

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
MARSHALL DIVISION**

ZIILABS INC., LTD.,	§	
	§	
Plaintiff,	§	
	§	
v.	§	Case No. 2:14-cv-203-JRG-RSP
	§	
SAMSUNG ELECTRONICS CO. LTD., ET	§	
AL.,	§	
	§	
Defendants.	§	

DAUBERT ORDER

Pending before the Court is Defendant Samsung’s *Daubert* Motion to Exclude Certain Testimony by Plaintiff’s Damages Expert Robert Mills.¹ (Dkt. No. 311.) Samsung argues that the Court should exclude any testimony from Mr. Mills regarding the MicroUnity license, incomplete licensing agreements, flawed apportionment analyses, and irrelevant economic theories. For the following reasons, the Court will only exclude Mr. Mills’ testimony on incomplete licensing agreements.

APPLICABLE LAW

Rule 702 provides that an expert witness may offer opinion testimony 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.

¹ “Samsung” refers to Defendants Samsung Electronics Co. Ltd., Samsung Electronics America, Inc., and Samsung Austin Semiconductor, LLC.

“The inquiry envisioned by Rule 702 is . . . a flexible one,” but, in *Daubert*, the Supreme Court held that the Rules also “assign to the trial judge the task of ensuring that an expert’s testimony both rests on a reliable foundation and is relevant to the task at hand.” *Daubert v. Merrell Dow Pharms. Inc.*, 509 U.S. 579, 594, 597 (1993); *see also Apple Inc. v. Motorola, Inc.*, 757 F.3d 1286, 1321 (Fed. Cir. 2014) (“Experts routinely rely upon other experts hired by the party they represent for expertise outside of their field.”); *TQP Dev. LLC v. 1-800-Flowers.com, Inc.*, Case No. 2:11-cv-248-JRG, 2015 WL 6694116, at *4 (E.D. Tex. Nov. 3, 2015) (“Dr. Becker was entitled to rely upon Dr. Jager’s technical analysis when constructing his damages model and presenting it to the jury.”).

“The relevance prong [of *Daubert*] requires the proponent [of the expert testimony] to demonstrate that the expert’s ‘reasoning or methodology can be properly applied to the facts in issue.’” *Johnson v. Arkema, Inc.*, 685 F.3d 452, 459 (5th Cir. 2012) (quoting *Curtis v. M & S Petroleum, Inc.*, 174 F.3d 661, 668 (5th Cir. 1999)). “The reliability prong [of *Daubert*] mandates that expert opinion ‘be grounded in the methods and procedures of science and . . . be more than unsupported speculation or subjective belief.’” *Johnson*, 685 F.3d at 459 (quoting *Curtis*, 174 F.3d at 668).

In assessing the “reliability” of an expert’s opinion, the trial court may consider a list of factors including: “whether a theory or technique . . . can be (and has been) tested,” “whether the theory or technique has been subjected to peer review and publication,” “the known or potential rate of error,” “the existence and maintenance of standards,” and “general acceptance” of a theory in the “relevant scientific community.” *Daubert*, 509 U.S. at 593–94; *see also Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 150 (1999) (“*Daubert* makes clear that the factors it

mentions do *not* constitute a ‘definitive checklist or test.’”); *U.S. v. Valencia*, 600 F.3d 389, 424 (5th Cir. 2010).

“The proponent need not prove to the judge that the expert’s testimony is correct, but she must prove by a preponderance of the evidence that the testimony is reliable.” *Johnson*, 685 F.3d at 459 (quoting *Moore v. Ashland Chem., Inc.*, 151 F.3d 269, 276 (5th Cir. 1998) (en banc)). At base, “the question of whether the expert is credible or the opinion is correct is generally a question for the fact finder, not the court.” *Summit 6, LLC v. Samsung Elecs. Co., Ltd.*, 802 F.3d 1283, 1296 (Fed. Cir. 2015).

ANALYSIS

A. MicroUnity License

The dispute between Plaintiff and Samsung regarding the MicroUnity license centers on whether Mr. Mills used reliable methods to show that the MicroUnity license is relevant to this case. The MicroUnity license covers 100 United States and foreign patents and arose out of a 2013 litigation settlement between MicroUnity and Samsung and other alleged infringers. (Dkt. No. 311 at 4.) Samsung principally asserts that Mr. Mills’ testimony regarding the MicroUnity license is not admissible on two grounds: first, the MicroUnity license is not economically comparable to a license for the Asserted Patents; and second, the MicroUnity license is not the most reliable license in the record.

1. Economically Comparable

Mr. Mills calculated the effective royalty rate of the MicroUnity license by relying on the value of the ten patents asserted in the MicroUnity litigation. (Dkt. No. 311 at 9.) He used that value to calculate the effective royalty rate of the license in three “periods”—through the date of settlement, through the date that most of the patents asserted in the MicroUnity litigation expired,

and through the date that the last patent asserted in the MicroUnity litigation expired. (Dkt. No. 331-8 ¶260.)

Mr. Mills stated that he relied on the value of the ten patents asserted in the MicroUnity litigation because in a patent portfolio “value is often concentrated in relatively few patents.” (Dkt. No. 331-8 ¶241.) For example, studies show that in certain patent groups, 10% of the patents account for 81-93% of the group’s value. (Dkt. No. 331-8 ¶241.) These numbers relate to the MicroUnity license because Dr. John Hart, Plaintiff’s technical expert, explained that the patents in the MicroUnity litigation “overlap a large portion of the patents licensed under the MicroUnity agreements.” (Dkt. No. 331-8 ¶241; *see also id.* (“Adjusting the financial terms of the MicroUnity agreement based on the relative number of licensed patents would be unreasonable . . . in light of the fact that MicroUnity [did] [] not allege[] that Samsung and Apple use[d] the other licensed patents.”).)

Mr. Mills then explained how he selected the license “periods” in his rate calculations. He selected August 16, 2015, for one license “period” because most of the patents asserted in the MicroUnity litigation expired on that day. (Dkt. No. 331-8 at ¶260.) He selected August 16, 2018, for another license “period” because the last patent asserted in the MicroUnity litigation expired on that day. (Dkt. No. 331-8 at ¶260.)

Samsung asserts that the Court should exclude Mr. Mills’ testimony. He erred, according to Samsung, when calculating the MicroUnity license’s effective royalty rate by: (1) considering the value of the ten patents asserted in the MicroUnity litigation but not the 100 patents covered by the MicroUnity license (Dkt. No. 311 at 9, 11–12), and (2) selecting license “periods” that Samsung contends are “arbitrary” (Dkt. No. 311 at 11–12).

For three reasons, the Court will not exclude Mr. Mills' testimony on the MicroUnity license. First, Mr. Mills explained why he considered only the value of the ten patents asserted in the MicroUnity litigation. (Dkt. No. 331-8 ¶241.) That method is testable and is supported by several publications. *See Daubert*, 509 U.S. at 593 (“Another pertinent consideration is whether the theory of technique has been subjected to peer review and publication.”). Second, Mr. Mills explained why he selected specific dates as license “periods.” (Dkt. No. 331-8 at ¶260.) That method is also testable and Mr. Mills' reasoning can be challenged on cross-examination. *See Summit 6*, 802 F.3d at 1296 (“[T]he question of whether the expert is credible or the opinion is correct is generally a question for the fact finder, not the court.”). Finally, Mr. Mills explained why he did not seriously consider the value of the foreign patents and sales. He stated that the parties “would have primarily focused on [] activity in the United States” (Dkt. No. 331-8 ¶250) because “recovering damages [is] far more difficult outside the United States” (Dkt. No. 331-8 ¶250 n.570).

2. Most Comparable License

In *LaserDynamics*, the Federal Circuit held that parties are permitted, in “limited circumstances,” to rely on settlement agreements to show reasonable royalty damages. *LaserDynamics, Inc. v. Quanta Comput., Inc.*, 694 F.3d 51, 77 (Fed. Cir. 2012). A “limited circumstance” arises when a settlement agreement is “the most reliable license in [the] record,” such as when the remaining licenses in the record do not “even mention[] the patents in suit” or show “any [] discernable link to the claimed technology.” *ResQNet.com, Inc. v. Lansa, Inc.*, 594 F.3d 860, 870, 872 (Fed. Cir. 2010); *see id.* at 871–72 (“The first *Georgia-Pacific* factor, which Dr. David found to be controlling and which the district court in turn adopted, must consider licenses that are commensurate with what the defendant has appropriated.”).

Samsung asserts that these Federal Circuit cases bar the admission of Mr. Mills' testimony on the MicroUnity license. (Dkt. No. 311 at 10.) Samsung claims that the MicroUnity license is not the "most reliable license in the record" because the Asserted Patents are more comparable to the patents in the Graphics Property Holdings (GPH) license than to the patents in the MicroUnity license. (Dkt. No. 311 at 10–11; Dkt. No. 311 at 10 ("[A]ccording to the unrebutted analysis of Dr. John Kelly (Samsung's technical expert), 151 of the 225 patents (or 67%) in the GPH licenses relate to technology in the GPU, the same component that is accused of infringing the Patents-in-Suit.")) The patents in the MicroUnity license, Samsung states, relate primarily to the central processing unit (CPU) whereas the patents in the GPH license relate primarily to the GPU. (*See* Dkt. No. 311 at 11.)

The Court will not exclude Mr. Mills' testimony because *LaserDynamics* does not apply. The Federal Circuit confirmed in *LaserDynamics* a "longstanding disapproval of relying on settlement agreements to establish reasonable royalty damages." *LaserDynamics*, 694 F.3d at 77. The basis for this disapproval was "[t]he notion that license fees that are tainted by the coercive environment of patent litigation are unsuitable to prove a reasonable royalty" under *Georgia-Pacific* because *Georgia-Pacific* "assumes a voluntary agreement . . . reached between a willing licensor and willing licensee, with validity and infringement of the patent not being disputed." *LaserDynamics*, 694 F.3d at 77.

The parties' dispute here does not implicate the Federal Circuit's concern for the coercive effect of litigation. The MicroUnity license and the GPH license are **both** litigation settlement agreements. (*See* Dkt. No. 331 at 11; Dkt. No. 326-1 ¶48 ("[O]ther patents in the GPH portfolio [] are more similar to the ZiiLabs patents-in-suit tha[n] the patents . . . asserted in the GPH litigation.")) *LaserDynamics* discourages the admission of a litigation settlement agreement that

is not the “most reliable license in the record” if the alternative is the admission of an agreement that is free from the effects of litigation. However, if the parties’ do not dispute that settlement agreements are the most comparable licenses, their dispute over the most factually comparable license should be resolved by the jury. *See Uniloc USA, Inc. v. Microsoft Corp.*, 632 F.3d 1292, 1306 (Fed. Cir. 2011) (“It is decidedly the jury’s role to evaluate the weight to be given to the testimony of dueling qualified experts.”).

3. Remaining Issues

Samsung challenges Mr. Mills’ testimony on the MicroUnity license on two last grounds. First, it asserts that the patents in the MicroUnity license are not technologically comparable to the Asserted Patents. (Dkt. No. 311 at 6–8.) Second, it asserts that Mr. Mills’ testimony does not pass muster under Rule 403. (Dkt. No. 311 at 11.)

As to the first, “Rule 703 explicitly allows an expert to rely on information he has been made aware of ‘if experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion on the subject.’” *Apple*, 757 F.3d at 1321; *see TQP Dev.*, 2015 WL 6694116, at *4. Samsung does not argue that Mr. Mills’ reliance on Dr. Hart’s testimony was unreasonable, and the Court has held in a separate Order that Dr. Hart’s testimony is relevant and reliable. *See ZiiLabs Inc., Ltd. v. Samsung Elecs. Co. Ltd.*, Case No. 2:14-cv-203-JRG-RSP, Dkt. No. 503 at 1 (E.D. Tex. Dec. 3, 2015) (holding Dr. Hart’s analysis relevant and reliable under *Daubert*).

As to the second, Samsung has not shown why the probative value of the MicroUnity license is substantially outweighed by the possibility of “wasting time.” Fed. R. Evid. 403; (Dkt. No. 311 at 11 (“Indeed, Mr. Mills’ report contains numerous tangential and time-wasting discussions of sideline issues.”).) The Court does not find it “time-wasting” for Mr. Mills to

attempt to show that the terms of the MicroUnity license are indicative of a reasonable royalty for the Asserted Patents.

B. Unconsummated licensing proposals

Mr. Mills’ testimony references four licensing negotiations between Apple and Samsung. (Dkt. No 311 at 12–13.) He discusses (1) a 2010 presentation by Apple regarding the potential license of certain patents by Apple to Samsung (Dkt. No 331-8 ¶225); (2) a royalty opinion from Samsung’s damages expert in a 2011 litigation between Apple and Samsung (Dkt. No 331-8 ¶235); (3) a royalty demand from Samsung to Apple in the same litigation (Dkt. No 331-8 ¶271); and (4) a royalty demand from Apple to Samsung on separate patent claims (Dkt. No 331-8 ¶273).

Samsung contends that Mr. Mills’ testimony as to these licensing negotiations should be excluded. First, Samsung asserts that “none of the royalty proposals enumerated above resulted in executed licenses or involved patents that are claimed to be technically comparable to the [Asserted Patents].” (Dkt. No. 311 at 13.) Second, Samsung asserts that “Mr. Mills has [] failed to present any evidence . . . that these proposals occurred in a similar context or addressed the same questions as the hypothetical negotiations between [Plaintiff and Samsung].” (Dkt. No. 311 at 13.)

The Court finds that Mr. Mills’ testimony on these points should be partially excluded. Plaintiff has not shown that licensing proposals between Apple and Samsung occurred in a context that is comparable to that of a hypothetical negotiation between Plaintiff and Samsung. For example, Apple and Samsung compete in the consumer electronics market, but Plaintiff and Samsung do not compete in the SoC or GPU market. Plaintiff has not shown how the negotiations between Apple and Samsung are factually analogous to the hypothetical negotiation

in this case, and by extension have not shown how the figures from those negotiations are relevant either. *See VirnetX, Inc. v. Cisco Sys., Inc.*, 767 F.3d 1308, 1333 (Fed. Cir. 2014) (“[E]ven if an expert could identify all of the factors that would cause negotiating parties to deviate from the 50/50 baseline in a particular case, the use of this methodology would nevertheless run the significant risk of inappropriately skewing the jury’s verdict.”).

C. Surface area analysis

Mr. Mills considered the area of the System-on-Chip (SoC) covered by the GPU when he assessed “[t]he portion of the realizable profit that should be credited to the invention.” (Dkt. No. 331-8 ¶¶219–21, 224.) He stated that “[a]ppportioning the average prices of the accused Samsung chips by the percentage of the surface area of [the] chip[] . . . dedicated to the[] GPU[] provides some insight into the value of the GPU[], although the value is not necessarily limited to the apportioned price.” (Dkt. No. 331-8 ¶224.) The portion of the SoC surface area covered by the GPU partly indicates the GPU’s value because “the surface area of an SoC will be budgeted to the various components . . . based on the value provided by those components.” (Dkt. No. 331-8 ¶¶242, 220.)

Samsung asserts that Mr. Mills’ GPU surface area-related testimony is unreliable. It contends that Mr. Mills based his testimony on flawed analysis from Jim Turley, Plaintiff’s expert, and that Mr. Mills did not correctly apportion the royalty base to “reflect the value attributable to the infringing features of the product, and no more.” *Ericsson, Inc. v. D-Link Sys., Inc.*, 773 F.3d 1201, 1226 (Fed. Cir. 2014). Samsung claims that Mr. Mills did not correctly apportion the royalty base because the Asserted Patents “are not the invention of an entire GPU, but rather relate only to specific functions in a GPU.” (Dkt. No. 311 at 14.)

The Court will not exclude Mr. Mills’ SoC surface area-related testimony. Plaintiff says that Mr. Mills did not use the GPU revenue as the royalty base but used it only to “qualitatively analyze” the “realizable profit that should be credited to the invention.” (Dkt. No. 331 at 13.) *Georgia-Pacific* factor 15 requires an expert to consider “[t]he amount that a licensor (such as the patent owner) and a licensee (such as the infringer) would have agreed upon (at the time the infringement began) if both had been reasonably and voluntarily trying to reach an agreement.” (Dkt. No. 331-8 ¶¶228–64; *Georgia-Pacific Corp. v. U.S. Plywood Corp.*, 318 F. Supp. 1116, 1120 (S.D.N.Y. 1970).) In analyzing this factor, Mr. Mills said that the GPU “account[ed] for a significant percentage of the surface area” of an accused SoC which indicated the importance of GPU-related technology to the accused devices. (Dkt. No. 331-8 ¶¶242–43.) Mr. Mills then used this information to adjust the royalty rate for the Asserted Patents upwards. (Dkt. No. 331-8 ¶249.)

Because Mr. Mills explained how the GPU surface area reflects the importance of graphics processing and explained how the GPU surface area impacts the royalty base, Samsung can challenge, on cross-examination, Mr. Mills’ adjustment of the royalty rate using the GPU surface area. *Daubert*, 509 U.S. at 569 (“Vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence.”). Indeed, the results of Mr. Mills’ GPU surface area analysis suggest that contrary to Samsung’s arguments, Mr. Mills did not use the revenue attributable to the GPU as the royalty base. Mr. Mills’ final reasonable royalty rate is less than 10% of the average apportioned revenue per unit attributable to the GPU. (*See* Dkt. No. 311 at 5; Dkt. No. 331-8 ¶224 tbl.26.)

D. Economic Theories

The Court should exclude Mr. Mills' testimony, Samsung asserts, because he relied on economic theories that are untethered to a hypothetical negotiation for the Asserted Patents. (Dkt. No. 311 at 14.) Specifically, Samsung contends that three theories should be excluded (1) studies and articles about "settlement discounts" based on litigation uncertainty; (2) studies, articles, and a district court decision allegedly showing that "a significant majority of the value of a patent portfolio is often concentrated in a relatively small [subset] of the patents in the portfolio"; and (3) a survey discussion of the running and lump sum form of royalties. (Dkt. No. 311 at 14–15.)

The Court finds that Mr. Mills had shown that all three theories are relevant to this case. First, Mr. Mills' testimony about "settlement discounts" is relevant because no facts suggest that this case is more or less "certain" than other patent cases. Second, Mr. Mills' testimony about the concentration of value in patent portfolios is tied to the MicroUnity license which Dr. Hart and Mr. Mills claim is similar to a license for the Asserted Patents. (*See, supra*, Section A.) Finally, Mr. Mills' testimony about the running and lump sum royalties is relevant. Mr. Mills tied it to Samsung's testimony and Samsung's past actions which show that the company has entered into license agreements for both running and lump sum royalties. (Dkt. No. 331-8 ¶271); *cf. VirnetX*, 767 F.3d at 1332 ("Anyone seeking to invoke the theorem as applicable to a particular situation must establish that fit, because the 50/50 profit-split result is proven by the theorem only on those premises.").

CONCLUSION

Plaintiff has shown by a preponderance of the evidence that Mr. Mills' testimony is relevant and is reliable as to all issues except one. Defendant Samsung's *Daubert* Motion to

Exclude Certain Testimony by Plaintiff ZiiLabs' Expert Robert Hart (Dkt. No. 311) is therefore **GRANTED-IN-PART** as to all references by Mr. Mills' to unconsummated license agreements between Apple and Samsung but **DENIED-IN-PART** as to the remainder of Mr. Mills' testimony.²

SIGNED this 4th day of December, 2015.


ROY S. PAYNE
UNITED STATES MAGISTRATE JUDGE

² The Court will not strike specific paragraphs of Mr. Mills' expert report, but will bar Mr. Mills from referencing any incomplete licensing agreements between Apple and Samsung. (*See also* Dkt. No. 455 at 5 (“The Court **GRANTED** this motion which seeks to preclude any “evidence or argument referencing unrelated litigation or governmental investigations involving Samsung, including litigation between Apple and Samsung.”).))