Exhibit P

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

NXP USA, INC., and NXP B.V., Plaintiffs, v. IMPINJ, INC., Defendant.	CASE NO. 2:20-cv-01503-JHC REDACTED[1] ORDER RE: IMPINJ'S MOTION TO EXCLUDE DAVID A. HAAS AND NXP'S MOTION FOR PARTIAL SUMMARY JUDGMENT

There are two motions before the Court. First, Impinj moves to exclude certain opinions of expert David A. Haas. *See* Dkt. # 296 (Impinj's motion); *see also* Dkt. ## 329, 354, 412, 419 (NXP's response, Impinj's reply, NXP's supplemental brief, and Impinj's supplemental brief).[2] Second, NXP moves for partial summary judgment as to an element of its damages argument.[3]

[1] The Court provisionally sealed its initial order. Dkt. # 452. After hearing from the parties about what material, if any, must remain sealed in the public version of the order (Dkt. # 463), the Court hereby publishes this redacted version of the order.

[2] The Court refers to the sealed version of each filing throughout this order. The unsealed versions (which contain page numbers that correspond to the sealed versions) can be found at the following docket entries: Dkt. ## 286, 323, 349, 410, 417 (filings related to Impinj's motion to exclude); Dkt. ## 277, 316, 340 (filings related to NXP's motion for partial summary judgment).

[3] The Court previously ruled on several other arguments in NXP's partial summary judgment motion (Dkt. ## 380, 414), but deferred ruling on this issue to consider it alongside other damages-related issues. *See* Dkt. # 414 at 35.

See Dkt. # 282 at 27–29 (NXP's motion); *see also* Dkt. ## 319, 343 (Impinj's response and NXP's reply).

For the reasons below, the Court:

(1) GRANTS in part and DENIES in part Impinj's motion to exclude certain opinions of David A. Haas (Dkt. # 296); and

(2) DENIES NXP's partial summary judgment motion as to the damages issue (Dkt. # 282 at 27–29).

I

BACKGROUND

A. Patent Background

Two patents remain at issue in this case. First, U.S. Patent Number 7,257,092 (the '092 Patent) describes an improved communication protocol between a "communication station" and a "data carrier" in which an "identification data block" and "useful data" are transmitted simultaneously, rather than sequentially. *See* '092 Patent at 1:5–8, 11:7–17. Second, U.S. Patent Number 7,347,097 (the '097 Patent) describes a system that allows information to be stored on a data carrier for a longer period of time with higher reliability, produced in part by adding a "voltage-raising means" to the "information-voltage generating means" of the data carrier. *See* '097 Patent at 2:13–23, 2:34–36. A more detailed description of the patents can be found in the Court's recent summary judgment order. *See* Dkt. # 414 at 3–5.

B. Procedural History

This order addresses two motions. First, it addresses Impinj's motion to exclude certain opinions of NXP's damages expert, David A. Haas. *See* Dkt. # 296. While styled as a *Daubert*-style evidentiary motion, the motion raises questions of law and fact that could be addressed only in a motion for summary judgment. The Court informed the parties that it would treat the motion

as one for partial summary judgment and would allow the parties to provide supplemental briefing. *See* Dkt. # 397; *see also* Fed. R. Civ. P. 56(f) (requiring notice and a "reasonable time to respond" before considering summary judgment sua sponte); *Norse v. City of Santa Cruz*, 629 F.3d 966, 971–72 (9th Cir. 2010) ("Sua sponte grants of summary judgment are only appropriate if the losing party has reasonable notice that the sufficiency of his or her claim will be in issue." (citation omitted)). Pursuant to the Court's order, the parties provided additional briefing. Dkt. # 412 (NXP's supplemental brief); Dkt. # 419 (Impinj's supplemental brief). The Court applies the summary judgment standard in evaluating the motion.

Second, this order addresses one remaining argument from NXP's motion for partial summary judgment: whether, for purposes of damage calculations, there were acceptable, non-infringing alternatives available to Impinj. Dkt. # 282 at 26–29. While the Court already ruled on most aspects of NXP's motion for partial summary judgment, the Court reserved ruling on this issue to consider it alongside other damages-related issues. Dkt. # 414 at 35.[4]

II

MOTION TO EXCLUDE OPINIONS OF DAVID A. HAAS

Impinj moves to exclude certain opinions of NXP's damages expert, David A. Haas. Dkt. # 296. As noted above, however, the Court analyzes the issues in the motion under the applicable summary judgment standards.

The motion raises four issues: (1) whether NXP is entitled to pre-suit damages stemming from infringement of the '097 Patent; (2) whether NXP is entitled to recover damages stemming

[4] The Court notes that there are two other summary judgment motions pending. Dkt. ## 421, 430. Nothing in this order should be construed to express any opinion as to the merits of either motion. Also, the order at times assumes infringement *arguendo* so that the Court can discuss damages. Any such language should not be read to imply that Impinj has infringed any patent: To date, there has been no finding of infringement in this case.

from Impinj's sales to customers outside the United States; (3) whether NXP USA has standing to obtain damages; and (4) whether NXP may recover "lost profit" damages.

A. Availability of Pre-Suit Damages

NXP seeks pre-suit damages for infringement of the '097 Patent.[5] Dkt. # 296 at 6–8. Impinj asks the Court to exclude Haas's opinions about the availability of pre-suit damages. *Id.* The Court denies Impinj's motion.

35 U.S.C. § 287(a) imposes a "marking" obligation on any patentee who produces a patented product: A patentee must generally mark each patented product with the word "patent" or something similar (the exact marking requirements are unimportant here). A failure to mark can affect the patentee's right to pre-suit damages. If a patentee fails to mark its patented products in accordance with the statute, "no damages shall be recovered by the patentee in any action for infringement, except on proof that the infringer was notified of the infringement and continued to infringe thereafter, in which event damages may be recovered only for infringement occurring after such notice." 35 U.S.C. § 287(a).

But the statute does not apply if the patentee "never makes or sells a patented article." *Arctic Cat Inc. v. Bombardier Recreational Prod. Inc.*, 950 F.3d 860, 864 (Fed. Cir. 2020); *see also id.* ("[A] patentee who never makes or sells a patented article may recover damages even absent notice to an alleged infringer."). "If, however, a patentee makes or sells a patented article and fails to mark in accordance with § 287, the patentee cannot collect damages until it either begins providing notice or sues the alleged infringer—the ultimate form of notice—and then only for the period after notification or suit has occurred." *Id.* "A patentee who makes or sells

[5] NXP appears to concede that it is not entitled to pre-suit damages for the '092 Patent. *See* Dkt. # 296 at 7; Dkt. # 329 at 8 (NXP's brief discussing the issue only with respect to the '097 Patent).

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