UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

APPLE INC.,

Plaintiff,

vs.

WI-LAN, INC.,

Defendant.

AND ALL RELATED COUNTERCLAIMS.

CASE NO. 14cv2235 DMS (BLM)

ORDER DENYING WI-LAN'S MOTION FOR RECONSIDERATION

On January 4, 2019, this Court issued an Order granting Apple's motion for a new trial on damages. (ECF No. 554.) Wi-LAN now moves for reconsideration of that decision. Apple filed an opposition to the motion, and Wi-LAN filed a reply.

"Reconsideration is appropriate if the district court (1) is presented with newly discovered evidence, (2) committed clear error or the initial decision was manifestly unjust, or (3) if there is an intervening change in controlling law." *School Dist. No. 1J, Multnomah County, Oregon v. ACandS, Inc.*, 5 F.3d 1255, 1263 (9th Cir. 1993). Here, Wi-LAN relies on the second prong, and argues the Court's decision to grant a new trial on damages was clearly erroneous and manifestly unjust. Specifically, Wi-LAN asserts there was substantial evidence to support the jury's damages verdict, and thus the Court's decision to grant a new trial on damages was both clearly erroneous and

manifestly unjust. Wi-LAN also argues Dr. Madisetti properly measured the technical benefit of the invention recited in claim 26 of the '145 Patent, and the Court's decision to the contrary was clearly erroneous.

The burden to show a decision is clearly erroneous is a high one, "which by design is difficult to meet." *United States v. Perkins*, 850 F.3d 1109, 1125 (9th Cir. 2017). "'To be clearly erroneous, a finding must be more than possibly or even probably wrong; the error must be pellucid to any objective observer.'" *United States v. Christie*, 825 F.3d 1048, 1058 (9th Cir. 2016) (quoting *United States v. Quaintance*, 608 F.3d 717, 721 (10th Cir. 2010)) (internal quotation marks omitted). Stated otherwise, "'to be clearly erroneous, a decision must ... strike us as wrong with the force of a five-week old, unrefrigerated dead fish.'" *Ocean Garden, Inc. v. Marktrade Co., Inc.*, 953 F.2d 500, 502 (9th Cir. 1991) (quoting *Parts and Elec. Motors, Inc. v. Sterling Elec., Inc.*, 866 F.2d 228, 233 (7th Cir. 1988)). "This stringent standard 'rests on good sense and the desire to protect both court and parties against the burdens of repeated reargument by indefatigable diehards.'" *Alaimalo v. United States*, 645 F.3d 1042, 1060 (9th Cir. 2011) (quoting 18B Charles A. Wright *et al.*, *Federal Practice and Procedure* § 4478 (2d ed. 2002)).

Here, Wi-LAN argues the Court committed clear error in finding that Dr. Madisetti's opinion about the benefits of claim 26 of the '145 Patent lacked a sufficient factual basis. However, this argument is essentially a rehash of arguments Wi-LAN has raised in previous motions, namely, that Dr. Madisetti did not equate the value of claim 26 of the '145 Patent with VOLTE. Wi-LAN attempts to put a finer point on that argument here by drawing a distinction between VOLTE, in general terms, and one aspect of VOLTE, namely "improved voice quality during loading[,]" (Mot. at 10), but at its core this argument is simply a different shade of the same argument Wi-LAN has been making consistently in this case. As such, it does not warrant reconsideration of the Court's prior finding. *See Brown v. Kinross Gold, U.S.A.*, 378 F.Supp.2d 1280, 1288 (D. Nev. 2005) ("A motion for reconsideration is not an avenue to re-litigate the

same issues and arguments upon which the court already has ruled.") (citing *Brogdon v. Nat'l Healthcare Corp.*, 103 F.Supp.2d 1322, 1338 (N.D. Ga. 2000)).

Furthermore, the Court does not agree with the premise of Wi-LAN's argument, namely, that Dr. Madisetti confined his opinions to that aspect of VOLTE associated with improved voice quality "during loading." As Apple points out, Dr. Madisetti testified repeatedly that the benefit of claim 26 of the '145 Patent, generally, was "much higher quality calls." (Trial Tr. at 259:20-23, July 24, 2018, ECF No. 504; *see also id.* at 261:22-24 ("And then you compare the quality of voice with VOLTE and with Skype then that gives you an idea of how much benefits Apple would have using these iPhone.")) Those opinions were not confined to improved voice quality "during loading." Thus, this argument does not show the Court's prior finding about Dr. Madisetti's opinion is clearly erroneous.

Wi-LAN's only other argument is that there was substantial evidence to support the jury's damages verdict, and thus the Court's decision to grant a new trial on damages was clearly erroneous and manifestly unjust. As an initial matter, the Court notes that Wi-LAN did not raise this "substantial evidence" argument in its opposition to Apple's motion for a new trial on damages. Indeed, the lead case in Wi-LAN's motion for reconsideration, *Landes Construction Co. v. Royal Bank of Canada*, 833 F.2d 1365 (9th Cir. 1987), is nowhere cited in Wi-LAN's opposition to Apple's motion for a new trial on damages. Wi-LAN's failure to make this specific argument in its prior brief is reason enough to deny the motion for reconsideration. *See Garber v. Embry-Riddle Aeronautical Univ.*, 259 F.Supp.2d 979, 982 (D. Ariz. 2003) ("[N]ew arguments and new legal theories that could have been made at the time of the original motion may not be offered in a motion for reconsideration.")

Even considering the merits of the argument, it does not warrant reconsideration of the Court's previous order. Contrary to Wi-LAN's argument, the jury in this case was not presented with two alternative theories of damages. Rather, the jury was presented with one theory: A reasonable royalty. The evidence Wi-LAN relies on to

support its assertion that there was another theory of damages, *i.e.*, [redacted], the rate sheets and the infrastructure analysis, were all part of that theory. Indeed, all of that evidence was used primarily as a "check" against Mr. Kennedy's opinion that [redacted] was a reasonable royalty in this case. It did not form the basis for an alternative theory of damages.[1]

Furthermore, the Court is persuaded that admission of this evidence, combined with Dr. Madisetti's improper opinion on the benefits of claim 26 of the '145 Patent, "skew[ed] the damages horizon for the jury." *Uniloc USA, Inc. v. Microsoft Corp.*, 632 F.3d 1292, 1320 (Fed. Cir. 2011). This is especially so with respect to [redacted] and the rate sheets. For instance, although Mr. Kennedy testified that [redacted] was "probative" to the hypothetical negotiation analysis, he did not say [redacted] was comparable to the hypothetical license the parties would have agreed to in this case, (Trial Tr. at 693-94, July 26, 2018), which was a prerequisite to its admissibility. *See LaserDynamics, Inc. v. Quanta Computer, Inc.*, 694 F.3d 51, 78-81 (Fed. Cir. 2012) (granting new trial because damages testimony relied on licenses that were not comparable and therefore not relevant). Indeed, Mr. Kennedy testified it was *not* the similarities between [redacted] that made [redacted] relevant, but [redacted] that was "most helpful." (*Id.* at 693-94.) Admission of the rate sheets was similarly prejudicial. *See Whitserve, LLC v. Computer Packages, Inc.*, 694 F.3d 10, 29-30 (Fed. Cir. 2012) (acknowledging that although "proposed licenses may have some value for determining a reasonable royalty in certain situations[,]" the evidentiary value of proposed licenses is limited by "the fact that patentees could artificially inflate the royalty rate by making outrageous offers.")

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[1] The absence of an alternative theory of damages takes this case outside the holding of *Landes*. In that case, unlike here, the plaintiff actually presented two "alternative calculations of damages" to the jury, one based on lost profits and another based on "the difference between the purchase price and fair market value[.]" 833 F.2d at 1372-73. In light of those two theories, the court concluded "that proper respect for the role of the jury and the discretion of the trial judge favors construing a general verdict in behalf of the prevailing party." *Id.* at 1373. That presumption does not apply here, where the jury was presented with only one theory of damages.

Under these circumstances, the Court cannot say its decision to grant Apple's motion for a new trial on damages was either clearly erroneous or manifestly unjust. *See United States v. 99.66 Acres of Land*, 970 F.2d 651, 658 (9th Cir. 1992) (stating new trial is warranted "on the basis of an incorrect evidentiary ruling if the ruling substantially prejudiced a party.") Accordingly, Wi-LAN's motion for reconsideration is denied.

IT IS SO ORDERED.

DATED: March 26, 2019

HON. DANA M. SABRAW
United States District Judge