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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

ENOVSYYS LLC,
Plaintiff,
v.
AT&T MOBILITY LLC, et al.,
Defendants.

Case No. CV 11-5210 SS
**ORDER GRANTING DEFENDANTS'
MOTION TO EXCLUDE THE
SUPPLEMENTAL OPINIONS OF
PLAINTIFF'S DAMAGES EXPERT
RUSSELL PARR (Dkt. No. 523)**

AND RELATED COUNTER-CLAIMS

I.
INTRODUCTION

On July 22, 2015, Defendants AT&T Mobility LLC and AT&T Mobility II LLC (collectively, "AT&T") filed a Motion to Exclude the Supplemental Opinions of Russell Parr ("Motion"), including the declaration of Eliot D. Williams. ("Williams Decl.," Dkt. No. 523 (redacted) & 548 (under seal)). On July 30, 2015, Plaintiff Enovsys LLC ("Enovsys") filed an Opposition ("Opp.," Dkt. No. 528 (application to file under seal) & 544 (under

1 seal)), including the declaration of Scott R. Miller. ("Miller
2 Decl.," Dkt. No 529 & 545 (under seal exhibits)). On July 31,
3 2015, AT&T filed a Reply ("Reply"), including the declaration of
4 Jason German. ("German Decl.," Dkt. No. 538). On August 4,
5 2015, AT&T filed a Notice of Errata, including the declaration of
6 Gina A. Bibby ("Bibby Decl."), to correct an inadvertent citation
7 and exhibit attachment in the Motion. (Dkt. No. 541). On August
8 5, 2015, the Court held a hearing.¹ On August 6, 2015, per the
9 Court's instruction, AT&T filed a Notice of Filing Defendants'
10 PowerPoint Presentation titled "AT&T's Motion to Exclude Parr,"
11 which presentation Defendants had used as a demonstrative during
12 the August 5, 2015 hearing. (Dkt. No. 552 (redacted) & 556
13 (under seal)).

14
15 For the reasons stated below, AT&T's Motion to Exclude the
16 Supplemental Opinions of Russell Parr is GRANTED. Furthermore,
17 the Court concludes that the interests of justice will be served
18 by bifurcating the trial into a liability phase and, if
19 necessary, a damages phase, to be tried before different juries.

20
21 ¹ At the August 5, 2015 hearing, the Court announced a Tentative
22 Decision to deny the Motion and offered grounds in support of
23 that denial. However, both parties provided argument to the
24 Court following the statement of the Tentative Decision. In
25 addition to the evidence that had been submitted in support of
26 the Parties' respective briefs, the Parties addressed certain
27 evidence that had come to light after the Motion to Exclude was
28 filed, in particular deposition testimony concerning some of the
data upon which Parr had relied in his Supplemental Report. In
light of the arguments made at the hearing, the new evidence
presented, and upon reconsideration of the materials, briefs and
pleadings previously submitted, the Court rejects its Tentative
Decision and instead grants the Motion, as discussed more fully
below.

1 In the event that a damages trial is necessary, the Court will
2 allow Enovsys to submit a Second Revised Damages Report and will
3 reopen discovery for the limited purpose of permitting AT&T to
4 conduct discovery on the opinions in the Second Supplemental
5 Damages Report.

6
7 **II.**

8 **AT&T'S MOTION**

9
10 Russell Parr is Enovsys' damages expert. On June 11, 2015,
11 the Court granted AT&T's Motion in Limine to Exclude Parr's
12 Opinions ("MIL") after determining that Parr in his original
13 report had "not adequately apportioned the royalty based on the
14 estimated value of the claimed technology." ("MIL Order," Dkt.
15 No. 501 at 5). Specifically, the Court found that Parr's
16 opinions did not sufficiently tie damages to the "limited
17 features" of the patented invention. (Id.). However, the Court
18 allowed Enovsys to revise its damages report to address these
19 deficiencies. (Id.)

20
21 On June 24, 2015, Enovsys served Parr's "Supplemental Expert
22 Damages Report" ("Parr Supp. Rpt."). (See Motion at 1 & Williams
23 Decl., Exh. A). AT&T contends that the opinions in the
24 Supplemental Report, organized around four alternative damages
25 calculations presented in two sets of two, did not correct the
26 defects in Parr's original report because Parr did not tie "his
27 damages calculations to the value of the patented invention."
28 (Id. at 1). According to AT&T, Parr's Calculation 1 and

1 Calculation 2 simply attempt to exclude certain non-infringing
2 revenue from the royalty base in response to this Court's Summary
3 Judgment Order and do not attempt to address apportionment at
4 all.² (Id. at 4-5). As such, AT&T argue that Calculation 1 and
5 Calculation 2 run afoul of the entire market value rule because
6 they "derive damages using all of AT&T's LBS revenue" without
7 "consideration of revenue obtained or sales that would have been
8 lost on account to the selective location disclosure feature" at
9 issue in this action. (Reply at 8). Furthermore, AT&T argues
10 that ABI, the "research-for-hire firm that Enovsys engaged to
11 compile data for Parr's use," explained in a recent deposition
12 that its network request and SUPL data, which Parr used to
13 exclude non-infringing LBS revenue in Calculation 1 and
14 Calculation 2, did not reliably support the conclusions that Parr
15 drew from the data. (See id. at 5 n. 5).

16
17 AT&T further maintains that Parr's Calculation 3 and
18 Calculation 4, which apply a 57% adjustment to the figures

19
20 ² Specifically, AT&T contends that Calculation 1 "purportedly
21 excludes from [the] royalty base revenue that is associated with
22 [Location-Based Services, or "LBS"] that does not infringe."
23 (Motion at 4). Calculation 2 "purportedly excludes from [the]
24 royalty base revenue that is associated with LBS location
25 requests from handsets that are not SUPL-enabled." (Id. at 5).
26 AT&T contends that the resulting figures, following these
27 exclusions, "reach[] for the entire value of revenue from
28 location-based applications and revenue from all of the data
consumers use with those applications." (Id. at 9). In other
words, AT&T argues that Parr impermissibly "takes the whole of
the LBS applications revenue and the whole of the LBS data
revenue as the starting point for his base" on the erroneous
assumption that "the importance of location privacy justifies
including in his royalty base the entire market value of AT&T's
products and services." (Id.).

1 derived in Calculation 1 and Calculation 2, are also unreliable.
2 AT&T argues that the 2012 Internet-published PEW Study upon which
3 the adjustment is based claimed only to measure the perceived
4 consumer value of protecting "personal information" in general
5 and was not focused on location privacy, much less the selective
6 location disclosure feature at issue here. (Motion at 6).
7 Finally, AT&T contends that Parr directed the entirety of his
8 supplemental opinions to the '461 patent and did not "separately
9 calculate damages for the '273 patent or, in any other way,
10 attempt to isolate the damages associated with alleged
11 infringement." (Id. at 16) (footnote omitted). Accordingly,
12 AT&T contends that "Parr should be precluded from offering
13 testimony about the '273 patent." (Id.).

14
15 Enovsys maintains that Parr's Supplemental Report "does not
16 in fact use the entire market value" in Calculation 1 and
17 Calculation 2, but instead appropriately apportions revenue to
18 include "only that which is associated with sales that AT&T would
19 have lost without the inclusion of the patented invention."
20 (Opp. at 1) (citing, inter alia, Sentius Int'l, LLC v. Microsoft
21 Corp., 2015 WL 451950, at *11 (N.D. Cal. Jan. 27, 2015)).
22 According to Enovsys, "[e]ven though the LBS products and
23 services might present other benefits and attractions to AT&T
24 customers, the invention of the '461 patent was the only way that
25 AT&T could make those benefits and attractions available to AT&T
26 customers while allowing AT&T to be in compliance with the
27 Telecommunications Act and to give its customers the comfort of
28 knowing that their private location data would remain private

1" (Id. at 12). Additionally, Enovsys claims that "there
2 is no noninfringing alternative to provide the functionality of
3 the privacy protection that AT&T has obtained by the infringement
4 of the '461 patent nor the efficiencies produced by AT&T
5 infringement of the '273 patent." (Id.). Enovsys defends the
6 PEW Study and other studies and reports that Parr relied on as
7 "uncontroverted consumer research." (Id. at 10). Furthermore,
8 Enovsys argues that the research Parr considered included not
9 only the Pew Study, but also a 2011 TRUSTe survey and a 2010
10 TRUSTe report.³ (Id. at 12-13).

11
12 Finally, Enovsys contends that Parr has provided an opinion
13 about the '273 patent. (Id. at 14). According to Enovsys, Parr
14 "has opined since his original report that, based on his years of
15 experience in dealing with both real-life negotiations and
16 analysis [of] patent damages, that AT&T and Enovsys would have
17 included the '273 patent in with the earlier hypothetical
18 negotiation of the license for the '461 patent." (Id. at 15).
19 Parr also "explained at his deposition that the Spring settlement
20 agreement provides a floor for the reasonable royalty for
21 infringement of at least the '273 patent." (Id.) (citing Miller
22 Decl., Exh. D).

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25
26 ³ Enovsys argues that the TRUSTe results reported even higher
27 percentages of smartphone users who valued location information
28 privacy than the Pew Study results, but Parr took the
"conservative approach" by adopting the Pew Study results. (Opp.
at 13).

1 knowledge and experience of [the relevant] discipline.” Daubert
2 v. Merrell Dow Pharm., Inc., 509 U.S. 579, 592 (1993); Kumho Tire
3 Co., Ltd. v. Carmichael, 526 U.S. 137, 147 (1999) (the “basic
4 gatekeeping obligation” articulated in Daubert applies not only
5 to scientific testimony but to all expert testimony). The
6 court’s review of expert testimony focuses “solely on principles
7 and methodology, not on the conclusions that they generate.”
8 Daubert, 509 U.S. at 595. “Evidence should be excluded as
9 unreliable only if it “suffer[s] from serious methodological
10 flaws.” Obrey v. Johnson, 400 F.3d 691, 696 (9th Cir. 2005).

11
12 “The reliability inquiry is ‘a flexible one.’” Estate of
13 Barabin v. AstenJohnson, Inc., 740 F.3d 457, 463 (9th Cir. 2014)
14 (quoting Kumho Tire Co., Ltd., 526 U.S. at 150). However, “[a]
15 judge must be cautious not to overstep its gatekeeping role and
16 weigh facts, evaluate the correctness of conclusions, impose its
17 own preferred methodology, or judge credibility, including the
18 credibility of one expert over another. These tasks are solely
19 reserved for the fact finder.” Apple Inc. v. Motorola, Inc., 757
20 F.3d 1286, 1314 (Fed. Cir. 2014), overruled on other grounds by
21 Williamson v. Citrix Online, LLC, __ F.3d __, 2015 WL 3687459, at
22 *6 (Fed. Cir. June 16, 2015). The limitation of the trial
23 court’s gatekeeping role “to excluding testimony based on
24 unreliable principles and methods is particularly essential in
25 the context of patent damages” because “questions regarding which
26 facts are most relevant or reliable to calculating a reasonable
27 royalty are for the jury.” Id. at 1315. (internal quotation
28 marks and citation omitted). “When the methodology is sound, and

1 the evidence relied upon sufficiently related to the case at
2 hand, disputes about the degree of relevance or accuracy (above
3 this minimum threshold) may go to the testimony's weight, but not
4 its admissibility." i4i Ltd. Partnership v. Microsoft Corp., 598
5 F.3d 831, 856 (Fed. Cir. 2010); see also Primiano v. Cook, 598
6 F.3d 558, 564-65 (9th Cir. 2010) ("Under Daubert, the district
7 judge is 'a gatekeeper, not a fact finder.'" (quoting United
8 States v. Sandoval-Mendoza, 472 F.3d 645, 654 (9th Cir. 2006))).

9
10 In Daubert, the Supreme Court suggested several factors that
11 can be used to determine the reliability of expert testimony:
12 "1) whether a theory or technique can be tested; 2) whether it
13 has been subjected to peer review and publication; 3) the known
14 or potential error rate of the theory or technique; and
15 4) whether the theory or technique enjoys general acceptance
16 within the relevant scientific community." United States v.
17 Hankey, 203 F.3d 1160, 1167 (9th Cir. 2000) (citing Daubert, 509
18 U.S. at 592-94). "However, whether these specific factors are
19 'reasonable measures of reliability in a particular case is a
20 matter that the law grants the trial judge broad latitude to
21 determine.'" Estate of Barabin, 740 F.3d at 463 (quoting Kumho
22 Tire Co., Ltd., 526 U.S. at 153).

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IV.

DISCUSSION

A. Law Governing Expert Damages Opinions In Patent Cases

“Upon finding for the claimant the court shall award the claimant damages adequate to compensate for the infringement, but in no event less than a reasonable royalty for the use made of the invention by the infringer, together with interest and costs as fixed by the court.” 35 U.S.C. § 284. Two typical categories of compensation for infringement are the patentee’s lost profits and the “reasonable royalty he would have received through arms-length bargaining.” Lucent Techs., Inc. v. Gateway, Inc., 580 F.3d 1301, 1324 (Fed. Cir. 2009). The measure of damages at issue in this case is a reasonable royalty, which is “merely the floor below which damages shall not fall.” Id. (quoting Bandag, Inc. v. Gerrard Tire Co., 704 F.2d 1578, 1583 (Fed. Cir. 1983)).

“[R]easonable royalty damages are deemed the minimum amount of infringement damages ‘adequate to compensate for the infringement.’” LaserDynamics, Inc. v. Quanta Computer, Inc., 694 F.3d 51, 66 (Fed. Cir. 2012) (quoting 35 U.S.C. § 284). The most common method for determining a reasonable royalty is the hypothetical negotiation approach, which “attempts to ascertain the royalty upon which the parties would have agreed had they successfully negotiated an agreement just before infringement began.” Lucent Techs., 580 F.3d at 1324. The Federal Circuit has approved application of the non-exhaustive factors identified

1 in Georgia-Pacific Corp. v. U.S. Plywood Corp., 318 F. Supp.
2 1116, 1120 (S.D. N.Y. 1970), to arrive at a reasonable royalty
3 through hypothetical negotiation. See Uniloc USA, Inc. v.
4 Microsoft Corp., 632 F.3d 1292, 1317 (Fed. Cir. 2011) (“This
5 court has sanctioned the use of the Georgia-Pacific factors to
6 frame the reasonable royalty inquiry. Those factors properly tie
7 the reasonable royalty calculation to the facts of the
8 hypothetical negotiation at issue.”).

9
10 “Where small elements of multi-component products are
11 accused of infringement, calculating a royalty on the entire
12 product carries a considerable risk that the patentee will be
13 improperly compensated for non-infringing components of that
14 product.” LaserDynamics, 694 F.3d at 67. Accordingly, “[w]hen
15 the accused infringing products have both patented and unpatented
16 features, measuring this value requires a determination of the
17 value added by such features.” Ericsson, Inc. v. D-Link Sys.,
18 Inc., 773 F.3d 1201, 1226 (Fed. Cir. 2014). “Indeed,
19 apportionment is required even for non-royalty forms of damages:
20 a jury must ultimately ‘apportion the defendant’s profits and the
21 patentee’s damages between the patented feature and the
22 unpatented features’ using ‘reliable and tangible’ evidence.”
23 Id. (quoting Garretson v. Clark, 111 U.S. 120, 120 (1884)).

24
25 Pursuant to the “entire market value rule,” “when small
26 elements of multi-component products are accused of infringement,
27 a patentee may ‘assess damages based on the entire market value
28 of the accused product only where the patented feature creates

1 the basis for customer demand or substantially creates the value
2 of the component parts.'" AstraZeneca AB v. Apotex Corp., 782
3 F.3d 1324, 1337 (Fed. Cir. 2015) (quoting Uniloc, 632 F.3d at
4 1318 (internal quotation marks omitted); see also Lucent Techs.,
5 580 F.3d at 1336 ("The entire market value rule allows for the
6 recovery of damages based on the value of an entire apparatus
7 containing several features, when the feature patented
8 constitutes the basis for customer demand.") (internal quotation
9 marks and citation omitted). However, the "entire market value
10 rule is a narrow exception" to the general rule that royalties
11 "be based not on the entire product, but instead on the smallest
12 salable patent-practicing unit." LaserDynamics, 694 F.3d at 67
13 (internal quotation marks and citation omitted). "[W]here a
14 multi-component product is at issue and the patented feature is
15 not the item which imbues the combination of the other features
16 with value, care must be taken to avoid misleading the jury by
17 placing undue emphasis on the value of the entire product."
18 Ericsson, 773 F.3d at 1226. In such instances, "courts must
19 insist on a more realistic starting point for the royalty
20 calculations by juries -- often, the smallest salable unit and,
21 at times, even less." Ericsson, 773 F.3d at 1227. As the
22 Federal Circuit has explained, "Where the smallest salable unit
23 is, in fact, a multi-component product containing several non-
24 infringing features with no relation to the patented feature
25 . . ., the patentee must do more to estimate what portion of the
26 value of that product is attributable to the patented technology.
27 To hold otherwise would permit the entire market value exception
28

1 to swallow the rule of apportionment." Virnetx, Inc. v. Cisco
2 Sys., Inc., 767 F.3d 1308, 1327-28 (Fed. Cir. 2014).

3
4 To be admissible under Rule 702, "expert testimony opining
5 on a reasonable royalty rate must 'carefully tie proof of damages
6 to the claimed invention's footprint in the market place.'" Uniloc,
7 632 F.3d at 1317 (quoting ResQNet.com, Inc. v. Lansa,
8 Inc., 594 F.3d 860, 869 (Fed. Cir. 2010)). "A damages theory
9 must be based on 'sound economic and factual predicates.'" LaserDynamics,
10 694 F.3d at 67 (quoting Riles v. Shell Exploration
11 & Prod. Co., 298 F.3d 1302, 1311 (Fed. Cir. 2002)). Notably, a
12 court may "not allow consideration of the entire market value of
13 accused products for minor patent improvements simply by
14 asserting a low enough royalty rate" because the inappropriate
15 disclosure of the total revenue from an infringing product
16 "cannot help but skew the damages horizon for the jury,
17 regardless of the contribution of the patented component to this
18 revenue." Uniloc, 632 F.3d at 1320. However, it is also true
19 that "[d]etermining a fair and reasonable royalty is often . . .
20 a difficult judicial chore, seeming often to involve more the
21 talents of a conjurer than those of a judge." ResQNet.com, 594
22 F.3d at 869 (quoting Fromson v. Western Litho Plate & Supply Co.,
23 853 F.2d 1568, 1574 (Fed. Cir. 1988)); see also LaserDynamics,
24 694 F.3d at 66 ("To assess how much value each patented and non-
25 patented component individually contributes to the overall end
26 product -- e.g., a personal computer -- can be an exceedingly
27 difficult and error-prone task."). As such, the court must
28 exclude speculation but allow hypothesized damages sufficiently

1 grounded in fact to reach the jury. See, e.g., Lapsley v. Xtek,
2 Inc., 689 F.3d 802, 814 (7th Cir. 2012) ("Rule 702 asks whether
3 [the expert's] . . . hypothesis was reliably supported and
4 applied to the known facts, such that it rises above speculation
5 and becomes a presentable probability."). Applying these
6 authorities, the Court analyzes below the admissibility of
7 supplemental Parr report.

8
9 **B. Parr's Reasonable Royalty Calculations Fail To Adequately**
10 **Apportion The Value of Enovsys' Patents**

11
12 The Court concludes that all four of Parr's proposed
13 Calculations fail to apportion the value added by Enovsys'
14 patents to AT&T's network. This failure is a methodological
15 error that the Court must address due to the Court's gatekeeper
16 role.

17
18 Upon careful review, the Court concludes that the revenue
19 bases established by Calculation 1 and Calculation 2 fail to even
20 attempt apportionment and improperly "skew the damages horizon."⁴
21 Uniloc, 632 F.3d at 1320. Enovsys is correct that Parr rejects
22 "a royalty base that would include all revenue derived by AT&T
23 from its network." (Opp. at 6). However, Parr's "limitation" of
24 the royalty base "to only the revenue for data consumed by LBS

25 _____
26 ⁴ Parr's Supplemental Report did not revisit his application of a
27 4.5% "royalty rate" to the royalty bases determined in
28 Calculation 1 and Calculation 2. (See Parr Original Report, Dkt.
No. 435-06, at 40-41). Accordingly, the Court will not address
Parr's determination of royalty rate, as that aspect of his
opinion is generally encompassed by the Court's MIL Order.

1 applications" still attributes to Enovsys the entirety of that
2 revenue without showing that the patented feature, selective
3 location disclosure, "creates the basis for customer demand or
4 substantially creates the value of the component parts."
5 AstraZeneca, 782 F.3d at 1337; (see, e.g., Parr Supp. Rpt. at 5
6 ("[T]he infringement of the Enovsys' patented technology is what
7 allows AT&T to obtain value from the AT&T Network for all LBS
8 Services.")). AT&T submitted evidence with its Motion, which
9 Enovsys does not challenge, showing that AT&T Navigator offers
10 "turn-by-turn driving directions, full-color moving maps, a fuel
11 finder feature that lets customers identify the cheapest nearby
12 gas and access to YELLOWPAGES.COM's database of millions of
13 business locations." (Williams Decl., Exh. D). Other location-
14 based applications available to AT&T subscribers include traffic
15 alerts with alternate routes, 3-D moving maps, and quick route
16 recalculation for missed turns, among others. (Id.). Parr's
17 royalty base assumptions appear predicated on the belief that
18 none of the LBS features besides selective location disclosure
19 has an impact on LBS revenues.

20
21 The LaserDynamics court explained why, even if a product
22 would be commercially unviable without a patented feature, the
23 patented feature cannot necessarily be deemed to drive demand for
24 the entire product. The patent at issue in LaserDynamics was for
25 a method of optical disc discrimination that enables an optical
26 disc drive ("ODD"), for example, in a laptop computer, to
27 automatically identify whether the disc inserted in the drive is
28

1 a CD or a DVD. LaserDynamics, 694 F.3d at 56. The court
2 observed that it is not enough

3
4 to show that a laptop computer without an ODD
5 practicing the disc discrimination method would be
6 commercially unviable. Were this sufficient, a
7 plethora of features of a laptop computer could be
8 deemed to drive demand for the entire product. To
9 name a few, a high resolution screen, responsive
10 keyboard, fast wireless network receiver, and
11 extended-life battery are all in a sense important or
12 essential features to a laptop computer; take away one
13 of these features and consumers are unlikely to select
14 such a laptop computer in the marketplace. But proof
15 that consumers would not want a laptop computer
16 without such features is not tantamount to proof that
17 any one of those features alone drives the market for
18 laptop computers. Put another way, if given a choice
19 between two otherwise equivalent laptop computers,
20 only one of which practices optical disc
21 discrimination, proof that consumers would choose the
22 laptop computer having the disc discrimination
23 functionality says nothing as to whether the presence
24 of that functionality is what motivates consumers to
25 buy a laptop computer in the first place. It is this

1 latter and higher degree of proof that must exist to
2 support an entire market value rule theory.

3
4 Id. at 68.

5
6 Parr has failed to show in any reliable way that Enovsys'
7 selective location disclosure invention is what motivates
8 consumers to subscribe to AT&T's network. Without such proof,
9 the royalty bases established by Calculation 1 and Calculation 2
10 are impermissibly broad and unreliable.⁵ Even to the extent that
11 Calculation 1 and Calculation 2 could be construed as arguably
12 relevant under the Federal Rules' generous relevancy standards,
13 any probative value they may have is outweighed by the dangers of
14 prejudice, confusion of the issues, and the risk of misleading
15 the jury. See LaserDynamics, 694 F.3d at 77 ("Rule 403 provides
16 for the exclusion of otherwise relevant evidence when the
17 probative value of that evidence is substantially outweighed by
18 the danger of unfair prejudice, confusing the issues, or

19
20 ⁵ Furthermore, it is unclear whether the ABI data upon which Parr
21 relied in determining Calculation 1 and Calculation 2 stood for
22 what he thought they did. For example, according to AT&T,
23 although Parr apparently believed he was using data traffic from
24 only location requests that went to AT&T's location platform on
25 the network, an ABI witness testified that the table Parr relied
26 on did not support that assumption. (Reply at 5 n.5).
27 Similarly, AT&T states that although Parr believed that the data
28 he received showed only location requests from "SUPL-enabled"
 handsets that use AT&T's SUPL server, an ABI witness testified
 that some of those requests use non-AT&T SUPL servers. (Id.).
 Because this argument was not fully briefed or supported by
 evidence, the Court does not rely on it in striking Parr's
 Supplemental Report. However, Enovsys should address the ABI
 testimony if it intends to rely on ABI data in any future revised
 report.

1 misleading the jury."); see also Estate of Barabin v.
2 AstenJohnson, Inc., 740 F.3d 457, 462 (9th Cir. 2014), cert.
3 denied, ___ U.S. ___, 135 S. Ct. 55 (2014) (evidentiary rulings are
4 reviewed for abused of discretion); see also Bose Corp. v. JBL,
5 Inc., 274 F.3d 1354, 1360 (Fed. Cir. 2001) (applying law of the
6 circuit for standard concerning exclusion of evidence).

7
8 Parr's Calculation 3 and Calculation 4, which simply apply a
9 57% adjustment to Calculation 1 and Calculation 2, respectively,
10 are similarly unreliable as they also fail to tie damages to
11 specific features of the invention. Parr derived the 57%
12 adjustment from a 2011 Pew Research Center Study Report entitled
13 "Privacy and Data Management on Mobile Devices." (Parr Supp.
14 Rpt. at 14). According to Parr, the study shows that, in the
15 aggregate, "57% of all app users have either uninstalled an app
16 over concerns about having to share their personal information,
17 or declined to install an app in the first place for similar
18 reasons." (Id.). Parr admits that "the Pew Study is not linked
19 directly to location information," but claims that evidence shows
20 that "location information is the most sensitive information AT&T
21 holds about its customers." (Id.). However, Parr fails to
22 demonstrate that the report itself actually supports this
23 statement and the Court finds that it does not. The Pew Study
24 addresses concerns about the privacy of photos, contacts and
25 other files stored on cell phones, as well as browsing and search
26 history, in addition to location tracking features. (See
27 Williams Decl., Exh. C at 2). Indeed, even the Pew Study shows
28 that only "19% of cell owners have turned off the location

1 tracking feature on their cell phone because they were concerned
2 that other individuals or companies could access that
3 information." (Id.) (emphasis added). Parr appears to conclude
4 that any type of privacy concern expressed by cell phone app
5 users is a proxy for location-based privacy concerns, and that
6 location-based privacy concerns necessarily measure how consumers
7 value Enovsys' selective location disclosure technology. The Pew
8 Study does not specifically address selective location disclosure
9 technology and therefore is not a reliable source for the
10 conclusions Parr attempts to draw from it in his Supplemental
11 Report.⁶

12
13 **V.**

14 **CONCLUSION**

15
16 For the foregoing reasons, the Court GRANTS AT&T's Motion to
17 Exclude the Supplemental Opinions of Russell Parr. The Court
18 ORDERS that the Supplemental Opinions of Russell Parr are
19 excluded and may not be presented to the jury. Because the
20 Parties and the Court have already devoted extensive resources to
21 prepare for trial, which is scheduled to start on August 18,
22 2015, and because further delay in this case, which was filed
23 more than four years ago, would be prejudicial to the Parties,
24 the Court concludes that the interests of justice will be served
25 by bifurcating the trial of this matter into a liability phase

26 _____
27 ⁶ Because the Court concludes that Parr's opinions as expressed
28 in the Supplemental Report must be stricken for the reasons
expressed above, it is not necessary for the Court to address
whether those opinions extend to the '273 patent.

