

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

LOGANTREE LP,

Plaintiff,

vs.

GARMIN INTERNATIONAL, INC.,

Defendant.

Case No. 6:17-cv-01217

MOTION TO STRIKE LOGANTREE’S NEW DAMAGES THEORY

On the eve of trial and after the Court’s pretrial conference last Thursday, LoganTree just made Garmin aware of its intent to present an entirely new damages theory. LoganTree apparently intends to present a new damages theory and calculations based on LoganTree’s settlement with Huawei signed April 6, 2022. Over the last six months, LoganTree:

- Never moved to amend the Pre-trial Order to add a new damage theory or factual basis;
- Never amended its expert report to add a new damages theory or factual basis;
- Never provided Garmin with notice that it intended to raise a new damages theory or provide any additional factual basis for its current damages theories; and
- Never supplemented its response to Garmin’s interrogatory relating to LoganTree’s theory of damages.

LoganTree’s last-minute machinations are violative of the Court’s rules and prejudicial to Garmin and should be stricken by this Court. *Wilson v. Muckala*, 303 F.3d 1207, 1215 (10th Cir. 2002) (reversing liability verdict against defendant for a cause of action not preserved in the pretrial order because “‘the pretrial order is the controlling document for trial’ . . . [a]s such, claims issues, defenses, or theories of damages not included in the pretrial order are waived[.]”); *Sunderman v. Westar Energy, Inc.*, 520 F. Supp. 2d 1269, 1278 (D. Kan. 2007) (holding that plaintiff’s claim not

included in the pretrial order was waived and would not be considered); *Harte v. Burns*, 2020 WL 777207, at *4 (D. Kan. Feb. 18, 2020) (denying a motion to amend pretrial order and summarizing cases denying untimely amendment to pretrial order and motions made on eve of trial); Rule 26(e); Rule 37(c)(1).

Notably, in the Pretrial Order, LoganTree contended Dr. Volkov calculated damages “based on an average product/device licensor-for-royalty-rate calculation of a percentage of net sales on average for products and devices” and that “these damages [were] based on an analysis of 9 comparable patent licenses for technology such as code; software; modules/software; products; and devices/software/methods.” *Id.* The Huawei license was not part of Dr. Volkov’s report, which is LoganTree’s sole theory of damages. This means Volkov’s damages theory reflected in the Pretrial Order can be the only damages theory for trial. *Wilson v. Muckala*, 303 F.3d at 1215.

LoganTree itself has told the Court it “has no problem” adhering to the theories it disclosed in the Pretrial Order. ECF No. 262, at 1. And LoganTree should be bound by those rules and should be prohibited from offering any last-minute damages theory or factual basis for damages. LoganTree had six months to reconsider its damages case in light of its settlement with Huawei. If LoganTree desired to advance a new damages theory at trial, LoganTree should have moved the Court to supplement Volkov’s expert report and to amend the Pretrial Order. It did not. Accordingly, LoganTree should be precluded from doing so now.

Dated: October 23, 2022

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on October 23, 2022, the foregoing document filed with the Clerk of the Court using CM/ECF and that all counsel of record who are deemed to have consented to electronic service are being served with a copy of this document via the Court's CM/ECF system accordingly.