Complete Retrial On Damages Is Appropriate

The jury found that all Defendants infringed I/P Engine’s valid asserted patents. (D.I. 789 (verdict) at 2-6). The jury also found that I/P Engine was entitled to a running royalty of 3.5%, and awarded money damages for Defendants’ past infringement. (*Id.* at 11). The parties agree that the jury’s specific dollar award of past damages was based upon error. (*See* D.I. 826 (Seeking New Trial on Dollar Amount of Past Damages)). Defendants cite to no authority whatsoever that requires granting a JMOL of no damages under such circumstances.

Numerous Federal Circuit decisions dictate that, if there was an error in conjunction with the presentation of a patent holder’s damages case at trial, the appropriate remedy is a new trial limited to the damages issues tainted by the error. In the present case, there was error associated with the dollar amount of past damages awarded.¹ The jury’s special-interrogatory findings enables this Court to preserve all other aspects of the verdict, and narrowly defines the scope of

¹ I/P Engine has separately argued that the Court’s substantive laches decision was improper, and that damages should be awarded from September 15, 2005. (D.I. 837). That motion also relates solely to the amount of past damages.

the new trial. *See, e.g., LaserDynamics, Inc. v. Quanta Computer, Inc.*, 694 F.3d 51, 69, 81 (Fed. Cir. 2012) (remanded for new damages determination limited to the appropriate royalty rate, as expert's royalty rate was "untethered from the patented technology at issue and the many licenses thereto" and the expert's royalty base violated the entire market value rule); *ResQNet.com, Inc. v. Lansa, Inc.*, 594 F.3d 860, 870-72 (Fed. Cir. 2010) (remanded for recalculation of reasonable royalty, as expert relied on incomparable licenses and misrepresented those licenses); *Lucent Techs., Inc. v. Gateway, Inc.*, 580 F.3d. 1301, 1338-39 (Fed. Cir. 2009) (remanded for new trial on the amount of damages where expert provided no analysis of certain license agreements and increased royalty rate to a rate that lacked any evidentiary support); *Riles v. Shell Exploration & Prod. Co.*, 298 F.3d 1302, 1312-14 (Fed. Cir. 2002) (remanded for redetermination of past damages because the three damages models employed by plaintiff's expert lacked in "any reasonable economic or factual basis").²

Defendants assert (at 3) that the Supreme Court decision in *Weisgram v. Marley Co.*, 528 U.S. 440 (2000), supports their argument. But *Weisgram* does not apply to the facts of this case. In *Weisgram*, the Supreme Court upheld the Court of Appeals' decision to enter a JMOL rather than remand for retrial because there was no evidence (expert or otherwise) sufficient to support the verdict, and the plaintiff did not present *any* grounds for a new trial to the Court. *Id.* at 456. The Eighth Circuit found that the plaintiffs' expert evidence was entirely speculative, inconsistent with *Daubert*, and that the case was not close. *Id.* Here, by contrast, Dr. Becker's testimony was fully consistent with *Daubert*, strongly supported by considerable evidence, and there was also substantial other evidence in the record sufficient to support I/P Engine's damages

² In *Cornell Univ. v. Hewlett-Packard Co.*, 609 F. Supp. 2d 279, 292 (N.D.N.Y. 2009), the district granted JMOL after it determined that the royalty base used by the jury was too large, but even then, it recalculated the appropriate amount of damages, and did not grant a judgment of zero damages, as Defendants seek in their present motion.

case. *See infra* § III, § V. This Court previously rejected Defendants' *Daubert* and *in limine* arguments seeking exclusion of Dr. Becker's opinions and supporting evidence. Unlike *Weisgram*, this Court admitted into evidence numerous documents from I/P Engine and Defendants supporting I/P Engine's damages theory, and found that Dr. Becker's opinions were consistent with *Daubert*. *See infra* § V. And unlike *Weisgram*, I/P Engine has presented detailed grounds for a new trial on the dollar amount of past damages. (D.I. 826, 837).

B. The New Trial Should Be Limited to the Dollar Amount of Past Damages

Aside from the dollar amount of past damages, there were no defects in any other aspect of the trial or verdict. The jury found that a running royalty, not a lump sum, was appropriate, and found that the appropriate royalty rate was 3.5%. (D.I. 789 at 11). These findings were based on the substantial evidence of record (e.g. Trial Tr. at 772:11-21; 792:17-799:1; 834:1-846:11; 1683:14-19), and were expressly set forth in the special interrogatory verdict form. (D.I. 789 at 11).

The Federal Circuit has endorsed the type of special verdicts used by this Court in this case. *Richardson-Vicks*, 122 F.3d at 1484-85. Because the Court used a special verdict form that separately asked about a running royalty or lump sum, the royalty rate, and the dollar amount of past damages, "the sound portions of the verdict may be saved and only the unsound portions [need] be subject to redeterminations through a new trial." *Id.* The new trial should be limited to the sole issue of the dollar amount of past damages, as stated by question III.C of the verdict form:

If you have found any claim of the '420 or the '664 patent to be both valid and infringed by Defendants, what sum of money, if any, if paid now in cash, would reasonably compensate I/P Engine for any of defendants past infringement?

A new trial on the dollar amount of past damages could be accomplished in a single day, with brief openings and summations, stipulated facts, and expert testimony (consistent with their reports) from Dr. Becker and Dr. Ugone.

In their brief, Defendants ignore the Federal Circuit jurisprudence holding that special verdicts should be preserved as much as possible. Defendants instead rely (at 3) on three non-binding and irrelevant decisions relating to the admissibility of a defendant's wealth or net worth.³ I/P Engine did not introduce any evidence of Defendants' wealth or net worth, however. Indeed, the Court precluded I/P Engine from even referencing Defendants' total revenues relating to the accused systems. (Trial Tr. at 746:2-19). Defendants' attempt (at 3) to transform I/P Engine's introduction of an apportioned royalty base into evidence of admission of wealth is absurd. Evidence of apportioned revenues from Defendants' infringing activities has nothing to do with Defendants' wealth and cannot support JMOL. *See, e.g., Carnegie Mellon Univ. v. Marvell Tech. Group, LTD.*, No. 09 cv 290, 2012 U.S. Dist. LEXIS 120558, *13 (W.D. Pa. Aug. 24, 2012) ("reference to average operating profits for the purpose of showing a starting point [of an apportionment analysis] is justified").

III. I/P ENGINE SUBMITTED SUFFICIENT EVIDENCE OF THE ROYALTY BASE

Defendants claim (at 11-12) that the "only evidence that I/P Engine attempted to rely on to establish damages or a royalty base" after the Court issued its *sua sponte* laches decision⁴

³ *U.S. ex rel. Miller v. Bill Harbert Int'l Constr., Inc.*, 608 F.3d 871, 897-98 (D.C. Cir. 2010); *Koufakis v. Carvel*, 425 F.2d 892, 902 (2d Cir. 1970); and *Reilly v. NatWest Mkts. Group Inc.*, 181 F.3d 253, 266 (2d Cir. 1999). Notably, the *Reilly* court held that although evidence of wealth is generally inadmissible there was no error in admitting the evidence because it was relevant to the witness's credibility. 181 F.3d at 266-67.

⁴ Defendants falsely state (at 6) that the Court granted Defendants' laches motion. As the Court acknowledged in its written decision (D.I. 800, at 1), Defendants had not moved for JMOL on laches in response to I/P Engine's JMOL at the close of Defendants' case. The Court ruled *sua sponte* on laches.

“was a demonstrative bar chart.” That bar chart (Ex. 2, PDX-441) has nothing to do with a royalty base, however. It was essentially the same demonstrative (Ex. 1, PDX-83) that Dr. Becker referenced during his testimony. Dr. Becker explained that he prepared PDX-83 to “show[] the amounts by quarter that you would have under a running royalty structure.” (Trial Tr. at 848:11-21). I/P Engine used the demonstrative PDX-441 during summation as an illustration and reminder of the amount of royalties it was seeking post-filing of the complaint. Inspection of the four relevant quarters after the complaint was filed shows that between \$25 million and \$30 million would be due in each of these quarters. (Ex. 2, PDX-441).⁵ Showing a demonstrative during summation that was previously referenced by an expert and shown to a jury is a perfectly appropriate aid to argument. *See United States v. Soulard*, 730 F.2d 1292, 1300 (9th Cir. 1984) (approving use of demonstrative charts during expert testimony and closing arguments); *U.S. v. Waddell*, 62 Fed. Appx. 491, 495 (4th Cir. 2003) (“the display of the chart did not constitute plain error, if error at all”).

Defendants disregard that any alleged shortcoming in I/P Engine’s admitted evidence of damages is of their own making. Indeed, Defendants objected to the introduction of the evidence that they now assert was required. For example, I/P Engine attempted to submit quarterly revenues for the accused systems for each of the Defendants. These revenues could have been used to calculate a precise royalty base for the post-laches damages period by multiplying each Defendant’s quarterly revenue by the corresponding apportionment factor. (See Trial Tr. at 826:11-827:2; Ex. 3 (PDX-076, listing the apportionment factors Dr. Becker used)). Defendants

⁵ Although I/P Engine agrees that the timing of the Court’s laches rulings caused jury confusion warranting a new trial as to the dollar amount of damages (see, e.g., D.I. 826 and 837), the record contains ample evidence supporting I/P Engine’s damages claim, including specific numbers of the royalty base and specific damage numbers for each defendant. (e.g. Trial Tr. at 833:3-846:17; 1028:20-21 (denying Defendants’ Rule 50(a) motion on damages); 2135:8-2136:25 (same)).

objected to the introduction of this evidence as violating the “entire market value rule;” and, the Court excluded the total accused revenues from evidence. (Trial Tr. at 746:2-19 (general ruling); 828:2-22 (specifically precluding PX-280)). As explained in more detail in I/P Engine’s Motion for a New Trial (D.I. 826 at 7-13), the Court’s exclusion of that evidence was improper because the entire market value rule was not in play, and the proffered information was not entire market value evidence. Numerous courts have held that the revenues attributable to the smallest salable patent-practicing unit are admissible, and that introduction of these revenues does not implicate the entire market value rule. *See, e.g., LaserDynamics, Inc. v. Quanta Computer, Inc.*, 694 F.3d 51, 67 (Fed. Cir. 2012); *Carnegie Mellon Univ. v. Marvell Tech. Group, LTD.*, No. 09 cv 290, 2012 U.S. Dist. LEXIS 120558, *12 (W.D. Pa. Aug. 24, 2012); *PACT XPP Techs., AG v. Xilinx, Inc.*, No. 2:07 cv 563, 2012 U.S. Dist. LEXIS 66436, *8-9 (E.D. Tex. May 10, 2012). Defendants are trying to have it both ways, arguing at trial that financial evidence should be excluded for one reason, then arguing in post-trial motions that the same evidence should have been introduced for another reason and that the exclusion sought and obtained by the Defendants taints the verdict.

Defendants insinuate (at 11) that JMOL is warranted because I/P Engine, aware that Defendants may press their affirmative defense of laches, should have introduced damages claims under both a non-laches and laches environment. This argument is illogical and unsupported by the case law. Laches is an affirmative defense, where Defendants at all times bore the burden of proof. *A.C. Aukerman Co. v. R.L. Chaides Constr. Co.*, 960 F.2d 1020, 1038-1039 (Fed. Cir. 1992). There was no obligation for I/P Engine to introduce alternative damages theories and amounts during its case in chief. Doing so would have caused needless jury confusion. This is particularly true because laches was and is an equitable defense, and the Court

already ruled at the final pretrial conference that the issue would not be submitted to the jury. (D.I. 839 ¶ 2 (Rudenko Dec.); D.I. 840 ¶ 2 (Sherwood Dec.); D.I. 841 ¶ 2 (Brothers Dec.), D.I. 842 ¶ 2 (Snow Dec.)).

Defendants fail to cite (and I/P Engine did not find) a single case suggesting that a patentee (or any other plaintiff) is obligated to present alternative non-laches and laches damage claims at trial to the jury, and that the failure to do so is grounds for JMOL. To the contrary, where laches is at issue during a trial, the common practice is for the jury to decide the damages due for the full damages period. If the court then finds that laches applies, it reduces the jury's damage award to reflect only the post-suit damages. *See, e.g., Humanscale Corp. v. CompX Intern. Inc.*, No. 09-86, 2010 WL 3222411 (E.D. Va. Aug. 16, 2010) (jury verdict covered damages period beginning six years prior to filing; court then denied laches); *Amado v. Microsoft Corporation*, No. 03-242, 2008 WL 8641264, *1 (C.D. Cal Dec. 4, 2008) (jury verdict covered damages period beginning six years prior to filing; court found laches and altered jury award to reflect laches ruling); *Engineered Products Co. v. Donaldson Co.*, 330 F. Supp. 2d 1013, 1017-18 (N.D. Iowa 2004) (“Still unresolved after the jury’s verdict [is] the defendant’s equitable defenses of… laches..., which [was] tried to the court....”), *rev’d on other grounds*, 147 Fed. Appx. 979 (Fed. Cir. 2005); *Imonex Services, Inc. v. W.H. Munzprufer Deitmar, Trenner G.m.b.H.*, No. 01-174, 2003 WL 26095807, *1 (E.D. Tex. Sept. 25, 2003) (“defendants have failed to meet their burden to demonstrate that laches bars the recovery of any damages in this case. Therefore, the court declines to reduce the amount of damages awarded by the jury....”).⁶

⁶ Defendants cite no cases that support the argument that they used to convince the Court to change the damages period near the end of trial. (Trial Tr. at 1813:2-8 (arguing that submitting full damages period to the jury would be improper)). Indeed, the case law contradicts Defendants’ argument. *See, e.g., Amado v. Microsoft Corporation*, No. 03-242, 2008 WL 8641264, *1 (C.D. Cal Dec. 4, 2008) (jury verdict covered damages period beginning six years

Consistent with the common practice of the courts, I/P Engine understood that this Court would not rule on laches prior to the jury's verdict of the entire damages period. (D.I. 837 at 3; D.I. 839 ¶ 2 (Rudenko Dec.); D.I. 840 ¶ 2 (Sherwood Dec.); D.I. 841 ¶ 2 (Brothers Dec.), D.I. 842 ¶ 2 (Snow Dec.)).⁷

Nor do Defendants explain how Dr. Becker would have been able to provide such "alternative" theories. The Court ruled that the experts were limited to the opinions expressly set out in their reports. (Trial Tr. at 433:13-14). Defendants frequently objected at trial when they believed I/P Engine was not complying with this ruling. (e.g. Trial Tr. at 812:17-20; 840:16-19; 846:21-22). I/P Engine did not bear the burden of proving laches, and Defendants' damages expert failed to proffer any evidence of alternative damages theory or amount based upon an application of laches, so there was nothing relating to laches for Dr. Becker to rebut.

Defendants' argument that I/P Engine should have sought to reopen the record after the Court's laches ruling is no basis to grant Defendants' JMOL. Defendants ignore that the Court made clear that it was not accepting additional testimony (Trial Tr. at 1868:17-22, 1963:20-22),

prior to filing; court found laches and altered jury award to reflect laches ruling); *Humanscale Corp. v. CompX Intern. Inc.*, No. 09-86, 2010 WL 3222411 (E.D. Va. Aug. 16, 2010) (jury verdict covered damages period beginning six years prior to filing; court considered laches after the jury verdict).

⁷ After the Court initially stated its laches ruling, I/P Engine requested that the Court defer application until after the jury verdict. (Trial Tr. at 1812:3-18). The Court indicated it was willing to do so, but after Defendants objected, the Court changed its mind. (Trial Tr. at 1815:1-11). Defendants asserted that allowing I/P Engine to argue for damages that cover the full damages period would be improper because I/P Engine could "try to prejudice the verdict and to achieve some kind of compromise" by the jury that I/P Engine should "get something out of it." (Trial Tr. at 1813:2-8). This position is meritless. Both damages experts had already testified regarding damages that covered the full damages period (Trial Tr. at 845:18-846:17; 1599:5-10), and Defendants never alleged that allowing this testimony was error. Defendants cannot have it both ways, by arguing in its post-trial brief that I/P Engine should have proceeded with laches in the alternative, but objecting at trial to permitting the Court to adjust the verdict post-trial by an application of the laches equitable defense.

and that the Court believed that the record was sufficient for the jury to arrive at a damages verdict (Trial Tr. at 1964:5-13, 1968:10-25). Defendants also ignore that I/P Engine made repeated attempts to address the laches issue as it related to past damages. For example, I/P Engine repeatedly urged the Court to follow the routine practice of allowing the jury to consider the full damages period, and making any laches-related adjustments post-verdict. (Trial Tr. at 1811:19-1812:2 (suggesting leaving the damages period unchanged); 1815:12-1816:15 (suggesting allowing the jury to evaluate both damages periods); 1976:9-19, 2022:13-18 (objecting to jury instructions regarding the damages period)).

The only case on which Defendants rely for this argument, *Davis v. Rodriguez*, 364 F. 3d 424 (2d Cir. 2004), does not stand for the premise that a failure to seek to reopen a case is grounds for JMOL. That issue was not even addressed on appeal in *Davis*. Commenting on Rule 50(a)(1), the Second Circuit stated that the plaintiff should have been given an opportunity to reopen his case based on the comments to the rule that say “in no event ... should the court enter judgment against a party who has not been apprised of the materiality of the dispositive fact and been afforded an opportunity to present any available evidence bearing on that fact.” *Id.* at 432. *Davis* suggests that depriving I/P Engine of the ability to present its laches evidence once the presumption of laches was found by the Court was error. It does not suggest that I/P Engine was required to attempt to re-open the record.

I/P Engine explicitly sought the Court’s guidance regarding how to proceed in view of the Court’s laches ruling regarding the damages period. After specifically discussing PDX-83 in view of the shortened damages period with the Court, I/P Engine’s counsel acknowledged that a specific damages number for the shortened period was not in evidence and asked the Court for guidance on how to address the situation. (Trial Tr. at 1962:9-1963:19.) The Court’s response

was to prohibit the parties from mentioning the damages numbers that apply to the shortened damages period. (Trial Tr. at 1963:20-22; D.I. 827 (Sherwood Dec) ¶ 2). The parties agree that the Court's implementation of its laches ruling was error. The appropriate remedy is a new trial solely on the dollar amount of past damages. As explained in I/P Engine's motion for a new trial on past damages (D.I. 826), a new trial on past damages is appropriate whether or not the Court reverses its laches ruling.

IV. DEFENDANTS' DOUBLE COUNTING OF REVENUE ARGUMENT IS MERITLESS

The Court has twice previously ruled that all defendants can be jointly and severally liable (D.I. 682 at 5 (“AOL, Gannett, IAC..., and Target... may be jointly and severally liable for any alleged infringement with their co-defendant, Google, Inc.”; D.I. 705 at 9 (same)). In its Order, the Court reiterated the well-established law that “the parties that make and sell an infringing device are joint tort-feasors with parties that purchase an infringing device for use or resale....” (D.I. 682 at 5 (citing *Shockley v. Arcan Inc.*, 248 F.3d 1349,1364 (Fed. Cir. 2001))). The third time is not the charm; Defendants’ “double counting” argument must be rejected for three independent reasons. First, Defendants failed to timely object, and thus waived this argument. Second, as explained above, there is no legal basis for the argument (even if it were factually correct). Third, the argument is factually incorrect. I/P Engine fully disaggregated the damages numbers that it presented to the jury.

A. Defendants Waived Any Double-Counting Objection

At no time during Dr. Becker's trial testimony did Defendants object that he was not appropriately disaggregating the total damages-related revenues. (Trial Tr. at 754:12-849:9; 924:18-935:20). Nor did Defendants cross-examine Dr. Becker or move for JMOL at the end of I/P Engine's case-in-chief regarding any alleged failure to disaggregate the numbers. (Trial Tr.

at 849:10-924:17). As Dr. Becker testified at trial, and the demonstratives and evidence that he relied on show, he disaggregated the damages numbers for each defendant. (Trial Tr. at 767:20-769:2; 848:16-849:6; Ex. 1 (PDX-83); Ex. 4 (PDX-77); Ex. 5 (PDX-82)). I/P Engine never has attempted to seek double recovery from any defendant in this case.

Defendants allege (at 13) that I/P Engine “urged the jury” during summation to interpret PDX-441 as the royalties due from Google alone, instead of the royalties due from Defendants collectively. Defendants’ argument is based solely upon I/P Engine’s closing arguments. (D.I. 844 at 13). But counsel’s statements during opening and closing arguments are not evidence. *See Kelly v. Smith*, No. 7 cv 536, 2008 WL 345838, *9 (W.D.Va. Feb. 6, 2008). This Court instructed the jury on just this stating that “[s]tatements and argument of counsel are not evidence in the case unless made as an admission or stipulation of fact.” (Trial Tr. at 2076:1-3).

Further, Defendants could have objected to I/P Engine’s closing if they found it improper. They did not and have therefore waived any right to argue putative error stemming from I/P Engine’s closing. *Dennis v. General Elec. Corp.*, 762 F.2d 365, 366–67 (4th Cir.1985) (counsel “cannot as a rule remain silent, interpose no objections, and after a verdict has been returned seize for the first time on the point that the comments to the jury were improper and prejudicial”).

B. There Is No Legal or Factual Basis For Defendants’ Double-Counting Argument

Defendants are attempting to capitalize on the confusion created by the Court’s laches rulings by isolating from its context a portion of the transcript that relates to this ruling. The damages period was shortened only after all of the damages evidence was submitted, and the jury had not heard anything about a shortened damages period prior to closing. The damages period for the non-Google defendants had not been shortened at the time of I/P Engine’s initial closing

argument. On summation, I/P Engine therefore explained to the jury that the damages period for Google had been shortened:

And remember, for Google recovery is only limited to the last four quarters, so go back to the fourth quarter of last year. So those are the only rates from here that are relevant to your determinations when you retire to deliberate.

(Trial Tr. at 2007:25-2008:4). Consistent with what it had already discussed with the Court, I/P Engine's counsel reminded the jury of the evidence relevant to Google's damages stating:

Well, as a result of the ruling, the only royalties that are at issue here are the ones that are represented by the four bars on the far right. **And you will need to rely on your memory and judgment** to determine based upon that what's a reasonable royalty for Google to pay after September 15, 2011."

(Trial Tr. at 2008:19-24) (emphasis added). Contrary to Defendants' characterization, I/P Engine's counsel did not tell the jury that the bar chart represented a royalty for Google alone. I/P Engine's counsel instead referenced a demonstrative exhibit that was virtually identical to the demonstrative shown during Dr. Becker's testimony, then asked the jury to rely on their collective recollection of the evidence. (*Id.*) In his next breath, I/P Engine's counsel asked the jury to recall the damages due from the other defendants. (Trial Tr. at 2008:25-2009:2).

After the Court changed its laches ruling relating to the non-Google defendants (after I/P Engine's initial summation), I/P Engine attempted to explain that ruling and its impact on damages to the jury. Again, referring the jury to PDX-441, I/P Engine's counsel explained:

So when it comes to determining a royalty, as you have heard the Court has made a ruling, an additional ruling since I was up here before, with respect to what the scope of recovery is. And the scope of recovery is going to be limited for all defendants to the period September 15 forward to the present day. September 15, 2011, excuse me. So this is what you have to look at with respect to how to calculate the damages in this case, which is the last four quarters, and these amounts are cumulative. In other words, each bar on here reflects a different amount of money, a per quarter accumulation of revenue as a result of using the infringing system.

(Trial Tr. 2069-70). I/P Engine thus made clear that PDX-441 represented the damages sought for all defendants for the reduced damages period. At no time did I/P Engine “encourage” a so-called “double counting of revenue and damages” as Defendants allege.

V. DR. BECKER’S DAMAGES THEORIES AND RELATED EVIDENCE ARE PROPER, ADMISSIBLE AND CREDIBLE

The remainder of Defendants’ arguments fall into three general buckets: (1) infringement; (2) credibility and issues of fact for the Jury; and (3) entire market value rule. None of these are proper grounds for JMOL.

A. There Is Substantial Evidence Regarding Infringement

Defendants spend eight pages in their brief arguing that Dr. Becker’s damages opinion and testimony are improper because I/P Engine allegedly failed to prove several different aspects of its infringement case. (D.I. 844 at 2, 4, 15-16, 19-22). The Court already has considered and rejected Defendants’ arguments.⁸ Specifically, Defendants argue that I/P Engine did not prove infringement before 2010, so Dr. Becker’s reliance on a 2004 hypothetical negotiation date and events occurring before 2010 to determine a reasonable royalty’s form, rate and base are unreliable and inadmissible. (D.I. 844 at 19-22). Defendants also argue that Dr. Becker improperly included the incremental impact of the disabling and promotion features in the royalty base without any evidence that these features related to SmartAds or the accused functionality. (D.I. 844 at 2, 15-16).

These arguments are improper damages-related arguments because a damages expert must presume infringement. “Patents are presumed valid, enforceable, and infringed in the context of an expert’s formulation of an opinion on damages in a patent trial.” *St. Clair*

⁸ The Court denied Defendants’ *Daubert* motion finding that the Defendants’ objections to Dr. Becker’s testimony “are best resolved at trial during the course of examination as they generally go to the weight of the evidence and should be resolved by the jury.” (D.I. 705 at 9-10).

Intellectual Property Consultants, Inc. v. Canon, Inc., No. 03 cv 241, 2004 WL 2213562, *3 (D. Del. Sept. 28, 2004). Thus, the hypothetical negotiation for calculating a reasonable royalty is based on the assumption that the patents are valid, enforceable and infringed. *Id.* (citing Chisum, Patents § 20.03[3][a], p. 20-181; *TP Orthodontics, Inc. v. Professional Positioners, Inc.*, 20 U.S.P.Q.2d 1017, 1025 (E.D. Wis. 1991), *aff'd*, 980 F.2d 743 (Fed. Cir. 1992)). This legal premise is undisputed and was acknowledged by Defendants' own damages expert. (Trial Tr. at 1570:24-1571:5). Defendants filed a separate infringement JMOL (D.I. 831), and I/P Engine respectfully directs the Court to I/P Engine's Opposition thereto, which is filed contemporaneously with this brief.

Dr. Becker properly presumed infringement and properly relied on I/P Engine's infringement allegations, including the expert opinion and trial testimony of Dr. Frieder. In its infringement case, I/P Engine submitted ample evidence that disabling and promotion functionalities are part of the accused functionality. (Trial Tr. at 461:15-18; 494:1-10; 495:8-11; 496:13-15). Dr. Becker, as a damages expert, properly relied on Dr. Frieder's testimony.

DataQuill Ltd. v. High Tech Computer Corp., No. 08 cv 543, 2011 WL 6013022, *23 (S.D. Cal. Dec. 1, 2011) ("It is routine and proper for a damages expert in a technical patent case to rely on a technical expert for background.").

Likewise, Dr. Frieder testified that Google's infringement began in 2004 (Trial Tr. at 592:14-600:17). As a matter of law, the hypothetical negotiation date is based on the date of first infringement. *LaserDynamics, Inc. v. Quanta Computer, Inc.*, 694 F.3d 51, 75 (Fed. Cir. 2012). Dr. Becker appropriately may rely upon Dr. Frieder's testimony on this issue. *DataQuill Ltd.*, 2011 WL 6013022, *23; *Oracle America, Inc. v. Google Inc.*, No. 10 cv 3561, 2011 WL 5914033, *2 (N.D. Cal. Nov. 28, 2011) (rejecting argument that damages expert's opinion is

improper where the damages expert relied on technical experts). Significantly, Defendants' damages expert also identified the hypothetical negotiation date as 2004. (Trial Tr. at 1851:17-22). The 2004 hypothetical negotiation date was the only date of record presented to the jury by *all* parties' damages experts. Defendants did not present any other date, 2010 or otherwise, to the jury during trial relating to damages. Nor did they cross-examine Dr. Becker about his use of the 2004 hypothetical negotiation date. Not only is there ample evidence for Dr. Becker to use the 2004 hypothetical negotiation date; there is no evidence of record to support the 2010 hypothetical negotiation date.

Accordingly, Defendants may not argue, contrary to their own position at trial, that the 2004 hypothetical negotiation date is a grounds for JMOL. Because they did not proffer testimony at trial of an alternative date, any objection now, post-verdict, is waived and improper. *See Mobil Oil Corp. v. Amoco Chemicals Corp.*, 915 F. Supp. 1333, 1353 (D. Del. 1995) (finding that Mobil waived its right to object to a position by taking that position itself).

B. The Jury's Findings Regarding Dr. Becker's Credibility Should Remain Undisturbed

Defendants attack Dr. Becker's credibility and argue that I/P Engine's damages case is not supported by substantial evidence because Dr. Becker (a) ignored Google's evidence supporting a lump sum over a running royalty; (b) improperly weighed the Overture licenses versus "real-world transactions" in arriving at his opinions; and (c) the Overture patents are not comparable. These arguments are nothing more than a rehash of arguments previously made by Defendants in their *Daubert* and *in limine* motions, which this Court properly rejected as invading the jury's province of credibility. (D.I. 682 at 3-4; D.I. 705 at 9-10). Importantly, the jury has heard Defendants' arguments, considered the evidence presented by both sides, and rendered its verdict. That I/P Engine's evidence was weighed more heavily than Defendants'

evidence fails to justify JMOL. *See, e.g., Bonner v. Dawson*, 404 F.3d 290, 295 (4th Cir. 2005) (“[T]o prevail on a Rule 50(b) motion, the court must determine without weighing the evidence or considering the credibility of the witnesses, that substantial evidence does not support the jury’s findings.”).

1. There is Substantial Evidence of Record Supporting the Jury’s Verdict of a Running Royalty

Defendants argue (at 23) that Dr. Becker’s testimony and evidence that he presented to the jury was “speculative, not based on substantial evidence, and inadmissible.” According to Defendants (at 24), “none of the evidence relied on by I/P Engine or Dr. Becker to justify a running royalty was admissible or reliable.” Defendants argue (at 25) that unlike I/P Engine (and Dr. Becker), they “[i]ntroduced evidence that the hypothetical negotiation would have resulted in a lump-sum.”

Defendants are doing nothing more than improperly arguing that their evidence was more credible and deserved more weight than I/P Engine’s evidence. *See Bonner v. Dawson*, 404 F.3d 290, 295 (4th Cir. 2005). Here, substantial evidence supports the jury’s verdict that a running royalty was the appropriate measure of damages. This evidence includes Dr. Becker’s experience, analysis, and opinion including that the general advantages to a running royalty outweighed the advantages to a lump sum in this particular negotiation, and the multiple comparable Overture licenses. (Trial Tr. at 772:11-21; 842:9-10; 843:1-2; 845:3-17). The evidence also reflects that Google licensed the Overture patents. (Trial Tr. at 840:4-8), Lycos’ preference for a running royalty (Trial Tr. at 1683:14-19), and the absence of a formal Google licensing policy. (Trial Tr. at 1684:7-1685:17). As this Court already has held, the sufficiency of testimony and evidence relating to these issues are “best resolved at trial during the course of

examination as they generally go to the weight of the evidence and should be resolved by the jury.” (D.I. 705 at 9-10).

Defendants’ reliance (at 23-24) on *Stickle v. Heublein, Inc.*, 716 F.2d 1550, 1561 (Fed. Cir. 1983), and *LaserDynamics*, 694 F.3d at 78-81, does nothing to undermine the jury’s determination that a running royalty is appropriate. The Federal Circuit rejected the damages awards in those cases because the evidence of the form of the royalty (either in the industry or the licenses of record) being a lump sum was effectively undisputed or was completely devoid of any connection to either the patented technology or the industry. *Stickle*, at 716 F.2d at 1553; *LaserDynamics*, 694 F.3d at 64-65, 80.⁹

2. There Is Sufficient Evidence for the Jury to Have Found that the Overture Licenses Were Comparable

Defendants claim (at 28) that Dr. Becker “compounded” his error by relying on the non-comparable Overture licenses. Defendants argue that the Overture licenses are not comparable because (a) they do not involve comparable technology; (b) there is no evidence that value of the Overture technology was comparable to the technology of the patents-in-suit; (c) Dr. Becker “selectively ignored comparable real-world transactions” in arriving at his opinion; and (d) the negotiating positions of the Overture licensees and Yahoo! were radically different than Google and Lycos. This is a factual matter that was the subject of conflicting expert testimony, and the

⁹ In *Stickle*, there was no evidence that the relevant industry ever used the type of royalty that the district court adopted. In fact, *Stickle* does not adopt a lump-sum as that term is used in this case; rather, it used a royalty based on a lump-sum for *each* machine that is sold. 716 F.2d at 1562. Unlike in *Stickle*, the Overture licenses establish that running royalties are used in the search advertising industry. Likewise, *LaserDynamics* did not prohibit a patentee from presenting a running royalty theory to the jury. *LaserDynamics* prohibited the expert from presenting a royalty rate that was not tethered to a comparable license, but explicitly held, “we do not hold that LaserDynamics’ past licenses create an absolute ceiling on the amount of damages to which it may be entitled, see 35 U.S.C. § 284, or that its history of lump sum licenses precludes LaserDynamics from obtaining damages in the form of a running royalty.” 694 F. 3d at 81.

jury disagreed with Defendants' evidence and arguments. Defendants' arguments provide no reason to take the case away from the jury.

The proper issue for JMOL is whether "there is no legally sufficient evidentiary basis for a reasonable jury to have found for [I/P Engine] with respect to [damages]." Fed. R. Civ. P. 50. Defendants are merely rearguing their *Daubert* motion against Dr. Becker's opinion (D.I. 320), which the Court rejected. (D.I. 705 at 9-10). As set forth below, there is ample evidence of record that the Overture licenses are comparable in technology and value. And Dr. Becker addressed the "real world transactions" and the parties' negotiating positions in his analysis of the *Georgia Pacific* factors.

For example, Google licensed the technology of the Overture licenses (Trial Tr. at 840:4-8). Dr. Frieder, I/P Engine's technical expert, testified that the '361 patent (which is the subject of the Overture licenses) is comparable technology. (Trial Tr. at 630:17-23). Dr. Becker relied on Dr. Frieder's opinions regarding comparability, and properly testified about the Overture licenses under *Georgia Pacific* factor 12 (comparable licenses in the industry).¹⁰ (Trial Tr. at 924:20-925:5). That both patents cover search advertising makes them sufficiently comparable for damages purposes. *See Lucent*, 580 F.3d at 1329 (requiring similar technology); *ResQNet.com, Inc. v. Lansa, Inc.*, 594 F.3d 860, 870 (Fed. Cir. 2010) (rejecting licenses not showing a "discernible link to the claimed technology").

¹⁰ Citing *ResQNet*, Defendants suggest (at 28) that because the Overture licenses are directed to patents other than the patents-in-suit, they are automatically suspect. *ResQNet* does not stand for this premise. The licenses in *ResQNet* were licenses granted from the patent holder, which failed to license any patent at all. 594 F.3d at 870. The licenses were "re-branding or re-bundling licenses" directed to "marketing and other services" rather than the technology covered by the patent owned by the licensor. Further, *ResQNet* heavily criticizes misrepresenting non-patent license agreements as suitable for use in a patent case, something not relevant here.

Defendants point out that the ‘361 patent does not talk about relevance, as the patents-in-suit do. But Defendants fail to mention that Dr. Frieder testified that “[the ‘361 patent] is definitely missing the relevance. That is why [the patents-in-suit] are better.” (Trial Tr. at 716:20-23). Dr. Frieder provided an easily discernible link between these two similar technologies. He also provided justification as to why the patents-in-suit have a greater value than the Overture technology.¹¹

Dr. Becker also testified that he considered all of the licenses on which Defendants relied and identified the evidence that he believed to be most relevant, comparable, and temporal to the 2004 hypothetical negotiation date.¹² (e.g. Trial Tr. at 835:15-839:6; 925:6-926:6; 930:2-17). This includes considering the differences between the negotiating positions of Lycos and Google (as compared to the Overture licensees) under *Georgia Pacific* factor 5 (the commercial relationship between the licensor and licensee). *Georgia-Pacific Corp. v. U.S. Plywood Corp.*, 318 F. Supp. 1116, 1120 (S.D.N.Y 1970). In analyzing each of the *Georgia Pacific* factors, Dr.

¹¹ There is no “breadth of the claims” or “ease with which a patent can be designed around” test as Defendants imply (at 28). The “vigilance” that *ResQNet* refers to when technologies other than the patent-in-suit are involved is vigilance to make sure that other technologies are similar. Indeed, *ResQNet* states “A... damages award... cannot stand solely on evidence which amounts to little more than a recitation of royalty numbers... particularly *when it is doubtful that the technology of those license agreement is in any way similar to the technology being litigated here.*” *ResQNet*, 594 F.3d at 869 (quoting *Lucent*, 580 F.3d at 1329) (emphasis added). The portion of *ResQNet* cited by Defendants addresses the technological similarity requirement that Dr. Frieder’s testimony satisfies, not a “breadth of the claims” or “ease with which a patent can be designed around” test. Nonetheless, I/P Engine notes that Dr. Frieder testified that the Defendants’ non-infringing alternatives are not suitable (Trial Tr. at 630:25-631:13), thereby avoiding any risk that I/P Engine’s patents could be worth less than the Overture patents.

¹² Defendants argue (at 28) that the Overture agreements are not comparable because they are remote in time from a 2010 hypothetical negotiation date. This argument merely repeats Defendants’ unsupported allegation that a 2010 date for the hypothetical negotiation should be adopted. See section V.A, *supra*. The Overture licenses were executed in 2005; they are temporal to the 2004 hypothetical negotiation date, certainly more so than the Meyer agreement, which was from 2007, and the only agreement on which Defendants relied for Dr. Ugone’s opinion.

Becker acknowledged the differences between the negotiating parties (including their size). (Trial Tr. at 891:22-892:7). He testified that “the respective bargaining positions is something you take into account in factor 5, but that has to be done in the context of this hypothetical negotiation where [the] patent holder has the cards on the table of the valid and infringed patent.” (Trial Tr. at 932:21-933:2). Dr. Becker also agreed that Lycos was a smaller company, relative to the accused infringer, than Yahoo! and Overture, but he disagreed that Google’s size alone renders agreements between other parties incomparable. *Id.* Rather, he testified that this consideration may affect the factual determination of whether to adjust the royalty rate up or down in *Georgia Pacific* factor 15. *Id.* Defendants cite no case law supporting their proposition that their size relative to Lycos prohibits license agreements between differently-sized companies from being relevant or comparable. And indeed, such an argument would make little sense when considering that the agreement is licensing technology.

Defendants presented their critiques and allegedly more comparable license and “real world transactions” to the jury, cross-examined Dr. Becker regarding his testimony and evidence, and elicited supporting and counter testimony from their own expert, Dr. Ugone. (Trial Tr. at 849:12-920:20 (Becker cross-examination); 1556:12-1621:14 (Ugone direct examination); 2057:21-2062:13 (closing argument)) The jury was entitled to credit Dr. Becker’s testimony that Defendants’ proffered transactions were not comparable or not as relevant to the hypothetical negotiation as those proffered by Dr. Becker. (e.g. Trial Tr. at 925:6-926:6; 930:2-17). Defendants’ objections go to the weight that should be placed by the jury on the evidence—exactly what the Court found in previously denying these same arguments ruling that Defendants’ objections to the Overture licenses “go to the weight of the evidence and should be resolved by the jury.” (D.I. 705 at 9-10).

C. Defendants' Thinly Disguised Entire Market Value Rule Argument Is A Red Herring

Defendants attack Dr. Becker's opinion arguing that his apportioned base was incorrectly based on "the entire incremental impact that the entire SmartAds system had on Google's revenue" (at 1, 14-17) and because "he attempted to account for his improper apportionment by adjusting the royalty rate down" (at 17). Both of these arguments are made by citing exclusively to entire market value rule decisions. Despite this fact, Defendants go to great pains not to use the term "entire market value rule." Defendants attempt to avoid this nomenclature because I/P Engine did not introduce evidence at trial relating to Defendants' entire market value of the accused products. In fact, the Court precluded I/P Engine from introducing at trial the total revenues for the accused products.¹³

Defendants have previously made these same arguments in their *in limine* (D.I. 302), and *Daubert* (D.I. 320 at 13-17) motions against Dr. Becker as well as repeatedly before this Court at trial (e.g. Tr. at 948:19-952:4; 1006:4-16). Each time, the Court rejected their arguments. (D.I. 705 at 8-10 ("objections... go to the weight of the evidence and should be resolved by the jury."); Trial Tr. at 1028:20-21 (denying Defendants' rule 50(a) motion on damages); 2135:8-2136:25 (same)). As this Court held "[t]he sufficiency of this evidence in determining a reasonable royalty is a question for the jury." (D.I. 705 at 8-9). Defendants cross-examined Dr. Becker on his apportionment calculations, evidence and testimony, and provided counter testimony from their own damages expert at trial. (Trial Tr. at 902:25-919:22; 1614:25-1618:23). The jury was entitled to credit Dr. Becker's testimony over Dr. Ugone's, and the jury's

¹³ The total revenues for the accused products should not have been excluded. See D.I. 826 at 7-13; *Carnegie Mellon Univ.*, 2012 U.S. Dist. LEXIS 120558, *12 ; *PACT XPP Techs., AG*, 2012 U.S. Dist. LEXIS 66436, *8-9.

acceptance of Dr. Becker's testimony should remain undisturbed. *Bonner v. Dawson*, 404 F.3d 290, 295 (4th Cir. 2005) (explaining substantial evidence standard).

Despite how Defendants attempt to couch their arguments, their true complaint is that Dr. Becker did not sub-apportion the already apportioned base—*i.e.*, that he did not properly apportion the royalty base. (D.I. 844 at 16). But contrary to Defendants' creative wording, Dr. Becker's evidence does not implicate the entire market value rule. Whether the base was properly apportioned was a matter of the weight to be decided by the jury, not one of admissibility or for JMOL. *Carnegie Mellon Univ. v. Marvell Tech. Group, LTD.*, No. 09 cv 290, 2012 U.S. Dist. LEXIS 120558, *13 (W.D. Pa. Aug. 24, 2012) (holding that defendants' criticisms that expert's apportionment, which relied on defendants' customer surveys and internal reports, go more toward weight of evidence than admissibility).

First, Defendants' claim (at 18) that Dr. Becker violated the entire market value rule because he allegedly “attempted to account for his improper apportionment by adjusting the royalty rate down” is meritless. In fact, Defendants asked Dr. Becker to agree with this *exact* assertion at trial, and he refused:

Q. Now, in your analysis you attempt to account for the value of the unaccused features of SmartAds by adjusting the royalty rate down to 3.5 percent, correct?

A. I -- no, I wouldn't agree with the way you've stated that.

(Trial Tr. at 918:24-919:2). Dr. Becker did not “adjust the royalty rate down” due to any concerns about the royalty base. He properly arrived at the 3.5% royalty rate by analyzing the *Georgia Pacific* factors. (e.g. Trial Tr. at 784:24-786:15; 792:17-799:1).

The out-of-context testimony to which Defendants cite refers to Dr. Becker's analysis of *Georgia Pacific* factor 13, which reads “The portion of the realizable profit that should be credited to the invention as distinguished from non-patented elements, the manufacturing

process, business risks, or significant features or improvements added by the infringer.”

Georgia-Pacific Corp., 318 F. Supp. at 1120. Dr. Becker set his 3.5% royalty rate after considering all of the *Georgia-Pacific* factors, including this one. But as he expressly testified, he did not set or adjust his rate due to any concern about an improper (or over-inclusive) royalty base. There is no evidence of an inflated royalty base here. Defendants’ comparisons to *LaserDynamics* (at 18) and *Uniloc* (at 19) are therefore inapt.

In *LaserDynamics*, the expert developed a 6% royalty rate based on the correct royalty base (an optical disc drive). 694 F.3d at 60. The expert then changed the royalty base (incorrectly) to the entire market value of a laptop computer and adjusted the royalty rate down to 2% to partially compensate for the inflated base. *Id.* at 61. The Court noted that this 2% rate “appears to have been plucked out of thin air....” *Id.* at 69. Unlike in *LaserDynamics*, Dr. Becker never adjusted the royalty base, nor did he alter the royalty rate to compensate for any such adjustment.

Defendants’ references to *Uniloc* (at 19) are similarly unsound. I/P Engine does not now nor has it ever contended that “the royalty base need not be properly apportioned” as Defendants claim. As explained above, Defendants’ objections to Dr. Becker’s apportionment are inconsistent with Federal Circuit law, including the very cases to which Defendants cite. The royalty base was properly apportioned. Again, if Defendants believed Dr. Becker’s apportionment was overinflated, they could have presented their own apportionment to the jury. See *PACT XPP Techs.* , 2012 U.S. Dist. LEXIS 66436, *8 (holding that defendants’ criticisms of expert’s apportionment go to the weight of the evidence rather than to admissibility). They did not. Defendants did, however, proffer evidence to the jury attacking Dr. Becker’s apportionment base (and made the same arguments that they make now). (Trial Tr. at 1614:25-1618:23). The

jury was entitled to weigh and discredit that evidence and Defendants' arguments, just as it clearly did.

Second, there is substantial evidence to support Dr. Becker's apportionment of the royalty base. Relying on Google's own documents and other evidence, Dr. Becker apportioned the incremental revenues Google received by using the infringing systems. Dr. Becker properly apportioned the overall revenue of the accused products (AdWords, AdSense For Search, and AdSense For Mobile Search) by apportioning only that incremental revenue attributable to the accused functionality in the accused products (SmartAds, Disabling, and Promotion functionalities). (*See* Trial Tr. at 803:16-21 (Becker testimony identifying accused functionality); 461:15-18 (underlying testimony explaining infringement by accused functionality); 494:1-10 (same); 495:8-10 (same); 496:13-15 (same)). Defendants' argument that Dr. Becker's apportionment overstates the royalty base because it includes some unidentified impact on revenue of unpatented features (an argument I/P Engine rejects) raises a factual dispute, not a question of Dr. Becker's methodology. *PACT XPP Techs.*, 2012 U.S. Dist. LEXIS 66436, at *8. Defendants fail to cite a single case to support their novel theory that the entire market value rule is violated (or apportionment is improper) by failing to sub-apportion the already apportioned revenue attributable to each inseparable feature of the accused system, as opposed to failing to apportion altogether. This is because this is not the law.

LaserDynamics and *Uniloc* relate to a plaintiff's failure to apportion a royalty base at all. *LaserDynamics* explains that the royalty base should be based on the "**smallest salable patent-practicing unit**," *not the entire product*. *LaserDynamics*, 694 F.3d at 67 (internal citations omitted, emphasis added). This case does not require, as Defendants suggest, that the revenues associated with the smallest salable patent-practicing unit be further subdivided.

Here, the only revenue stream associated with the accused systems is the advertising revenue received for advertisements served using the accused infringing systems. Thus, the accused systems are the smallest salable patent-practicing unit. But Dr. Becker apportioned the revenues associated with the infringing systems even more (again, using Google's own apportionment documents).¹⁴ Dr. Becker apportioned the total revenues of the accused products to cover only the discrete accused functionality (SmartAds, including disabling and promotion). (Trial Tr. at 799:19-807:20). There is no smaller salable unit to use as a royalty base nor have Defendants ever identified any such smaller unit. The royalty base reflects the direct value that the infringing functionalities added to the pre-existing revenue stream, nothing more. (PX-64 (discussed at 799:19-807:20), PX-34 (discussed at 807:21-810:13), PX-32 (discussed at 811:9-815:22), PX-337 (discussed at 815:23-817:25), and PX-228 (discussed at 818:1-819:9)). Indeed, Defendants did not introduce any other apportionment calculation or base at trial. They now simply argue that Dr. Becker's apportioned base is wrong and that it was error for I/P Engine to use a graphic like PDX-444 (at 15) to show the jury what portion of the apportioned base I/P Engine was seeking. But the Federal Circuit cases relied on by Defendants do not support Defendants' arguments. They support Dr. Becker's apportioned royalty base.

Indeed, in *LaserDynamics*, the patent-practicing component accused was an optical disc drive (ODD), which is a component of a computer that can be separated from the rest of the computer. The *LaserDynamics* Court found error because “[t]he royalty was expressly

¹⁴ Google attacks the veracity of one of the documents that Dr. Becker relied upon to apportion the revenues to arrive at the apportioned royalty base. (Motion at 2, 5, 15-16, regarding “draft” document.) This argument goes to the weight and credibility of the evidence and witnesses. Notably, Defendants did not proffer any evidence that this document or Dr. Becker’s apportionment numbers were wrong or even suggest a number in the alternative. Moreover, the document shows actual sales figures extending back over time, which puts the future projections into context. Despite the fact that this was a Google document, Google never made any effort to clarify or introduce a later or alternative version of this document.

calculated as a percentage of the entire market value of a laptop computer rather than a patent-practicing ODD alone". 694 F.3d at 68. It does not suggest that the value of the ODD must be further sub-divided to arrive at a royalty base. Notably, the ODDs were the proper royalty base, regardless of the fact that numerous aspects of ODDs, such as their ability to read CDs, were not covered by the patents. *Id.* at 70.¹⁵ Similar to *LaserDynamics*, Dr. Becker's royalty base is proper regardless of whether some inseparable sub-component of the accused functionality is arguably not covered by the patents.

In *Uniloc*, the Federal Circuit's concern with the plaintiff's introduction of the \$19 billion dollars total revenue of the infringing product was because that revenue had no relevance whatsoever to the "isolated value" of the accused infringing component. Indeed, even though the plaintiff had identified the amount of a reasonable royalty using an isolated value of \$10 per license, it went out of its way to reference the total revenue numbers. 632 F.3d at 1318-21. The \$19 billion number was in no way needed (and completely irrelevant) to calculating the royalty base. *Id.* The plaintiff then compared his royalty number (\$565 million) to the larger \$19 billion for the sole purpose of expressing his royalty as a percentage (2.9%) of the larger figure. *Id.* This is what the Federal Circuit took umbrage to, and has no semblance to the present case. Thus, contrary to Defendants' characterization (at 15), this case is completely distinguishable.

¹⁵ Another example is *Lucent Techs., Inc. v. Gateway, Inc.*, 580 F.3d 1301 (Fed. Cir. 2009). In *Lucent* the expert used an entire computer as royalty base, despite opining on a patent that only covered the date-picker component of Microsoft's Outlook software program. *Id.* at 1338. After a *motion in limine*, the expert reduced the royalty base to the price of the accused software, but unjustifiably adjusted the royalty rate from 1% to 8% in order to arrive at the same end result. *Id.* The Federal Circuit criticized the adjustment to the royalty rate. *Id.* The Federal Circuit did not criticize using the price of the software as the royalty base, despite the patent covering only the date-picker feature of the software.

The fact that the apportioned royalty base here is large (over \$14 billion) or that I/P Engine is only seeking 3.5% of that approximately 20% increase in Defendants' total revenues from the accused systems does not make Dr. Becker's apportionment wrong or run afoul of *LaserDynamics*, *Uniloc* or any other entire market value rule decision. Dr. Becker testified at length regarding the evidence supporting his apportionment calculations and apportioned royalty base, including PX-64 (discussed at 799:19-807:20), PX-34 (discussed at 807:21-810:13), PX-32 (discussed at 811:9-815:22), PX-337 (discussed at 815:23-817:25), and PX-228 (discussed at 818:1-819:9). Dr. Becker's apportionment is supported by substantial evidence; the base was directly related to the accused systems and the increased demand by customers for the infringing systems (*Id.*), and the base was essential to establishing the reasonable royalty. Defendants cite no contrary evidence, let alone any evidence justifying JMOL.

VI. A NEW TRIAL IS WARRANTED ONLY ON THE DOLLAR AMOUNT OF PAST DAMAGES

Defendants argue that the Court's mid-trial changes to the damages period caused jury confusion. (D.I. 844 at 29). I/P Engine agrees. (*See* D.I. 826). Thus, both sides believe that a new trial on the dollar amount of past damages is warranted. For the reasons set forth in sections II-V *supra*, and as set forth in I/P Engine's Rule 59 Motion for a New (D.I. 826), aside from the dollar amount of the past damages award, there were no defects in any other aspect of the trial or jury verdict. (*Id.* at 1.) Therefore, only a new trial on the dollar amount of past damages for all defendants is warranted.

Notably, Defendants limit their request for a new trial to the non-Google defendants, but this limitation does not make sense. A review of the evidence suggests that the award for Google is too small, not that the award for the non-Google defendants is too large. The shortened damages period is about 15% as long as the original damages period. The award for the

shortened damages period should be more than 15% of the award for the original damages period because the evidence showed that the royalty base increased each year. (*See* Ex. 1, PDX-83). The jury's awards for the non-Google defendants are consistent with this logic, but the jury's award for Google is not. Indeed, as illustrated by the chart below, the jury allocated 35% of the revenues in the original damages period to the shortened damages period for the non-Google defendants, but only 3.5% of the revenues in the original damages period to the shortened damages period for Google, even though the plaintiff's damages evidence showed that Google is liable for the vast majority of the claimed damages.

Defendant	Royalties Sought For Original Damages Period	Royalties Awarded For Shortened Damages Period	Royalties Award As Percentage of Royalties Originally Sought
AOL, Inc.	\$22,693,517 ¹⁶	\$7,943,000	35.0%
IAC Search & Media, Inc.	\$18,917,570	\$6,650,000	35.2%
Gannett Co., Inc.	\$12,348	\$4,322	35.0%
Target Corp.	\$282,380	\$98,833	35.0%
Google, Inc.	\$451,190,903	\$15,800,000	3.5%

The tenfold difference between the jury's award for the Google and for the non-Google defendants strongly suggests that the jury simply misplaced a decimal point when calculating Google's damages. Defendants' assumption that the award for each of the non-Google defendants is flawed assumes that the jury misplaced a decimal point, not once when calculating Google's damages, but four separate times: once each time that the jury calculated each of the non-Google defendants' damages. The more logical conclusion is that a single error occurred when the jury calculated Google's damages.

¹⁶ This amount does not include \$510,746 that was identified separately as damages for AOL Search Marketplace. Including the \$510,746 in the total royalties sought for AOL, Inc. would result in the jury's award equaling 34.2% of the royalties sought.

Neither do Defendants' arguments (at 29-30) justify a new trial on any issues other than the dollar amount of past damages. The damages period is irrelevant to the jury's determination that a running royalty was the correct form of reasonable royalty. And the damages period is irrelevant to the jury's determination that the rate of the running royalty is 3.5%. These findings were based on the substantial evidence of record (*see* § V, *supra*), and expressly set forth in the special interrogatory verdict form (D.I. 789). The special verdict enables the Court to localize the errors so that the sound portions of the verdict may be saved. *Richardson-Vicks Inc. v. Upjohn Co.*, 122 F.3d 1476, 1484-85 (Fed. Cir. 1997); *see also, Walker v. Pettit Const. Co., Inc.*, 605 F.2d 128, 131 (4th Cir. 1979) ("to grant a new trial on all issues on the basis of an error relating to only one issue would undermine the principal purposes of the special verdict"). The mid-trial change to the damages period, and any resulting juror confusion as to the dollar amount of damages, fails to justify a new trial on these independent issues. A new trial should therefore be granted on the dollar amount of past damages only.

VII. CONCLUSION

For the foregoing reasons, Defendants motion for judgment as a matter of law or alternatively a new trial on all damages issues should be denied.

Dated: January 25, 2013

By: /s/ Jeffrey K. Sherwood
Donald C. Schultz (Virginia Bar No. 30531)
W. Ryan Snow (Virginia Bar No. 47423)
CRENSHAW, WARE & MARTIN PLC
150 West Main Street
Norfolk, VA 23510
Telephone: (757) 623-3000
Facsimile: (757) 623-5735

Jeffrey K. Sherwood (Virginia Bar No. 19222)
Frank C. Cimino, Jr.
Kenneth W. Brothers

Charles J. Monterio, Jr.
DICKSTEIN SHAPIRO LLP
1825 Eye Street, NW
Washington, DC 20006
Telephone: (202) 420-2200
Facsimile: (202) 420-2201

Dawn Rudenko Albert
DICKSTEIN SHAPIRO LLP
1633 Broadway
New York, NY 10019
Telephone: (212) 277-6500
Facsimile: (212) 277-6501

Counsel for Plaintiff I/P Engine, Inc.

CERTIFICATE OF SERVICE

I hereby certify that on January 25, 2013, the foregoing, was served via the Court's CM/ECF system on the following:

Stephen Edward Noona
Kaufman & Canoles, P.C.
150 W Main St
Suite 2100
Norfolk, VA 23510
senoona@kaufcan.com

David Bilsker
David Perlson
Quinn Emanuel Urquhart & Sullivan LLP
50 California Street, 22nd Floor
San Francisco, CA 94111
davidbilsker@quinnmanuel.com
davidperlson@quinnmanuel.com

Robert L. Burns
Finnegan, Henderson, Farabow, Garrett & Dunner, LLP
Two Freedom Square
11955 Freedom Drive
Reston, VA 20190
robert.burns@finnegan.com

Cortney S. Alexander
Finnegan, Henderson, Farabow, Garrett & Dunner, LLP
3500 SunTrust Plaza
303 Peachtree Street, NE
Atlanta, GA 94111
cortney.alexander@finnegan.com

/s/ Jeffrey K. Sherwood