

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

GERBER SCIENTIFIC :
INTERNATIONAL, INC., :
Plaintiff, :
 :
v. : No. 3:06cv2024 (AVC)
 :
ROLAND DGA CORP., ET AL, :
Defendants :

**ORDER DENYING THE DEFENDANTS' MOTION FOR SUMMARY JUDGMENT OF NO
LOST PROFITS OR ENHANCED DAMAGES**

The defendants', Roland DGA Corporation and Roland DG Corporation (collectively "Roland"), motion for summary judgment is denied. The court concludes that the plaintiff, Gerber Scientific International, Inc. ("Gerber") has presented sufficient evidence to create a material issue of fact for trial as to Gerber's claims for lost profits and enhanced damages.

I. LOST PROFITS

"To recover lost profits a patentee must show that 'but for' infringement it reasonably would have made the additional profits enjoyed by the infringer." Micro Chemical, Inc. v. Lextron, Inc., 316 F.3d 1119, 1122 (Fed. Cir. 2003). "A patentee may resort to any method showing, with reasonable probability, entitlement to lost profits 'but for' the infringement." Id. Roland argues that there is no admissible evidence to support Gerber's claim for lost profits because the survey upon which Gerber exclusively relies is "unreliable, untrustworthy, and prejudicial."

A review of the case law suggests that there is a dispute over the proper consequence of alleged unreliability and/or untrustworthiness of survey evidence. See Schering Corp. v. Pfizer, 189 F.3d 218, 225-26 (2d Cir. 1999) (comparing cases). "While some courts . . . believe such flaws are proper grounds for exclusion, others view methodological errors as affecting only the weight of the evidence." Id. Thus, Roland is correct that indications of unreliability and/or untrustworthiness **may** result in the exclusion of a survey. However, the court concludes that the deficiencies alleged by Roland in this case are not clearly egregious or sufficiently prejudicial to warrant exclusion at this time. See, e.g., New Colt Holding Corp. v. RJG Holdings of Fla., Inc., 312 F.Supp.2d 195, 224-25 (D. Conn.

2004) (holding that the defendants' objections as to the trustworthiness of the survey, "while serious and could properly convince a fact finder to discount the survey entirely, properly go to the weight of the survey"). As such, the court concludes that Gerber has presented sufficient evidence concerning lost profits to raise genuine issues of material fact.

II. ENHANCED DAMAGES

"Title 35 Section 284 of the Patent Act gives district courts the discretion to award enhanced damages against those guilty of patent infringement." Halo Electronics, Inc. v. Pulse Electronics, Inc., et al., 2016 WL 3221515, Nos. 14-1513, 14-1520, slip op. at *11 (2016). The award of enhanced damages shall be limited to "egregious cases of misconduct beyond typical infringement." Id.

As noted in the court's denials of the parties' respective motions for summary judgment, several genuine issues of material fact remain with respect to, *inter alia*, infringement and invalidity. Because factual issues exist, the court is precluded from determining the issue of enhanced damages at this point in time.

Accordingly, Roland's motion for summary judgment is denied with respect to enhanced damages.

So ordered this 27th day of June 2016, at Hartford, Connecticut.

/s/
Alfred V. Covello, U.S.D.J.