** NOT PRINTED FOR PUBLICATION **

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

AFFINITY LABS OF TEXAS, LLC,	§	
	§	
Plaintiff,	§	
	§	CIVIL ACTION No. 1-12-CV-580
v.	§	
	§	JUDGE RON CLARK
FORD MOTOR CO.,	§	
	§	
Defendant.	§	

ORDER DENYING AFFINITY LABS OF TEXAS, LLC'S MOTION TO STRIKE PORTIONS OF THE OPINION OF FORD'S EXPERT JULIE L. DAVIS

Before the court is Affinity Labs of Texas, LLC's Motion to Strike Portions of the Opinion of Ford's Expert Julie L. Davis. [Doc. # 131]. Plaintiff Affinity is seeking to strike portions of Defendant Ford's damages expert, Julie L. Davis. The court denies this motion.

I. Background

Affinity has moved to strike portions of Ford's expert report regarding damages for two reasons. First, it argues that Davis improperly relied on the license that Ford entered into regarding the Himmelstein patents. Second, it argues that Davis improperly converted Affinity's lump-sum agreements into per-unit royalties.

II. Applicable Law

Regional law governs a motion to exclude expert testimony on the basis that it is unreliable. *ePlus, Inc. v. Lawson Software, Inc.*, 700 F.3d 509, 516 (Fed. Cir. 2012). Federal Rule of Evidence 702 provides that a witness who is "qualified by knowledge, skill, experience, training, or education," may provide opinion testimony if that testimony will assist the trier of

fact and: (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case. Fed. R. Evid. 702. The witness must possess "knowledge, skill, experience, training, or education" in the relevant field in order to be qualified to express his expert opinion on the topic in issue. *Id.* "Rule 702 does not mandate that an expert be highly qualified in order to testify about a given issue. Differences in expertise bear chiefly on the weight to be assigned to test testimony by the trier of fact, not its admissibility." *Huss v. Gayden*, 571 F.3d 442, 452 (5th Cir. 2009).

The Supreme Court in *Daubert* charged trial courts with determining whether scientific expert testimony under Rule 702 is "not only relevant, but reliable." *Daubert v. Merrill Dow Pharms., Inc.*, 509 U.S. 579, 589, 113 S. Ct. 2786, 2794 (1993); see also *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 149, 119 S. Ct. 1167, 1175 (1999) (extending *Daubert* to all expert testimony).

> The *Daubert* opinion lists a number of factors that a trial court may use in determining an expert's reliability. Trial courts are to consider the extent to which a given technique can be tested, whether the technique is subject to peer review and publication, any known potential rate of error, the existence and maintenance of standards governing operation of the technique, and, finally, whether the method has been generally accepted in the relevant scientific community . . . These factors are not mandatory or exclusive; the district court must decide whether the factors discussed in *Daubert* are appropriate, use them as a starting point, and then ascertain if other factors should be considered . . . But the existence of sufficient facts and a reliable methodology is in all instances mandatory. Without more than credentials and a subjective opinion, an expert's testimony that "it is so" is not admissible.

Hathaway v. Bazany, 507 F.3d 312, 318 (5th Cir. 2007) (internal citations omitted).

A court is not required to "admit opinion evidence that is connected to existing data only by the ipse dixit of the expert," and may "rightfully exclude expert testimony where a court finds

that an expert has extrapolated data, and there is 'too great an analytical gap between the data and the opinion proffered.'" *Burleson v. Tex. Dep't. Crim. Justice*, 393 F.3d 577, 587 (5th Cir. 2004) (quoting *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 146, 118 S. Ct. 512, 519 (1997)).

In calculating reasonable royalties, the court is called on "'to hypothesize, not to speculate.'" *LaserDynamics, Inc. v. Quanta Computer, Inc.*, 694 F.3d 51, 67 (Fed. Cir. 2012) (*ResQNet.com, Inc. v. Lansa, Inc.*, 594 F.3d 860, 869 (Fed. Cir. 2010)). "'[C]omparisons of past patent licenses to the infringement must account for 'the technological and economic differences' between them." *Wordtech Sys., Inc. v. Integrated Networks Solutions, Inc.*, 609 F.3d 1308, 1320 (Fed. Cir. 2010) (quoting *ResQNet.com*, 594 F.3d at 873). So long as the methodology is sound and the evidence is reasonably related, the degree of comparability and any failure to control for certain variables are "factual issues best addressed by cross examination and not by exclusion." *ActiveVideo Networks, Inc. v. Verizon Commc'ns, Inc.*, 694 F.3d 1312, 1333 (Fed. Cir. 2012) (quoting *i4i Ltd. P'ship v. Microsoft Corp.*, 598 F.3d 831, 852 (Fed. Cir. 2010)).

III. Analysis

A. Ms. Davis Did Not Improperly Rely on the Himmelstein Licenses

Affinity advances two related arguments regarding Ms. Davis's use of the Himmelstein licenses in her damages calculations. First, Affinity argues that Ms. Davis does not have a technical background to determine the comparability of the licenses and that she never spoke to the Ford's technical expert, Scott Andrews. Next, it argues that the Himmelstein licenses cannot be relied upon because they are not sufficiently related.

Ms. Davis is Ford's damages expert, not a technical expert, and presumably, she will be offering economic testimony, not scientific or engineering based testimony. She relied on Mr.

Andrews's technical expertise and report in determining what licenses to use in her analysis. Whether Ms. Davis has a technical background and whether she spoke to Mr. Andrews can be developed on cross-examination, but gives no basis to exclude her testimony on damages.

As to the more relevant inquiry related to the comparability of the licenses, Affinity argues that Ford has failed to meet its burden in showing that they are technologically and economically comparable. Affinity argues that the comparison was inadequate because Mr. Andrews only reviewed one of the twenty-three patents and patent applications and that he did not engage in an analysis of whether the Himmelstein patents were valid. The Himmelstein patents relate to a mobile unit that communicatively interfaces with a vehicle for audio/visual information. All of the Himmelstein patents are members of the same patent family, so they share a common specification; Affinity's arguments that Mr. Andrews did not review all of the applications falls flat. The comparability is an issue of fact for the jury to determine, not a reason to exclude the testimony. *ActiveVideo Networks, Inc.*, 694 F.3d at 1333.

B. Ms. Davis's Conversion of a Lump-Sum License Agreement into Per-Unit Royalties was not Improper

Affinity next argues that Ms. Davis's testimony regarding her conversion of a lump-sum license agreement into per-unit royalties was improper and requires exclusion. "[L]ump sum payments … should not support running royalty rates without testimony explaining how they apply to the facts of the case." *Whitserve, LLC v. Computer Packages, Inc.*, 694 F.3d 10, 30 (Fed. Cir. 2012). Ms. Davis provided a chart as part of her expert report detailing her conversion of the Apple lump-sum royalty to per-unit royalty. [Doc. # 141-5]. As to the Panasonic license, upon which Affinity itself relies, Ms. Davis did not rely upon it specifically to calculate a value, but rather generally states that it would lead to a "very modest running royalty rate." Affinity

also argues that Ms. Davis's analysis of Ford's licenses with 911 Notify, LLC and Tendler Cellular of Texas, LLC is flawed. The calculation of a reasonable royalty is not an exact science, and just because one approach may be better does not make other approaches inadmissible. *Apple Inc. v. Motorola, Inc.*, --- F.3d ---, 2014 WL 1646435, *19 (Fed. Cir. Apr. 25, 2014). The issues that Affinity raises regarding Ms. Davis's calculations are a matter of weight for the jury to determine, rather than a matter of exclusion.

IV. Conclusion

Affinity Labs of Texas, LLC's Motion to Strike Portions of the Opinion of Ford's Expert Julie L. Davis [Doc. # 131] is DENIED.

So **ORDERED** and **SIGNED** this **22** day of **August, 2014.**

Ron Clark, United States District Judge