UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TEXAS
MARSHALL DIVISION

VERSATA SOFTWARE INC., et al., *Plaintiffs,*	§ § §	
v.	§	CASE NO. 2:07-CV-153 CE
SAP AMERICA, INC. and SAP AG, *Defendants*.	§ § §	

ORDER

Pending before the Court are Defendants' Motion to Exclude the Expert Testimony of Neeraj Gupta, Christopher Bakewell, and Roy Weinstein (Dkt. No. 459); Plaintiffs' Motion to Exclude Inadmissible Opinions of SAP's Experts Dr. M. Ray Mercer and Michael J. Wagner (Dkt. No. 461); Plaintiffs' Motion to Strike Portions of the Expert Report of Stephen L. Becker, Ph.D and Michael J. Wagner (Dkt. No. 462); Plaintiffs' Motion to Strike Elizabeth Baker, Jack Childs, and John Tully From SAP's Trial Witness List (Dkt. No. 464); and Plaintiffs' Motion to Strike Portions of the Rebuttal Expert Report of Michael J. Wagner Regarding Damages and Testimony Related Thereto (Dkt. No. 463).

Having carefully considered the parties' submissions, the record, and the applicable law, the court is of the opinion that Defendants' Motion to Exclude the Expert Testimony of Neeraj Gupta, Christopher Bakewell, and Roy Weinstein (Dkt. No. 459) should be CARRIED-IN-PART and DENIED-IN-PART; Plaintiffs' Motion to Exclude Inadmissible Opinions of SAP's Experts Dr. M. Ray Mercer and Michael J. Wagner (Dkt. No. 461) should be GRANTED; Plaintiffs' Motion to Strike Portions of the Expert Report of Stephen L. Becker, Ph.D and Michael J. Wagner (Dkt. No. 462) should be GRANTED; Plaintiffs' Motion to Strike Elizabeth Baker, Jack Childs, and John Tully From SAP's Trial Witness List should be DENIED; and

Plaintiffs' Motion to Strike Portions of the Rebuttal Expert Report of Michael J. Wagner Regarding Damages and Testimony Related Thereto (Dkt. No. 463) should be DENIED.

I. Defendants' Motion to Exclude the Expert Testimony of Neeraj Gupta, Christopher Bakewell, and Roy Weinstein (Dkt. No. 459).

It is well established that the trial court acts as a "gatekeeper" to exclude expert testimony that does not meet the relevancy and reliability threshold requirements. In this role, the trial court determines the admissibility of expert testimony based on Federal Rule of Evidence 702 and *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993). Accordingly, opinion testimony is not admissible unless: (1) the witness is qualified "as an expert by knowledge, skill, experience, training, or education," FED. R. EVID. 702; (2) the witness's reasoning or methodology underlying the opinion testimony is scientifically reliable, *Daubert*, 509 U.S. at 592-93; and (3) the testimony is relevant—that is, it must assist the trier of fact to understand the evidence or to determine a fact at issue. FED. R. EVID. 702; *Daubert*, 509 U.S. at 591. When the methodology is sound, and the evidence relied upon sufficiently related to the case at hand, disputes about the degree of relevance or accuracy (above this minimum threshold) may go to the testimony's weight, but not its admissibility. *Knight v. Kirby Inland Marine Inc.*, 482 F.3d 347, 351 (5th Cir. 2007); *Moore v. Ashland Chem. Inc.*, 151 F.3d 269, 276 (5th Cir. 1998) (en banc).

SAP seeks to exclude expert testimony relating to both of Versata's damage models. Specifically, Versata has enlisted three experts to present its reasonable royalty model and one expert to present its lost profit model. Regarding Versata's reasonable royalty model, the court is of the opinion that it would benefit from hearing oral arguments relating to this model. Accordingly, Defendants' motion, as it relates to Versata's reasonable royalty model, is CARRIED until the Court receives oral argument at the May 6, 2011 hearing.

Regarding Versata's lost profit model, the court is of the opinion that Defendants' motion should be DENIED. SAP generally argues that Mr. Weinstein's analysis fails to satisfy the *Panduit* factors for lost profits enumerated in *Panduit Corp. v. Stahlin Bros. Fibre Works, Inc.*, 575 F.2d 1152 (6th Cir. 1978). *Panduit* requires that the plaintiff prove with reasonable probability that "but for" the infringement, the plaintiff would have made the sales. That is, the patentee must prove: "(1) demand for the patented product, (2) absence of acceptable noninfringing substitutes, (3) his manufacturing and marketing capability to exploit the demand, and (4) the amount of the profit he would have made." *Id.* at 1156.

Defendants do not attack the methodology used by Mr. Weinstein or his qualifications, but instead attack the sufficiency of the evidence that he relied upon as it relates to the *Panduit* factors. After reviewing the record, the court finds that the evidence relied upon by Mr. Weinstein satisfies the minimum threshold required by *Daubert* and Rule 702. For example, Mr. Weinstein based his lost profit calculation on Versata's actual sales of Pricer between 1996 and 1998, which was three years before SAP introduced hierarchical access. Mr. Weinstein also addressed Versata's incremental profit margins and met with Trilogy's Chief Operating Officer, Chris Smith, to discuss the accuracy of these incremental profit margins. In sum, Defendants' quarrel with the facts Mr. Weinstein used go to the weight, not admissibility, of his opinion. Accordingly, Defendants' motion, as it relates to Versata's lost profit model, is DENIED.

II. Motion to Exclude Inadmissible Opinions of SAP's Experts Dr. M. Ray Mercer and Michael J. Wagner (Dkt. No. 461).

In their rebuttable reports, SAP's experts Dr. Mercer and Mr. Wagner, attack Mr. Gupta's opinions by claiming that he failed to "isolate the value of the asserted claims of the '350 patent[1] from the '400 patent[.][2]" Versata contends these opinions of Dr. Mercer and Mr. Wagner are

[1] Patent No. 6,553,350 ("the '350' patent").
[2] Patent No. 5,878,400 ("the '400 patent").

inadmissible under Rule 702 and *Daubert* because they are irrelevant and unreliable testimony. Specifically, Versata argues that the court's previous determination that Versata did not prove that SAP directly infringed the '400 patent is not relevant to the damages inquiry in the retrial. In other words, Versata argues that this court's JMOL ruling has no bearing on the value of the '350 patent. The court agrees with Versata and finds that this testimony is not only irrelevant but would also tend to confuse the jury. To be sure, the Court's previous ruling was related to the court's interpretation of the term "configured" as required by the claims of the '400 patent. (Dkt No. 409, Order at 2-3.) As argued by Versata, that ruling does not establish or affect the value of the "capability" provided by the claimed inventions of the '350 patent.

SAP responds that the Court's JMOL ruling draws a large distinction between the "configured" language of the '400 Patent and the "capability" language of the '350 Patent. Although this may be true, the court's interpretation of the term "configured" as it relates to the '400 Patent is not before the jury in this trial because the '400 Patent is not at issue in this trial. To allow Defendants' experts to argue this distinction via their "incremental value" methodology would only confuse the jury and would not help them understand the evidence or determine a fact at issue. Accordingly, Plaintiffs' Motion to Exclude Inadmissible Opinions of SAP's Experts Dr. M. Ray Mercer and Michael J. Wagner is GRANTED. SAP's experts are precluded from attacking Versata's expert or referring to the isolated value of the asserted claims of the '350 patent based when they are compared to the claims of the '400 patent.

III. Plaintiffs' Motion to Strike Portions of the Expert Report of Stephen L. Becker, Ph.D, and Michael J. Wagner (Dkt. No. 462).

Versata's next motion relates to Defendants' experts', Dr. Becker and Mr. Wagner, reliance on factual statements made during the private interviews of more than forty-five SAP employees who work on particular customers' accounts. Versata contends that SAP did not

collect or produce documents from any of these employees and that it has never disclosed these employees as individuals with relevant knowledge, even though SAP seeks to rely on their statements at trial and has apparently known of their existence for some time. Versata further argues that this type of factual statement was something that it repeatedly sought during fact discovery. Versata purports that SAP fought these discovery requests throughout—refusing to provide even basic statements supporting its position that many of its customers did not use the hierarchical access functionality, and opposed Versata's attempts to obtain this information directly from SAP's account executives and customers alike. In summary, Versata argues that to allow SAP to offer its own handpicked evidence at trial would be improper and unfairly prejudicial because Versata was not provided with the same full opportunity for this fact discovery.

After reviewing the record before the court, the court finds the following facts to be relevant to Versata's argument. On November 21, 2008, Versata served SAP with its Interrogatory 33 that requested SAP to "[d]escribe any and all information regarding how and to what extent customers utilize the SAP Accused Software (including the specific features thereof…)." (Dkt. No. 462-4 at 7-8.) SAP responded on December 22, 2008 to Interrogatory 33, identifying documents relating to license key activations and promising to later supplement with "CSS/OSS data," which is data from an SAP help ticket database. (Dkt. No. 462-6 at 13-14.) Despite this promise, it appears that SAP provided no other substantive information. On January 6, 2009, Versata wrote SAP regarding its response to Interrogatory 33, and in particular, with respect to the "CSS/OSS" help ticket data. Versata asked: "How does that data respond to Versata's request for any data or information regarding how and to what extent customers utilize the SAP Accused Software in the United States?" (Dkt. No. 462-7 at 2.)

On January 28, 2009, Versata notified SAP that it intended to seek discovery from a number of its customers. (Dkt. No. 462-12.) On January 29, 2009, Versata noticed an additional 30(b)(6) deposition on the topic of "[h]ow SAP, its resellers/distributors, and other entities acting on SAP's behalf… determine, fulfill, and document the product functionality offered to, requested by, or used by SAP's customers or prospective customers, particularly with respect to the SAP pricing… features…." (Dkt. No. 462-13 at 8.) In February and early March 2009, Versata noticed three individual SAP employees (Robert Girvan, Pamela Chance, and Ronald Kirby) whose titles seemed to indicate that they might possess the requested information about customer usage or at least know where to find it. (Dkt. No. 462-14, 462-15, 462-16.)

SAP then supplemented its response to Interrogatory 33 on February 11, 2009, but only to claim that:

> For some, but not all customers throughout the world, including the United States, SAP or third parties configure and test the accused software at the customer site during the implementation phase. However, SAP does not systemically, centrally track which features are configured and tested during the tests at the customer sites. With respect to whether accused features of the accused software were tested during the implementation phase, **this interrogatory is overly broad and unduly burdensome, because understanding precisely which features were configured or tested for each customer would require relying on the imprecise recollections and inconsistent record keeping of thousands of individuals spread across the United States**.

(Dkt. No. 462-18 at 11) (emphasis added). On February 25, 2009, SAP then filed a motion opposing Versata's efforts to seek leave to take discovery from SAP's customers to find out what features they used. (Dkt. No. 462-19.) On March 6, 2009, Versata wrote SAP asking it to supplement its response to "provide a narrative response that specifically lists which of its U.S. customers do and do not use the accused features of the accused products." (Dkt. No. 462-24.) On March 15, 2009, Versata again requested that SAP supplement its response. (Dkt. No. 462-

25.) On April 2, 2009, SAP supplemented its response to Interrogatory 33, but instead of providing a substantive answer, merely stated that:

> Detailed knowledge of the particular functions used by each customer generally resides with each customer. **Individual SAP employees may have anecdotal information with respect to particular customers' use of particular features, but their knowledge is not comprehensive and not systemically tracked within SAP**.

(Dkt. No. 462-26 at 9.) On April 21, 2009, Versata sent a final letter requesting a substantive answer:

> In its response, SAP contends that some proportion of its U.S. customers that have licensed the accused software have not installed, activated, configured, or implemented the Accused SAP Functionalities, but fails to set forth any facts whatsoever supporting that contention. Rather, SAP improperly claims that its contention is the subject of expert testimony. That claim is baseless -- whether or not a customer has installed, activated, configured, or implemented one or more of the Accused SAP Functionalities is a fact, not an opinion. Versata is entitled to discover such facts, particularly if SAP's experts intend to rely upon them.
>
> If SAP fails to identify the factual basis for its contention that a portion of the revenues at issue are not associated with sales, licenses, deliveries, activations, or implementations of the Accused SAP Functionalities in a supplemental response, Versata intends to seek an order precluding SAP and its experts from opining or contending otherwise at trial.

(Dkt. No. 462-27.) Versata further requested that SAP confirm that it has produced all documents in its possession, custody, and/or control evidencing usage by its U.S. customers of the hierarchical access functionality. (Dkt. No. 462-28.) Finally, at a hearing on May 14, 2009, SAP successfully asked the court to limit Versata's discovery from SAP's customers on the subject of what functionality they used. Versata now contends that during this process SAP made representations to this court about what evidence was in its own possession,

representations whose accuracy are now called into question based on Dr. Becker and Mr. Wagner's reports.

Versata further argues that SAP's counsel specifically represented to this court that the "best data" SAP had was from its database of help tickets, and that data about the specific functionality SAP's customers use "just doesn't exist within SAP:"

> But the problem that Your Honor's question was directed to is this is CRM, and when a customer purchases the product from SAP, this is the kind of functionality that would be specified as we're going to use CRM. They're not going to go in and specify we're going to use within CRM and opportunity management S14 pricing. **That data, unfortunately, for purposes of assessing damages, just doesn't exist within SAP.** So that OSS/CSS data, while it's not perfect, is the best data that SAP has, we think, to measure functionality at this granular level, and that's what we've provided.

(Dkt. No. 462-2 at 4, 32:20-33:5) (emphasis added). Versata contends that Dr. Becker and Mr. Wagner's reports make plain that for at least the customers SAP chose to inquire into, SAP does, in fact, have such data, it simply decided not to produce it. After considering all of the facts, the court agrees with Versata.

Specifically, on April 11 and 13, 2011, SAP provided Versata with the expert reports of Michael Wagner and Stephen Becker. In the Wagner report, Mr. Wagner states that "[m]y staff and I interviewed SAP Account Executives for large seat license customers……Through these interviews, I understand that a large proportion of SAP's seat base does not use any SAP pricing functionality, let alone the accused hierarchy access functionality." (Dkt. No. 462-29 at ¶ 303.) Mr. Wagner also references a conversation with SAP customer Valero (one of three customer interviews he conducted) regarding Valero's use of SAP's pricing functionality. *Id*. at ¶ 368. In total, Mr. Wagner spoke with more than forty SAP employees and three SAP customers (Valero,

Advanced Micro Devices, and Kimberly-Clark) regarding what functionality SAP customers are using. *Id*. at ¶ 464.

In his report, Dr. Becker states that he conducted interviews with SAP Account Executives and discloses information that was obviously within the scope of Versata's discovery request. In addition to his interviews with SAP Account Executives, Dr. Becker cites to a number of SAP customer contracts to support his opinion that Mr. Weinstein improperly included certain seats in his damages model. (Dkt. No. 462-30 at ¶¶ 111 (Citrix), 116 (AT&T), 123 (Comcast), 137 (Ford), 142 (State of California), 148 (AIG)).

Defendants respond that rather than waiting for Versata to come forward with evidence of value for the patented functionality and then negating it, SAP's experts asked the questions that Versata could have asked SAP's customers and employees during discovery but did not. The court disagrees and finds that in conducting these interviews, SAP deprived Versata of the information it diligently sought during discovery. Moreover, Versata's "failure" to ask the questions proposed to these undisclosed witnesses does not excuse SAP for its omission of relevant discovery. The court concludes that it is inconsistent for SAP to claim that this type of information was either not accessible, unreliable, or not systemically tracked, and then turn around and provide this type of information to its expert without providing it to Versata.

In addition to the interviews, Mr. Wagner and Dr. Becker reviewed the contracts of several large SAP customers to determine if Versata was over-counting the number of seats for these customers. SAP purports that upon pulling those agreements, it produced those same agreements to Versata. SAP also contends that after receiving Versata's request, SAP has also produced agreements for dozens of additional customers.

In response, Versata claims that these contracts, in addition to being cherry-picked by SAP, are the very same documents that SAP refused to produce in the initial discovery period.

The record confirms Versata's assertion that it undertook extensive efforts to obtain the very same contracts relied upon by Mr. Becker. Versata argues that to date, SAP has produced a handful of contracts selected by SAP and a limited set of contracts specifically identified by Versata. Moreover, Versata contends that these disclosures are untimely given that they did not occur until four days before the close of fact discovery for the second trial. Given Versata's repeated request for contracts like the ones that were only recently disclosed, the Court agrees that SAP's disclosure was untimely.

For these reasons, the court GRANTS Plaintiffs' Motion to Strike Portions of the Expert Report of Stephen L. Becker, Ph.D., and Michael J. Wagner (Dkt. No. 462). Accordingly, the court STRIKES the portions of SAP's expert reports which rely on the recent interviews or newly disclosed contracts, and precludes SAP's experts from testifying to such. However, SAP's expert may use: (1) SAP's CSS/OSS data; (2) SAP's license key activations; (3) Versata's depositions on written questions of SAP customers; and (4) any evidence presented in the first trial that may indicate what functionality a customer did or did not use.

IV. Motion to Strike Elizabeth Baker, Jack Childs, and John Tully From SAP's Trial Witness List (Dkt. No. 464).

Versata argues that SAP is attempting to call three SAP employees as trial witnesses even though (1) they were not timely disclosed by SAP; (2) they were not properly asked to preserve relevant documents; (3) their files were not adequately searched for relevant materials during either the initial or supplemental fact discovery period; and (4) the Court's order setting a new trial did not provide for new fact witnesses. Specifically, Versata seeks to strike Mr. Childs (SAP's Global Vice President of Product Portfolio Strategy with specialized knowledge of SAP software implementation for large businesses and building the business case for customers considering implementing SAP software), Ms. Baker (Senior Vice President at SAP with

specialized knowledge of SAP software sales and marketing strategies worldwide), and Mr. Tully (SAP's Regional Vice President for Sales with particular knowledge of sales and business development) because they were not disclosed earlier than March 2011.

Versata's primary argument is that it has been denied the opportunity to adequately seek relevant documents from these individuals or pursue a thorough line of inquiry. Specifically, Versata contends that Mr. Tully was not advised to preserve relevant documents until after March 15, 2011, and a search of his files was not conducted until the week of April 6, 2011. Likewise, Versata contends that Ms. Baker was not advised to preserve relevant documents, nor were her files searched for relevant materials as of April 6, 2011. In addition, Versata argues that Mr. Childs was not advised to preserve relevant documents until April 4, 2011, and a search a search of his files for relevant information was not conducted until April 7, 2011. Versata further argues that SAP has not produced a single document from Ms. Baker, Mr. Tully, or Mr. Childs. It contends that permitting SAP to elicit testimony from these witnesses at trial would be highly prejudicial and fundamentally unfair.

Versata also argues that in its orders regarding the new trial, the court has never granted the parties leave to add new fact witnesses. SAP responds that since January both parties have endeavored to obtain new evidence, disclose new witnesses, and take further discovery relevant to the damages issues as framed by the new controlling case law and changes in the facts relevant to the retrial as compared with the original trial. SAP argues that in the three months since the court's Order issued, both Versata and SAP found and disclosed additional witnesses likely to have knowledge relevant to the damages issues that will be presented in the retrial.

Specifically, SAP contends that on March 9, 2011, Versata served an expert report from Neeraj Gupta, a former employee of Versata, who was never disclosed as a witness for the 2009 trial regarding damages. Similarly, on March 11, 2011, Versata served an expert report

regarding damages from Roy Weinstein, an economist never disclosed by Versata as an expert in connection with the 2009 trial. Moreover, Mr. Weinstein's report included a lost profits theory never disclosed for use at trial in 2009. On March 16 and 17, 2011, SAP disclosed Jack Childs, Elizabeth Baker, and John Tully, none of whom were witnesses in the 2009 trial. On March 18, 2011, Versata noticed the depositions of all three individuals, and Versata subsequently took depositions of Mr. Childs, Ms. Baker, and Mr. Tully before the discovery period expired. SAP notes that Versata did not request production of documents in the possession of Mr. Childs, Ms. Baker, and Mr. Tully before or after their depositions. Nevertheless, SAP represents to the court that each witness conducted electronic searches of files in their possession, and found no relevant document relating to the accused functionality of Versata and Trilogy. SAP argues that if there were search terms Versata wanted SAP to run on these witnesses, Versata had the full opportunity to request that SAP run those searches during the discovery period, which closed on April 15, 2011.

The court agrees with SAP that given the changes in controlling law and changes in the parties' allegations since 2009, the parties were reasonable in locating new witnesses not previously identified in the first trial in 2009. Indeed, both parties identified previously undisclosed witnesses. For example, two of Versata's six trial witnesses for the upcoming 2011 retrial were not disclosed as witnesses in connection with the previous trial in 2009, including Neeraj Gupta, who was a Versata employee throughout the discovery period in 2008 and early 2009. Additionally, the court agrees that SAP could not have anticipated that Versata would present an entirely new theory of lost profits at a retrial in 2011. Accordingly, the court finds that neither party was limited to the disclosures of witnesses that occurred in the 2009 proceedings. With respect to the three SAP witnesses, the court finds that Versata had the opportunity to take full discovery of each of these witnesses through both depositions and

document discovery. SAP represents to the court that Versata deposed each of them and did not use the full seven hours available to it for any of the three SAP employees, or collectively use its full 20-hour allotment of deposition time under the court's Scheduling Order. The court further notes that it appears that Versata never requested production of documents from Ms. Baker, Mr. Childs, or Mr. Tully even after they testified about their document collections. Accordingly, Plaintiffs' Motion to Strike Elizabeth Baker, Jack Childs, and John Tully From SAP's Trial Witness List (Dkt. No. 464) is DENIED.

V. Plaintiffs' Motion to Strike Portions of the Rebuttal Expert Report of Michael J. Wagner Regarding Damages and Testimony Related Thereto (Dkt. No. 463).

Versata argues that in responding to its written and deposition discovery, SAP never disclosed the alleged third-party non-infringing alternatives or the SAP Allocation Mapping files that it now plans to present at trial. Specifically, in Paragraph 329 of his recent Rebuttal Report, Mr. Wagner states that "[f]rom 1997 through 2010, SAP never had an ERP market share greater than 37 percent, and a CRM market share greater than 26 percent. Given that Trilogy has not sold its product during the damages period, more than half of the market has been addressed by third party noninfringing alternatives." (Dkt. No. 463-21 at ¶ 329.) Versata argues that none of these third-party alternatives were ever disclosed by SAP in response to Versata's discovery requests. In addition, Versata argues that Mr. Wagner has also failed to list a single third-party non-infringing alternative by name, and has not demonstrated that any such purported alternative is non-infringing. Thus, Versata argues that because SAP did not timely disclose the requested information, Mr. Wagner should be barred from opining on them at trial.

SAP responds that since June 2008, SAP's interrogatory responses have made clear that SAP was relying upon third-party non-infringing alternatives in addition to SAP software. Additionally, SAP further argues that it was only recently that it became aware of additional non-

infringing alternatives as a result of the testimony of Versata's technical expert and former employee Neeraj Gupta and Versata's 30(b)(6) designee Christopher Smith. Specifically, SAP points to Versata's technical expert testimony that he was unaware of any analysis suggesting that a third-party infringed the '350 Patent, suggesting that there may be numerous third-party non-infringing alternatives in the market. Similarly, Versata's 30(b)(6) designee recently testified that Versata has no reason to believe that Oracle, the second largest enterprise software company in the market, infringes the '350 Patent.

SAP also argues that it is Versata that has the burden of proof on damages including the issue of whether non-infringing alternatives or substitutes exist in the market, and that SAP is well within its right to rebut any suggestion by Versata that non-infringing alternatives are unavailable in the marketplace. In summary, SAP argues that having fully disclosed its intention to rely on third-party prior art systems as non-infringing alternatives, and having only recently uncovered additional third-party non-infringing alternatives, SAP is properly entitled to rely upon these non-infringing alternatives in its expert reports and at trial. SAP also contends that Versata's attempt to strike is too broad because it seeks to have the court determine, as a matter of law, that no non-infringing alternatives exist. Given Versata's decision to seek lost profits for the first time in the retrial, the court agrees with SAP regarding its intention to rely on third-party prior art systems as non-infringing alternatives.

Versata also argues that in his Rebuttal Report, Mr. Wagner opines that "the ERP revenues that Mr. Bakewell [one of Versata's damages experts] uses to calculate total business suite revenues" includes revenues for certain "materials" that are "unrelated to the core SAP business suite." (Dkt. No. 463-21 at ¶¶449-452.) Mr. Wagner then concludes that by including these revenues in his damages model, Mr. Bakewell has "overstated the amount of revenue attributable to the business suite." *Id.* at ¶452. In support of this opinion, Mr. Wagner cites to a

lengthy list of SAP Allocation Mapping files. *Id*. at Schedules 9.1 and 9.2. Versata argues that SAP never identified these documents in response to Versata's relevant interrogatories and permitting Mr. Wagner to opine based on them now would be fundamentally unfair.

SAP responds that to the extent that Versata seeks to exclude a small set of files that were cited in the expert reports of Dr. Becker and Mr. Wagner, Versata failed to point out that these files were produced to Versata over three years ago and were referenced in produced deposition testimony of Mr. Trammell. Specifically, SAP contends that it produced Mr. Trammell's 30(b)(6) deposition on revenue-related topics from the *Sky v. SAP* litigation on August 2008. In that deposition, SAP contends that Mr. Trammell discussed material numbers at length, including six pages of testimony about one of the revenue allocation spreadsheets which Versata now seeks to exclude. Additionally, SAP argues that the points Mr. Wagner and Dr. Becker made with respect to SAP's use of materials numbers as a method of allocating revenues are also apparent from the numerous SAP revenue spreadsheets and price lists that were disclosed in SAP's 2008 interrogatory responses and cited in Versata's trial exhibit list and damages experts reports in 2009 and 2011. After reviewing the record before the court, the court agrees with SAP.

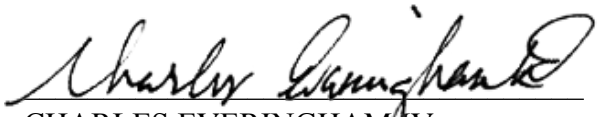
Finally, Versata argues that in his Rebuttal Report, Mr. Wagner opines that Versata would offer a "Pricer Lite" product for a price of $100,000 to $150,000 that would embody the '350 Patent. (Dkt. No. 463-21 at ¶ 411). Versata contends that the only evidence cited by Mr. Wagner in support of this claim is a single document from 1998 discussing Versata's product positioning, strategy, and development. (*See* Dkt. No. 463-25). Versata argues that the document contains no technical details that would allow for a comparison of the anticipated "Pricer Lite" to the asserted claims and, in any event, Mr. Wagner lacks the technical background to perform that analysis. Versata contends that Mr. Wagner's opinion that an "anticipated Pricer Lite" product

"embod[ied] the asserted claims of the '350 patent" must be stricken because the record lacks sufficient evidence from which he could have drawn such a conclusion.

SAP responds that Versata's motion to strike references to Pricer Lite improperly seeks to exclude party opponent admissions by Versata former employee and trial witness Sameer Dholakia that Versata considered but chose not to develop a cheaper version of its Pricer products that could have achieved wider distribution than the expensive Pricer product. SAP further contends that the prohibitive cost of Versata's embodying products, and the potential for a higher demand if Versata's prices for its embodying products had been lower, is directly relevant to the lost profits "but-for" causation analysis. Specifically, SAP argues that one document relating to Pricer Lite references a set of features in the proposed product that appears to include the same features that embody the patents in Versata's Pricer products but at a much cheaper price. SAP further argues that given that Mr. Dholakia is a trial witness, and former Versata employee Neeraj Gupta will also serve as an expert, there is more than sufficient opportunity for Versata to provide counter proof regarding the features of Pricer Lite or lack thereof. Given Versata's decision to seek lost profits for the first time in the second trial, the Court concludes that it would not be fundamentally unfair or unfairly prejudicial to allow SAP to present evidence and testimony concerning Pricer Lite. For these reasons, Plaintiffs' Motion to Strike Portions of the Rebuttal Expert Report of Michael J. Wagner Regarding Damages and Testimony Related Thereto (Dkt. No. 463) is DENIED.

IT IS SO ORDERED.

SIGNED this 5th day of May, 2011.



CHARLES EVERINGHAM IV
UNITED STATES MAGISTRATE JUDGE