

**UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION**

HARRIS CORPORATION,

Plaintiff,

v.

CASE NO. 6:11-CV-618-Orl-36KRS

RUCKUS WIRELESS, INC.,

Defendant.

ORDER

This cause comes before the Court on Plaintiff Harris Corporation's ("Plaintiff") Motion to Strike the Expert Report and Exclude Testimony of Richard J. Ostiller ("Motion to Strike") (Doc. 65). Defendant Ruckus Wireless, Inc. ("Defendant") filed a Response in opposition (Doc. 82). On November 15, 2012, the Court held a hearing on Plaintiff's Motion to Strike. *See* Doc. 114. Upon consideration, Plaintiff's Motion to Strike will be denied.

BACKGROUND

Plaintiff is the sole and exclusive owner of all rights, title, and interest to the following United States Patents (collectively, the "Patents-in-Suit"):

Patent No. 6,504,515 ("the '515 Patent"): High Capacity Broadband Cellular/PCS Base Station Using a Phased Array Antenna;

Patent No. 7,916,684 ("the '684 Patent"): Wireless Communications Network Providing Communication Between Mobile Devices and Access Points.

Doc. 13, Exs. 1, 2. In the Amended Complaint, Plaintiff asserts that Defendant has sold products and performed methods that infringe directly, by inducement and/or contributorily, one or more

claims of the '515 Patent and '684 Patent (Doc. 13, ¶¶ 11, 17). Plaintiff further asserts that Defendant has infringed and is still infringing upon one or more claims of the Patents-in-Suit by making, selling, and using wireless products that embody Plaintiff's patented invention. *Id.* at ¶¶ 12, 18. A jury trial in this matter is set for the July 2013 trial term. *See* Doc. 100. In conjunction with this case, Plaintiff has moved to strike the Expert Report and expert testimony of Richard J. Ostiller ("Ostiller"). *See* Doc. 65.

STANDARD

Rule 702 governs the admissibility of expert testimony and states:

A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of opinion or otherwise if: (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue; (b) the testimony is based on sufficient facts or data; (c) the testimony is the product of reliable principles and methods; and (d) the expert has reliably applied the principles and methods to the facts of the case.

Fed. R. Evid. 702. The Supreme Court in *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 589 (1993), charged district courts with a "gatekeeping function" of "ensur[ing] that any and all scientific testimony or evidence is not only relevant, but reliable." *See also United States v. Frazier*, 387 F.3d 1244, 1260 (11th Cir. 2004) (*en banc*).¹ Accordingly, the admission of such testimony is a matter within the discretion of the district court. *Cook ex rel. Estate of Tessier v. Sheriff of Monroe Cnty., Fla.*, 402 F.3d 1092, 1108 (11th Cir. 2005). In performing its gatekeeping function, the Court must consider whether:

¹ The Court extended its reasoning in *Daubert* to non-scientist experts in *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 141 (1999).

(1) the expert is qualified to testify competently regarding the matters he intends to address, (2) the methodology by which the expert reaches his conclusions is sufficiently reliable as determined by the sort of inquiry mandated in *Daubert*, and (3) the testimony assists the trier of fact, through the application of scientific, technical, or specialized expertise, to understand the evidence or to determine a fact in issue.

Frazier, 387 F.3d at 1260 (quoting *City of Tuscaloosa v. Harcros Chem., Inc.*, 158 F.3d 548, 562 (11th Cir. 1998)). The proponent of expert opinion testimony carries the burden of proving its reliability by a preponderance of the evidence. *Id.* (citing *Daubert*, 509 U.S. at 592-93 & n.10).

ANALYSIS

I. Introduction

In the Expert Report, Ostiller asserts that he “considered conventional intangible asset valuation techniques, as well as factors influencing a license that would have resulted from a hypothetical negotiation between the parties as of October 2005” to determine the damages in this matter.² Doc. 62, Ex. 2, ¶ 26. After doing so, Ostiller opined that “a royalty rate of 1.5% applied to [Defendant’s] revenue from sales of the Accused Products represents a reasonable royalty that would have resulted from the hypothetical negotiation of a license between [the parties].” *Id.* at ¶ 27. Accordingly, Ostiller concluded that, assuming infringement took place, the resultant damages of the Patents-in-Suit would total \$1,044,444. *Id.* at ¶ 28.

Plaintiff argues that the Expert Report, and Ostiller’s accompanying testimony, should be stricken for three reasons: (1) Ostiller relied upon license agreements that were “radically different”

²The basic premise of the hypothetical negotiation approach to determining a reasonable royalty is to hypothesize a negotiation for a license between the patentee and the alleged infringer just prior to the time of the first alleged infringement. *See, e.g., Georgia-Pacific Corp. v. United States Plywood Corp.*, 318 F. Supp. 1116 (S.D.N.Y. 1970).

from the hypothetical agreement under consideration; (2) his non-falsifiable method of selecting “comparables” renders his Expert Report and testimony inadmissible; and (3) his conclusory statements regarding the royalty base and structure of the hypothetical license are not admissible as expert opinions. *See* Doc. 65. Each argument will be considered in turn.

A. It Was Not Improper for Ostiller to Rely Upon the Tantivity and DPAC Agreements

In the Expert Report, Ostiller asserts that he identified “two particularly relevant market transactions” with respect to his damages analysis: (1) the Tantivity/InterDigital Agreement (“Tantivity Agreement”); and (2) the DPAC/QuaTech Agreement (“DPAC Agreement”). Doc. 62, Ex. 2, ¶¶ 69-76. Ostiller further states that these two Agreements “provide for a royalty rate in the range of 1% to 3.5%, with a midpoint range of 2.3%.” *Id.* Therefore, Ostiller subsequently used the mid point range of 2.3% as a starting royalty rate for a license covering the Patents-in-Suit. *Id.* at ¶ 76.

Plaintiff asserts that Ostiller “did not provide any testimony that would suggest any of the parties to the two ‘particularly relevant market transactions’ were similarly situated as [Plaintiff and Defendant] would have been at the time of a hypothetical negotiation.” Doc. 65, p. 6. More specifically, Plaintiff asserts that there is insufficient data from which Ostiller could base his opinion that the technology at issue in the Tantivity and DPAC Agreements are comparable to the technology at issue in the instant case. *Id.* at pp. 9-10.

Plaintiff fails to adequately support its contention that the licensing agreements that Ostiller relied upon were “radically different” from the hypothetical agreement under consideration in this case. Ostiller located the Tantivity and DPAC Agreements by using keywords taken from the Patents-in-Suit and associated legal filings. *See* Doc. 62, Ex. 1, p. 88. The Tantivity Agreement

involved the purchase of nearly all of Tantivity's assets, including subscriber-based smart antenna solutions based on antenna and steering algorithm technology. Doc. 62, Ex. 2, p. 21. The Tantivity Agreement described Smart Antennas as antennas that use "multiple antenna elements with signal processing capabilities which enhance desired or reduce undesired transmissions to or from wireless products." *Id.* Similarly, in the DPAC Agreement, QuaTech received a license to certain technology owned by DPAC including, among other things, patents related to embedded wireless networking and connectivity products. *Id.* at 21-22. Ostiller ultimately concluded that "the wireless networking and connectivity technologies embodied in the DPAC technology licensed by QuaTech are analogous to certain of the technologies embodied in the [Patents-in-Suit]." *Id.* at 22. Further, Defendant's expert, Dr. John Thompson ("Dr. Thompson"), confirmed that the technology in both Agreements was comparable to the technology involved in the Patents-in-Suit. *Id.* at pp. 84-86.

The Tantivity and DPAC Agreements are not perfectly analogous, and they need not be. In fact, it is nearly impossible to find an identical agreement in any patent dispute. However, the Court agrees with Ostiller that the Agreements "provide clarity with respect to the financial arrangements between the parties" and are "instructive in developing a reasonable royalty rate in this matter." *Id.* Additionally, Ostiller's opinions are not based solely on those Agreements. Rather, he used them as a starting point in his damages analysis. Thus, the Court will not strike Ostiller's testimony on the grounds that he relied upon license agreements that were "radically different" from the hypothetical agreement under consideration. This argument goes to the weight to be accorded Ostiller's opinions and not the admissibility of the opinions.

B. Plaintiff has Failed to Establish that Ostiller's Methodology is Not Falsifiable

Next, Plaintiff asserts that because Ostiller's methodology for determining which market transactions are relevant to this case is not falsifiable, his Expert Report and testimony must be stricken. Doc. 65, pp. 11-12. In support of this argument, Plaintiff contends that Ostiller cannot replicate his methodology because:

(1) he is not familiar with the process by which the companies RoyaltyStat and RoyaltySource gather information/transactions in response to inquiries; and (2) he is unable to provide a list of search terms he used to gather the transactions he obtained from which he then selected the "particularly relevant market transactions."

Id. at 11.

During his deposition testimony, Ostiller stated that he did not know how the databases he utilized processed the information once it was provided. *See* Doc. 62, Ex. 1, pp. 90-92. However, experts are permitted to rely upon licensing materials obtained from databases such as RoyaltyStat and RoyaltySource in formulating their opinions. *See, e.g., Black & Decker v. Bosch Tools*, 2006 WL 5156873, at *3 (N.D. Ill. 2006); *St.-Gobain Corp. v. Gemtron Corp.*, 2006 WL 1307890, at *2 (W.D. Mich. 2006). Moreover, requiring experts to have a complete understanding of the inner-workings of third party sources would be extremely difficult in practice, and is unsupported in case law.

Also at his deposition, Ostiller testified that he could not recite the list of search terms provided to RoyaltyStat and RoyaltySource from memory. *See* Doc. 62, Ex. 1, p. 88. However, Ostiller stated that he possibly still had the list of keywords he used, and offered a number of keywords that he believed were on that list. *Id.* at 91. In other words, with the proper keywords, it is certainly possible that Ostiller's methods could be recreated. Accordingly, the Court will not

strike Ostiller's testimony on the grounds that his methods are not falsifiable. This argument, too, goes to the weight to be accorded Ostiller's opinions.

C. Ostiller did not Improperly Rely Upon the Conclusory Statements of Defense Witnesses

Last, Plaintiff asserts that in drawing his conclusions, Ostiller improperly relied upon Defendant's counsel, Defendant's Chief Financial Officer, Seamus Hennessy ("Hennessy"), and Dr. Thompson for facts and analysis. Doc. 65, p. 12. Moreover, Plaintiff asserts that Ostiller's conclusory statements regarding the royalty bases and structure of the hypothetical license erroneously provides a single rate applied to all accused products, and erroneously removes several accused products from the royalty base of both Patents-in-Suit. *Id.* at 14-15.

It is true that Ostiller relied upon the guidance of others for certain technical issues. However, damages experts are permitted to rely upon others for technical issues. *See, e.g., Bowling v. Hasbro, Inc.*, 2008 WL 717741 (D. R.I. 2008) ("a damages expert [need not] have experience in the specific industry in question"); *Minebea Co., Ltd. v. Papst*, 2005 WL 1459704 (D. D.C. 2005) (allowing the testimony of a damages expert where that expert relied upon another expert's opinion).

Moreover, Ostiller's opinions are not merely based on the conclusions of Hennessy, Dr. Thompson, and Defendant's counsel. Ostiller supported his opinions and identified his assumptions. With regard to Ostiller's use of a single royalty rate in his damages calculation, patent law is clear that a separate royalty rate is not required for each accused product. *See, e.g., FMT Corp. v. Nissei ASB Co.*, 1993 WL 588529 (N.D. Ga. 1993) (finding that the Special Master did not err in finding that the hypothetical license which would be agreed to by the parties would include use of all three patents for a single fee); *Procter & Gamble Co. v. Paragon Trade Brands, Inc.*, 989 F.Supp. 547, 607 (D. Del. 1997) ("Both experts concluded that a single negotiation was appropriate to determine

the reasonable royalty rate for licensing the technology covered by [both] patents”); *DataQuill Ltd. v. High Tech Computer Corp.*, 2012 WL 1284381, *3 (S.D. Cal. 2012) (allowing damages testimony where expert applied a single royalty rate to alleged infringement of multiple patents). More importantly, Plaintiff does not explicitly indicate why Ostiller’s decision to use one royalty rate is inherently harmful.

With regard to Ostiller’s removal of certain products from the royalty base, he sufficiently explains in the Expert Report that he excluded only products that could not possibly infringe on the Patents-in-Suit. Doc. 62, Ex. 2, ¶¶ 14-16. This practice, once again, is permitted by the courts. *See Lear Automotive Dearborn, Inc. v. Johnson Controls, Inc.*, 2011 WL 218948, *2 (E.D. Mich. 2011) (refusing to strike damages expert’s testimony, and noting that the mere capability of infringement without actual infringement was properly excluded from damages calculation). Therefore, the Court will not strike Ostiller’s testimony on these grounds.

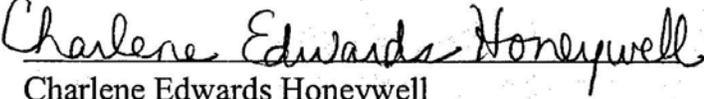
II. Conclusion

Plaintiff seeks to strike the entirety of Ostiller’s Expert Report and testimony based on various specific arguments, none of which are fatal to his testimony. The focus of the Court’s inquiry must be based solely on the principles and methodology of the expert, and not the conclusions that the expert reaches. *Daubert*, 509 U.S. at 594. Based on the analysis above, Plaintiff’s Motion to Strike is denied.

Accordingly, it is hereby **ORDERED**:

1. Plaintiff Harris Corporation’s Motion to Strike the Expert Report and Exclude Testimony of Richard J. Ostiller (Doc. 65) is **DENIED**.

DONE AND ORDERED at Orlando, Florida on January 16, 2013.


Charlene Edwards Honeywell
United States District Judge

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