JOHN ALLCOCK (Bar No. 98895)
john.allcock@dlapiper.com
SEAN C. CUNNINGHAM (Bar No. 174931)
sean.cunningham@dlapiper.com
ERIN GIBSON (Bar No. 229305)
erin.gibson@dlapiper.com
ROBERT WILLIAMS (Bar No. 246990)
robert.williams@dlapiper.com
TIFFANY MILLER (Bar No. 246987)
tiffany.miller@dlapiper.com
JACOB ANDERSON (Bar No. 265768)
jacob.anderson@dlapiper.com
DLA PIPER LLP (US)
401 B Street, Suite 1700
San Diego, California 92101-4297
Tel: 619.699.2700
Fax: 619.699.2701

ROBERT BUERGI (Bar No. 242910)
robert.buergi@dlapiper.com
AMY WALTERS (Bar No. 286022)
amy.walters@dlapiper.com
DLA PIPER LLP (US)
2000 University Avenue
East Palo Alto, CA 94303-2215
Tel: 650.833.2000
Fax: 650.833.2001

Attorneys for
APPLE INC.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

WI-LAN, INC.,

Plaintiff,

v.

APPLE INC.,

Defendant.

AND RELATED COUNTERCLAIMS

CASE NO. 3:14-cv-1507-DMS-BLM (consolidated);

CASE NO. 3:14-cv-02235-DMS-BLM (lead case)

APPLE INC.'S OBJECTIONS TO DAVID KENNEDY'S OPINIONS

Dept.: 13A
Judge: Hon. Dana M. Sabraw
Magistrate Judge: Hon. Barbara L. Major

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In order to avoid disrupting the presentation of evidence at trial with multiple preservation objections, Apple Inc. ("Apple") respectfully submits for the record the following written objections to the expected testimony by David Kennedy. Mr. Kennedy is expected to testify in support of Wi-LAN's unapportioned damages claim, which is legally flawed. Therefore, this testimony should not be admitted for the reasons stated in Apple's *Daubert* motion briefing and trial brief, and as irrelevant and more prejudicial than probative under Federal Rules of Evidence 401, 402 and 403. Dkt. Nos. 333, 373, 433.

First, Mr. Kennedy rejects the proper smallest saleable patent-practicing unit, the baseband processor, and instead uses the entire iPhone as his royalty base. Dkt. No. 433 at 12. Allowing this evidence is contrary to Federal Circuit damages law and Supreme Court law starting in 1884 with *Garretson v. Clark*. Indeed, the Federal Circuit explained earlier this month that "where multi-component products are accused of infringement, the royalty base should not be larger than the smallest salable unit embodying the patented invention." *Power Integrations, Inc. v. Fairchild Semiconductor Int'l, Inc.*, 894 F.3d 1258 (Fed. Cir. 2018); *Commonwealth Sci. & Indus. Research Org. v. Cisco Sys., Inc.*, 809 F.3d 1295, 1302 (Fed. Cir. 2015) ("Where small elements of multi-component products are accused of infringement, calculating a royalty on the entire product carries a considerable risk that the patentee will be improperly compensated for non-infringing components of that product."). "Fundamentally, the smallest salable patent-practicing unit principle states that a damages model cannot reliably apportion from a royalty base without that base being the smallest salable patent-practicing unit." *CSIRO,* 809 F.3d at 1303; *LaserDynamics, Inc. v. Quanta Comput., Inc.*, 694 F.3d 51, 67 (Fed. Cir. 2012). "A patentee should not be able to opt in or out of the smallest salable patent-practicing unit doctrine based on its decision of whom to sue." *GPNE Corp. v. Apple, Inc.*, No. 12-cv-2885-LHK, 2014 WL 1494247, at *12 (N.D. Cal. Apr. 16, 2014). Here, Wi-LAN will be permitted

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1 to opt out of the smallest salable unit doctrine against iPhones with Qualcomm
2 chips, after having opted in with respect to iPhones with Intel chips.
3 Second, Mr. Kennedy does not apportion the value of the asserted patents by
4 using rates from comparable licenses. The Federal Circuit has held that “a
5 methodology that values the asserted patent based on comparable licenses” may
6 constitute the required apportionment. *CSIRO*, 809 F.3d at 1303. “Such a model
7 begins with rates from comparable licenses and then account[s] for differences in
8 the technologies and economic circumstances of the contracting parties.” *Id*.
9 (internal quotations and citations omitted). When license-based apportionment
10 takes the place of actual apportionment, the Federal Circuit requires that “damages
11 testimony regarding those licenses takes into account the very types of
12 apportionment principles contemplated in *Garretson*.” *Ericsson, Inc. v. D-Link*
13 *Sys., Inc*., 773 F.3d 1201, 1228 (Fed. Cir. 2014). Instead, Mr. Kennedy disregards
14 these requirements and offers opinions based on unadjusted portfolio license
15 agreements and royalty rate sheets that do not allow the jury to weigh the economic
16 value of the patented feature against the economic value of the features and services
17 covered by the license agreement or license offer. *See id*.
18 Third, Mr. Kennedy includes millions of iPhones that do not even allegedly
19 infringe the asserted patents his damages calculations based on a fundamental
20 misunderstanding of Wi-LAN’s infringement case. Wi-LAN’s infringement claims
21 requires(among other things) a VoLTE connection. iPhones that have never been
22 configured by the carrier to make a VoLTE call cannot infringe, even under Wi-
23 LAN’s theory. Thus, even assuming infringement based on Wi-LAN’s theory,
24 these iPhones that are not VoLTE-enabled cannot infringe and should not be
25 included in the damages base.
26 Fourth, Mr. Kennedy inappropriately uses survey results from Wi-LAN’s
27 survey expert, Professor Prince as a proxy for apportionment. Professor Prince’s
28 survey results do not apportion the relative value between the patented and

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1 unpatented features, yet Mr. Kennedy's opinions in his expert report relied on those
2 calculations as a proxy for apportionment. Mr. Kennedy's opinions based on
3 Professor Prince's calculations are therefore inadmissible because the patentee
4 "must in every case give evidence tending to separate or apportion the defendant's
5 profits and the patentee's damages between the patented feature and the unpatented
6 features." *Uniloc USA, Inc. v. Microsoft Corp.*, 632 F.3d 1292, 1318 (Fed. Cir.
7 2011) (quoting *Garretson v. Clark*, 111 U.S. 120, 121 (1884)); *Finjan, Inc. v. Blue
8 Coat Sys., Inc.*, 879 F.3d 1299, 1311 (Fed. Cir. 2018) ("Further apportionment was
9 required to reflect the value of the patented technology compared to the value of the
10 unpatented elements.").

11 Fifth, Mr. Kennedy's opinions that rely on Dr. Madisetti's unreliable benefits
12 opinions should fall with Dr. Madisetti's opinions, which are inadmissible for the
13 reasons stated in Apple's objections to Dr. Madisetti's testimony. Dkt. No. 453.

14 Sixth, Mr. Kennedy should not be permitted to offer testimony regarding
15 unfairly prejudicial, large financial numbers, including those identified in Apple's
16 Motion *In Limine* No. 3. Dkt. No. 405. In addition, Wi-LAN failed to offer any
17 testimony regarding the technical comparability of these licenses. Federal Circuit
18 law does not permit Wi-LAN and its damages expert, Mr. Kennedy to "skew the
19 damages horizon for the jury" with large numbers. *Uniloc USA, Inc.*, 632 F.3d at
20 1320. Wi-LAN and Mr. Kennedy intend to disregard this rule and show the jury
21 certain Apple license amounts without any adjustments to account for those
22 differences for the sole purpose of establishing, according to Wi-LAN's damages
23 expert, that "Apple is willing to pay a substantial sum for the rights to use valuable
24 patented technology." Dkt. No. 352, Ex. 1, Kennedy Report at ¶ 514. In short, Mr.
25 Kennedy intends to do precisely what the Federal Circuit prohibits: "skew the
26 damages horizon for the jury" with big dollar numbers. *Uniloc USA, Inc.*, 632 F.3d
27 at 1320. Because the licenses are so radically different from the agreement arising
28 out of a hypothetical negotiation for six patents allegedly directed to a fringe feature

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(VoLTE), these amounts "serve[] no purpose other than to increase the reasonable royalty rate above rates more clearly linked to the economic demand for the claimed technology." *LaserDynamics, Inc.*, 694 F.3d at 80-81 (internal quotations omitted).

The unfair prejudice from these numbers significantly outweighs their probative value because an expert may not rely on license agreements that are "radically different from the hypothetical agreement under consideration" to determine a reasonable royalty. *Lucent Techs., Inc. v. Gateway, Inc.*, 580 F.3d 1301, 1327 (Fed. Cir. 2009). As another judge in this District noted in *DataQuill Ltd. v. High Tech Comput. Corp.*, "where a license covers a portfolio of patents or includes other intellectual property or services, Plaintiff must present evidence sufficient to allow the jury to weigh the economic value of the patented feature against the economic value of the features and services covered by the license agreement." 887 F. Supp. 2d 999, 1021-25 (S.D. Cal. 2011) (quoting *LaserDynamic, Inc. v. Quanta Comput., Inc.*, No. 06-cv-348, 2011 WL 7563818, at *3 (E.D. Tex. Jan. 7, 2011)). Here, Mr. Kennedy admitted "there are too many differences between these licenses and the Hypothetical License to be able to calculate an acceptably comparable per-device royalty rate." Dkt. No. 352, Ex. 1, Kennedy Report, ¶ 483.

Seventh, Mr. Kennedy should not be permitted to offer the new opinions in Wi-LAN's *Daubert* opposition brief that "the value of an accused iPhone's unaccused features can be calculated by subtracting Prof. Prince's results from the accused iPhone profit—leaving behind only the value of the unaccused features." Dkt No. 352 at 18-19.

For the foregoing reasons, and for the reasons set forth in Apple's *Daubert* briefing (Dkt. Nos. 333, 373), Apple's motion *in limine* (Dkt. No. 405), and Apple's trial brief (Dkt. No. 433), the Court should sustain Apple's objections and exclude Mr. Kennedy's opinions about (a) the appropriate damages base (including

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