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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

GOLDEN BRIDGE TECHNOLOGY,)	Case No. 5:12-cv-04882-PSG
)	
Plaintiff,)	ORDER RE: APPLE’S SECOND
v.)	MOTION TO EXCLUDE KARL
)	SCHULZE AND MOTIONS-IN-
APPLE INC.,)	LIMINE
)	
Defendant.)	(Re: Docket No. 418, 486)

Two weeks ago, this court issued an order excluding the opinions and testimony of Plaintiff Golden Bridge Technology’s damages expert, Karl Schulze.¹ The court gave GBT one week to submit a new report based on a new theory. GBT met its deadline, with Schulze abandoning his earlier theory that the parties would have agreed to an uncapped percentage of the sales price of each and every iPhone 4, 4S and 5 and second-generation iPad. Schulze now advocates a per-unit royalty of \$0.0869, based in large part on his analysis of portfolio licenses Apple signed with Ericsson and Nokia.² Apple Inc. now moves to dismiss this second report as well.

¹ See Docket No. 471. The court found fault with Schulze's methodology in evaluating what the royalty base and rate Apple would have paid to practice GBT's United States Patent No. 6,075,793. The '793 patent has been deemed by GBT as essential to the “3GPP” or “WCDMA” standard; GBT has committed to license such patents on a fair, reasonable and nondiscriminatory (“FRAND”) terms.

² See Docket No. 487 at 3.

1 Schulze’s new report reflects a genuine effort to improve upon the problems identified with
2 the original version. Schulze has abandoned his “entire market value” theory and looked to
3 Apple’s real-world licenses to substantiate his new, per-unit calculation. Unfortunately, a new but
4 flawed methodology is no better than an old and flawed methodology. Apple’s motion points out
5 several of the significant flaws in Schulze’s current report: (1) Schulze improperly and *sub silencio*
6 allocated the entire value of Apple’s portfolio licenses with Ericsson and Nokia to a tiny subset of a
7 subset of a subset of the patents and standards in those portfolios; (2) Schulze
8 improperly tripled the per-unit rate that Apple would have paid to GBT based on purely academic
9 articles; (3) Schulze improperly failed to compare the patent-in-suit’s technical merits to those of
10 other standards essential patents and (4) Schulze improperly failed to allocate any value to the
11 non-license terms of the Ericsson and Nokia agreements. Because the first of these flaws is fatal to
12 Schulze’s testimony, the court will focus its analysis there.

14 The portfolio license agreements that undergird Schulze’s calculations covered “all
15 standards essential patents” owned by those companies.³ These patents cover a wide array of
16 technologies beyond the WCDMA standard, including but not limited to Wi-Fi, GSM, and LTE.
17 Yet in calculating a reasonable royalty, Schulze begins with the premise that the under both
18 agreements, “Apple was granted a license to all Nokia[/Ericsson] patents that are essential to the
19 WCDMA standards.”⁴ This statement, while true, does not account in any way at all for the many
20 other SEPs to which Apple was also granted a license. When pressed in deposition, Schulze
21 admitted that he focused on the ‘793 patent and attributed no value whatsoever to patents essential
22 to other standards because in his estimation, their value would be “marginal,”⁵ though his report
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25 ³ See Docket No. 485-7 at 15-16.

26 ⁴ See *id.* at 21-22.

27 ⁵ See Docket No. 485-9 at 13-14.
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1 does not acknowledge this omission, let alone attempt to explain it. At the hearing on this motion,
2 counsel for GBT attempted to explain this omission by explaining that, at the time of the
3 agreements “the [W]CDMA standard is what was being used in connection with the iPhone and
4 iPad units accused here.”⁶ This explanation might have been sufficient if Schulze had cited any
5 evidence supporting it in his report, but he did not.

6 Under established Federal Circuit law, an expert may not rely on broad licenses that cover
7 technologies far beyond the patents-in-suit without accounting for the differences in his
8 calculations.⁷ That is precisely what Schulze did not do here, resulting in a fundamentally unsound
9 calculation. That the entire dollar value of the Apple-Ericsson and Apple-Nokia agreements
10 stemmed entirely from the actually-essential (not just declared essential) WCDMA patents (not
11 those related to other active standards) relating to terminal devices is an implausible assumption to
12 begin with, and Schulze does not even attempt to justify this assumption. Each of the other errors
13 identified by Apple then compounded this basic error, with the end result that “there is simply too
14 great an analytical gap between the data and the opinion proffered” to allow its admission.⁸

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17 Schulze will not be permitted to testify in the upcoming trial. With the jury already picked
18 and trial underway, Apple would suffer undue prejudice if GBT were to offer a new damages
19 expert with yet a third theory, to which it would have had no meaningful time to respond.⁹
20 However, GBT is free to offer evidence of its damages from other, fact witnesses.¹⁰

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22 ⁶ See Docket No. 492 at 174:20-22.

23 ⁷ See *Trell v. Marlee Elecs.*, 912 F.2d 1443, 1446-47 (Fed. Cir. 1990); see also *Lucent*
24 *Technologies, Inc. v. Gateway, Inc.*, 580 F.3d 1301, 1330-31 (Fed. Cir. 2009).

25 ⁸ *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 146 (1997).

26 ⁹ Cf. *ePlus, Inc. v. Lawson Software, Inc.*, 700 F.3d 509, 523 (Fed. Cir. 2012)(finding it within the
27 sound discretion of the trial judge to preclude a new damages expert from testifying due to the risk
28 of disrupting the proceedings, causing unacceptable delay and unduly prejudicing the other side);
see also *Network Protection Sciences, LLC v. Fortinet, Inc.*, Case No. 3:12-cv-01106-WHA,
Docket No. 334 at 13-14 (“This leaves the follow-on question of whether NPS should be permitted

Turning to Apple’s renewed motions-in-limine regarding damages, the court rules as follows:

<u>Docket</u>	<u>Document</u>	<u>Seeking To Exclude</u>	<u>Result</u>
418	Defendant’s Motions-in-Limine Set 3 (Damages)	Any Argument or Testimony Regarding Apple’s Size, Wealth, Market Capitalization, Cash, Overall Revenues, Revenues on Accused Products, or Entire Market Value of Apple’s Accused Sales	GRANTED
		Monetary Terms of Apple’s License Agreements	GRANTED
		Any Argument or Testimony Regarding Litigation Settlement Discussions, Including the Confidential Delaware Mediation	GRANTED
		Exclude Any Fact Witness Testimony Opining on Damages	DENIED
		Any Argument or Testimony that the ‘793 Patent or the Accused Functionality Provides Any “Improvement” Over the Next Best Alternative	DENIED
		Any Argument or Testimony that a Design Around Would Not Have “Been Available”	DENIED

an opportunity to have a second bite at the apple. Over the course of many years and more than a dozen patent trials, the undersigned judge has concluded that giving a second bite simply encourages overreaching on the first bite (on both sides). A second bite may be appropriate where the expert report can be salvaged with minimal disruption to an orderly trial, but where the report is not even close, there is a positive need to deny a second bite in order to encourage candor in the place. . . . Possibly, plaintiff can cobble together a royalty case based on other disclosed witnesses and evidence. Possibly not.”).

¹⁰ See *Apple Inc. v. Motorola, Inc.*, Case No. 2012-1548, 2014 WL 1646435, at *32-33 (Fed. Cir. Apr. 25, 2014).

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		Any Argument or Testimony Regarding Mr. Schulze's Damages Opinions	GRANTED
		Any Argument or Testimony Regarding the Third Party Papers Identified By Mr. Schulze in His Expert Report	DENIED
		Any Argument or Testimony that GBT or its Licensees Marked any Product	GRANTED as unopposed

IT IS SO ORDERED.

Dated: June 1, 2014


PAUL S. GREWAL
United States Magistrate Judge