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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
WACO DIVISION

PARKERVISION, INC., Plaintiff, v. INTEL CORPORATION, Defendant.	Case No. 6:20-cv-00108-ADA JURY TRIAL DEMANDED

PLAINTIFF PARKERVISION, INC.'S DAUBERT MOTION REGARDING DAMAGES ISSUES

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A. The Court should exclude certain of Perryman's opinions and discussions of [redacted] because they are untied to the facts of the case.

Intel's damages expert Dr. Marlin Ray Perryman, Ph.D. ("Perryman") offers opinions relating to (i) [redacted] that Intel acquired through its acquisition of Infineon; (ii) ParkerVision's patent portfolio values that were included in a Security and Exchange Commission ("SEC") filing, and (iii) [redacted]. (Ex. 1 at ¶¶ 224-228, 250-258). These valuations and Perryman's opinions about them are not helpful, reliable and relevant evidence; they will only serve to mislead and confuse the jury and should be excluded.

1. Perryman's opinions relating to the fair market value of Infineon's [redacted] patents in 2010 is misleading and untied to the facts of the case.

Perryman opines that "Mr. Benoit's damages opinion in this case is out of line with the facts," and uses Intel's 2011 acquisition of Infineon as an example of what he believes contradicts Benoit's analysis. (Ex. 1 at ¶ 220). Perryman argues that Infineon had a "well-developed, established product business with a significant patent portfolio," and notes, [redacted] (Ex. 1 at ¶¶ 220, 225). Perryman (1) compares [redacted] to ParkerVision's damages claim, and (2) compares the total $1.4 billion acquisition price to ParkerVision's damages claim. (Ex. 1 at ¶¶ 226 and 227). Both comparisons, however, are improper and should be excluded.

The issue in this case is the value of the technology covered by the ParkerVision patents asserted in this case – not any of Infineon's patents. Neither party has suggested that the Infineon patents are comparable to the asserted patents in this litigation. In fact, Perryman conceded that he does ***not*** consider [redacted] (Ex. 2 at 149:9-19 and 150:1-8). It follows, therefore, that his

consideration of non-comparable technology and transactions has no place in a proper damages analysis.

In addition, there are several other flaws with Perryman's comparisons to Infineon's portfolio and business valuations that make them unreliable and inappropriate. Perryman's first comparison uses the fair market value of Infineon's [redacted] patents by applying an *equal weighting to each patent*. Specifically, Perryman stated:

> *Assuming equal patent values*, that would translate to [redacted] per patent. Using that price per patent, the value of the six patents-in-suit asserted in this case would indicate a total value of [redacted] This amount is [redacted] times smaller than ParkerVision's damages claim of [redacted].

(Ex. 1 at ¶ 226).

Perryman's equal weighting of all patents in a portfolio runs counter to established damages law. *DataQuill Ltd. v. High Tech Comp. Corp.*, 887 F. Supp. 2d 999, 1023-24 (N.D. Cal 2011) (holding that in order to rely on licenses to a broad portfolio, experts "must present evidence sufficient to allow the jury to weigh the economic value of the patented feature against the economic value of the features and services covered by the license agreement.") *Golden Bridge Tech. v. Apple Inc.*, No. 5:12-cv-04882-PSG, 2014 U.S. Dist. LEXIS 68564, at *19 (N.D. Cal. 2014) (holding "the case law is clear that mere patent counting and dividing is not enough"). Different patents can – and do – have different values. Some inventions have great value, while other do not. By equally weighting all [redacted] Infineon patents (which again are not claimed to be comparable), Perryman's analysis improperly suggests that each patent provides the same technical and economic benefit, has the same patent life, was issued in the same time period, was being used, and/or was perceived to have value at the time of [redacted]. Perryman performed no analysis whatsoever as to the variation of value within the acquired patent portfolio to indicate whether all patents are of similar value, whether the majority of the acquired patents

have little to no value, or whether a select few of the acquired patents drive the majority of value. And Perryman provided no indication of whether and to what extent the [redacted] acquired patents were claimed to be embodied in any Infineon and/or Intel commercialized products or whether those products and technologies had become technologically obsolete as of the acquisition date. Further, he did not identify the percentage of the [redacted] patents that were U.S. patents or foreign patents. Again, Perryman did no analysis whatsoever to support his "assumed" equal weighting approach and his flawed assumption makes his analysis inherently unreliable

In addition, [redacted] does not make any adjustments to account for differences between a fair market valuation of a portfolio and, as required in a hypothetical negotiation, that a reasonable royalty is based on the assumption that the patents are valid and infringed. Moreover, a damages award is a pre-tax amount, while a fair market valuation is a post-tax number. Unlike a damage award in a patent case that is a pre-tax value without accounting for invalidity, non-infringement and other business risks, the fair market value of Infineon's patents was a post-tax value derived from an analysis that includes a discount rate and "individual surcharges [that were] added [to the discount rate] to account for the inherent risks of the assets." (Ex. 3 at 336). All of the above differences *undervalue* the patents in an acquisition context as opposed to the proper context of a *Georgia-Pacific* hypothetical negotiation. Using a post-tax, equally weighted, fair market value of [redacted] patents that are discounted to present value to reflect uncertainty in the context of a hypothetical negotiation analysis is improper and would only serve to confuse and mislead the jury.

In sum, Perryman plans to use patents that are not technologically or economically comparable that were valued according to an analysis that is not compatible with a hypothetical negotiation analysis to tell the jury that the average patent is worth [redacted] and that

ParkerVision's valuation for the six patents in suit is [redacted] higher than the average would indicate. Such a baseless, unreliable, and misleading opinion is highly prejudicial and completely disconnected from the facts of this case. It should, therefore, be excluded (along with the data underlying Perryman's planned discussion).

Equally as flawed is Perryman's second comparison that uses the entire $1.4 billion acquisition price to assign value to each of Infineon's [redacted] patents. Using this approach, Perryman claims that the value of each patent is [redacted] smaller than ParkerVision's damages claim. (Ex. 1 at ¶ 227). This approach, based on the entire acquisition price, is misleading and not tied at all to the facts of the case. Indeed, Perryman's approach is illogical and encompasses a host of business issues (from tax rates to geopolitical risk, to poor management) that have no applicability in the valuation of infringed patents pursuant to a hypothetical negotiation. It is another direct attempt to mislead the jury by proffering an absurd argument. Any use of the business values from Intel's acquisition of Infineon is unreliable and not tied to the facts of the case.

The Court should, therefore, exclude Perryman's opinions and discussions surrounding Deloitte's valuation of Infineon's [redacted] patents and any reliance on the fair market values of Intel's acquisition.

2. Perryman's discussions of ParkerVision's patent portfolio valuations included in ParkerVision's SEC filings are misleading and untied to the facts of the case and should not be admitted.

Perryman opines that the estimated value of ParkerVision's patent portfolio, as per its SEC filings, provides evidence of the total value of ParkerVision's entire patent portfolio, and that this value "would be much greater than the value of a nonexclusive U.S. license to the patents-in-suit." (Ex. 1 at ¶ 249). Despite making this conclusion, Perryman concedes that ParkerVision's SEC filings reflected book values of its patent portfolio that [redacted]

[redacted] (Ex. 1 at ¶ 252). Further, Perryman testified that book value and market value are [redacted] and there are differences between the [redacted] (Ex. 2 at 268:19-269:14). Perryman's own admissions indicate that a book value of a patent portfolio does not equate to the market value, let alone the market value of a portfolio that is infringed and valid that is assumed in a hypothetical negotiation in a litigation.

Moreover, Perryman testified that his report does not contain any [redacted] and that it did not occur to him to provide such an explanation in his report. (Ex. 2 at 269:16-270-9).

Accordingly, Perryman should be precluded from testifying about patent portfolio valuations included in ParkerVision's SEC filings. Allowing such testimony, where the admittedly different concepts of the book value and the market value of a patent portfolio are conflated, will lead to misleading and confusing the jury.

3. Perryman's discussions of ParkerVision's [redacted] are misleading and untied to the facts of the case and should not be admitted.

Perryman suggests that [redacted] provided in [redacted] at the hypothetical negotiation between ParkerVision and Intel. (Ex. 1 at ¶ 258). In this regard, Perryman seeks to provide several statements to the jury including:

- [redacted] (Ex. 1 at ¶ 232).
- [redacted] x. 2 at 250:11-13).

As discussed below, these foregoing statement and testimony are directly contradicted by the facts.

Perryman suggests that ParkerVision's own advisors agreed that a lower royalty rate was warranted for ParkerVision's portfolio. But Perryman's statement is unsupported because Price Waterhouse Cooper ("PWC"), ParkerVision's accounting firm, specifically questioned [redacted]. In particular, PWC stated that [redacted] and asked, [redacted] (Ex. 1 at ¶ 257). Perryman relies on PWC's statement to support his erroneous conclusion and [redacted]. Specifically, Perryman admitted [redacted]. (Ex. 2 at 262:21-263:7). Given Perryman's admission [redacted], any discussion of ParkerVision's advisors agreeing [redacted] must be stricken.

Perryman statements that [redacted] of ParkerVision's patent portfolio was derived [redacted] did *not* include [redacted] and, in fact, [redacted] states flat-out that [redacted] (Ex. 4 at p.3). As such, Perryman's conclusion that [redacted] ParkerVision's patent portfolio was determined under [redacted] should be stricken.

Likewise, Perryman's suggestion that ParkerVision and Intel would have considered the [redacted] at the hypothetical negotiation is without any basis. Perryman testified that

[redacted] (Ex. 2 at 261:22-262:9). But Perryman provides no explanation for why a [redacted] of ParkerVision's technology.[1] [redacted] renders it incomplete and not reliable. Perryman's bare statements about an [redacted] of what ParkerVision's patented technology was worth should, therefore, be excluded.

Additionally, Perryman provides no opinion or explanation for why [redacted], which was prepared to support ParkerVision's financial reporting to ParkerVision's external financial auditors, is comparable or indicative of the value of the patents-in-suit. (Ex. 4 at p.3). The [redacted] specifically states that [redacted]. Generally accepted accounting principles ("GAAP") require that intangible assets reflected on a company's balance sheet be tested for impairment, which would exist if the fair market value of those assets were determined to be lower than the book value of the assets that is reflected by the amount paid in legal fees and filing fees to obtain the assets. [redacted] (Ex 4 at p.3). Thus, [redacted] merely established that there was no need for ParkerVision to recognize an impairment of its patent

[1] [redacted] (Ex. 4 at p.3). [redacted] the '725, '528, '736 and '673 Patents asserted in this case had not yet been filed and thus would not be included in [redacted].

portfolio under GAAP. Moreover, as previously discussed, fair market value assessments are determined on a post-tax and present-value bases, which is not comparable to the determination of a running royalty, which assumes validity and infringement.

As discussed above, [redacted] (Ex. 2 at 262:21-263:7). Because the [redacted] is unreliable and inconclusive. The Court should therefore exclude Perryman's discussions, opinions, and reliance on [redacted].

B. The Court should exclude Perryman's opinions and reliance on the [redacted] because they are not comparable licenses

1. Perryman's determination of economic comparability of the [redacted] is unsupported, unreliable and not tied to the facts of the case.

Perryman suggests that the [redacted] are [redacted]. (Ex. 1 at ¶¶ 205 and 212). But Intel made no such valuation. In fact, Mr. Gray testified [redacted] (Ex. 5 at 112:14-113:1). Simply put, Gray [redacted] And by Intel failing to evaluate the economic value of [redacted]

technologies, any payment amounts included in the [redacted] simply have *no* relationship to any economic benefits or economic value pertaining to [redacted] technologies and patents. In other words, it is not possible to measure or opine on the supposed economic comparability of the [redacted] when Intel admits that was never done when it entered into the [redacted]. Perryman's conclusions surrounding the economic comparability of the [redacted] should, therefore, be excluded because they are contradicted by Intel's own admissions. *See Ericsson, Inc. v. D-Link Sys., 773 F.3d 1201, 1228-29 (Fed. Cir. 2014)* (holding that "[t]estimony relying on licenses must account for such distinguishing facts [regarding comparability] when invoking them to value the patented invention"); *Corelogic Info. Sol'ns, Inc. v. Fiserv, Inc.*, 2012 U.S Dist. LEXIS 196809, at *10 (E.D. Tex. 2012) (holding that "the proponent of a license must establish its technical and economic comparability *prior to* introducing the royalty amount to the jury").

2. Perryman fails to offer or provide an opinion on the value of the [redacted] agreements.

In his expert report, Perryman does not provide an opinion on the value of the [redacted]. Perryman states that due to the [redacted] providing [redacted] three downward adjustments are warranted. (Ex. 1 at ¶¶ 210 and 219). But Perryman does not offer an opinion on the value of the [redacted] after his three downward adjustments, and he admitted that he never performed that analysis or quantified those adjustments.

With respect to the [redacted], Perryman testified as follows:

[redacted]

[redacted]

(Ex. 2 at 247:10-248:2).

Perryman's reliance on Gray's testimony to support his opinion in this regard is equally flawed because Gray [redacted] (Ex. 5 at 129:6-9). By failing to perform any quantitative analysis on the [redacted] (and it not being in his report), any testimony from Perryman regarding the value of the [redacted] is unreliable and cannot assist the jury in understanding or determining the comparability of the [redacted].

Similarly, Perryman relies on Dr. Subramanian to support the statement in his report that the purported advantages of the technology covered by the patents in the [redacted] are [redacted] (Ex. 1 at ¶¶ 217). But Perryman has no support for this statement as Dr. Subramanian opines only that the benefits of the [redacted] Therefore, Perryman's statement regarding the technology covered in the [redacted] is unsupported and must be stricken.

Like the [redacted], Perryman neither provides any opinion on the value of the [redacted] nor quantified the three purported downward adjustments. (Ex. 2 at 249:14-25). And that is further troubling to Perryman's use of the [redacted] because that agreement is [redacted] and includes terms that would not exist in the

hypothetical patent *license* between ParkerVision and Intel. For example, Perryman testified that [redacted] (Ex. 2 at 248:19-25). Perryman failed to provide any indication of what quantitative value equates to [redacted] and concluded, without any analysis or support, that [redacted] By failing to quantify the adjustments that are supposedly warranted for [redacted], a jury will be unable to determine the value of [redacted] to corroborate Perryman's *ipse dixit* conclusion that [redacted] would provide an offset to the ownership rights granted in [redacted] By not performing a proper and supported comparability analysis to account for the [redacted] nature of [redacted], any testimony from Perryman at trial regarding the value of [redacted] is unreliable hand-waving, cannot assist the jury in understanding or determining the comparability of [redacted], and unfairly prejudicial to ParkerVision.

Perryman's discussions and testimony about [redacted] cannot assist the trier of fact because he simply points to the amounts paid under those [redacted] but offers no opinion on, and in fact, fails to perform any analysis that could help inform the jury of the value of [redacted]. The analytical gap between the value associated with [redacted], for which there is admittedly no evidence and Perryman offers no opinion on, and Perryman's proffered opinions that [redacted] are comparable to the hypothetical negotiation here, is too great to be sustained under Daubert. Any testimony about the alleged comparability of [redacted]

[redacted] would be unreliable expert say-so, mislead the jury, confuse the issues relevant to a proper damages analysis in this case, and should be excluded.

3. Perryman improperly relies on [redacted] for support that Intel uses lump-[redacted]

Perryman relies on [redacted] as confirmation that [redacted] (Ex. 1 at ¶ 218). Perryman's use of [redacted], which is a patent purchase agreement, for support that Intel utilizes lump-sum royalty structures is improper and misleading. Perryman testified that [redacted] (Ex. 2 at 255:16-256:8). Perryman does not provide any explanation or evidentiary support for why the payment structure of [redacted] is comparable to the hypothetical patent *license* between ParkerVision and Intel. Perryman's own admission indicates that [redacted] are exclusively lump-sum or fixed fee payments, which is not comparable to a patent license that can take the form of either a lump-sum or running royalty. Accordingly, Perryman's use of [redacted] as confirmation that [redacted] is misleading, unreliable *ipse dixit* and should be excluded.

C. The Court Should Exclude Perryman's Opinions and Reliance on the [redacted], Which Are Not Comparable Licenses

Perryman suggests that ParkerVision's [redacted], are comparable and indicative of the value of a hypothetical license between ParkerVision and Intel. (Ex. 1 at ¶¶ 146-158). Though Perryman's report argues that [redacted] are comparable, he conceded at his deposition that the

[redacted] (Ex. 2 at 213:10-14 and 22-24, 219:2-4). Additionally, while Perryman admitted [redacted] were for a different technology, Perryman also admitted that [redacted]. These admissions about the lack of comparability should preclude Perryman from testifying at trial about [redacted] or that they are indicative of the value of any hypothetical license between ParkerVision and Intel at trial. *See Ericsson, Inc.,* 773 F.3d at 1228-29 (Fed. Cir. 2014).

Further, in addition to failing to establish technological and economic comparability, Perryman also does not explain why [redacted], which are dated [redacted] after the 2013 hypothetical negotiation, are instructive. In fact, Perryman opines that an agreement between [redacted] and ParkerVision is not comparable or instructive because it was entered [redacted] (Ex. 1 at ¶ 176). Perryman cannot have it both ways. If an agreement entered [redacted] years from the hypothetical negotiation is not comparable or instructive, then agreements that are [redacted] years removed from the hypothetical negotiation should also not be comparable or instructive. For this additional reason, Perryman's expected testimony about [redacted] should be excluded.

D. The Court should exclude Perryman's unsupported technical opinions that he is not qualified to offer.

As discussed below, Perryman is seeking to provide technical opinions to the jury that are either based on Perryman's understandings from Dr. Subramanian that are *not* contained in either of Dr. Subramanian's reports or based solely on Perryman's conjecture:

[redacted] (Ex. 2 at 174:17-25).

In its gatekeeping role, the Court, pursuant to Federal Rule of Evidence 702, is charged with "ensur[ing] that expert testimony admitted into evidence is both reliable and relevant." *Sundance, Inc. v. DeMonte Fabricating Ltd.*, 550 F.3d 1356, 1360 (Fed. Cir. 2008). This is because "[e]xpert evidence can be both powerful and quite misleading . . . ." *Id.* at 595.

In support of his opinion that the patents-in-suit provide minimal, if any, noticeable benefits to the end users of the products-at-issue, Perryman relies on his discussions with Intel's liability expert Dr. Vivek Subramanian and Dr. Subramanian's noninfringement report. (Ex. 1 at ¶ 358) Perryman's citation to Dr. Subramanian's noninfringement report includes a reference to a 59-page range of Dr. Subramanian's report, none of which support Perryman's opinion. (Ex. 1 at ¶ 358, n. 571) Specifically, in none of these 59-pages does Dr. Subramanian provide any explanation for what constitutes significant benefits, and more importantly never states that such benefits are "minimal, if any." Perryman, therefore, has no support for his technical opinion and he is not qualified to derive a conclusion that the asserted patents provided minimal, if any, noticeable benefits. Accordingly, any opinion from Perryman regarding the alleged lack of benefits.

In addition, during his deposition, Perryman discussed [redacted] (Ex. 2 at 172-177:12, 178:6-181:10). An expert should not be allowed to testify if he or she "is not qualified to testify in a particular field or on a

given subject." *Wilson v. Woods*, 163 F.3d 935, 937 (5th Cir. 1999). Perryman does not possess any of the necessary knowledge, skill, experience, training, or education relating to baseband technology or the role that technology plays in transceivers to offer an opinion or his "observations" on this topic. Perryman admitted that [redacted] (Ex. 2 at 176:13-15 and 177:1-2). Accordingly, any "observations" or testimony relating to baseband technology that is derived from Perryman's own experiences must be excluded.

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