

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TEXAS
TYLER DIVISION**

Flexuspine, Inc.

v.

Globus Medical, Inc.

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CASE NO. 6:15-cv-201-JRG-KNM

JURY TRIAL DEMANDED

ORDER

Before the Court is Defendant Globus Medical, Inc.’s (“Globus”) *Daubert* Motion to Exclude Portions of Plaintiff’s Amended Damages Expert Report (Doc. No. 170) (“Mot.”). Plaintiff Flexuspine, Inc. (“Flexuspine”) filed an expedited response (Doc. No. 172) (“Resp.”), and Globus filed a reply (Doc. No. 176) (“Reply”). The parties completed this briefing on August 1, 2016. For the reasons stated herein, Globus’s Motion (Doc. No. 170) is **GRANTED**.

BACKGROUND

Flexuspine relies on Dr. Stephen L. Becker as a damages expert. In determining a reasonable royalty for the asserted patents in this case, Dr. Becker relies on prior litigation (“Synthes litigation”) between DePuy-Synthes (“Synthes”) and Globus. In his original report, Dr. Becker relied on a settlement license agreement from the Synthes litigation (“settlement license”), which this Court excluded, finding it was not sufficiently comparable to a hypothetical negotiation in this case to aid the trier of fact in determining a reasonable royalty. Doc. No. 145 at 9. Dr. Becker’s amended report relies instead on the jury verdict from the Synthes litigation (“jury verdict”), which Globus now seeks to exclude.

As set forth in Dr. Becker’s Amended Report (Resp. Ex. A), in the litigation between Globus and Synthes, Synthes accused three of Globus’s static spinal implants of infringing U.S. Patent Numbers 7,875,076 (“the ’076 Patent”); 7,862,616 (“the ’616 Patent”); 7,846,207 (“the

'207 Patent"). Resp. Ex. A ¶¶ 132–133, 142. On June 14, 2013, a jury found in favor of Synthes, and awarded a 15% royalty on past sales. *Id.* ¶¶ 135, 136. According to Dr. Becker, in reaching this royalty, the jury “was asked to consider a hypothetical negotiation between Synthes as licensor and Globus as licensee occurring in December 2010.” *Id.* ¶ 134. As set forth in Dr. Becker’s original expert report, after the Synthes jury verdict and entry of judgment, Synthes and Globus “settled outstanding litigation between the companies,” which included a license to the '076, '616, and '207 Patents, among others, and a running royalty payment of 10% of net sales of the three static implants found to infringe by the jury. Doc. No. 105-1 Ex. A ¶¶ 139–141 & n.238.

In determining a reasonable royalty for the asserted patents, Dr. Becker’s original expert report relied in part on the 10% royalty rate in the Synthes settlement license. *Id.* ¶¶ 135–142, 149–153, 235–242, 247. Dr. Becker noted an “upward adjustment to the 10% settlement-influenced royalty rate could extend up to the 15% rate reflected in the jury award.” *Id.* ¶ 242.

Dr. Becker then explained:

To summarize, consideration of the starting point rates from Exactech and Synthes-Globus, after adjusting the latter for the fact that it was a settlement, implies a range of royalty rates from a low of 6% to as high as 15%. The upper end of that range requires some downward adjustment to reflect the greater degree of direct competition that was certainly present between Synthes and Globus as compared to the Flexuspine-Globus relationship.

Id. ¶ 246. Dr. Becker then concluded “it is my opinion that a reasonable royalty for a non-exclusive U.S. license to the patents-in-suit is a royalty rate of 10% applied to the net sales (as previously defined) of the accused Globus products.” *Id.* ¶ 247.

After the Court excluded Dr. Becker’s reliance on the Synthes settlement license, Dr. Becker amended his report, and instead relies on the Synthes jury verdict. Resp. Ex. A ¶¶ 132–

136, 140–146, 226–229, 236–237. Dr. Becker adjusted the jury verdict royalty rate downward to 12% of net sales because of the “lower level of direct competition between Flexuspine and Globus versus that of Synthes and Globus.” *Id.* ¶ 236. Dr. Becker then concluded “it is my opinion that the reasonable royalty is 10%.” *Id.* ¶ 237.

APPLICABLE LAW

A. Expert Testimony

Pursuant to Federal Rule of Evidence 702, “[a] witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:

- (a) the expert’s scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
- (b) the testimony is based on sufficient facts or data;
- (c) the testimony is the product of reliable principles and methods; and
- (d) the expert has reliably applied the principles and methods to the facts of the case.”

Rule 702 is broadly interpreted, and helpfulness to the trier of fact is its “touchstone.” *Kopf v. Skyrn*, 993 F.2d 374, 377 (4th Cir. 1993) (citing *Friendship Heights Associates v. Koubek*, 785 F.2d 1154, 1159 (4th Cir. 1986)). Testimony from an expert is presumed to be helpful unless it concerns matters within the everyday knowledge and experience of a lay juror. *Id.*

In *Daubert*, the Supreme Court recognized that the trial judge has a gate-keeping role to ensure that expert testimony is relevant and reliable. *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 589 (1993). The Court espoused five non-exclusive flexible factors that may be considered in deciding whether a proposed expert’s methodology is scientifically valid or reliable:

- (1) whether the expert’s theory can be or has been tested,
- (2) whether the theory has been subject to peer review and publication,
- (3) the known or potential rate of error of the technique or theory when applied,
- (4) the existence and maintenance of standards and controls, and

- (5) the degree to which the technique or theory has been generally accepted in the scientific community.

Id. at 593–95. The Court must make a “preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether the reasoning or methodology properly can be applied to the facts in issue.” *Id.* at 592–93. The *Daubert* factors are not mandatory or exclusive; a court must decide whether the *Daubert* factors are appropriate, use them as a starting point, and then ascertain if other factors should be considered. *Hathaway v. Bazany*, 507 F.3d 312, 318 (5th Cir. 2007). To be admissible, an expert’s opinion must be based on sufficient facts and a reliable methodology. *Id.*

In *Kumho Tire*, the Supreme Court applied the *Daubert* principles to technical or specialized expert testimony. The Court explained that the overarching goal of *Daubert*’s gate-keeping requirement is to “ensure the reliability and relevancy of expert testimony. It is to make certain an expert, whether basing testimony upon professional studies or personal experience, employees in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field.” *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 152 (1999). A trial court has the discretion to exclude expert testimony if there is an “analytical gap” between the expert’s reasoning and the conclusion. *Gen. Elec. Co. v. Joiner*, 522 U.S. 136 (1997).

After a court considers the *Daubert* factors, it may then consider whether other factors, not mentioned in *Daubert*, are relevant. *Black v. Food Lion, Inc.*, 171 F.3d 308, 312 (5th Cir. 1999). “The proponent [of the expert testimony] need not prove to the judge that the expert’s testimony is correct, but she must prove by a preponderance of the evidence that the testimony is reliable.” *Moore v. Ashland Chem., Inc.*, 151 F.3d 269, 276 (5th Cir. 1998).

B. Damages

A patentee is entitled to “damages adequate to compensate for the infringement, but in no event less than a reasonable royalty for the use made of the invention by the infringer.” 35 U.S.C. § 284. The patentee bears the burden of proving damages. *Dow Chem. Co. v. Mee Indus., Inc.*, 341 F.3d 1370, 1372, 1381 (Fed. Cir. 2003). There are two categories of infringement compensation: “the patentee’s lost profits and the reasonable royalty he would have received through arms-length bargaining.” *Lucent Techs., Inc. v. Gateway, Inc.*, 580 F.3d 1301, 1324 (Fed. Cir. 2009). The most common approach to determining a reasonable royalty is through a hypothetical negotiation, which “attempts to ascertain the royalty upon which the parties would have agreed had they successfully negotiated an agreement just before infringement began.” *Id.*

ANALYSIS

Globus seeks to exclude Dr. Becker’s reliance on the Synthes jury verdict, arguing it is “even less connected” to a hypothetical negotiation than the excluded settlement license, and “far more prejudicial.” Mot. at 7. Specifically, Globus contends: (1) Dr. Becker’s report still fails to establish that the Synthes litigation, involving different patents and different products, is technologically comparable to the patents and products at issue in this case, *id.* at 7–9, (2) the jury verdict in June 2013 “in no way reflects the economic value of *Flexuspine’s patents* to Globus as of January 2011,” *id.* at 2 (emphasis in original), (3) permitting Flexuspine to introduce evidence “that other Globus implants were found to infringe different patents before, and that another plaintiff won a large verdict from Globus” would be prejudicial, *id.* at 9, and (4) Globus would need to offer evidence of the settlement license in rebuttal, which would “effectively void[] the Court’s previous decision” *id.* at 2, 9.

Flexuspine responds that: (1) the Synthes jury verdict involved comparable technology to the technology in this case, as established in Dr. Becker's expert report, Globus's testimony regarding non-infringing alternatives and in other litigation, and classifications by the FDA and PTO, (2) the jury in Synthes was asked a question similar to the question the jury will be asked here, (3) the Court's reasons for excluding the Synthes settlement license do not compel exclusion of the Synthes jury verdict, and (4) the Court's *in limine* ruling is not a final ruling regarding the admissibility of the evidence.

The hypothetical negotiation, or "willing licensor-willing licensee," approach to determining a reasonable royalty "tries, as best as possible, to recreate the *ex ante* licensing negotiation scenario and to describe the resulting agreement." *Lucent Techs.*, 580 F.3d at 1325. The Court previously struck Dr. Becker's reliance on a settlement licensing agreement in the Synthes litigation, reasoning it was not sufficiently comparable to circumstances of a hypothetical negotiation in this case to aid the trier of fact. The Synthes jury verdict at issue here is even further removed from a hypothetical negotiation in this case than the settlement license that the Court previously struck. Furthermore, Dr. Becker's amended report and the evidence submitted in response to Globus's motion still fail to establish that the Synthes litigation involved sufficiently comparable technology and sufficiently comparable economic circumstances. For example, like the settlement license, the Synthes jury verdict involved technology that lacks an essential feature of the patents-in-suit. *See* Doc. No. 74 at 10 (noting "the intrinsic record [of the patents-in-suit] emphasizes expansion as the primary inventive contribution"); *see also ResQNet.com, Inc. v. Lansa, Inc.*, 594 F.3d 860, 869 (Fed. Cir. 2010) ("This court has long required district courts performing reasonable royalty calculations to

exercise vigilance when considering past licenses to technologies *other* than the patent in suit.”)
(emphasis in original).

Flexuspine has not demonstrated the jury verdict at issue here will aid the trier of fact in recreating a hypothetical negotiation between a willing licensor and willing licensee in this case. Consistent with the Court’s prior ruling, the Court therefore strikes Dr. Becker’s reliance on the Synthes jury verdict.

CONCLUSION

Globus’s *Daubert* Motion to Exclude Portions of Plaintiff’s Amended Damages Expert Report (Doc. No. 170) is therefore **GRANTED**. Dr. Becker’s reliance on the Synthes jury verdict in his amended report is hereby **STRICKEN**.

So ORDERED and SIGNED this

Aug 5, 2016



K. NICOLE MITCHELL
UNITED STATES MAGISTRATE JUDGE