

IN THE UNITED STATES DISTRICT COURT  
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

KIMBERLY-CLARK WORLDWIDE, INC., :  
Plaintiff :  
 : CIVIL NO. 1:09-CV-1685  
v. :  
 :  
FIRST QUALITY BABY PRODUCTS, LLC, :  
FIRST QUALITY PRODUCTS, INC., :  
FIRST QUALITY RETAIL SERVICES, LLC, :  
FIRST QUALITY HYGIENIC, INC., :  
Defendants and :  
Counterclaim Plaintiffs :  
v. :  
 :  
KIMBERLY-CLARK CORPORATION, :  
KIMBERLY-CLARK WORLDWIDE, INC., :  
KIMBERLY-CLARK GLOBAL SALES, LLC, :  
Counterclaim Defendants

*ORDER*

The background of this order is as follows:

Among numerous other pretrial motions filed by the parties in this patent infringement action, Defendants sought to preclude Plaintiff's economic expert, Julie L. Davis, from testifying at trial. Specifically, Defendants challenged the methodology employed by Ms. Davis to determine a "reasonable royalty rate" and calculate infringement damages. By Memorandum issued November 13, 2013 (Doc. 1024), we determined that Ms. Davis's methodology was proper and denied Defendants' motion.

Presently before the court is Defendants' motion (Doc. 1042), which seeks reconsideration of our November 13, 2013 order. In particular, Defendants

argue that the court erred by: (1) failing to apply the “entire market value rule”; and (2) concluding that prior licenses upon which Ms. Davis relied used the same methodology to calculate royalties as she used in her expert report. (Doc. 1043 at 3-9). Plaintiff opposes Defendants’ motion and contends that the court’s prior order is proper. (Doc. 1058).

A party seeking reconsideration must demonstrate: (1) an intervening change in the controlling law; (2) the availability of new evidence; or (3) the need to correct a clear error of law or fact or to prevent manifest injustice. *Max’s Seafood Café by Lou-Ann, Inc. v. Quinteros*, 176 F.3d 669, 677 (3d Cir. 1999). We conclude that reconsideration of our prior order is unwarranted in this instance.

With respect to Defendants’ first argument, “[t]he entire market value rule allows for the recovery of damages based on the value of an entire apparatus containing several features, when the feature patented constitutes the basis for customer demand.” *Rite-Hite Corp. v. Kelley Co.*, 56 F.3d 1538, 1549 (Fed. Cir. 1995). The entire market value rule applies “[w]here small elements of multi-component products are accused of infringement.” *LaserDynamics, Inc. v. Quanta Computer, Inc.*, 694 F.3d 51, 67 (Fed.Cir.2012). The requirements of the entire market value rule need not be met, however, where a reasonable royalty is calculated based on the “smallest saleable unit” with close relation to the claimed invention. *Broadcom Corp. v. Emulex Corp.*, No. 09-01058-JVS, 2011 U.S. Dist.

LEXIS 154416, \*17-18 (C.D. Cal. Dec. 13, 2011); *Cornell Univ. v. Hewlett-Packard Co.*, 609 F. Supp. 2d 279, 288 (N.D.N.Y. 2009).

Here, Ms. Davis's royalty calculations are based on the smallest saleable unit because the patents-in-suit claim disposable absorbent articles or composites comprising numerous different elements. Defendants have not identified, nor can the court envision, a manner in which the articles could be further subdivided into component parts that still practice the patents at issue. Accordingly, the entire market value rule does not render Ms. Davis's methodology improper. See *Broadcom Corp.*, 2011 U.S. Dist. LEXIS 154416 at \*17-18 (finding that Ms. Davis's royalty calculations did not violate the entire market value rule where plaintiff offered sufficient evidence to permit a reasonable jury to conclude that patent-practicing computer chips were, in fact, the smallest saleable unit); *Personalized Media Communs., LLC v. Zynga, Inc.*, No. 2:12-CV-00068-JRG-RSP, 2013 U.S. Dist. LEXIS 160247, \*6-7 (E.D. Tex. Nov. 8, 2013) (rejecting defendant's challenge to expert's methodology where defendant provided no explanation of how the smallest saleable unit used by expert could be further subdivided while remaining consistent with plaintiff's theory of infringement).

Defendants' second ground for reconsideration—the contention that we improperly concluded that some of the prior licenses Ms. Davis examined used the same methodology to calculate royalties as she did in her expert report—is similarly unpersuasive. Ms. Davis's expert report and deposition testimony indicate that some

of the prior licenses regarding the patents-in-suit used a “running royalty rate” like the one she proposes, while others involved up-front, “lump sum” payments to license the technology. The fact that all prior licenses did not employ a running royalty rate is not fatal to Ms. Davis’s methodology. See *Wordtech Systems, Inc. v. Integrated Networks Solutions, Inc.*, 609 F.3d 1308, 1320 (Fed. Cir. 2010) (finding that lump sum and running-royalty agreements can be relevant to each other as long as some basis for comparison exists in the evidence presented to the jury); *Broadcom Corp.*, 2011 U.S. Dist. LEXIS 154416 at \*15 (same).

Accordingly, this 27<sup>th</sup> day of May, 2014, it is ORDERED that Defendants’ motion for reconsideration (Doc. 1042) is DENIED. It is further ORDERED that Plaintiff’s motion (Doc. 1074) for leave to file a surreply is DENIED.

/s/ William W. Caldwell

William W. Caldwell

United States District Judge