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

MAXELL, LTD.,

Plaintiff,

v.

APPLE INC.,

Defendant.

Case No. 5:19-cv-00036-RWS

JURY TRIAL DEMANDED

PUBLIC VERSION

MAXELL, LTD.'S SUR-REPLY IN OPPOSITION TO APPLE INC.'S DAUBERT MOTION TO EXCLUDE THE OPINIONS AND TESTIMONY OF PLAINTIFF'S DAMAGES EXPERT MS. CARLA MULHERN

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Apple's Reply underscores the weaknesses of its motion. First, Apple's motion is not based on failure to meet reliability requirements, but Apple's preferences. Second, Apple cherry-picks portions of Ms. Mulhern's methodology and supporting evidence, conflates principles, and then argues that the incomplete and misleading picture it presents requires exclusion. But, as set forth in Maxell's Opposition, when Ms. Mulhern's methodology, opinions, and underlying support are considered, as presented and in their totality, they easily satisfy the requirements of Rule 702.

I. Ms. Mulhern's Calculation of a Lump Sum Royalty Is Reliable and Supported

Apple's motion seeks exclusion of Ms. Mulhern's opinion because she allegedly ignored

. Mot. at 5-6. Recognizing now that Ms. Mulhern *did* provide for a lump sum royalty (Opp. at 1-2), Apple instead argues that the fact Ms. Mulhern provided her ultimate opinion as a lump sum "is irrelevant" and "misconstrues Apple's argument." Reply at 1. Apple newly alleges that Ms. Mulhern's *calculation* is unreliable because "instead of rendering it based on the lump structure," Ms. Mulhern based her damages amount on a running royalty. But, as Maxell has already shown, the evidence in the record supports a calculation arrived at using a running royalty. Opp. at 2-4.

no limit on how a lump sum would have been derived during a hypothetical negotiation. As stated previously,

. *Id.* at 3. Meanwhile, there *is* support in the record that

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The evidence is not overridden by Apple's unsupported attorney argument. And Apple's cited case is no more applicable now than when presented as part of its motion. Maxell already admitted the difference between lump sum and running royalty agreements and acknowledged that Courts have cautioned against the *unsupported* or *unexplained* use of running royalty agreements as a basis to award lump-sum damages. *Id.* at 4-5. But such concern is not pertinent here where Ms. Mulhern provided her full methodology. *Id.*

Apple continues to criticize Ms. Mulhern's decision not to rely on Apple's licenses in determining the outcome of the hypothetical negotiation, asserting that the "*post hoc* excuses…is (*sic*) contradicted by Ms. Mulhern herself." Reply at 2. Ms. Mulhern, however, fully explained her decision, including: "I relied both on the fact that Apple had not identified any of these licenses as technologically comparable and the fact that we do in this case have a rich record of licenses that involve the asserted patents and the portfolio at issue … that we know that by definition are technologically comparable. And so I thought that was sufficient information on which to base my opinions." Ex. 3, Mulhern Dep. Tr. at 118:3-12; *see also* Opp. at 5.

Apple's motion requests exclusion of Ms. Mulhern's analysis for ignoring evidence, but Apple has not shown that she ignored anything. All Apple demonstrated is that its attorneys prefer calculating damages in a different way. That is not a basis to exclude damages opinions.

II. Prior Licenses, Considered in Full, Support Reliance on Maxell's Standard Rate

Apple seems to submit that only explicitly stated royalty rates matter. Not only is this unsupported, it conflicts with the hypothetical negotiation construct, which assumes a license that conveys one-way, naked patent rights. *See* Ex. 1, Mulhern Rpt. ¶ 69.

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