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 REPLY BRIEF IN SUPPORT OF ITS DAUBERT MOTION REGARDING DAMAGES ISSUES

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

I. INTRODUCTION

Intel's opposition contains arguments that attempt to mislead the Court by contradicting its own damages expert, inadvertently confirms ParkerVision's arguments, and does not properly address the issues at hand. For the reasons stated in its motion and set forth below, ParkerVision respectfully requests the Court to grant ParkerVision's Daubert motion on damages issues.

II. ARGUMENT

A. Dr. Perryman's Opinions and Reliance on [redacted] do not Sufficiently Address Economic Comparability and Should be Excluded

Intel's opposition fails to establish that Dr. Perryman sufficiently analyzed the economic comparability of [redacted]. First, Intel argues that Dr. Perryman used a methodology in assessing the economic comparability of [redacted] that the Federal Circuit has endorsed. To support of its argument, Intel identified a subset of the factors that various courts have articulated (many of which are duplicative of GP Factors 5, 7, 15) that inform adjustments that may be necessary to account for differences between an agreement relied on versus the agreement the parties would have reached in a hypothetical negotiation.[1] Intel's argument implies that any agreement can be relied upon so long as adjustments are subsequently made. But this argument highlights Intel's failure to apply properly the methodology it espouses. As articulated by the *Lucent* court:

> The second *Georgia-Pacific* factor is '[t]he rates paid by the licensee for the use of other patents comparable to the patent in suit.' *This factor examines whether the licenses relied on by the patentee in proving damages are sufficiently comparable to the hypothetical license at issue in suit.*

[1] Contrary to its representations, the cases Intel cited do not specifically provide the factors that make a prior agreement economically comparable to the hypothetical negotiation.

Lucent Techs., Inc. v. gateway, Inc., 580 F.3d 1301, 1325 (Fed. Cir. 2009). Thus, fundamentally, an agreement must be established by the proponent as being sufficiently comparable to the patents-in-suit for it to be instructive as to the hypothetical license. Once that comparability has been established, adjustments may be warranted in accordance with other GP Factors. But such potential adjustments do not cure an improper starting point that is based on an agreement that has not been established to reflect the economic contributions of other patents espoused to be comparable to the patents-in-suit. Dr. Perryman does not point to [redacted]. Dr. Perryman ignores this glaring problem. Dr. Perryman has therefore failed to meet the requirement of establishing comparability of [redacted] to the hypothetical license. No amount of adjustments under other GP Factors can cure this erroneous and unreliable starting point.

In an attempt to sweep aside his lack of analysis and failure to establish the foundational requirement of economic comparability of [redacted], Intel erroneously argues that [redacted] as his opinion. Resp. at 3 n. 4. Dr. Perryman did not do that. Contrary to Intel's argument, [redacted]"[2] Ex. ___ at ¶ 395. Dr. Perryman was questioned numerous times in his deposition regarding his conclusions of [redacted]

[2] As another example, [redacted]" ECF No. 178-2 at 247:10-248:2 (emphasis added).

[redacted] and never once opined that he conservatively used the full payment amounts and provided no opinion in that regard.

Second, Intel argues that [redacted] To support its argument, Intel cited testimony of [redacted]." Resp. at 4. But Intel omits a key part of Mr. Gray's testimony which highlights that [redacted]. Intel's omission is not insignificant [redacted]. Ex. 1 at 74:23-75:11, 127:14-128:12. To the extent that [redacted]. Intel's use of Mr. Gray's testimony inadvertently supports ParkerVision's argument that it is not possible to measure or opine on the economic comparability [redacted] This alone is grounds for excluding [redacted]. *See LaserDynamics, Inc. v. Quanta Computer, Inc.*, 4 694 F.3d 51, 80 (Fed. Cir. 2012) (holding that "two licenses, although in the form of lump sums, were also rejected for not describing how the lump sums were calculated or the type and volume of products intended to cover the licenses.").

Intel's argument that [redacted] is also not persuasive. Intel asserts that [redacted] But neither Intel nor Dr. Perryman provided any indication that such "fair market values" can be economically comparable to a hypothetical license to the asserted patents. Notably, Intel failed to address ParkerVision's argument that fair market values, which are post-tax and discounted to present value, are not comparable to the determination of a reasonable royalty which assumes validity and infringement and are performed on a pre-tax basis. At bottom, Perryman has no evidentiary and reliable basis to [redacted] as economically comparable to the hypothetical negotiation and his reliance on them should be excluded.

B. Dr. Perryman's opinions and reliance on the Buffalo and ZyXEL agreements do not sufficiently address economic comparability and should be excluded.

Intel fails to show that Perryman's opinions surrounding the Buffalo and ZyXEL agreements address economic comparability. Intel claims that Dr. Perryman did not admit to the Buffalo and ZyXEL agreements not being economically comparable. As support, Intel cites to Dr. Perryman's testimony surrounding questions relating to [redacted] Intel states that [redacted] Resp. at 8. Intel's argument does not address the issue of economic comparability, nor does it have any relevance to the issue of economic comparability. If anything, Intel further supports ParkerVision's position that Dr. Perryman does not believe the Buffalo and ZyXEL agreements are economically comparable. Perryman's testimony describes the [redacted]

[redacted] Dr. Perryman testified that [redacted] Ex. 2 at 217:19-219:4, 220:4-222:3).

In addition, Intel argues that the Buffalo and ZyXEL agreements are not too far removed from the hypothetical negotiation date because those agreements "were entered into after the patents-in-suit were granted." Resp. at 9. Intel cites no legal authority to support its assertion that the Buffalo and ZyXEL agreements are not too far removed from the date of the hypothetical negotiation simply because the asserted patents were all granted as of the time the agreements were entered into. Though not specifically cited, in the event Intel is referencing the "book of wisdom" to support its assertion of analyzing ex-post data, the "book of wisdom" requires an expert to analyze the ex-post evidence to determine if it is reflective of economic conditions that would have existed and therefore influenced what negotiators would have agreed to at the time of the negotiation. *See generally Fromson v. Western Litho Plate Supply Co.*, 853 F.2d 1568 (Fed. Cir. 1988). But Dr. Perryman did not perform any such economic analysis nor did he provide any opinions in that regard. This is not insignificant because the Buffalo and ZyXEL agreements were entered in 2020 and 2021, respectively, which had drastically different economic conditions compared to the 2013 hypothetical negotiation when Intel was trying to enter the nascent 4G cellular market. The Federal Circuit has excluded licenses that were negotiated after the date of first infringement due to the financial landscape being drastically different post-infringement. *See Odetics, Inc. v. Storage Tech. Corp.*, 185 F.3d 1259, 1276-77 (Fed. Cir. 1999) (finding no error in reasoning that "four and five years later . . . is much, much,

too late, after the financial landscape has changed remarkably in the four to five years"). As such, Intel's argument about the Buffalo and ZyXEL agreements being entered after the hypothetical negotiation does not exempt those agreements from being too far removed to be reliable, especially where Perryman did not even consider the economic market conditions of ex-post data and his prior opinion of over five years removed from the hypothetical negotiation being too far to be comparable. ECF No. 178-1 at ¶ 176.

C. Dr. Perryman is not qualified to offer or derive his own technical opinions.

Intel argues that Dr. Perryman's conclusion that the benefits of the technology [redacted] being greater than the advantages of the asserted patents is properly supported by Dr. Subramanian's conclusions referenced in his report. Intel references Dr. Subramanian's discussion that [redacted]. Inadvertently, this is consistent with ParkerVision's argument that Dr. Subramanian's report only references [redacted] Ex. 3 at ¶ 1012). Further, Intel's citations to portions of Dr. Subramanian's report is not persuasive as the eight-page range from Dr. Subramanian's report does *not* include any discussions of [redacted] having "greater" advantages to the patents-in-suit. ECF No. 178-1 at ¶ 207 n. 311; Ex. 3 at pp. 595-602.

Second, Intel argues that Dr. Perryman's technical conclusions regarding the magnitude of the benefits of the asserted patents is supported by Dr. Subramanian's "technical analysis." Resp. at 9-10. Intel cites to eighty-three paragraphs of Dr. Subramanian's report as support for Dr. Perryman's conclusion of "minimal, if any," noticeable benefits. These paragraphs are where Dr. Subramanian discusses his disagreement with Dr. Steer's conclusions

of the benefits of the patents-in-suit, but there is no statement or opinion from Dr. Subramanian where he says the benefits of the patents-in-suit are "minimal, if any." Indeed, as a matter of principal, Dr. Subramanian's report does not include any opinions of what he believes are the benefits of the asserted patents if Intel is found to have infringed the patents-in-suit. Dr. Perryman therefore has no basis—and is therefore not qualified—to derive an opinion that the benefits of the claimed invention are "minimal, if any." For the same reason, Dr. Perryman has no basis to opine as to the magnitude of those benefits which Dr. Subramanian only characterizes as not being "significant". Ex. 3 at ¶ 1017)

Lastly, Intel argues that Perryman's testimony surrounding his prior experiences relating to the significance of baseband technology was not a technical opinion, but an observation from "his extensive experience . . . as an economist who has studied the market for cellular products over a period of many years." Resp. at 10. But Intel's argument does not address the issue-at-hand. For example, [redacted] ECF No. 178-2 at 174:22-25. As an economist, Dr. Perryman should not be permitted to offer such technical opinions of the significance of baseband technology no matter the "extensive experience" he may have.

D. Dr. Perryman's analysis of the [redacted] is unreliable, untied to the facts of the case and not a reasonableness check.

Intel argues that [redacted] of ParkerVision's IP portfolio is merely a "reasonableness check" that should not be excluded due to ParkerVision's arguments going to the weight of the evidence. Resp. at 10, 12. First, Intel incorrectly characterizes Dr. Perryman's use of the [redacted] as a "reasonableness check." That is misleading. Dr. Perryman testified numerous times that the [redacted] was one of his "key" and/or "principal"

comparables he used in determining a reasonable royalty in this matter and was not merely a "reasonableness check." ECF No. 178-2 at 150:5-24, 217:22-218:6.

Second, Intel argues that [redacted]" in which [redacted] Intel Response, p. 11. Neither Intel nor Dr. Perryman provide any evidence [redacted] as Intel only references a *proposed* call between the parties [redacted] Additionally, as to [redacted] ECF No. 178-2 at 262:21-263:13. But that was speculation; Dr. Perryman did not cite to or make any reference to what [redacted] which are not insignificant adjustments as Dr. Perryman did not dispute in his deposition that the [redacted] ECF No. 178-2 at 263:14-264:10. As such, [redacted]

Finally, Intel argues that Dr. Perryman's analysis of the [redacted] was "not premised on any such assumption [of validity and enforceability] and he did not state in his report or the deposition testimony that ParkerVision cites that it was." Resp. at 12. Intel's argument is incorrect because—in at least two instances—Perryman testified that [redacted] was performed under assumptions of validity and enforceability. ECF No. 178-2 at 218:1-6, 250:7-13. Perryman is wrong. And the underlying document directly contradicts his

testimony. Even if his error were set aside, Dr. Perryman did not performed any analysis or provided any opinions to the [redacted] adjusting for assumptions of validity and enforceability. Therefore, the [redacted] an improper comparison to a reasonable royalty in this matter and cannot assist the jury even as a purported "reasonableness check."

E. Dr. Perryman's analysis of the [redacted] is unreliable, improper and not a reasonableness check.

Intel argues that Dr. Perryman's analysis of [redacted] provide "important context" that will assist the jury and serves as a "reasonableness check" on Mr. Benoit's damages opinion. Resp. at 12, 15. Intel asserts that Dr. Perryman's analysis of the [redacted] is tied to the facts of the case due to Dr. Subramanian identifying [redacted] at issue in this matter. Resp. at 13. But neither Dr. Perryman nor Dr. Subramanian performed any analysis to compare the benefits and economic value of [redacted] to the patents-in-suit. To the contrary, without performing any analysis, adjusting for assumptions of validity or even accounting for the discounted values included in the [redacted], Dr. Perryman assigns equal weighting to each of the acquired patents and divides by the fair market value of the patents and the entire purchase price. Dr. Perryman's equal-weighting methodology is fundamentally flawed and improper, and Intel cites no legal authority to support it. *See* ECF No. 178.

F. Dr. Perryman's reliance on the Book Value of ParkerVision's IP portfolio is improper and not a reasonableness check.

Intel argues that the book value of ParkerVision's IP portfolio serves as a "reasonableness check" on Mr. Benoit's damages opinion. Resp. at 15. Intel asserts that the

differences between book value and market value are not a basis for exclusion due to being a "bold argument" in which ParkerVision does not cite to any caselaw supporting its argument. As a matter of principle, Intel's expert admitted that ParkerVision's reported book value of its IP portfolio is "not necessarily representative of the market value," and there are differences between book value "relative to what someone might pay for something." ECF No. 178-1 at ¶ 252; ECF No. 178-2 at 268:19-269:3. Though the difference between book value and market value is a fundamental economic concept in which ParkerVision need not cite to caselaw for support, Dr. Perryman's admission that he did not provide a detailed explanation of the differences between market value versus book value, and his failure to perform any analysis adjusting the reported book value of ParkerVision's IP portfolio to equate to a market value, cannot assist a jury in any regard. Accordingly, Perryman's reliance on the book value of ParkerVision's patent portfolio is improper and should be excluded, and should not be admissible as a misleading and purported "reasonableness check."

III. CONCLUSION

For the foregoing reasons, the Court should exclude Dr. Perryman's opinions and reliance on the evidence identified in this Motion and preclude any corresponding testimony at trial.

Dated: November 22, 2022

Respectfully submitted,

/s/ Raymond W. Mort, III

Raymond W. Mort, III
Texas State Bar No. 00791308
THE MORT LAW FIRM, PLLC
501 Congress Avenue, Suite 150
Austin, Texas 78701
Tel/Fax: 512-865-7950

Of Counsel:
Ronald M. Daignault (*pro hac vice*)*
Chandran B. Iyer (*pro hac vice*)
Jason S. Charkow (*pro hac vice*)*

Scott R. Samay (*pro hac vice*)*
Stephanie Mandir (*pro hac vice*)
Zachary H. Ellis (Texas Bar No. 24122606)
rdaignault@daignaultiyer.com
cbiyer@daignaultiyer.com
jcharkow@daignaultiyer.com
ssamay@daignaultiyer.com
smandir@daignaultiyer.com
zellis@daignaultiyer.com

DAIGNAULT IYER LLP
8618 Westwood Center Drive - Suite 150
Vienna, VA 22182

**Not admitted in Virginia*

Attorneys for ParkerVision, Inc.

CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of November, 2022, a true and correct copy of the foregoing document was forwarded by electronic mail to all counsel of record for Defendant Intel Corporation.

Dated: November 22, 2022

/s/ Raymond W. Mort, III
Raymond W. Mort, III