

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16

**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA**

AREA 55, INC., a California Corporation,  
and VINTURI, INC., a California  
Corporation,

Plaintiffs,

vs.

AMAZON.COM, INC., et al.,

Defendants.

CASE NO. 11-CV-00145-H-NLS

**ORDER DENYING WITHOUT  
PREJUDICE DEFENDANT’S  
MOTION TO EXCLUDE  
PLAINTIFFS’ EXPERT’S  
OPINIONS AND TESTIMONY**

On June 22, 2012, Defendant Amazon.com (“Amazon”) filed a motion to exclude the opinions of Plaintiffs’ damages expert, Mr. Stephen Jones. (Doc. No. 123.) On July 9, 2012, Plaintiffs Area 55, Inc. (“Area 55”) and Vinturi, Inc. (“Vinturi”) filed their opposition to Defendant’s motion. (Doc. No. 127.) On July 16, 2012, Defendant filed its reply. (Doc. No. 131.) Eric Martin Acker and Mary Prendergast appeared on behalf of Plaintiffs Area 55, Inc. and Vinturi, Inc. Phillip Samouris appeared on behalf of Defendant Amazon. For the following reasons, the Court denies without prejudice Defendant’s motion to exclude Mr. Jones’s opinions and testimony except as noted in this order.

**Background**

Plaintiffs Area 55 and Vinturi are owners of U.S. Patent Numbers 7,614,614 and 7,841,584 (“Area 55 Vinturi patents”). (Doc. No. 1 ¶¶ 15-21.) Plaintiffs invented, designed, and currently sell the Vinturi wine aerator, a product that utilizes the technology of the Area

1 55 Vinturi patents. (Id. ¶ 22.) On January 24, 2011, Plaintiffs filed suit against Defendant  
2 Amazon for advertising, offering for sale, and sale of the following third-party products that  
3 allegedly infringe the Area 55 Vinturi patents: Decantus, Vin O2, Magic Decanter, Respirer,  
4 and Vin-Aire. (Id. ¶¶ 23-24.) In its complaint, Plaintiffs allege against Defendant Amazon  
5 direct infringement, inducement to infringe, and contributory infringement under 35 U.S.C.  
6 § 271; unfair competition and false designation of origin under 15 U.S.C. § 1125(a); and  
7 unlawful conduct and fraudulent business practices under California Business and Professions  
8 Code sections 17200, et seq. (Id.)

### 9 Discussion

#### 10 **I. Legal Standard for a Motion to Exclude Expert Testimony**

11 A district court's decision to admit expert testimony under Daubert follows the law of  
12 the regional circuit. Micro Chem., Inc. v. Lextron, Inc., 317 F.3d 1387, 1390-91 (Fed. Cir.  
13 2003). When considering expert testimony offered pursuant to Federal Rule of Evidence 702,  
14 the trial court acts as a "gatekeeper" by "making preliminary determinations of whether the  
15 expert's testimony is reliable." Elsayed Mukhtar v. Cal. State Univ., Hayward, 299 F.3d 1053,  
16 1063 (9th Cir. 2002); see Kumho Tire Co. v. Carmichael, 526 U.S. 137, 150 (1999); Daubert  
17 v. Merrell Dow Pharms., Inc., 509 U.S. 579, 597 (1993). Under Rule 702, a court may permit  
18 opinion testimony from an expert only if the testimony "will assist the trier of fact" and "(1)  
19 the testimony is based on sufficient facts or data, (2) the testimony is the product of reliable  
20 principles and methods, and (3) the witness has applied the principles and methods reliably to  
21 the facts of the case." Fed. R. Evid. 702.

22 The inquiry into admissibility of expert opinion is a "flexible one," where "[s]haky but  
23 admissible evidence is to be attacked by cross examination, contrary evidence, and attention  
24 to the burden of proof, not exclusion." Primiano v. Cook, 598 F.3d 558, 564 (9th Cir. 2010).  
25 Under Daubert, the district judge is 'a gatekeeper, not a fact finder.' When an expert meets  
26 the threshold established by Rule 702 as explained in Daubert, the expert may testify and the  
27 jury decides how much weight to give that testimony." Id. (quoting United States v.  
28 Sandoval-Mendoza, 472 F.3d 645, 654 (9th Cir. 2006)). As the Supreme Court noted in

1 Daubert, “[v]igorous cross-examination, presentation of contrary evidence, and careful  
2 instruction on the burden of proof are the traditional and appropriate means of attacking shaky  
3 but admissible evidence.” 509 U.S. at 596.

4 Rule 703 of the Federal Rules of Evidence permits experts to render opinions even if  
5 based on inadmissible evidence so long as the inadmissible evidence is of the type reasonably  
6 relied on by experts in that field. Daubert, 509 U.S. at 595. Such inadmissible facts or data  
7 may be admissible as the basis for an expert’s opinion if their “probative value in assisting the  
8 jury to evaluate the expert’s opinion substantially outweighs their prejudicial effect.” Fed. R.  
9 Evid. 703.

10 For a proper calculation of patent damages, the Federal Circuit requires “sound  
11 economic and factual predicates.” See Riles v. Shell Exploration and Prod. Co., 298 F.3d  
12 1301, 1311 (Fed. Cir. 2002); see also Grain Processing Corp. v. Am. Maize-Prods. Co., 185  
13 F. 3d 1341, 1350 (Fed. Cir. 1999) (“To prevent the hypothetical from lapsing into pure  
14 speculation, this court requires sound economic proof of the nature of the market and likely  
15 outcomes with infringement factored out of the economic picture.”); Crystal Semiconductor  
16 Corp. v. TriTech Microelectronics Int’l, Inc., 246 F.3d 1336, 1355 (Fed. Cir. 2001) (“Such  
17 market reconstruction, though hypothetical, requires ‘sound economic proof of the nature of  
18 the market.’”). Accordingly, any economic expert testifying about patent damages must base  
19 the opinion on sound economic principles meeting the test in Daubert and Rule 702 of the  
20 Federal Rules of Evidence.

## 21 **II. Lost Profits**

### 22 **A. Legal Standard for Lost Profits**

23 There are two alternative categories of infringement compensation: the patentee’s lost  
24 profits and the reasonable royalty the patentee would have received through arm’s-length  
25 bargaining. See Lucent Techs., Inc. v. Gateway, Inc., 580 F.3d 1301, 1324 (Fed. Cir. 2009).  
26 “To recover lost profits damages, the patentee must show a reasonable probability that, ‘but  
27 for’ the infringement, it would have made the sales that were made by the infringer.” Rite-Hite  
28 Corp. v. Kelley Co., 56 F.3d 1538, 1545 (Fed. Cir. 1995) (en banc) (citations omitted); accord

1 BIC Leisure Prods. v. Windsurfing Int'l, 1 F.3d 1214, 1218 (Fed. Cir. 1993). In Panduit Corp.  
2 v. Stahlin Bros. Fibre Works, Inc., 575 F.2d 1152 (6th Cir. 1978), the court articulated an  
3 accepted—but not exclusive—test for lost profits damages. The Panduit test permits recovery  
4 of lost profits if the patent holder establishes: “(1) demand for the patented product; (2)  
5 absence of acceptable non-infringing substitutes; (3) manufacturing and marketing capability  
6 to exploit the demand; and (4) the amount of profit it would have made.” Rite-Hite, 56 F.3d  
7 at 1545.

8 The Federal Circuit has articulated the test for the absence of acceptable noninfringing  
9 substitutes as follows:

10 [T]he mere existence of a competing device does not necessarily make that  
11 device an acceptable substitute. A product on the market which lacks the  
12 advantages of the patented product can hardly be termed a substitute acceptable  
13 to the customer who wants those advantages. Accordingly, if purchasers are  
14 motivated to purchase because of particular features available only from the  
15 patented product, products without such features—even if otherwise competing  
in the marketplace—would not be acceptable noninfringing substitutes.

Thus, to prove that there are no acceptable noninfringing substitutes, the patent  
owner must show either that (1) the purchasers in the marketplace generally  
were willing to buy the patented product for its advantages, or (2) the specific  
purchasers of the infringing product purchased on that basis.

16 Cohesive Techs., Inc. v. Waters Corp., 543 F.3d 1351, 1373 (9th Cir. 2008) (quoting Standard  
17 Havens Prods., Inc. v. Gencor Indus., Inc., 953 F.2d 1360, 1373 (Fed. Cir. 1991)). Available  
18 noninfringing substitutes of significantly higher cost are not considered acceptable for the  
19 purpose of calculating damages. Kaufman Co., Inc. v. Lantech, Inc., 926 F.2d 1136,  
20 1142 (Fed. Cir. 1991) (“To be deemed acceptable, the alleged noninfringing substitute must  
21 not have a disparately higher price than . . . the patented product.” (emphasis omitted)); see  
22 also Gyromat Corp. v. Champion Spark Plug Co., 735 F.2d 549, 553-554 (Fed. Cir. 1984).

23 If the patent holder successfully meets the Panduit test, the patent holder can reasonably  
24 infer that but for the infringement it would have made the sales made by the infringer.  
25 Kaufman Co., Inc. v. Lantech, Inc., 926 F.2d 1136, 1143 (Fed. Cir. 1991) (“Because the  
26 district court should have found that there was an absence of acceptable noninfringing  
27 substitutes, the Panduit test is satisfied. This positive determination indicates the  
28 reasonableness of the inference that [the patentee] probably would have made all the sales but

1 for the occurrence of the infringing sales . . . . [T]his finding alone [is] sufficient to base an  
2 award of lost profits damages assuming that the alleged infringer did not present evidence to  
3 successfully rebut the inference.”).

4 **B. Analysis**

5 **1. Absence of Acceptable, Noninfringing Substitutes**

6 The parties dispute whether Plaintiffs’ expert has sufficiently analyzed an absence of  
7 acceptable, noninfringing substitutes. (See Doc. Nos. 123, 127.) Defendant argues that  
8 Plaintiffs’ damages expert’s opinions should be excluded because his conclusion that there are  
9 no acceptable, noninfringing substitutes is without a sufficient basis. (Doc. No. 123.)  
10 Plaintiffs argue that Defendant attacks Plaintiffs’ expert’s conclusions, not his methodology.  
11 (Doc. No. 127.)

12 According to Plaintiffs, the patented advantages of the Vinturi are the features of the  
13 improved venturi device that allow it to successfully aerate wine. (See Doc. No. 127.) In his  
14 report, Mr. Jones explains, “The Vinturi’s innovative design resulted in an improved ability  
15 to draw in air and mix the air with wine, resulting in a better bouquet and enhanced flavors,  
16 and a smoother finish.” (Doc. No. 123, Decl. of Kevin L. Wheeler, Ex. 1 at 8.) He also states  
17 that the application of Bernoulli’s principle allows the Vinturi aerator to be most effective over  
18 other aerating devices. (Id. at 14.) According to Mr. Jones, the Vinturi allows aeration to  
19 occur quickly by pouring the wine at atmospheric pressure, rather than requiring either the  
20 wine or air to be introduced at pressure. (Id. at 8, 14.) Mr. Jones then turns to the Panduit  
21 factors and analyzes each individually. (Id. at 13-18.)

22 In considering the second Panduit factor, Mr. Jones opines in his report that none of the  
23 decanting/pourer-type devices offered in the market feature the innovative design applying  
24 Bernoulli’s principle. (Id. at 14.) He distinguishes the Vinturi from other nonventuri devices  
25 and states that it is the most effective device available. (Id.) Eventually, he reaches the  
26 conclusion that there are no acceptable noninfringing substitutes available in the market. (Id.)

27 Consistent with Cohesive Technologies, Inc. v. Waters Corp., to prove that there are no  
28 acceptable, noninfringing substitutes available, Plaintiffs “must show either that (1) the

1 purchasers in the marketplace generally were willing to buy the patented product for its  
2 advantages, or (2) the specific purchasers of the infringing product purchased on that basis.”  
3 Cohesive, 543 F.3d at 1372 (quoting Standard Havens, 953 F.2d at 1373. Here, Mr. Jones does  
4 not opine on whether the specific purchasers of the infringing product purchased because of  
5 the patented features. (See Doc. No. 123, Decl. of Kevin L. Wheeler, Ex. 1 at 13-17.)

6 To the extent that Mr. Jones analyzes whether purchasers select the Vinturi for its  
7 advantages, the Court notes that Mr. Jones provides economic analysis based on the  
8 assumption that there are no acceptable, noninfringing substitutes available. (See Doc. No.  
9 123, Decl. of Kevin L. Wheeler, Ex. 1 at 13-17.) To formulate his assumptions, Mr. Jones is  
10 entitled to offer opinion testimony based on materials “of any type reasonably relied on by  
11 experts in the particular field.” Fed. R. Civ. 703; see also United States v. 1014.15 Acres of  
12 Land, 588 F. Supp. 1238, 1242 (W.D. Mo. 1983).

13 In his deposition, Mr. Jones stated that he relied on discussions with the product’s  
14 inventor, Mr. Sabadicci, and on company marketing materials. (See Doc. No. 127, Decl. of  
15 Mary Prendergast, Ex. B at 4-5 see also Doc. No. 127.) “An expert cannot be an expert in all  
16 fields, and it is reasonable to expect that experts will rely on the opinions of experts in other  
17 fields as background material for arriving at an opinion.” 1014.15 Acres of Land, 558 F. Supp.  
18 at 1242. Defendants argue that marketing materials and a conversation with the product’s  
19 inventor, without more, are an insufficient basis for his conclusion that there are no acceptable,  
20 noninfringing substitutes. See Elsayed, 299 F.3d at 1063 (explaining that the trial court has  
21 the task of “making preliminary determination of whether the expert’s testimony is reliable);  
22 see also Fed R. Evid. 702 (stating that a court may permit testimony from an expert witness  
23 only if “the testimony is based on sufficient facts or data”).

24 Mr. Jones bases his analysis of lost profits on the assumption that there are no  
25 acceptable, noninfringing substitutes exist in the marketplace. See Fed. R. Evid. 702; see also  
26 Elsayed, 299 F.3d at 1063. For this assumption, Mr. Jones relied on his discussions with Mr.  
27 Sabadicci in formulating his conclusions. (See Doc. No. 127, Decl. of Mary Prendergast, Ex.  
28 B at 4-5.) Mr. Sabadicci’s deposition testimony reflects that he extensively considered

1 whether there were acceptable, noninfringing alternatives available in the marketplace. (Doc.  
2 No. 136, Ex. C. at 2-18.) Mr. Sabadicci stated that other aerators on the market should not be  
3 conclusively deemed aerators because they do not actually aerate wine. (Id. at 4.) Mr.  
4 Sabadicci further testified that he did not consider any other wine aerators on the market to  
5 work better than the Vinturi. (Id. at 12-13.) He explained that he tested several of the  
6 competitors and that he has not “seen anything work nearly as well with water.” (Id. at 13.)  
7 Additionally, Mr. Sabadicci addressed several competitors in the market, stating that he looked  
8 at twenty-four competitors on the market. (Id. at 5-6.)

9 First, Mr. Sabadicci discussed the Metrokane Rabbit and testified, “We tried it and it  
10 was a piece of junk.” (Id.) He continued to consider Rabbit devices and explained, “We  
11 looked at that. Piece of junk. Doesn’t do a thing. . . . It’s . . . ineffective.” (Id. at 8.) He  
12 stated that he tested the Rabbit device and observed that it did not properly aerate liquids. (Id.  
13 at 8-10.)

14 He then discussed the Nuance Wine Finer Aerator. (Id. at 10.) He testified that he did  
15 not test the Nuance Wine Fine Aerator because it was not Vinturi-like because it was a device  
16 that “goes into your wine” unlike the Vinturi. (Id. at 10-11) When asked whether he thought  
17 the product was an acceptable substitute for the Vinturi or whether a consumer may buy the  
18 Nuance Wine Fine aerator instead of the Vinturi he testified, “As much as a Lamborghini is  
19 an alternative to a skateboard.” (Id. at 12.) He then clarified that he considered the Vinturi to  
20 be the Lamborghini. (Id.)

21 Mr. Sabadicci next testified about the Soiree Bottle-Top Wine Decanter and Aerator.  
22 (Id.) He stated that the product worked in the same way as the Metrokane and that the product  
23 is not effective. (Id.) Mr. Sabadicci also considered the Nicholas Wine Aerator. (Id. at 14.)  
24 He testified, “We did taste test this, and it doesn’t do as good a job as aerating it and it doesn’t  
25 have as long as contact time as the Vinturi does. So it doesn’t aerate as well.” (Id.)

26 He also considered the Menu Selecting Decanter Pourer and stated that he conducted  
27 a taste test, comparing the device to the Vinturi, and concluded that the device did “about five  
28 percent of what the Vinturi does.” (Id. at 17.) He said that the device would only create a

1 Vinturi effect in “theory.” (Id.) He testified, “The problem with this product is it blocks the  
2 neck. So if the air can’t get in, then wine can’t get out. So wine just kind of goes glug, glug,  
3 glug, through it. Therefore, there’s not enough of a velocity difference to create a pressure  
4 difference to draw any air to make any effect.” (Id.)

5 Mr. Sabadicci extensively testified in his deposition on substitutes for the Vinturi and  
6 provided his reasons as to why they were not as effective as the Vinturi. (Id. at 1-18.) Based  
7 on the marketing materials and his discussions with Mr. Sabadicci, Mr. Jones spans three pages  
8 in his report discussing the second Panduit factor and the absence of acceptable, noninfringing  
9 substitutes. (See Doc. No. 123, Decl. of Kevin L. Wheeler, Ex. 1 at 14-16.) The Court  
10 concludes that Mr. Jones’s report and the deposition testimony of Mr. Sabadicci provide  
11 Defendant with adequate notice of the basis for the expert’s opinion.

12 Defendant disagrees with Plaintiffs’ opinion concerning acceptable, noninfringing  
13 substitutes, not his methodology.<sup>1</sup> (Doc. No. 123.) As the Supreme Court stated in Daubert,  
14 “[v]igorous cross-examination, presentation of contrary evidence, and careful instruction on  
15 the burden of proof are traditional and appropriate means of attacking shaky but admissible  
16 evidence.” Daubert, 509 U.S. at 595. Although Defendant may dispute whether acceptable  
17 noninfringing substitutes are available, the proper recourse is for Defendant to present contrary  
18 evidence and attack Mr. Jones’s testimony on cross examination rather than for the Court to  
19 exclude Mr. Jones’s testimony. See id. at 595; Primiano, 598 F.3d at 564; see also Micro  
20 Chem., 316 F.3d at 1392 (“When, as here, the parties’ experts rely on conflicting sets of facts,  
21 it is not the role of the trial court to evaluate the correctness of the facts underlying one  
22 expert’s testimony.”). Accordingly, the Court denies Defendant’s motion to exclude Mr.  
23 Jones’s opinion on lost profits without prejudice to any contemporaneous objections at trial.

24 ///

25 ///

---

26  
27 <sup>1</sup>Defendant argues that Mr. Jones does not focus enough on the Court’s claim construction. Defendant  
28 is free to address this on cross-examination at trial, but Mr. Jones’s report addresses the standard in Cohesive  
Technologies, Inc. v. Waters that the “purchasers in the marketplace generally were willing to buy the patented  
product for its advantages.” Cohesive, 543 F.3d at 1373.

## 2. Use of Sales Data from 2009

Defendant also argues that Mr. Jones improperly uses in his report sales data from 2009 in reaching his conclusions on lost profits. (Doc. No. 123.) Defendant argues that there was no sales data available for 2009 and therefore the figures are uncertain and unreliable. (*Id.*) In response, Plaintiffs indicate that removing the 2009 sales data from his calculations would have no effect on Mr. Jones's analysis. (Doc. No. 127.) Further, Plaintiffs agreed with Defendant that they would not attempt to offer any 2009 sales information. (*Id.*) Because Mr. Jones's conclusions would be the same without the 2009 data and because Plaintiffs agreed they would not offer any 2009 sales information at trial, the Court denies Defendant's motion to exclude Mr. Jones's opinions based on the 2009 data without prejudice to any contemporaneous objections at trial.

## II. Reasonable Royalties

### A. Legal Standards for Reasonable Royalties

"Determining a fair and reasonable royalty is often . . . a difficult judicial chore, seeming often to involve more the talents of a conjurer than those of a judge." ResQNet.com Inc. v. Lansa, Inc., 594 F.3d 860, 869 (Fed. Cir. 2010). To ascertain the reasonable royalty, patentees commonly consider a hypothetical negotiation, in which the asserted patent claims are assumed valid, enforceable, and infringed, and attempt to ascertain the royalty upon which the parties would have agreed had they successfully negotiated an agreement just before infringement began. Lucent, 580 F.3d at 1324-25; Georgia-Pacific Corp. v. U.S. Plywood Corp., 318 F. Supp. 1116, 1120 (S.D.N.Y. 1970); see also Rite-Hite Corp., 56 F.3d at 1554 n.13. Thus, the hypothetical negotiation that "attempts to ascertain the royalty upon which the parties would have agreed had they successfully negotiated an agreement just before infringement began," necessarily "involves an element of approximation and uncertainty." Lucent, 580 F.3d at 1324-25. In determining the reasonable royalty that would have been agreed to at the hypothetical negotiation, parties in patent cases frequently utilize the fifteen factors enunciated in Georgia-Pacific Corp., 318 F. Supp. at 1120. The Federal Circuit has

1 expressly “sanctioned the use of the Georgia-Pacific factors to frame the reasonable royalty  
2 inquiry.” Uniloc USA, Inc. v. Microsoft Corp., 632 F.3d 1292, 1317 (Fed. Cir. 2011).

3 **B. Mr. Jones’s Reasonable Royalty Analysis**

4 Defendant argues that Mr. Jones bases his reasonable royalty analysis on unreliable  
5 data, including Amazon’s 10K filing with the SEC from a Yahoo website. (Doc. No. 123.)  
6 Further, Defendant argues that Mr. Jones’s opinions are based on unsupported assumptions.  
7 (Doc. No. 123.) After careful consideration, the Court concludes that Mr. Jones has an  
8 adequate basis for his conclusions within the scope of Federal Rule of Evidence 702. See Fed.  
9 R. Evid. 702.

10 In his report, Mr. Jones analyzes each Georgia-Pacific factor and addresses the impact  
11 it would have on a reasonable royalty rate. (Doc. No. 123, Decl. of Kevin Wheeler, Ex. 1 at  
12 18-24.) In generating the reasonable royalty rate in his report, Mr. Jones opines that in a  
13 hypothetical negotiation Area 55 would not be willing to take less than its historical gross  
14 margin of 67%—sales price less cost of goods sold.<sup>2</sup> (Id. at 28-30.) Further, he explains that  
15 in line with Amazon’s continuing business model, Amazon would accept a 15% revenue share.  
16 (Id.) Therefore, in his opinion, if Area 55 and Amazon negotiated how to divide the value  
17 created by Amazon’s sale of the infringing products, Area 55 would accept 67% of the  
18 infringing sales and Amazon 15%. (Id.) Mr. Jones’s reasonable royalty conclusions are based  
19 on Area 55’s historic sales margins of 67% and Amazon’s practice of charging its merchants  
20 a 15% revenue share fee. (Id. at 26.)

21 In Riles v. Shell Exploration and Production Co., 298 F.3d 1302 (Fed. Cir. 2002), the  
22 Federal Circuit stated:

23 A ‘reasonable royalty’ contemplates a hypothetical negotiation between the  
24 patentee and the infringer at a time before the infringement began. Again, this  
25 analysis necessarily involves some approximation of the market as it would have

---

26 <sup>2</sup>The Court notes that Defendant Amazon’s damages expert, Robert Wallace, concludes that Vinturi  
27 has incremental profit margin of 48% at the highest. Defendant’s expert’s report contains a different analysis  
28 of reasonable royalties., but it is not the Court’s function to weigh conflicting expert opinions.

1 hypothetically developed absent infringement. This analysis, in turn, requires  
2 sound economic and factual predicates.

3 Riles, 298 F.3d at 1311. Nevertheless, the Federal Circuit has also held that although Daubert  
4 requires a district court to ensure that any scientific testimony is not only relevant but reliable,  
5 “[w]hen the methodology is sound, and the evidence relied upon sufficiently related to the case  
6 at hand, disputes about the degree of relevance or accuracy . . . may go to the testimony’s  
7 weight, but not its admissibility.” i4i, 598 F.3d at 852. Mr. Jones’s reliance on sales  
8 information and Amazon’s practices is reasonable; sales data and business practices are typical  
9 facts relied upon by damages experts, constituting a sound economic and factual predicate.  
10 See Riles, 298 F.3d at 1311. Further, Mr. Jones explains how he reached his conclusions,  
11 emphasizing that he believes the reasonable royalty rate is the difference between Area 55’s  
12 gross margin, equal to sales price less cost of goods sold, and Amazon’s 15% revenue share.  
13 (Doc. No. 123, Decl. of Kevin Wheeler, Ex. 1 at 28-29.) Although Defendant may dispute Mr.  
14 Jones’s conclusions, the proper recourse is for Defendant to present contrary evidence and  
15 attack Mr. Jones’s testimony on cross examination rather than for the Court to exclude Mr.  
16 Jones’s testimony. See Primiano, 598 F.3d at 564; Daubert, 509 U.S. at 595 (“Vigorous cross-  
17 examination, presentation of contrary evidence, and careful instruction on the burden of proof  
18 are traditional and appropriate means of attacking shaky but admissible evidence.”); see also  
19 Micro Chem., 316 F.3d at 1392 (“When, as here, the parties’ experts rely on conflicting sets  
20 of facts, it is not the role of the trial court to evaluate the correctness of the facts underlying  
21 one expert’s testimony.”). Accordingly, the Court denies without prejudice Defendant’s  
22 motion to exclude Mr. Jones’s reasonable royalty opinions without prejudice to any  
23 contemporaneous objections at trial.

24 Nevertheless, to the extent that Plaintiffs attempt to introduce testimony stating that  
25 breaking even or losing money is consistent with Amazon’s business model, the Court declines  
26 to permit the evidence. (Doc. No. 123, Decl. of Kevin Wheeler, Ex. 1 at 28 & Ex. 2 at 114.)  
27 According to the Federal Circuit, a damages expert’s analysis involves some approximation  
28

1 but nevertheless requires sound economic and factual predicates. Riles, 298 F.3d at 1311.  
2 Consistent with this principle, the Federal Circuit has strongly encouraged trial courts to  
3 perform a gatekeeping function by ruling inadmissible before trial damages claims based on  
4 fundamentally flawed arguments. See Uniloc, 632 F.3d at 1315-18. Mr. Jones claims that  
5 Amazon would be willing to take a loss on individual sales of Vinturi products because  
6 Amazon would realize value in fulfilling “their mission and vision which is to offer customers  
7 a low price, pleasant experience, with lots of choices.” (Doc. No. 123, Decl. of Kevin  
8 Wheeler, Ex. 2, at 53.) After considering Mr. Jones’s statements relating to Amazon’s  
9 willingness to lose money, the Court concludes that these statements are not based on sound  
10 economic principles. See Uniloc, 632 F.3d at 1315-18; Riles, 298 F.3d at 1311. Such a theory  
11 and conclusion is fundamentally flawed and therefore inadmissible under Daubert and the  
12 Federal Rules of Evidence. See Fed R. Evid. 702; Daubert, 509 U.S. at 597; Uniloc, 632 F.3d  
13 at 1314; Riles, 298 F.3d at 1311. Nevertheless, the Court concludes that Mr. Jones’s opinion  
14 on Amazon’s willingness to lose money does not affect his ultimate analysis and conclusion  
15 on reasonable royalties and therefore declines to exclude Mr. Jones’s conclusions on  
16 reasonable royalties in their entirety.<sup>3</sup> (See Doc. No. 123, Decl. of Kevin Wheeler, Ex. 1 at 28  
17 & Ex. 2 at 114.)

18 Furthermore, to the extent the parties wish to move into evidence testimony regarding  
19 Amazon’s capitalization and revenue, as referenced in Mr. Jones’s expert report, the Court  
20 declines to allow the evidence. (See id. at 22.) In Uniloc, the Federal Circuit concluded that  
21 the introduction of Microsoft’s \$19 billion in revenues was irrelevant and tainted the jury’s  
22 damages award, and thus concluded that the evidence should have been excluded. see also  
23 Uniloc, 632 F.3d at 1319. Like in Uniloc, the Court concludes that evidence of Amazon’s  
24 capitalization and revenues would be unduly prejudicial to the jury and lacks significant  
25

---

26 <sup>3</sup> If excluding Mr. Jones’s opinion on Amazon’s willingness to lose money changes his ultimate  
27 conclusion on reasonable royalties, Amazon may renew its motion to exclude Mr. Jones’s reasonable royalty  
28 analysis in a motion in limine.

1 probative value. See Fed. R. Evid. 403; see also Uniloc, 632 F.3d at 1319. Accordingly, the  
2 Court excludes evidence or testimony relating to either Area 55's or Amazon's capitalization,  
3 revenues, earnings, or similar data. (See Doc. No. 123, Decl. of Kevin Wheeler, Ex. 1 at 28  
4 & Ex. 2 at 114.)

### 5 **III. Presumption in Favor of Access to Court Records**

6 “Historically, courts have recognized a ‘general right to inspect and copy public records  
7 and documents, including judicial records and documents.’” Kamakana v. City & Cnty. of  
8 Honolulu, 447 F.3d 1172, 1178 (9th Cir. 2006) (quoting Nixon v. Warner Commc'ns, Inc., 435  
9 U.S. 589, 597 (1978)). Except for documents that are traditionally kept secret, there is “a  
10 strong presumption in favor of access to court records.” Foltz v. State Farm Mut. Auto. Ins.  
11 Co., 331 F.3d 1122, 1135 (9th Cir. 2003); see also Kamakana, 447 F.3d at 1178-79. “A party  
12 seeking to seal a judicial record then bears the burden of overcoming this strong presumption  
13 by meeting the compelling reasons standard. That is, the party must articulate compelling  
14 reasons supported by specific factual findings . . . that outweigh the general history of access  
15 and the public policies favoring disclosure, such as the public interest in understanding the  
16 judicial process.” Id. at 1178-79 (citations omitted) (internal quotation marks omitted). The  
17 presumed right to access to court proceedings and documents can be overcome “only by an  
18 overriding right or interest ‘based on findings that closure is essential to preserve higher values  
19 and is narrowly tailored to serve that interest.’” Oregonian Publ'g Co. v. U.S. Dist. Court, 920  
20 F.2d 1462, 1465 (9th Cir. 1990) (quoting Press-Enterprise Co. v. Superior Court, 446 U.S. 501,  
21 510 (1985)).

22 The parties have made no request to seal this order. Nevertheless, the parties filed their  
23 motion, opposition, and reply under seal. (See Doc. Nos. 123, 127, 131.) Based on the strong  
24 presumption in favor of access to court records, the Court declines to seal this order. The  
25 Court concludes that there are no compelling reasons to seal this order. Accordingly, the Court  
26 declines to seal this order.

27 ///

28

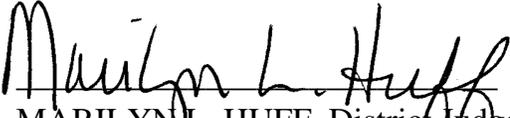
1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

**Conclusion**

For the foregoing reasons, the Court denies Defendant's motion to exclude Plaintiff's damages expert's testimony without prejudice to any contemporaneous objections at trial. The Court excludes, however, evidence relating to Amazon's alleged willingness to lose money and any testimony or evidence relating to Amazon's capitalization, revenue, earnings, or similar data.

**IT IS SO ORDERED.**

DATED: July 24, 2012

  
MARILYN L. HUFF, District Judge  
UNITED STATES DISTRICT COURT