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UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS,
SAN ANTONIO DIVISION

TWO-WAY MEDIA LLC, §
Plaintiff, §
§
v. § Cause No. SA-09-CA-00476-OLG
§
AT&T OPERATIONS, INC., et al., §
Defendants. §

ORDER

On March 7, 2013, the Court recessed in order to allow defendant to re-depose plaintiff's expert witness. That additional discovery led the parties to file several motions which the Court here considers in turn.

A. The Parties' Motions to File Under Seal

In accordance with the protective order entered in this case, the parties' various motions to file documents and exhibits under seal (docket nos. 532, 533, 534, 535, 538, 539, & 541) are GRANTED. The Clerk shall maintain the documents associated with those motions under seal.

B. Defendant's Second Motion for Summary Judgment on Damages

The Court has previously held that the evidence in the record allows TWM to survive summary judgment, at least partially, on the issue of damages. The evidence that allowed TWM to survive summary judgment in the Court's February 27, 2013 Order still exists in the record now. Nevertheless, AT&T now seeks to reargue its original summary judgment motion as it relates to Dr. Nawrocki's newly proffered expert report. AT&T rests this new motion for summary judgment primarily on arguments that are better suited to a comment on the *weight* of the evidence supporting TWM's alleged damages, and not the *existence* of that evidence. These arguments include: (1) an assertion that there is no factual foundation for Dr. Nawrocki's 25%

Lift calculation; (2) the $4.00 per subscriber-month is arbitrary and calculated using incorrect assumptions; (3) the advertising revenue from which damages is calculated was speculative, is inflated, and was not actually realized; and (4) that the 2%-4%-6% analysis rests, at least partially, on incomparable licenses. All of these arguments are merely contentions that the evidence in the record is *wrong*, and the Court finds no basis to reconsider its prior ruling nor to find that the damages theories fail as a matter of law. In so far as AT&T argues that the new damage calculations rest on the same type of "subscriber-month" data that the Court prohibited in the prior summary judgment ruling, the Court disagrees; the distinction lies in how the term "subscriber-month" in the analysis relates to the total U-verse market value. The prior ruling prohibited the damages calculation from resting on the entire market value of the U-verse system. The present calculations do not rest on the entire market value, but rather, are based on advertising revenue which AT&T appears to have projected based on its number of subscribers (thereby implicating what it might have believed to be the value of the patented technology at a hypothetical negotiation). These are entirely different uses of the subscriber-month metric.

Regardless, a summary judgment motion is simply not timely at this point in the trial. The Court's prior acknowledgment that motions would be accepted following the additional deposition of Dr. Nawrocki was intended to be a call for evidentiary motions that might be necessary to exclude portions of the new discovery obtained during the Court's recess—not a broad permission to file dispositive motions in the middle of trial. After the trial has begun, the proper place for a party to allege that the evidence fails as a matter of law is in a post-judgment motion. *See* FED. R. CIV. P. 50(a), 56(b). Therefore, the Court finds that AT&T's motion for summary judgment (docket no. 533, exhibit 2) should be DENIED.

C. Defendant's Second Rule 702 Objection to the Testimony of Dr. Nawrocki

AT&T additionally re-urges its *Daubert* objections relating to the calculations in Dr. Nawrocki's expert report. Based on the old report, the Court previously concluded that "whether or not it is right, Nawrocki's reports are relevant and based on an explicable methodology." (Order of February 27, 2013). When the new expert report was proposed, the Court concluded that "the methodologies in the [new] report mimic those of prior reports filed by both the plaintiff and defendant." (Order of March 3, 2013). The Court finds no reason to now find Nawrocki's testimony impermissible under Rule 702. Moreover, all of AT&T's objections, again, are easily resolved on cross-examination. AT&T's motion to wholly exclude Dr. Nawrocki's testimony under Rule 702 is DENIED.

D. Defendant's Additional Motions *in Limine* Regarding Damages

Though AT&T has sought leave to file additional motions *in limine*, the actual motions do not appear to have been filed by the Court's March 10th deadline. It appears that AT&T's actual motion was accidently omitted from docket entry number 534 (which includes a motion for leave to file the motions *in limine* under seal, a proposed order, and exhibits purporting to support the motions, but no actual motion or argument). TWM has filed a response to those proposed motions, however, likely due to the fact that AT&T served the motions *in limine* on TWM correctly but did not file them correctly with the Court. The motions are not properly before the Court and should be DENIED on that basis. However, the Court has attempted to discern the content of the motions from TWM's response, and in so far as AT&T seeks to exclude Dr. Nawrocki's testimony based on "surprise," or to exclude Dr. Nawrocki's reference to (1) the total advertising revenue of U-verse, (2) "subscriber-months" used in the advertising context, (3) AT&T's own internal projections of advertising revenue (that were previously disclosed in TWM's pre-trial exhibit list), or (4) the 2%-4%-6% analysis, the motions *in limine* are additionally denied on their merits. Dr. Nawrocki will be permitted to testify based on these theories and exhibits.

E. Plaintiff's Motion to Supplement its Exhibit List

TWM seeks to supplement its exhibit list with fourteen documents that were not previously disclosed to defendant before Sunday, March 10th. The Court recognizes that TWM has been under significant time constraints to organize its damages case since the Court's ruling granting partial summary judgment on damages. However, the Court agrees with AT&T that documents provided so late—especially *after* AT&T's latest deposition of TWM's damages expert, who will assumedly rely on the documents—is not justified at this time. Nevertheless, to strike a balance between the need for fairness to the parties and the need to ensure that the jury considers all of the relevant evidence, the Court will permit the proposed exhibits to be introduced into the record only where they are relevant for impeachment purposes or where defendant opens the door to the proposed exhibits by introducing other exhibits or testimony that directly contradicts the contents of the proposed exhibits. If TWM believes these exhibits should be admitted for one of these stated purposes, it will seek leave from the Court out of the jury's hearing.

F. Plaintiff's Additional Motion *in Limine*

TWM's motion *in limine* seeks to exclude any reference to Dr. Nawrocki's prior reports or the timeframe in which the new report was produced due to the fact that it necessarily implicates reference to the Court's ruling on summary judgment adverse to TWM (the report was provided on short notice and prior theories abandoned based on that ruling). The Court recognizes the possible prejudice to TWM by allowing such a line of questioning, but also recognizes the relevance of such evidence to AT&T's positions that the report was neither well thought-out or truly supported by Dr. Nawrocki's damages model. Because of these competing interests, the Court again will strike a balance. TWM's motion is GRANTED in so far as it seeks to exclude reference to Dr. Nawrocki's prior reports or any reference to the abandoning of Dr. Nawrocki's prior theories. TWM's motion is DENIED in so far as it seeks to exclude evidence relating to the time frame in which the report was produced. If evidence regarding the time frame of the report's production is introduced to imply a lack of diligence, as TWM believes it will be, TWM may, on rebuttal, discuss the timeframe in which prior, similar reports were produced.

IT IS SO ORDERED.

SIGNED this 12 day of March, 2013.

United States District Judge Orlando L. Garcia