

[REDACTED]

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TEXARKANA DIVISION**

MAXELL, LTD.,

Plaintiff

v.

APPLE INC.,

Defendant.

Civil Action NO. 5:19-cv-00036-RWS

JURY TRIAL DEMANDED

**APPLE INC.'S REPLY BRIEF IN SUPPORT OF ITS *DAUBERT* MOTION TO
EXCLUDE THE OPINIONS AND TESTIMONY OF CARLA MULHERN (ECF NO. 362)**

[REDACTED]

In conducting her analysis, Ms. Mulhern willfully ignored record evidence, relied on data untethered to the patented features, failed to apportion her inflated damages figure, and thus her opinion does not meet Rule 702's expert reliability requirements. Maxell's Response (D.I. 400, "Resp.") did not materially challenge those fatal criticisms, did not dispute the applicable standard, and did not point to evidence contradicting Apple's arguments. Instead, Maxell attempted to recast Ms. Mulhern's opinions (and those of the other experts on which she relies) to save their admissibility. But Ms. Mulhern's own deposition testimony prevents that, and so, her damages calculations should be excluded.

I. MS. MULHERN CALCULATED A RUNNING ROYALTY BUT HAS NO EVIDENCE [REDACTED]

Applying *Georgia Pacific* Factor No. 2, requiring her to determine whether Apple and Maxell would have agreed to a lump sum or a running royalty at the hypothetical negotiation, Ms. Mulhern ignored all of the record evidence [REDACTED] and instead relied on her own say-so to conclude the opposite. *See Lucent Techs. Inc. v. Gateway, Inc.*, 580 F.3d 1301, 1326 (Fed. Cir. 2009) (reciting factors). Maxell's response, unable to point to actual evidence in the case, attempts to dodge this problem in two ways.

First, it misconstrues Apple's argument, insisting that Ms. Mulhern's calculation is "not a royalty rate to be applied later." Resp. at 1. But Apple never said it was. A "royalty rate to be applied later" concerns future damages, not the amount to which the parties would have agreed at a hypothetical negotiation. Thus it is irrelevant that Ms. Mulhern expressed her damages calculation as a total dollar figure. That calculation is unreliable because, instead of rendering it based on the lump sum structure [REDACTED], *see Lucent*, 580 F.3d at 1326, Ms. Mulhern ignored that evidence to render it "based on a running royalty calculated as a fee per unit applied to the number of units sold." Second Declaration of Cameron W. Westin

[REDACTED]

(filed concurrently herewith), Ex. 31 at 45:9-13. Maxell even concedes that doing so allowed her to improperly use Apple’s “massive” unit sales to reach a “high damages” number. Resp. at 3.

Second, Maxell—incredibly—argues there is just no difference between lump sum and running royalty licenses, and thus there “is no evidence that Apple would not have agreed to a lump-sum agreement calculated based on the application of a running royalty.” Resp. at 2-3. But Ms. Mulhern admitted that the record evidence shows [REDACTED]

[REDACTED] See D.I. 362 (“Mot.”) at 6. *Lucent* and other Federal Circuit precedent require experts to consider the significant differences between these license forms and conform their opinions to “the form that a hypothetical license agreement would likely have taken.” See Mot. at 4-5. Maxell’s mischaracterization of [REDACTED] [REDACTED]

[REDACTED] is also no excuse. Resp. at 2 and Ex. 18 at 50:18-25. Rather than support Ms. Mulhern’s opinion, this testimony confirms what she conveniently ignores: Apple would have insisted on a lump sum structure at the hypothetical negotiation.

Maxell’s *post hoc* excuses for Ms. Mulhern’s decision to ignore Apple’s licenses, claiming that she relied on opinions from Maxell’s technical experts and an alleged absence of evidence “from Apple that the agreements are economically comparable,” Resp. at 5, is contradicted by Ms. Mulhern herself. She testified that she did not seek or rely on any testimony from Maxell’s technical experts about the technical comparability of Apple’s licenses. Mot. Ex. 3 at 118:13-119:4. And she concedes in her report that, regardless of their technical comparability, [REDACTED]. Mot. Ex. 1 ¶ 76.

II. MS. MULHERN’S FLAWED MARKET APPROACH IS INADMISSIBLE

A. [REDACTED]

Maxell agrees that “proposed, but unaccepted, offers” are too unreliable to serve as the

[REDACTED]

basis for quantifying damages. Resp. at 7. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] in an unsuccessful attempt to distinguish *Whitserve, LLC v. Computer Packages, Inc.*, 694 F.3d 10, 29 (Fed. Cir. 2012). That case excluded a rate “based on a proposed, but unaccepted, license,” but Maxell never explains the difference (in either form or reliability) between a never-accepted offer on one hand and [REDACTED]. Nor does it explain why those semantics negate the risk of a patentee using the sleight of hand *Whitserve* warned about to “artificially inflat[e] the royalty rate.” Resp. at 7.

B. Ms. Mulhern Based Her “Apportionment” on Irrelevant Component Costs

Maxell and Ms. Mulhern both acknowledge that the two portfolio royalty rates in her “Market Approach” are meant to “capture[] the value of the overall mobile device,” and thus must be apportioned. Resp. at 10 (quoting Mulhern Rpt. ¶ 261). But rather than actually apportioning these rates based on the value attributable to the patented technology, as required, Ms. Mulhern uses the entire cost of non-patented device components. This approach, for which Maxell cites no authority, leads to the bizarre scenario where Ms. Mulhern’s value for accused *software* features changes based on *hardware* components’ costs, such as the varying cost of the accused devices’ displays. See Mot. at 10 n.5. That is precisely what’s not allowed. See *Power Integrations, Inc. v. Fairchild Semiconductors Int’l, Inc.*, 904 F.3d 965, 977 (Fed. Cir. 2018).

Maxell’s desk analogy, see Resp. at 8, fails to explain what the patented feature would be, only that it implicates something about “drawers of the desk,” and does not explain why the differential cost of all of the materials used to make that drawer—whether plywood, ornate oak, or rare metals—bear any relationship to the incremental value provided by this hypothetical

patent. Under this analogy of “apportionment,” the value of a patented desk drawer guide would nonsensically vary based on a non-patented feature (the material used to make the drawer).

Maxell insists that the Court consider “the whole opinion,” pointing to another calculation by Ms. Mulhern that is again based on component costs. But this “Patented Component Cost Weighting” is merely her attempt “to avoid double-counting components that incorporate technology from more than one of the Accused Patents.” Mot. Ex. 1 ¶ 151. And it does nothing to address other non-patented technology facilitated by those components or other unrelated factors (such as materials or size) impacting component costs. This gets her no closer to apportioning the “value of the overall mobile device” (Resp. at 10) down to the “incremental value that the patented invention adds to the end product,” which is what the law requires.

Ericsson Inc. v. D-Link Sys., 773 F.3d 1201, 1226 (Fed. Cir. 2014). Indeed, Maxell admits that this approach only “minimiz[es] impact on the component cost share” when, for example, Apple uses a more expensive display on its iPhone. Resp. at 10 n. 5. That is not apportionment.

III. MS. MULHERN’S “INCOME APPROACH” IS INADMISSIBLE SPECULATION

A. Maxell Cannot Now Fix Her Unfounded Opinions By Rewriting Them

Maxell concedes that Ms. Mulhern’s “Income Approach” is “tied to her understanding that no acceptable non-infringing alternatives exist.” Resp. at 11. But that understanding is demonstrably false: Maxell’s other experts actually identified such alternatives. Using unsupported (and flatly contradicted) attorney argument to recast them as merely “next best alternatives” does not save her opinion. Resp. at 12. Not only do neither Ms. Mulhern nor Dr. Erdem ever use that term, but Dr. Erdem squarely asked Maxell’s technical experts to provide non-infringing alternatives: “what was the non-infringing way of doing something similar, what are some alternatives.” Mot. Ex. 13 at 36:18-23. And those technical experts answered her.

See, e.g., id. at 39. Indeed, many of the non-infringing alternatives Maxell’s experts gave Dr.

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