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

ELBIT SYSTEMS LAND AND C4I LTD., ELBIT SYSTEMS OF AMERICA, LLC,	§	
	§	CIVIL ACTION NO. 2:15-CV-00037-RWS
Plaintiffs,	§	
	§	
v.	§	
	§	
HUGHES NETWORK SYSTEMS, LLC,	§	
	§	
Defendant.	§	

ORDER

On June 20, 2017, the Magistrate Judge issued a Memorandum and Opinion and a Report and Recommendation ("Report and Order") on ruling the following motions:

(1) Plaintiffs' Motion to Strike Expert Opinions Regarding Stricken Prior Art References And Undisclosed Invalidity Theories (Docket No. 275) ("Elbit's Motion to Strike Invalidity Opinions");

(2) Defendant Hughes Network Systems, LLC's Motion to Strike Elbit's '874 Patent Infringement Contentions (Docket No. 276) ("Hughes's Motion to Strike Infringement Contentions");

(3) Defendant Hughes's Motion to Exclude Elbit's New Priority Date Contentions for the '073 Patent (Docket No. 277) ("Hughes's Priority Date Motion");

(4) Plaintiffs' Motion to Exclude the Testimony of Dr. Stephen B. Wicker (Docket No. 312) ("Elbit's Infringement Expert Motion");

(5) Defendant Hughes Network Systems, LLC's Motion to Exclude Expert Testimony of Stephen G. Kunin (Docket No. 313) ("Hughes's Motion to Exclude Patent Office Expert Testimony");

(6) Defendants' *Daubert* Motion to Exclude the Opinions Offered by Christopher Martinez (Docket No. 314) ("Defendants' Motion to Exclude Damages Expert Testimony");

(7) Plaintiffs' Motion to Strike Defendants' Experts Opinions Regarding Previously-Undisclosed Non-Infringing Alternatives (Docket No. 315) ("Plaintiffs' Motion to Strike Non-Infringing Alternatives");

(8) Hughes's Motion to Strike Portions of Elbit's Expert Reports that Rely on Previously-Unidentified Infringement Theories (Docket No. 316) ("Hughes's Motion to Strike Infringement Opinions"); and

(9) Plaintiffs' Motion to Exclude Certain Opinions of Defendants' Damages Expert, Mr. W. Christopher Bakewell (Docket No. 319) ("Elbit's Motion to Exclude Damages Expert Testimony").[1]

The Magistrate Judge's Report also recommended dispositions for the following motions:

(1) Defendants' Motion for Summary Judgment of Noninfringement of the Switching Means of United States Patent No. 6,240,073 (Docket No. 291) ("Defendants' 'Switching Means' Motion");

(2) Defendants Motion for Summary Judgment of Non-Infringement of Claim 28 of the '073 Patent for Lack of a "Means For Generating A Request" (Docket No. 292) ("Defendants' 'Means for Generating Request' Motion");

(3) Defendants' Motion for Partial Summary Judgment of Non-Infringement for Hughes's GMR-1 Products (Docket No. 293) ("Defendants' GMR-1 Products Motion");

(4) Defendants' Motion for Partial Summary Judgment of No Damages With Respect to the '874 Patent (Docket No. 294) ("Defendants' Damages Motion");

(5) Defendant Hughes Network Systems, LLC's Motion for Summary Judgment of No Copying of U.S. Patent No. 6, 240,073 (Docket No. 295) ("Hughes's Copying Motion");

(6) Defendant Hughes Network Systems, LLC's Motion for Summary Judgment of No Willfulness (Docket No. 296) ("Hughes's Willfulness Motion");

(7) Defendant Hughes Network Systems, LLC's Motion for Summary Judgment of No Pre- Suit Damages Based on Plaintiffs' Failure to Comply with 35 U.S.C. § 287 (Docket No. 297) ("Hughes's Marking Motion"); and

(8) Defendant Hughes Network Systems, LLC's Motion for Partial Summary Judgment of Non-Infringement of Claims 2-5, 7-9, 11, and 12 of U.S. Patent No. 7,245,874 (Docket No. 298) ("Motion for Summary Judgment of Noninfringement of the '874 Patent").

Both Plaintiff Elbit Systems Land and C4i Ltd and Elbit Systems of America, LLC (collectively, "Elbit") and Defendant Hughes Network Systems, LLC ("Hughes") have filed objections to various portions of the Magistrate Judge's Report and Order, and the Court considers the parties'

[1] The Magistrate Judge also ruled on two venue motions, and the Court overruled objections to the Magistrate Judge's Order on July 19, 2017. Docket No. 430.

objections to each set of rulings in turn. For the reasons detailed below, each objection is **OVERRULED** and the Magistrate Judge's Report and Order is adopted as the opinion of the Court.

I. OBJECTIONS TO DISPOSITIVE MOTIONS

Hughes filed objections to the Magistrate Judge's Report and Recommendation recommending denial of Hughes's motion for summary judgment of no pre-suit damages based on Plaintiffs' failure to comply with 35 U.S.C. § 287. Hughes argues that the Magistrate Judge erred in finding that "if Elbit's third-party patent broker, iLeverage, was considered an effective patentee, a reasonable juror could conclude that iLeverage gave actual notice of infringement to Hughes under the marking statute." Docket No. 414 at 2. According to Hughes, there is no evidence in the record to support the finding that iLeverage was an effective patentee. *Id.* Additionally, Hughes claims that the Magistrate Judge improperly shifted the burden on the marking question to Hughes. *Id.*

Elbit responds that the marking requirement did not exist in this case because "Hughes failed to show that Shiron (or its successor, Elbit) sold or offered for sale in the U.S. a single patent-practicing InterSKY system that would trigger the marking statute." Docket No. 438 at 2. But, Elbit argues, even if a marking requirement did exist, Judge Payne correctly found that a factual dispute exists concerning iLeverage's Notice to Hughes of its infringement. *Id.* at 3. Elbit points to deposition testimony of Uzi Aloush in the record from which, it argues, a juror could conclude that iLeverage provided actual notice to satisfy the marking statute. *Id.* Additionally, Elbit contends that iLeverage could provide notice because it "had the right to act as the exclusive worldwide agent to commercialize the '073 patent." *Id.*

The Court reviews objected-to portions of the Magistrate Judge's Report and Recommendation *de novo*. Fed. R. Civ. P. 72(b)(3). Having considered the record, the parties' arguments in the underlying motions, and the parties' objections, the Court agrees with the Magistrate Judge that the evidence in the record creates a genuine issue of material fact as to whether Hughes had actual notice of the '073 patent and the charge of infringement. As the Magistrate Judge correctly noted, a juror could conclude from the evidence that Aloush provided actual notice sufficient to satisfy the marking statute. Hughes has not met its burden on summary judgment to establish that iLeverage could not have been an effective patentee, and the scope and extent of iLeverage's relationship with Shiron is a question for the jury. Hughes's objection to the Magistrate Judge's Report on its pre-suit damages summary-judgment motion is **OVERRULED**.

II. OBJECTIONS TO MOTIONS TO STRIKE AND MOTIONS TO EXCLUDE

Both Elbit and Hughes have filed objections to the Magistrate Judge's rulings in its Report and Order (Docket Nos. 404, 413). The Court reviews objected-to portions of the Magistrate Judge's Orders for clear error. *See* 28 U.S.C. § 636; Fed. R. Civ. P. 72(a).

A. Elbit's Objection to the Magistrate Judge's Ruling on Elbit's Infringement Expert Motion

Elbit argues that Dr. Wicker's testimony has been inconsistent and that the Magistrate Judge should have granted its motion: According to Elbit, after concluding that PES does not anticipate the '073 patent under his understanding of the asserted claims, Dr. Wicker nonetheless explained at his deposition that he intended to testify that PES anticipates the asserted claims because the accused products practice the alleged prior art. Docket No. 413 at 3. Elbit offers two reasons for why this is improper: (1) anticipation cannot be proven by establishing that one practices the prior art and (2) if an expert disagrees with an adverse party's infringement theory, that expert is not permitted under Rule 702 to apply the adverse party's infringement theory to

affirmatively conclude that the patent is invalid. *Id.* at 3–4. According to Elbit, the Court should have excluded Dr. Wicker's opinions as improper. *Id.*

Elbit also argues that Dr. Wicker should not be permitted to testify to the construction of the "regenerator" element of the '874 patent because Dr. Wicker incorrectly applied the broadest reasonable interpretation claim construction standard. According to Elbit, the Magistrate Judge's ruling will "presumably allow[] him to substitute the correct standard at trial, . . . violat[ing] the disclosure requirements of FRCP 26(a)(2) because Wicker's report never disclosed the correct standard." Docket No. 413 at 4–5.

Finally, Elbit argues that Dr. Wicker offered a conclusory opinion that there are non-infringing alternatives. According to Elbit, the Court denied Elbit's motion to exclude that opinion based on Hughes's representation that Wicker will point to testimony from live fact witnesses at trial, but "[t]his constitutes clear error by allowing Wicker to conceal the basis of his opinions until trial." Docket No. 413 at 5.

In response, Hughes contends that the Court did not err in finding that Dr. Wicker's anticipation opinions properly rest on a factual analysis of the PES system as opposed to the asserted claims. Docket No. 431 at 2. According to Hughes, the Court found that Dr. Wicker did not advance a practicing the prior art defense and that there was enough standalone factual basis for Dr. Wicker's opinions to withstand exclusion under Rule 702. *Id.*

With respect to the "regenerator" element, Hughes contends that Dr. Wicker applied the correct standard: "Dr. Wicker's report states that "one of ordinary skill in the art would understand Arimilli to disclose a time slot regenerator" under the Court's construction of that term." *Id.* at 3. According to Hughes, there has been no Rule 26 violation because Dr. Wicker applied the Court's construction. *Id.*

With respect to non-infringing alternatives, Hughes claims that the Court did not err in declining to strike Dr. Wicker's opinions because Dr. Wicker cites relevant deposition testimony in his report that he is permitted to rely on at trial. *Id.* at 4.

The Court agrees with the Magistrate Judge's conclusion that Elbit's Infringement Expert Motion should be denied. The Court finds that, putting aside Dr. Wicker's comparisons between the PES system and the accused products, there is enough factual basis for Dr. Wicker's opinions to withstand exclusion on the basis of Rule 702. Moreover, the Court is not convinced that Dr. Wicker has applied a claim construction inconsistent with *Phillips*, but, to the extent that Dr. Wicker has proffered an opinion under such a construction, it will not be admissible at trial. Finally, the Court also agrees that Dr. Wicker has cited relevant deposition testimony in his report and is permitted to rely on fact testimony presented at trial. Accordingly, Elbit's objections are **OVERRULED**.

B. Elbit's Objection to the Magistrate Judge's Ruling on Elbit's Motion to Exclude Damages Expert Testimony

Elbit argues that Mr. Bakewell should not be permitted to opine on standard essential patents (SEPs) and fair, reasonable, and nondiscriminatory (FRAND) terms because he did not determine that the '073 is a SEP; instead, according to Elbit, Bakewell "erroneously believed that the law concerning SEPs would apply nonetheless." Docket No. 413 at 5. Elbit also argues that Bakewell's baseline royalty should be excluded because he did not explain his methodology. *Id.* at 6. Additionally, Elbit contends that the Court "failed to rule" on Elbit's request to exclude the Bakewell opinions concerning a purported DVB-S2 license and an "effective royalty rate" from a Caltech license offered as an "alternative" to the actual rate. *Id.* at 6. Finally, Elbit argues that Bakewell did not disclose the basis for his opinion on when his alleged non-infringing alternative

became available and that Bakewell improperly relied on the iLeverage "valuation" as it constituted a "manifestly unreasonable source of data." *Id.* at 7.

In response, Hughes argues that the Court did not err in finding that Elbit's objections are more relevant to the weight of Mr. Bakewell's opinions and not their admissibility. Hughes notes that the evidence supports the conclusion that the '073 patent is necessarily infringed by products practicing the IPoS standard. Docket No. 431 at 4. With respect to Mr. Bakewell's economic analysis, Hughes argues that the Court correctly found that Mr. Bakewell's range of royalties could be tested via cross-examination. *Id.* Hughes also contends that Elbit's concerns about Mr. Bakewell's reliance on the iLeverage valuation focus more on the reasonableness of Mr. Bakewell's valuation and not its potential exclusion. *Id.* at 5.

The Court agrees with the Magistrate Judge that Elbit's objections to Mr. Bakewell's opinions are more relevant to the weight of his testimony than to its admissibility. The parties dispute whether the patents-in-suit are SEPs, and Mr. Bakewell opines that at least the '073 patent is a SEP because it would be necessarily infringed by technology using the IPoS standard. *See* Docket No. 346-1 at ¶ 20. Moreover, the Court agrees that Mr. Bakewell's economic analysis, including relating to the Caltech license, is sufficiently detailed to avoid exclusion under *Daubert*. The Court agrees that cross-examination could address Elbit's concerns about Mr. Bakewell's opinions. Accordingly, Elbit's objection is **OVERRULED**.

C. Elbit's Objection to the Magistrate Judge's Ruling on Hughes's Priority Date Motion

Elbit argues that the Court erred in excluding Elbit's priority-date contentions because the Court relied on Hughes's misstatements and "ignored that Hughes did not include these other references in its 1405-page invalidity expert report." Docket No. 413 at 7.

In response, Hughes argues that Magistrate Judge correctly found that Elbit knew of the facts supporting its priority-date arguments at least by September 2016. Docket No. 431 at 6. According to Hughes, Elbit had represented that it was only relying on the filing date of the '073 patent for priority, and Hughes was justified in developing invalidity positions based on that statement. *Id.*

The Court agrees with the Magistrate Judge that Elbit knew of the facts supporting its priority-date arguments at least as early as September 2016 and that Hughes was justified in developing its invalidity positions based on the filing date. Accordingly, Elbit's objection is **OVERRULED**.

D. Hughes's Objection to the Magistrate Judge's Ruling on Defendants' Motion to Exclude Damages Expert Testimony (Docket No. 404)

Hughes argues that the Magistrate Judge clearly erred in permitting the jury to consider Mr. Martinez's damages opinions relating to the Gilat Agreement, the '874 Patent, and lost profits. According to Hughes, the Gilat Agreement is not reliable and contains economic differences from a hypothetical negotiation that Mr. Martinez does not account for. Docket No. 404 at 8–9. Hughes also contends that the Court should have excluded Mr. Martinez's opinion because Mr. Martinez improperly considers both the '874 patent and the '073 patent in his calculation. *Id.* at 9. Finally, Hughes faults Mr. Martinez's market-share approach to lost profits and contends that it is distinguishable from that in *Mor-Flo* and subsequent cases. *Id.*

In response, Elbit argues that the Magistrate Judge did not clearly err in allowing Mr. Martinez to provide opinions on the Gilat Agreement, the '874 patent, and lost profits. Elbit claims that Mr. Martinez did account for the Gilat Agreement's tiered rate structure or limit to existing inventory. Docket No. 423 at 5. According to Elbit, Mr. Martinez accounted for the Gilat Agreement's 60-month period by "explaining that the limited temporal relevance of the Gilat

Agreement technology was not applicable to the 2001 hypothetical negotiation here (as Elbit's technology remains relevant)." *Id.* Elbit also claims that Mr. Martinez "reasonably assumed that there would have been only one hypothetical negotiation for both patents—a consideration Hughes's damages expert says would not change his opinions." *Id.* at 6. Elbit finally contends that Mr. Martinez's opinions follow *Mor-Flo*.

The Court agrees with the Magistrate Judge Mr. Martinez's reliance on the Gilat Agreement is not a basis for excluding his opinion, as Mr. Martinez accounts for the differences in technologies and economic circumstances of the contracting parties. Additionally, Hughes has not established that Mr. Martinez's opinion that the parties would have engaged in a single hypothetical negotiation is unreliable. Mr. Martinez's lost-profits opinion also accounts for the existence and effect of noninfringing alternatives by conducting a market-share apportionment analysis. Moreover, the Court agrees that Mr. Martinez's opinion is consistent with Federal Circuit case law, including *Mor-Flo*. Accordingly, Hughes's Objection is **OVERRULED**.

E. Hughes's Objection to the Magistrate Judge's Order on Hughes's Motion to Strike Infringement Contentions (Docket No. 404)

Hughes argues that the Magistrate Judge erred in applying P.R. 3-1(g) by finding that Elbit had no obligation to identify corresponding source code. Docket No. 404 at 9. According to Hughes, Plaintiffs have an obligation to serve amended infringement contentions. *Id.* (citing *Zix Corp. v. Echoworx Corp*., 2016 WL 3410367 at *4 (E.D. Tex. May 13, 2016)).

In response, Elbit argues that *Zix Corp*. is irrelevant here because in that case, the contentions were " ' vague and conclusory' or 'merely recited claim language without providing notice.' " *Id.* Elbit contends that P.R.3-1(g) was designed to "delay compliance with P.R. 3-1 where source code is required, not heighten the contention standard to require disclosure of any source

code." *Id.* (citing *Am. Video Graphics v. Elec. Arts*, 359 F. Supp. 2d 558 (E.D. Tex. 2005); *Xerox Corp. v. Sharp Corp*., No. 2:06-CV-187-TJW, Dkt. 62, at 9-10 (E.D. Tex. Mar. 14, 2007)).

The Court agrees with the Magistrate Judge that P.R. 3.1(g) does not create an obligation to identify corresponding source code and that Elbit did not violate this local rule. Accordingly, Hughes's Objection is **OVERRULED**.

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Having considered each of the parties' objections to the Magistrate Judge's Report and Order and overruled each objection, the Magistrate Judge's Report and Order is adopted as the Order of this Court.

SIGNED this 31st day of July, 2017.

Robert W Schroeder III

ROBERT W. SCHROEDER III
UNITED STATES DISTRICT JUDGE