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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

ASETEK DANMARK A/S,

Plaintiff,

v.

CMI USA, INC. fka COOLER MASTER USA, INC.,

Defendant.

Case No. 3:13-cv-00457 JST

(CORRECTED) RENEWED MOTION FOR ENTRY OF JUDGMENT AS A MATTER OF LAW UNDER FEDERAL RULE OF CIVIL PROCEDURE 50(b)(3) AND MOTION FOR A NEW TRIAL UNDER FEDERAL RULE OF CIVIL PROCEDURE 50(b)(2) OR 59

Complaint Filed: January 31, 2013
Trial Date: December 2, 2014
Judge: Jon S. Tigar

Date: August 6, 2015
Time: 2:00 p.m.

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NOTICE OF MOTION AND MOTION

PLEASE TAKE NOTICE that Defendant CMI USA, Inc. ("CMI") hereby respectfully renews its motion for judgment as a matter of law, and also moves for a new trial ("Motion"). CMI proposes that the hearing on its Motion be held on August 6, 2015 at 2:00 p.m.

In this Motion, CMI seeks entry of judgment as a matter of law under Rule 50(b)(3) on the grounds that CMI products do not infringe any of the asserted claims in U.S. Patent No. 8,240,362 (the "'362 patent") and that Plaintiff Asetek Danmark A/S ("Asetek") is not entitled to its awarded damages. Alternatively, CMI moves for a new trial under Rule 50(b)(2) and 59 on the same grounds. Additionally, CMI moves for a new trial under Rule 59 based on erroneous findings of predicate facts regarding invalidity, the great weight of evidence, and prejudicial jury instructions. This Motion is based on the Memorandum of Points and Authorities set forth below, the evidence and proceedings at trial, and such other matters as may be presented and allowed by the Court.[1]

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

CMI's motion for judgment as a matter of law under Rule 50(b)(3) should be granted because no reasonable jury could find that CMI products directly or contributorily infringe any of the asserted claims of the '362 patent or that Asetek is entitled to a royalty rate of 14.5%. For the same reasons, a new trial should be alternatively granted under Rules 50(b)(2) and 59.

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[1] Before the case was submitted to the jury, CMI moved the Court for judgment as a matter of law on non-infringement of the '362 patent, and damages pursuant to Federal Rule of Civil Procedure 50(a) on December 10 and 15, 2014. (*See* Declaration of Kyle D. Chen in Support of (Corrected) Renewed Motion for Entry of Judgment as a Matter of Law of Non-Infringement ("Chen Decl."), Ex. 1 (12/10/2014 Trial Tr.) at 1046:13-1047:9 and 1051:22-1052:4; Ex. 2 (12/15/2014 Trial Tr.) at 1482:2-1494:3); *see also* Dkt. No. 232, Order Denying Motion for Direct Verdict as to Asetek's Claim for Contributory Infringement.) This renewed motion is timely filed pursuant to Federal Rule of Civil Procedure 50(b).

In addition, CMI respectfully submits that a new trial should be granted under Rule 59 because key predicate findings of fact used to reject CMI's invalidity defenses are clearly erroneous, because the verdict and the judgment are against the clear weight of the trial evidence, and because certain jury instructions resulted in prejudice to CMI.

A. CMI Products Do Not Infringe the '362 Patent as a Matter of Law.

1. The "Removably Attached [or Coupled]" Limitation

Prior to trial, CMI sought summary judgment that CMI products do not infringe the '362 patent because they do not meet a "removably attached [or coupled]" limitation that is present in every asserted claim in the '362 patent. (Dkt. No. 86, Defendant CMI USA, Inc.'s Notice of Motion and Motion for Summary Judgment of (1) Invalidity of U.S. Patent Nos. 8,240,362 and 8,245,764; and (2) Non-Infringement of U.S. Patent No. 8,240,362 (hereinafter "MSJ for Non-Infringement"), at 25.) In particular, Asetek asserted claims 14, 15, 17, 18, and 19 of the '362 patent against CMI. (*See* Dkt. No. 249, Findings of Fact and Conclusions of Law; Order Entering Judgment in Favor of Plaintiff, at 1.) As acknowledged by Asetek, "[c]laim 15 depends from claim 14, and claims 18 and 19 depend from claim 17, so that all of the asserted claims of the '362 patent contain this limitation" of "removably attached [or coupled]."[2] (Dkt. No. 99, Plaintiffs Asetek Holdings, Inc.'s and Asetek A/S's Opposition to Defendant CMI USA, Inc.'s Motion for Summary Judgment of (1) Invalidity of U.S. Patent Nos. 8,240,362 and 8,245,764; and (2) Non-Infringement of U.S. Patent No. 8,240,362 (hereinafter "Asetek's Opposition to MSJ for Non-Infringement"), at 7) (citation omitted).) CMI contended that this limitation should be construed by this Court to resolve the non-infringement issue, and proposed a construction that the "heat exchanging interface" and the "reservoir" are "[a]ttached such that the user can detach [the heat exchanging interface] from and reattach it to the reservoir as needed and cool the heat generating component with or without the heat exchanging interface in place." (*See* Dkt.

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[2] Asetek does not appear to dispute that "removably attached" and "removably coupled" have the same meaning. Thus, in this Motion, all discussions in connection with "removably attached" apply equally to "removably coupled."

No. 106, Defendant CMI USA, Inc.'s Reply in Support of Motion of Summary Judgment of (1) Invalidity of U.S. Patent Nos. 8,240,362 and 8,245,764; and (2) Non-Infringement of U.S. Patent No. 8,240,362 (hereinafter "Reply in Support of MSJ for Non-Infringement"), at 15, n.2 (citation omitted).)

In the order denying the MSJ for Non-Infringement, this Court rejected CMI's contention "that the Court should construe 'removably' in this order to resolve the issue of noninfringement[,]" and found "that 'removably coupled' and 'removably attached' do not require construction." (Dkt. No. 126, Order Denying Motion for Summary Judgment and Denying Motion to Exclude Expert Testimony (hereinafter "Order"), at 14, n.6 (citations omitted).) Based on the experts' conflicting views regarding whether CMI products meet the "removably attached" limitation, this Court further found that it "cannot grant CMI summary judgment of noninfringement because genuine disputes of material fact prevent the Court from doing so." (*Id.* at 14-15.)

But the trial record, including testimony elicited from Asetek's technical expert, Dr. Donald Tilton, established without question that CMI products do not meet the "removably attached" limitation as properly construed based on its plain meaning under controlling Federal Circuit law. Thus, judgment of non-infringement as a matter of law for this limitation should be entered in favor of CMI under its proposed construction.

2. The "Substantially Circular Passageway" Limitation

Claims 14 and 15 of the '362 patent include a limitation of "at least ***one*** of the one or more passageways being ***a*** substantially circular passageway."[3] (Emphasis added.) The undisputed trial evidence shows that CMI products have multiple "passageways," *none* of which is "substantially circular." In particular, the pictures of CMI products presented at trial show unambiguously and undisputedly that CMI products have *three* separate, "fan-shaped"

[3] The limitation is present in claim 14 of the '362 patent, but because claim 15 depends from 14, the limitation is also present in claim 15.

1 passageways, none of which by itself is substantially circular. That is, no reasonable jury
2 could find that any *one* of the three passageways is by itself "substantially circular," which
3 Asetek failed to prove at trial is met *literally* by CMI products under this limitation.

4 **3. CMI Committed No Contributory Infringement as a Matter of Law.**

5 Contributory infringement, a form of indirect infringement, requires as a prerequisite the
6 finding of direct infringement. Because CMI and its customers did not directly infringe any
7 asserted claim of the '362 patent as a matter of law, CMI could not have contributorily infringed
8 the '362 patent. Further, contributory infringement requires CMI's knowledge of infringement,
9 which no reasonable jury could find based on the trial record. Thus, CMI committed no
10 contributory infringement as a matter of law.

11 **B. Asetek Is Not Entitled to a Royalty Rate More Than 7% as a Matter of Law.**

12 The evidence presented at trial does not support the jury's award of a 14.5% royalty rate
13 and the resulting $404,941 in damages. The evidence shows that Asetek would have accepted a
14 royalty rate of no more than 7% from CMI during the hypothetical negotiation because Asetek
15 had willingly licensed the asserted patents as part of a patent portfolio to another party, Corsair
16 Components, Inc. ("Corsair"), for that rate. As such, the damages award should be vacated.

17 **C. The Court Should Grant a New Trial Under Rule 50(b)(2) and 59.**

18 The Court should alternatively grant a new trial under Rule 50(b)(2) and 59 for the same
19 reasons that CMI is entitled to judgment as a matter of law. Further, the Court should grant a
20 new trial under Rule 59 because the Court rejected CMI's invalidity defenses based on a clearly
21 erroneous finding of fact, because the judgment based on the jury verdict is against the clear
22 weight of evidence, and because certain jury instructions were prejudicial.

23 **II. LEGAL STANDARD**

24 **A. Non-Infringement**

25 Asetek's infringement claim against CMI with respect to the "removably attached" and
26 "substantial circular passageway" limitations at trial was based solely on literal infringement.
27 (Chen Decl., Ex. 3 (12/8/2014 Trial Tr.) at 692:23-693:9.) Literal infringement could be found
28 only if Asetek established that "every limitation recited in the claim appears in the accused

device, *i.e.*, when the properly construed claim reads on the accused device **exactly**." *DeMarini Sports, Inc. v. Worth, Inc.*, 239 F.3d 1314, 1331 (Fed. Cir. 2001) (internal quotations and citation omitted) (emphasis added). "If any claim limitation is absent from the accused device, there is no literal infringement as a matter of law." *Bayer AG v. Elan Pharm. Research Corp.*, 212 F.3d 1241, 1247 (Fed. Cir. 2000). In deciding a motion for judgment as a matter of law under Federal Rule of Civil Procedure 50, a district court must draw all reasonable inferences in favor of the nonmoving party and refrain from making credibility determinations or weighing the evidence. *See Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 150 (2000).

The question of literal infringement here did not turn on resolving conflicting evidence or weighing credibility of witnesses – the relevant facts surrounding the operation of CMI products in connection with the "removably attached" and "substantial circular passageway" limitations were undisputed. Infringement instead turned on applying the ordinary meaning of the "removably attached" and "substantial circular passageway" limitations to the undisputed operation of CMI products. The Federal Circuit has made it clear that in this situation – where there is no material dispute regarding the operation of the accused products – the question of literal infringement is properly decided as a matter of law. *See*, *e.g.*, *MyMail, Ltd. v. Am. Online, Inc.*, 476 F.3d 1372, 1378 (Fed. Cir. 2007) ("Because there is no dispute regarding the operation of the accused systems, that issue [of literal infringement] reduces to a question of claim interpretation and is amenable to summary judgment."); *K-2 Corp. v. Salomon S.A.*, 191 F.3d 1356, 1362 (Fed. Cir. 1999) ("Because the relevant aspects of the accused device's structure and operation are undisputed in this case, the question of whether [the accused product] literally infringes the asserted claims of the [patent-in-suit] turns on the interpretation of those claims."); *see also Reeves*, 530 U.S. at 150 ("And the standard for granting summary judgment 'mirrors' the standard for judgment as a matter of law, such that 'the inquiry under each is the same.'") (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250-51 (1986)).

B. Reasonable Royalty

Although the selection of a reasonable royalty "necessarily involves an element of approximation and uncertainty, a trier of fact must have some factual basis for a determination of

a reasonable royalty." *Unisplay, S.A. v. American Elec. Sign Co.*, 69 F.3d 512, 517 (Fed. Cir. 1995). "The [reasonable] royalty may be based upon an established royalty, ***if there is one***, or if not, upon the supposed result of hypothetical negotiations between the plaintiff and defendant." *Transocean Offshore Deepwater Drilling, Inc. v. Maersk Drilling United States, Inc.*, 699 F.3d 1340, 1357 (Fed. Cir. 2012)) (emphasis added) (citation omitted).

C. New Trial

"The district court can grant a new trial under Rule 59 on any ground necessary to prevent a miscarriage of justice." *Experience Hendrix L.L.C. v. Hendrixlicensing.com Ltd.*, 762 F.3d 829, 845-846 (9th Cir. 2014).

III. ARGUMENT

A. CMI Products Do Not Infringe the '362 Patent as a Matter of Law.

1. No Reasonable Jury Could Find that CMI Products Infringe the "Removably Attached" Limitation.

a. The '362 patent's "removably attached" limitation requires that the detachment of the "removably attached" component "not do violence" to the claimed product, which remains functional after detachment.

As noted previously, the Court declined to construe "removably attached," stating that the term should be given its plain meaning. The Court's decision not to construe "removably attached," however, presents no obstacle to granting judgment of non-infringement as a matter of law because the accused products do not infringe under that plain meaning.

As acknowledged by Asetek, "all of the asserted claims of the '362 patent contain this limitation": "the heat exchanging interface being *removably attached [or coupled]* to the reservoir." (Dkt. No. 99, Asetek's Opposition to MSJ for Non-Infringement, at 7) (citation omitted) (emphasis in original).) As CMI previously argued, this limitation requires that the heat exchanging interface be "[a]ttached such that the user can detach [the heat exchanging interface] from and reattach it to the reservoir as needed and cool the heat generating component with or without the heat exchanging interface in place." (*See* Dkt. No. 106, Reply in Support of MSJ for

Non-Infringement, at 15, n.2.) The Federal Circuit has confirmed that this is what the plain meaning of the "removably attached" limitation requires.[4] *See Dorel Juvenile Group, Inc. v. Graco Children's Prods.*, 429 F.3d 1043, 1044-46 (Fed. Cir. 2005) (explaining plain meaning of "removably attached").

In particular, CMI proposed that the heat exchanging interface and the reservoir are "[a]ttached such that the user can detach [the heat exchanging interface] from and reattach it to the reservoir as needed." (*See* Dkt. No. 106, Reply in Support of MSJ for Non-Infringement, at 15, n.2.) That is, the heat exchanging interface that is "removably attached" to the reservoir in the '362 patent "will be detached or unsecured on some occasion **during the lifetime of the product**." *Dorel*, 429 F.3d at 1045 (emphasis added). In other words, CMI's proposal makes clear that the heat exchanging interface and the reservoir in the '362 patent "are **designed at some time or another to come apart**" during the life time of the claimed product. *Id.* (emphasis added) (internal quotation omitted).

Further, CMI proposed that the heat exchanging interface and the reservoir are "[a]ttached such that the user can … cool the heat generating component with or without the heat exchanging interface in place." (*See* Dkt. No. 106, Reply in Support of MSJ for Non-Infringement, at 15, n.2.) Under CMI's proposal, the claimed structure in the '362 patent "must therefore be usable … upon separation" of the heat exchanging interface from the reservoir. *Dorel*, 429 F.3d at 1045. In other words, CMI proposed that "the claims cover a structure that includes a [heat exchanging interface] and [reservoir] affixed together in a manner that contemplates that the [heat exchanging interface] may be removed from the [reservoir]" such

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[4] Asetek does not contend that "removably attached" has any special meaning in the context of the '362 patent, of which neither the specification nor the prosecution history provides the definition for this limitation. (*See* Chen Decl., Ex. 3 (12/8/2014 Trial Tr.) at 691:4-8 (cross-examination of Asetek's expert, Dr. Tilton: "**Q.** The patent doesn't explain at all what 'removably attached' means; isn't that right? **A.** I don't know that there's a big description in there, but I think that's pretty clear what 'removable' is, if something's removable or not removable.").) Given the Court's declination to construe the "removably attached" limitation, its ordinary meaning should control. (Order at 14, n.6.)

that the claimed structure "***remains functional***." *Id.* (internal quotation omitted) (emphasis added). CMI's proposed construction thus "carr[ies] with [it] an implication that the detachment or unsecuring process" of the heat exchanging interface from the reservoir "not do violence to" the claimed product in the '362 patent. *Id.* (internal quotation omitted).

This implication in CMI's proposal, that the claimed product should remain functional after the detachment, is important because without it, the "removably attached" limitation becomes superfluous. *See Digital-Vending Servs. Int'l, LLC v. Univ. of Phoenix, Inc.*, 762 F.3d 1270, 1275 (Fed. Cir. 2012) (claim construction should not render a term "superfluous" because of "the well-established rule that claims are interpreted with an eye toward giving effect to all terms in the claim.") (internal quotation and citation omitted). The reason is that virtually any two "attached" parts in a structure ***can*** be "removed" from each other if one tries hard enough to separate the two parts[5] while paying no regard to whether the structure will suffer damages during the process. Thus, there must be some constraint on the detachment process when two parts are "***removably*** attached" to each other such that the phrase remains meaningful. *See Digital-Vending*, 762 F.3d at 1275. As held by the Federal Circuit, that constraint is "the detachment or unsecuring process not do violence to" the claimed product, which must remain "functional" after the detachment. *Dorel*, 429 F.3d at 1045. In the context of the '362 patent, that means "the detachment or unsecuring process" of the heat exchanging interface from the reservoir "not do violence to" the claimed product, which must remain "functional" after the heat exchanging interface is detached. *Id.* CMI's proposal that "the user can … cool the heat generating component with or without the heat exchanging interface in place" incorporates this required constraint under *Dorel*, which should therefore be adopted by this Court. *Id.*

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[5] Indeed, as confirmed by *Dorel*, the "removably attached" limitation does not require "ease of separation," of which the notion was "expressly and emphatically rejected." 429 F.3d at 1045 (internal quotation omitted).

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b. It is undisputed that detachment of the "heat exchanging interface" from the "reservoir" in CMI products will "do violence" to the products, which will no longer be functional after the detachment.

As this Court acknowledged, CMI had argued before trial that its products "are intended to prevent users from detaching" the heat exchanging interface from the reservoir. (*See* Order at 14.) Indeed, the trial testimony of ***Asetek's*** expert, Dr. Tilton, ***confirmed*** that in CMI products, once the "heat exchanging interface" is removed from the "reservoir," the coolant will leak out, and the products will no longer be functional. For example, Dr. Tilton testified that "we don't envision consumers taking that copper thing [*i.e.*, the heat exchanging interface] off" and that "[t]he unit is factory sealed." (Chen Decl., Ex. 3 (12/8/2014 Trial Tr.) at 605:13-14.) He also testified that in CMI products, "this thermal-exchange interface is the boundary of [the reservoir] – if I took that off, the coolant leaks out." (*Id.* at 646:14-16.) He further testified that "I think that's crazy in the first place, to think that consumers would be removing the thermal interface." (*Id.* at 649:22-24.) Thus, Asetek's expert confirmed at trial that the detachment of the heat exchanging interface from the reservoir in CMI products will damage the products, in which the heat exchanging interface and the reservoir are ***not*** designed to come apart during the products' lifetime. *Cf. Dorel*, 429 F.3d at 1045. CMI's expert, Dr. Gregory Carman, agreed with Dr. Tilton that CMI products are ***not*** "designed in such a way that the heat exchange interface can be removed from the reservoir by anyone after the manufacturing process is completed." (Chen Decl., Ex. 4 (12/9/2014 Trial Tr.) at 779:5-12.) He further agreed that, in CMI products, after the heat exchange interface is removed from the reservoir, the coolant leaks out, and the products "wouldn't function at all." (*Id.* at 779:13-23.)

As a result, it is undisputed that CMI products do not infringe the "removably attached" limitation under its ordinary meaning embodied in CMI's proposed construction because the user ***cannot*** "detach the [heat exchanging interface] from and reattach it to the reservoir as needed." (*See* Dkt. No. 106, Reply in Support of MSJ for Non-Infringement, at 15, n.2.) That is, CMI products are ***not*** designed such that the heat exchanging interface and the reservoir can "come apart" during the lifetime of the products. *Cf. Dorel*, 429 F.3d at 1045. It is also undisputed that

CMI products do not infringe the limitation under CMI's proposal because the user ***cannot*** "cool the heat generating component … without the heat exchanging interface in place." (*See* Dkt. No. 106, Reply in Support of MSJ for Non-Infringement, at 15, n.2.) That is, CMI products will ***not*** function after the heat exchanging interface is detached from the reservoir, which again will "do violence" to CMI products and cause their coolant to leak out. *Cf. id*.

In sum, under the ordinary meaning of "removably attached" as embodied in CMI's correct construction, no reasonable jury could conclude that CMI products meet this limitation that is present in every asserted claim in the '362 patent. CMI products therefore do not infringe any of the asserted claims in the '362 patent as a matter of law.

2. No Reasonable Jury Could Find that CMI Products Infringe the "Substantially Circular Passageway" Limitation.

As a matter of law, CMI products do not literally meet the "substantially circular passageway" limitation of claim 14 (and of claim 15 that depends from claim 14) in the '362 patent. Claim 14 recites in pertinent part:

> 14. A cooling system for a processing unit positioned on a motherboard of a computer, comprising:
>
> a reservoir configured to be coupled to the processing unit positioned on the motherboard at a first location, the reservoir being adapted to pass a cooling liquid therethrough, wherein the reservoir includes an upper chamber and a lower chamber, the upper chamber and the lower chamber being separate chambers containing cooling liquid that are separated by at least a horizontal wall and fluidly coupled together by **one or more passageways, at least *one* of the one or more passageways being *a* substantially circular passageway** positioned on the horizontal wall ….

(Emphasis added.) Asetek's infringement claim against CMI with respect to the "substantially circular passageway" limitation at trial was based solely on literal infringement. (Chen Decl., Ex. 3 (12/8/2014 Trial Tr.) at 692:23-693:9.)[6] Thus, the limitation must "read[] on the accused device **exactly**." *DeMarini*, 239 F.3d at 1331 (internal quotations and citation omitted) (emphasis added). Because claim 14 of the '362 patent requires "at least *one* of the one or more

[6] Asetek did not argue infringement under the doctrine of equivalents.

passageways being *a* substantially circular passageway," an accused device must have at least *one* singular passageway that is "substantially circular" to literally infringe.

But the evidence at trial shows conclusively that CMI products have three "fan-shaped" passageways, none of which by itself is "substantially circular." (*See* below, Chen Decl., Ex. 7 (Trial Exhibit 175 (marked and admitted on 12/9/2014)), at p. 3 of 3 (arrows and notations added); *see also* Chen Decl., Ex. 4 (12/9/2014 Trial Tr.) at 766:9-773:10.)

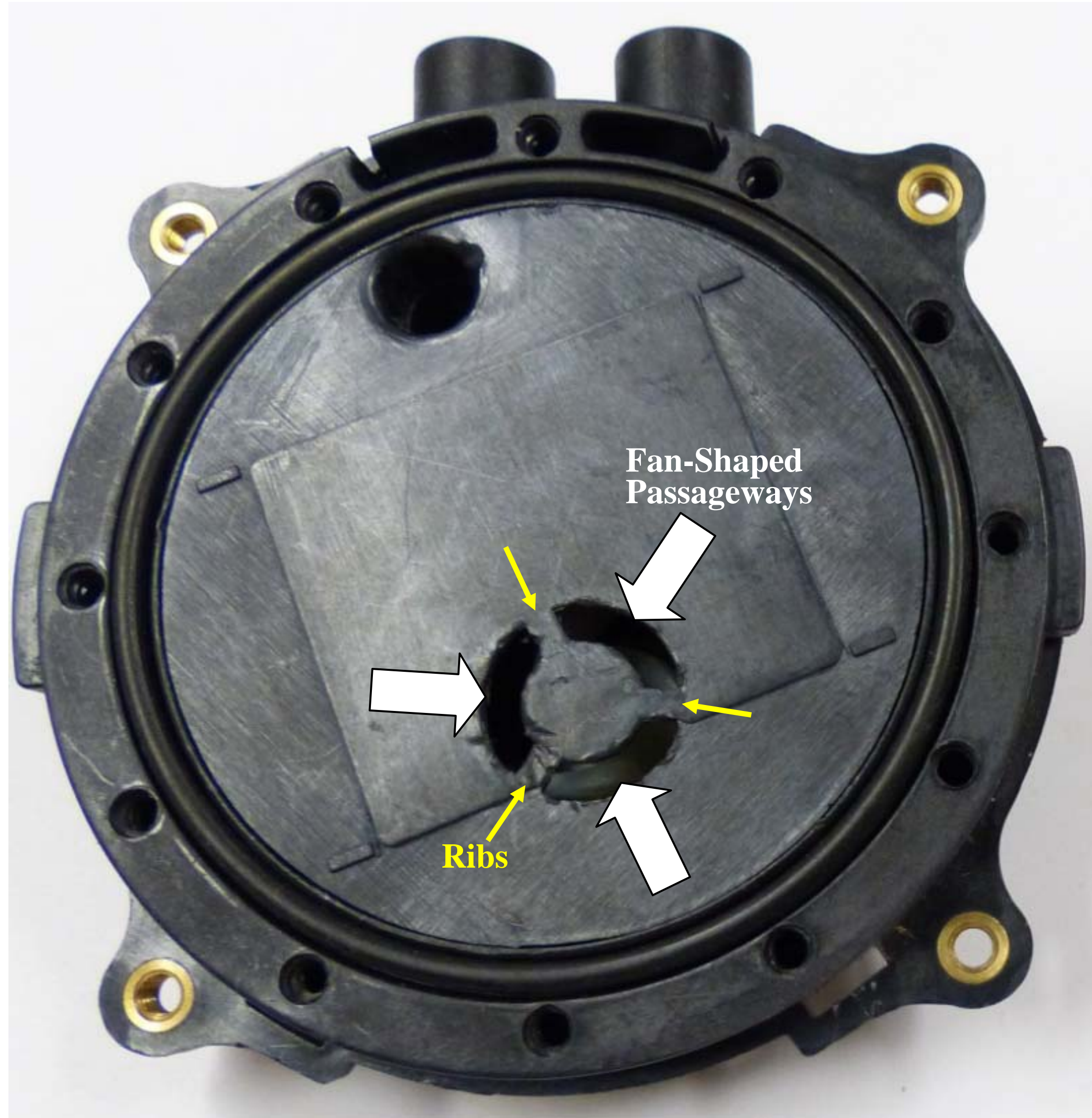

Figure 1. Cooler Master Seidon 120M

Asetek's expert, Dr. Tilton, did not dispute that the "ribs" (indicated by the thin, yellow arrows above) between the three fan-shaped passageways (indicated by the thick, white arrows

above) are "dividing" the space through which the cooling fluid passes into several "sections" or "segments." (*See* Chen Decl., Ex. 3 (12/8/2014 Trial Tr.) at 642:11-13, 643:18-644:4, 644:17-19, 645:13-16.) Dr. Tilton nonetheless argued that these *multiple* "sections" or "segments" can be combined into one "substantially circular passageway" (*id.*) by misleadingly conflating the engineering reality that a perfect circle cannot be made, with "hav[ing] other structure in there that has another engineering purpose" (*id.* at 642:14-19). But as Dr. Carman pointed out, the claim language does not "say anything about multiple noncircular passageways being combined to form ***a*** substantially circular passageway." (Chen Decl., Ex. 4 (12/9/2014 Trial Tr.) at 768:25-769:13 (emphasis added).) To the contrary, the claim language requires that at least "one" passageway must be "***a*** substantially circular passageway." In other words, "one" *singular* substantially circular passageway must be present in an accused product in order to infringe this limitation. Thus, Dr. Tilton's attempt to rewrite the express claim language of "***a*** substantially circular passageway" into "a ***collection*** of passageways that are ***collectively*** substantially circular" (*see id.* at 773:1-10) must be rejected as a matter of law. This rejection is legally required especially because Asetek alleges only *literal* infringement, and *not* infringement under the doctrine of equivalents, with respect to this limitation. (*See* Chen Decl., Ex. 3 (12/8/2014 Trial Tr.) at 692:23-693:9.)

In conclusion, the "substantially circular" language modifying the *singular* "passageway" language requires that the *singular* "passageway" be "substantially circular." In particular, this "passageway" limitation in its *singular* form cannot be literally infringed by a combination or collection of *multiple* passageways, and the "substantially circular" language modifying the *singular* "passageway" language *cannot* and does *not* change that. In fact, Dr. Tilton's admission that CMI products literally have a plurality of separate "sections" or "segments" in the space through which the cooling fluid passes must negate the alleged literal infringement as a matter of law. (*Id.*) That is, no reasonable jury could find that the *multiple* fan-shaped passageways in CMI products *literally* meet the *singular* "substantially circular passageway" limitation.

3. No Reasonable Jury Could Find Contributory Infringement.

"To succeed on a theory of contributory or induced infringement, [Asetek] was required to show direct infringement of the … patent." *E.g.*, *i4i Ltd. P'ship v. Microsoft Corp.*, 598 F.3d 831, 850 (Fed. Cir. 2010). CMI did not contributorily infringe the '362 patent because there was no direct infringement. As discussed above, the use and the sale of CMI products by CMI or its customers did not constitute direct infringement of the '362 patent as a matter of law. Thus, CMI did not contributorily infringe the '362 patent since there was no direct infringement by either CMI or its customers.

Further, contributory infringement requires CMI's knowledge of the patents and the infringement. *Commil USA, LLC v. Cisco Sys.*, 135 S. Ct. 1920 (U.S. 2015) ("contributory infringement requires knowledge of the patent in suit and knowledge of patent infringement"). Based on the trial record, no reasonable jury could find that CMI had knowledge of infringement because Asetek's only evidence for this purported knowledge is a cease-and-desist letter with only conclusory allegations of infringement *without* any explanation, such as a claim chart. Thus, CMI committed no contributory infringement of either patent as a matter of law.

B. Asetek Is Not Entitled to a Royalty Rate of 14.5% as a Matter of Law.

No substantial evidence supports the jury's finding of a 14.5% royalty rate and the damages award of $404,941 based on such rate.[7] Asetek's damages theory for a reasonable royalty was solely based on the notion that Asetek would not accept a royalty unless it makes up for the entirety of the alleged lost profits that Asetek would have made but for CMI's alleged infringement. However, as a matter of law, Asetek presented no actual evidence that it is entitled to lost profits because Asetek failed to present evidence to satisfy at least the "but-for" requirement under well-settled Federal Circuit law. To recover lost profits, Asetek must prove not only that it lost profits, but that those profits went to CMI. *Bic Leisure Prods. Inc. v.*

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[7] The royalty base was undisputedly $2,792,698. (Chen Decl., Ex. 4 (12/9/2014 Trial Tr.) at 850:14-19; Ex. 1 (12/10/2014 Trial Tr.) at 980:10-16.) Thus, based on a royalty rate of 14.5%, the damages would be $2,792,698 × 14.5% = $404,941.

1 *Windsurfing Int'l Inc.*, 1 F.3d 1214, 1218 (Fed. Cir. 1993).[8] Asetek's expert, Dr. Mody, admitted
2 she presented no evidence to support a lost profits claim. (Chen Decl., Ex. 4 (12/9/2014 Trial
3 Tr.) at 880:10-24.) As it was Asetek's evidentiary burden to prove it is entitled to CMI's profits
4 that Asetek claimed it had lost, its failure to offer any direct causal evidence mandates judgment
5 as a matter of law in CMI's favor.

6 In particular, the range of Asetek's alleged "effective" royalty rates of 10% to 19%, from
7 which the jury apparently selected the middle point, is speculatively based on some pseudo-
8 analysis of lost profits that Asetek's expert undisputedly failed to prove at trial. Dr. Mody
9 testified that Asetek's profit margin on its sales to a third-party licensee, Corsair, was ███. (*Id.*
10 at 860:3-861:7). To arrive at the alleged "effective" royalty rate range of 10% to 19% intended
11 to recover Asetek's lost profits due to the sales of CMI products, Dr. Mody blended Asetek's
12 ███ profit margin on its sales to Corsair with a 2% royalty rate in the Corsair license. (*Id.* at
13 862:12-863:6.)

14 But Dr. Mody admitted that she did not perform a lost profits analysis: "So a lost profits
15 [sic] is a very different construct than what I discussed here. And I didn't go over the factors that
16 are involved with lost profits." (*Id.* at 880:13-15.) Indeed, Dr. Mody provided no evidence that
17 CMI's customers would have purchased Asetek products had CMI's products been unavailable.
18 At best, Dr Mody argued CMI was a competitor of Asetek (*id.* at 868:10-871:4), but that "does
19 not require a conclusion that [Asetek's] products are substitutable and that any [CMI] customer
20 would have purchased a[n Asetek] product if [CMI's] product was not available." *Good Tech.*
21 *Corp. et al. v. MobileIron, Inc.*, Case No. 5-12-cv-05826 (N.D. Cal. June 23, 2015) (Grewal,
22 M.J.). That is, Dr. Moody failed to offer evidence that, but for CMI's sales of infringing
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[8] *Panduit* provides the causal requirement of (1) demand for the patented product; (2) absence of available acceptable non-infringing alternative substitutes; (3) sales/marketing capability and manufacturing capacity to meet demand; and, (4) computation of the amount of profit the patentee would have made on its lost sales. *Panduit Corp. v. Stahlin Bros. Fibre Works, Inc.*, 575 F.2d 1152, 197 U.S.P.Q. 726 (6th Cir. 1978); *Rite-Hite Corp. v. Kelly Co., Inc.*, 56 F.3d 1538, 35 U.S.P.Q.2d 1065 (Fed. Cir. 1999).

products, Asetek would have obtained all of CMI's sales, resulting in a speculated gross profit margin of 58% for Asetek if CMI's products were off the market. (Chen Decl., Ex. 4 (12/9/2014 Trial Tr.) at 949:6-16) Dr. Mody in fact conducted no investigation on the amount of profits that Asetek would have made "but for" CMI's sales.

As a result, Dr. Mody's analysis purportedly based on the *Georgia-Pacific* ("*GP*") factors was legally improper when she started with a royalty rate range of 10% to 19% intended to recover the *unproven* lost profits. In contrast, the first *GP* factor requires consideration of past and present royalties received by the patentee "for the licensing of the patent in suit, proving or tending to prove an established royalty." *ResQNet.com, Inc. v. Lansa, Inc*., 594 F.3d 860, 869 (Fed. Cir. 2010) (citing 318 F. Supp. at 1120 (emphasis added)). But the Corsair license, the only pre-existing license covering the asserted patents – which was entered into a mere six weeks prior to the date of the hypothetical negotiation between Asetek and CMI – established that Asetek willingly licensed a patent portfolio including the asserted patents for a royalty rate of no more than 7%. (*See* Chen Decl., Ex. 6 (Trial Exhibit No. 9) at p. 5 of 18.) In particular, Asetek was willing to grant the license to Corsair when its annual purchase volume from Asetek was less than "48,000 units." (*See id.*) That is, Corsair could obtain the license at a 7% royalty rate even if it purchased nothing from Asetek. (*See id.*) That is, a 7% royalty rate would be sufficient for Asetek to be willing to grant CMI a license, as admitted by Dr. Mody. (*See* Chen Decl., Ex. 4 (Trial Tr. 12/9/2014) at 859:20-25) ("this [Corsair] license was signed August 24th of 2012, which I believe was probably about -- wow, not even two months -- six weeks before the hypothetical negotiation. And so it's approximate to the hypothetical negotiation, and it gives us a good idea of what Asetek would want to extract from CMI.").)

Dr. Mody argued that Asetek would not offer the same Corsair license to CMI because it was a "competitor" as opposed to a "customer" like Corsair that bought products from Asetek. But the Corsair license itself belies this argument because the royalty rate Asetek would accept from Corsair under the license when Corsair's purchase *volume* from Asetek was zero, would be "5-7%." That is, a license to Corsair with a royalty rate of "5-7%" with zero purchase by Corsair from Asetek is no different from a license to CMI. Thus, a reasonable royalty rate to CMI could

not exceed 7%, and the 14.5% royalty rate awarded by the verdict, and the resulting damages award of $404,941 in the judgment, must be vacated as a matter of law. Given that Dr. Mody's royalty rate analysis based on the admittedly unproven lost profits is legally improper, no reasonable jury could award a 14.5% royalty rate that is the middle point of the improper 10% to 19% range. Thus, because of Asetek's failure to prove the 14.5% royalty rate, the damages award should be vacated. But if this Court is inclined to award any damages despite Asetek's complete failure to prove them, it should adopt the royalty rate of 4.5% proposed by CMI's expert, Mr. James E. Pampinella, because his analysis at trial was the only legally proper evidence of a reasonable royalty.

C. The Court Should Grant a New Trial Under Rule 50(b)(2) and 59.

If not inclined to grant judgment as a matter of law under Rule 50(b)(3), the Court should alternatively grant a new trial under Rule 50(b)(2) and 59 for the same reasons stated above. Further, the Court should grant a new trial under Rule 59 because CMI's invalidity defenses were rejected based on clearly erroneous findings of fact, because the judgment based on the jury verdict is against the great weight of evidence, and because certain jury instructions and evidentiary rulings were prejudicial.

1. New Trial Is Warranted Because Rejection of CMI's Invalidity Defenses Is Based on Clearly Erroneous Findings of Fact.

A new trial on the invalidity of U.S. Patent No. 8,245,764 (the "'764 patent") is warranted because several predicate findings of fact for rejecting CMI's invalidity defenses are clearly erroneous. A key dispute on invalidity is whether a "sucking channel" in a prior-art reference, Koga, meets the "thermal exchange chamber" limitation in the '764 patent. If Koga's sucking channel meets the limitation, then Koga discloses a dual-chamber reservoir as claimed in the '764 patent. If not, then Koga discloses a single-chamber reservoir, which is how Asetek purportedly distinguishes Koga from the '764 patent.

In its Findings of Fact and Conclusions of Law, the Court concluded that "CMI has not shown that a person of ordinary skill in the art would understand Koga's sucking channel 19 to constitute a thermal exchange chamber—a limitation in all the asserted claims of the '764

1 patent." (Dkt. No. 249, Court's Findings and Conclusions, at 18.) CMI respectfully submits that
2 as a matter of law, the Court's conclusion is incorrect.
3 The Court reasoned that Koga's sucking channel does not meet the "thermal exchange
4 chamber" limitation because "the primary purpose of sucking channel 19 is as a conduit to
5 deliver cooling fluid to the rotational center of Koga's pump room" as opposed to exchanging
6 heat. *Id.* This reasoning, with all due respect, is erroneous as a matter of law because regardless
7 of the sucking channel's "primary purpose," as long as it exchanges *some* heat, it meets the
8 "thermal exchange" limitation. *See Ecolab, Inc. v. FMC Corp.*, 569 F.3d 1335, 1348 (Fed. Cir.
9 2009) (that which would literally infringe if later in time anticipates if earlier than the date of
10 invention); *Abbott Labs. v. Sandoz, Inc.*, 566 F.3d 1282, 1299 (Fed. Cir. 2009) (noting that *de*
11 *minimis* infringement can still be infringement); *Embrex, Inc. v. Serv. Eng'g Corp.*, 216 F.3d
12 1343, 1352-53 (Fed. Cir. 2000) (Rader, J., concurring) ("[T]his court has not tolerated the notion
13 that a little infringement—*de minimis* infringement—is acceptable infringement or not
14 infringement at all."). The reason is that nothing in the claim language specifies the amount of
15 heat that must be exchanged in order to meet the "thermal exchange" limitation.
16 It is undisputed that Koga's sucking channel is a liquid holding receptacle that exchanges
17 *some* heat, as expressly admitted by Asetek's expert, Dr. Tilton. (*See* Chen Decl., Ex. 2
18 (12/15/2014 Trial Tr.) at 1427:4-5 and 1429:7-8 ("[the sucking channel is] a hole drilled in the
19 side … that delivers fluid to the center of a pump impeller"); Ex. 5 (12/16/2014 Trial Tr.) at
20 1557:25-1558:2 (Q. … And under this embodiment [of Koga], some heat is going up through
21 that sucking channel. Isn't that right? A. I believe my testimony was clear on that. ***Yeah***.")
22 (emphasis added).) Thus, based on Dr. Tilton's admission, Koga's "sucking channel" meets the
23 "thermal exchange chamber" limitation in the '764 patent as a matter of law.
24 The Court's other reasons (Dkt. No. 249, Court's Findings and Conclusions, at 18-19) for
25 rejecting that Koga's sucking channel meets the "thermal exchange chamber" limitation are, with
26 all due respect, similarly erroneous because they all focus on how much (or rather, how little)
27 heat the sucking channel can exchange. But there is no requirement in the claims on the amount
28 of heat that must be exchanged in order to meet the "thermal exchange" limitation. *See Abbott*,

566 F.3d at 1299; *see also Embrex*, 216 F.3d at 1352-53 (Rader, J., concurring). The patentee could have specified that the "thermal exchange chamber" must exchange, for example, a "substantial" amount of heat in the claims, but he did not. Thus, as long as there is *some* exchange of heat by a liquid holding receptacle, it meets the "thermal exchange chamber" limitation since there is no additional requirement under the limitation's plain meaning. That is, given that Koga's sucking channel is undisputedly a liquid holding receptacle which exchanges *some* heat, it meets the "thermal exchange chamber" as a matter of law.[9] Koga thus teaches a dual-chamber reservoir because in addition to the sucking channel that meets the "thermal exchange chamber" limitation as a matter of law, Koga undisputedly has a "pump chamber." (*See* Dkt. No. 249, Court's Findings and Conclusions, at 18.) In other words, there is no difference between Koga and the asserted claims in the '764 patent with respect to the dual-chamber "reservoir" limitation.

Hence, key findings of fact and conclusions of law with which the Court rejected CMI's invalidity defenses are erroneous under controlling Federal Circuit law. Specifically, the Court adopted the jury's finding that "[t]he prior art devices included … a *single-chamber* reservoir" while Koga actually disclosed a dual-chamber reservoir. (*Id.* at 9-10.) The Court also found that "none of the prior art references CMI has cited describes a dual-chambered reservoir" in rejecting CMI's invalidity defenses. (*Id.* at 9, 13, and 18-20.) As a result, the jury verdict and the judgment rejecting CMI's invalidity defenses must be vacated, and a new trial is warranted.

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[9] The Court's reasoning that the "water jacket" in the Ryu reference does not meet the "thermal exchange chamber" limitation is, with all due respect, similarly flawed because Ryu's water jacket is undisputedly a receptacle that holds cooling liquid and exchanges *some* heat. (*See id.* at 18-19.) Thus, similar to Koga, Ryu is no different from the asserted claims in the '764 patent with respect to the "thermal exchange chamber" limitation.

2. New Trial Is Warranted Because Rejection of CMI's Invalidity and Non-Infringement Defenses and the 14.5% Royalty Rate Awarded by the Jury, Are Against the Clear Weight of Trial Evidence.

Because Koga's sucking channel meets the "thermal exchange chamber" limitation as a matter of law, a new trial on the invalidity of the '764 patent is warranted under Rule 59 because the rejection of CMI's invalidity defenses is against the clear weight of trial evidence. For the same reasons that the Court should grant judgment of non-infringement of the '362 patent and that Asetek is not entitled to the 14.5% royalty rate as a matter of law, a new trial on either or both of those issues should be granted because the jury's findings on them are against the clear weight of evidence.

Furthermore, the clear weight of trial evidence also shows that the asserted claims of the '362 and '764 patents are anticipated or rendered obvious over the prior art presented at trial. In the interest of brevity, and considering that the Court has already addressed these arguments in its post-trial rulings, CMI refers to Docket No. 234, "CMI USA Inc.'s Memorandum of Points and Authorities Re Its Defense of Obviousness Under [35] U.S.C. § 103 and § 112," at 1-14, and Docket. No. 235, "Defendant CMI USA Inc.'s Proposed Findings of Fact and Conclusions of Law Re Its Defense of Obviousness Under [35] U.S.C. § 103 and § 112," at 2-23, both of which are incorporated by reference. For the reasons stated therein, the Court should grant a new trial on the invalidity of the '764 patent under Rule 59.

3. New Trial Is Warranted Because of Prejudicial Jury Instructions.

If not inclined to grant judgment as a matter of law as requested above, the Court should grant a new trial under Rule 59 on the non-infringement of the '362 patent and/or on the royalty rate because the jury instructions are prejudicial, as explained below.

a. New Trial on Non-Infringement of the '362 Patent Is Warranted If Judgment of Non-Infringement Is Not Granted as a Matter of Law.

The jury instructions contained no construction for the "removably attached" limitation because the Court refused to construe it, resulting in prejudice to CMI with respect to its non-infringement defense against the '362 patent. (Dkt. No. 126, Order, at 14, n.6.) Because CMI

raised this claim construction issue, the "removably attached" term should have been construed and provided in the jury instructions. *See O2 Micro Int'l Ltd. v. Beyond Innovation Tech. Co., Ltd.*, 521 F.3d 1351, 1362 (Fed. Cir. 2008) ("When the parties present a fundamental dispute regarding the scope of a claim term, it is the court's duty to resolve it."). The jury clearly did not understand that, as proposed by CMI, the plain meaning of "removably attached" includes the requirement that "the user can detach [the heat exchanging interface] from and reattach it to the reservoir as needed and cool the heat generating component with or without the heat exchanging interface in place." That is, this limitation requires that the heat exchanging interface "be detached or unsecured on some occasion during the lifetime of the product" and that the detachment "not do violence to" the claimed product in the '362 patent. *Dorel*, 429 F.3d at 1045. Thus, a new trial on non-infringement of the '362 patent with jury instructions providing the construction of "removably attached" as proposed by CMI should be granted if the Court is not inclined to grant judgment of non-infringement as a matter of law.

b. New Trial on Damages Is Warranted If the 14.5% Royalty Rate and Damages Are Not Vacated as a Matter of Law.

The following additional paragraph in "Final Instruction No. 24 Re Reasonable Royalty – Definition" is prejudicial:

> This is just an example of how a reasonable royalty might be determined. Whatever methodology is employed to calculate damages, the reasonable royalty must reflect business realities to ensure that the damages awarded are adequate to compensate the patent owner for the infringement. Accordingly, a reasonable royalty rate need not be based solely on sales revenue. Instead, depending on the circumstances, the parties to the hypothetical negotiation may base a reasonable royalty in whole or part on other measures of value, **including profits or non-monetary benefits.** The testimony of experts may assist you in determining not only the amount of damages that are adequate to compensate for the infringement, but also how those damages should be estimated. But it is up to you, based on the evidence, to decide the royalty that is appropriate in this case.

(Dkt. No. 217, Final Jury Instructions, at 25-26) (emphasis added.)

As CMI pointed out, this paragraph "erroneously creates the impression that the Court prefers Dr. Mody's analysis to Mr. Pampinella's." (Dkt. No. 205, Revised Joint Proposed Final Jury Instructions, at 40.) In particular, Asetek's expert, Dr. Mody, presented at trial an "effective" royalty rate based on the alleged but unproven lost **profits**. Further, Dr. Mody

argued that the special rates in the Corsair license were provided based on the fact that Corsair was Asetek's customer, which is a **non-monetary benefit** that justifies the rates. Both of these factors are squarely, and unfairly, mentioned in the jury instructions, giving the impression that the Court believes Dr. Mody's analyses using these factors are correct. Thus, these instructions are prejudicial, and a new trial on damages is warranted under Rule 59 if the Court is not inclined to vacate the 14.5% royalty rate as a matter of law.

IV. CONCLUSION

For at least the foregoing reasons, CMI respectfully requests that this Court enter judgment as a matter of law that CMI products do not infringe the '362 patent, and that Asetek is not entitled to a 14.5% royalty rate. If the Court is not inclined to grant judgment as a matter of law for these issues, CMI alternatively request a new trial on them. In addition, CMI respectfully requests that this Court grant a new trial on the invalidity of the '764 patent.

Dated: June 30, 2015

Respectfully submitted,

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