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14
15 **UNITED STATES DISTRICT COURT**
16 **SOUTHERN DISTRICT OF CALIFORNIA**

17 VIASAT, INC.,

18 Plaintiff,

19 vs.

20 SPACE SYSTEMS/LORAL, INC.,
LORAL SPACE &
COMMUNICATIONS INC.,

21 Defendants/Counterclaim
22 Plaintiffs.

Case No. 3:12-cv-00260-H-WVG

Hon. Marilyn L. Huff

**SS/L'S MOTION FOR JUDGMENT
AS A MATTER OF LAW
(RENEWED), OR A NEW TRIAL
(12 OF 12), REGARDING BREACH
OF CONTRACT**

Date: July 22, 2014

Time: 9:00 a.m.

Place: Courtroom 15A

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1 Space Systems/Loral, LLC (“SS/L”) moves¹ for judgment as a matter of law
2 that SS/L did not breach either the March 2006 NDA (Ex. B², S-552; Ex. C, S-547)
3 or the ViaSat-1 Build Contract (Ex. D, V-188). Alternatively, SS/L moves for a
4 new trial on breach of contract under Rule 59.

5 ViaSat’s breach of contract allegations can be divided into two categories:
6 (1) those involving Articles 22 and 39 of the Build Contract, and (2) those
7 involving the March 2006 NDA and the non-disclosure provision (Article 28) of the
8 Build Contract (the “NDAs”). SS/L could not have breached the limited license
9 provisions in Articles 22 and 39 of the Build Contract, whereby ViaSat merely
10 waived its right to sue as long as SS/L used ViaSat alleged IP within the scope of
11 its license. To the extent Articles 22 and 39 contain affirmative prohibitions on
12 SS/L, ViaSat failed to provide substantial evidence from which the jury could
13 reasonably find a breach. Meanwhile, by the plain terms of the NDAs, ViaSat could
14 not prove breach of the March 2006 NDA or Article 28 of the Build Contract
15 without proving SS/L disclosed information that was (1) marked as proprietary to
16 ViaSat; (2) not already known to SS/L, and (3) not publicly known. The trial record
17 is devoid of evidence from which the jury could find a disclosure by SS/L meeting
18 all of these criteria. Judgment as a matter of law is appropriate.

21 ¹ SS/L hereby moves for judgment as a matter of law (“JMOL”) pursuant to Rule 50(a) and,
22 pursuant to Rule 50(b), renews the motion for JMOL that it made before the close of evidence.
Alternatively, SS/L moves for a new trial pursuant to Rule 59.

23 ² Unless otherwise stated, all exhibits referenced herein are attached to the Declaration of Mark
24 Musico in Support of Defendants’ Motion for Judgment as a Matter of Law (Renewed), or a New
Trial (12 of 12), Regarding Breach of Contract, filed concurrently herewith. References to “Trial
Tr.” are included in Exhibit A.

I. LEGAL STANDARD

A. Judgment as a Matter of Law

Judgment as a matter of law (“JMOL”) may be granted and a jury verdict can be overturned “if the evidence, construed in the light most favorable to the nonmoving party, permits only one reasonable conclusion, and that conclusion is contrary to the jury’s verdict.” *Lucent Techs., Inc. v. Gateway Inc.*, 580 F.3d 1301, 1309 (Fed. Cir. 2009). “[D]istrict court judges must scrutinize the evidence carefully to ensure that the ‘substantial evidence’ standard is satisfied.” *Id.* at 1336. Substantial evidence is “more than a mere scintilla” and is “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” *The Johns Hopkins Univ. v. Datascope Corp.*, 543 F.3d 1342, 1348 (Fed. Cir. 2008).

B. Motion for New Trial

Whether to grant a new trial on some or all issues, pursuant to Fed. R. Civ. P. 59, is a matter of the trial court’s discretion. *City Solutions, Inc. v. Clear Channel Commc’ns*, 365 F.3d 835, 843 (9th Cir. 2004). Courts apply a lower standard of proof to motions for new trial than they do to JMOL motions. *William Inglis v. ITT Cont’l Baking Co.*, 668 F.2d 1014, 1026–7 (9th Cir. 1981) “[T]he trial court may grant a new trial, even though the verdict is supported by substantial evidence, if ‘the verdict is contrary to the clear weight of the evidence or is based upon evidence which is false, or to prevent, in the sound discretion of the trial court, a miscarriage of justice.’” *Wordtech Sys. v. Integrated Networks Solutions, Inc.*, 609 F.3d 1308, 1313 (Fed. Cir. 2010) (quoting *United States v. 4.0 Acres of Land*, 175 F.3d 1133, 1139 (9th Cir. 1999)). In deciding a motion for new trial, the court “has the right, and indeed the duty, to weigh the evidence” and may evaluate the credibility of the

1 witnesses. *Murphy v. City of Long Beach*, 914 F.2d 183 (9th Cir. 1990); *United*
2 *States v. Kellington*, 217 F.3d 1084, 1095 (9th Cir. 2000). The court is not required
3 to view the evidence from the perspective most favorable to the prevailing party.
4 *Kellington*, 217 F.3d at 1095.

5 **II. BUILD CONTRACT ARTICLES 22 & 39**

6 There is not substantial evidence in the record from which the jury could
7 conclude SS/L breached Articles 22 or 39 of the Build Contract. Article 39.2(B) is a
8 mere limited license whereby ViaSat waived its right to sue as long as SS/L used
9 ViaSat alleged IP within the scope of its license. Article 39.2(D), meanwhile, does
10 impose affirmative prohibitions on reverse engineering or filing for patents on
11 ViaSat IP. But the only evidence introduced by ViaSat as to this provision related
12 to SS/L's alleged filing of a patent on the "Option 3 email," which as a matter of
13 law is not ViaSat IP and thus cannot form the basis for a breach of contract.

14 Article 22 has a parallel set of licenses and prohibitions regarding ViaSat's
15 capacity tool. Article 22.2.3 simply grants SS/L a limited license to use the capacity
16 tool for work on the ViaSat-1 project, so there can be no claim for "breach of this
17 provision. While Article 22.2.4 imposes affirmative prohibitions on, for example,
18 reverse engineering the tool, there is no evidence that SS/L breached the affirmative
19 promises it made in Article 22.2.4.

20 **A. Legal Framework**

21 The Build Contract is governed by New York law. Ex. D (V-188) at 120 §
22 34.12. There has been no suggestion by either party that the language of the Build
23 Contract is ambiguous. The contract interpretation issues raised in this motion are
24 thus purely legal matters for resolution by the Court. *805 Third Ave. Co. v. M.W.*

1 *Realty Associates*, 58 N.Y.2d 447, 451, 448 N.E.2d 445, 447 (1983). The Federal
 2 Circuit, applying New York law, summarized the relevant background principles of
 3 contract interpretation:

4 Under New York law, “[c]onstruction of an unambiguous contract is a
 5 matter of law, and the intention of the parties may be gathered from the
 6 four corners of the instrument and should be enforced according to its
 7 terms.” *Beal Sav. Bank v. Sommer*, 8 N.Y.3d 318, 324, 834 N.Y.S.2d 44,
 8 47-48, 865 N.E.2d 1210, 1213-14 (2007). New York courts construe
 9 contracts “so as to give full meaning and effect to the material
 10 provisions,” mindful that a proper “reading of the contract should not
 11 render any portion meaningless.” *Id.* “Further, a contract should be ‘read
 as a whole, and every part will be interpreted with reference to the whole;
 and if possible it will be so interpreted as to give effect to its general
 purpose.’” *Id.* (quoting *Westmoreland Coal Co. v. Entech, Inc.*, 100
 N.Y.2d 352, 358, 763 N.Y.S.2d 525, 794 N.E.2d 667, 670 (2003)).

12 *Imation Corp. v. Koninklijke Philips Electronics N.V.*, 586 F.3d 980, 985 (Fed. Cir.
 13 2009). As to any factual matters, ViaSat has failed to provide sufficient evidence to
 14 establish a breach of the Build Contract.

15 **B. Article 39 of the Build Contract**

16 The limited license provision of Article 39.2(B) provides:

17 Subject to the terms of this Contract, [ViaSat] **grants to [SS/L] a**
 18 **nonexclusive, nontransferable, royalty-free license** during the term of
 19 this Contract, with no right to sublicense (except to Subcontractors), under
 20 Purchaser Intellectual Property only **to the extent necessary to provide**
the Work under this Contract.

21 Ex. D at SSL0099862-63 (emphasis added). Article 39.2(D), meanwhile,
 22 imposes only two specific prohibitions on use of ViaSat IP by SS/L:

23 Each Party **agrees not to reverse engineer** the Intellectual Property of the
 24 other Party provided to such Party in connection herewith (whether

1 provided prior to or after EDC). Each Party **agrees not to file for patents**
 2 covering the Intellectual Property Rights owned by the other Party hereto.

3 *Id.* at SSL009863 (emphasis added). For purposes of both provisions, ViaSat’s
 4 “Intellectual Property” is limited to “matter in which an Intellectual Property Right
 5 subsists.” Ex. D at SSL0099738. “Intellectual Property Right(s),” in turn, include
 6 only “common law and statutory proprietary rights with respect to Intellectual
 7 Property.” *Id.*

8 1. Article 39.2(B)

9 Under the plain language of the contract, Article 39.2(B) is merely a limited
 10 license for SS/L to use certain ViaSat IP. It has no additional significance, let alone
 11 the sweeping prohibitions ViaSat alleged it imposes on SS/L.

12 a. Limited License Provision

13 It is well-recognized under New York law that a license constitutes nothing
 14 more than a “mere waiver of the right to sue by the patentee.” *See Elgin Nat. Watch*
 15 *Co. v. Bulova Watch Co.*, 281 A.D. 219, 221 (N.Y. App. Div. 1953); *Bottlers' Seal*
 16 *Co. v. Rainey*, 122 N.E. 200, 201 (N.Y. 1919) (“The licensor, in law, undertakes
 17 merely that it will not sue for infringement....”). The Supreme Court and lower
 18 federal courts around the country share this view. *Gen. Talking Pictures Corp. v. W.*
 19 *Elec. Co.*, 304 U.S. 175, 181 (1938) (license is mere waiver of right to sue); *Eli*
 20 *Lilly & Co. v. Genentech, Inc.*, 1990 WL 305392, at *2-4 (S.D. Ind. July 17, 1990)
 21 (collecting cases); *see also Mallinckrodt, Inc. v. Medipart, Inc.*, 976 F.2d 700, 707
 22 n.6 (Fed. Cir. 1992) (noting that “a license is simply a promise not to sue for what
 23 would otherwise be patent infringement” and declining to find that licensor had
 24 additional remedy beyond patent law for use exceeding the scope of license).

1 By its plain terms, Article 39.2(B) merely “grants” a “license” to SS/L that
2 protects it against suit by ViaSat for work performed on the ViaSat-1 satellite.
3 Article 39.2(B) is a provision that inures to SS/L’s benefit, not ViaSat’s. ViaSat
4 agreed not to sue SS/L for infringement of its asserted IP so long as SS/L used that
5 IP within the scope of the license.

6 b. No Reciprocal Promise

7 SS/L, moreover, made no reciprocal promise not to use the IP outside the
8 scope of the license. When ViaSat wanted affirmative promises from SS/L it got
9 them—for example, SS/L’s promise in Article 28 not to disclose non-public
10 proprietary information. *See* Ex. D at SSL0099835-37. The presence of a separate
11 non-disclosure provision in the Build Contract is inconsistent with ViaSat’s
12 assertion that Article 39 restricts use of ViaSat’s alleged confidential information.

13 Similarly, SS/L made affirmative promises in Article 39.2(D) not to file for
14 patents on or to reverse engineer ViaSat’s intellectual property. The presence of
15 explicit reciprocal promises in Article 39.2(D) undermines any argument that
16 Article 39.2(B) contains any implied reciprocal promise. Indeed, ViaSat’s reading
17 of Article 39.2(B) as a blanket prohibition on use of ViaSat IP would violate basic
18 principles of contract interpretation by rendering superfluous the more specific
19 prohibitions on use of ViaSat IP in Article 39.2(D). *Kahn v. New York Times Co.*,
20 122 A.D.2d 655, 661 (N.Y. App. Div. 1986) (rejecting interpretation of more
21 general provision that would “render meaningless and superfluous” more specific
22 provisions of the contract). The plain language of the contract explains how to read
23 these provisions without creating impermissible superfluity: Article 39.2(D) reflects
24 the only reciprocal promises SS/L made with respect to ViaSat IP, while Article

1 39.2(B) merely reflects a limited license of ViaSat IP to SS/L that waived ViaSat's
2 right to sue on its IP for certain uses.³

3 ViaSat has relied on *Eli Lilly & Co. v. Emisphere Technologies, Inc.*, 408 F.
4 Supp. 2d 668 (S.D. Ind. 2006), to support its reading of the Build Contract as
5 imposing a reciprocal negative covenant. *Emisphere*, however, is distinguishable in
6 any number of ways. First and foremost, the contract language in *Emisphere*
7 included (1) a first provision granting a limited license, and also (2) a second
8 provision including prohibitive language that the defendant "shall not" use the
9 plaintiff's technology. *Id.* at 673-74. It was only the second provision that the Court
10 found created a reciprocal negative covenant and provided a basis for a breach of
11 contract action. Article 39.2(B) of the Build Contract only includes language
12 parallel to the grant of a license in *Emisphere*. And only Article 39.2(D) introduces
13 prohibitory language about what each party "agrees not to" do, parallel to the
14 language the Court in *Emisphere* found created an affirmative prohibition. Indeed,
15 *Emisphere* itself recognizes the distinction between the type of license-granting
16 language in Article 39.2(B) as opposed to the language of negative covenants in
17

18 ³ If more were needed, a reciprocal promise also cannot be implied into Article
19 39.2(B) due to the Build Contract's integration clause. Ex. D at 119 ¶ 34.8. The
20 integration clause "establish[es] the parties' intent that the Agreement is to be
21 considered a completely integrated writing," *Primex Int'l Corp. v. Wal-Mart Stores,*
22 *Inc.*, 679 N.E.2d 624, 627 (N.Y. 1997), and precludes evidence of implied promises
23 to vary the writing. *Cf. Grossman v. New York Life Ins. Co.*, 90 A.D.3d 990, 991
24 (N.Y. App. Div. 2011) (finding action for implied contract barred by integration
clause); *Schron v. Troutman Sanders LLP*, 986 N.E.2d 430, 433-34 (N.Y. 2013)
(merger clause requires "full application of the parol evidence rule in order to bar
the introduction of extrinsic evidence to vary or contradict the terms of the
writing").

1 Article 39.2(D). *See Emisphere*, 408 F. Supp. 2d at 688 (contrasting (1) limited
2 license language that the “license herein granted...does not include” use of
3 technology for certain purposes from (2) broader restrictive covenant language that
4 a party “shall not have any right to use” technology for certain purposes).

5 Additionally, the Court in *Emisphere* was concerned that the plaintiff and
6 defendant were sharing a vast amount of technical information, “only some of
7 which might be protected by patent law.” *Emisphere*, 408 F. Supp. 2d at 689. As a
8 result, finding a mere limited license without a reciprocal negative covenant would
9 leave what appeared to be unintended gaps in protection for the technology plaintiff
10 disclosed to defendant. Here, by contrast, ViaSat is by definition protected by some
11 common law or statutory scheme for any “intellectual property” disclosed to SS/L
12 under the Build Contract. There is thus no similar concern that interpreting Article
13 39.2(B) as a limited license without any reciprocal promises would undermine the
14 purposes of the contract. *Cf.* 23 Williston on Contracts § 63:21 (4th ed.) (reciprocal
15 promises implied only where “absolutely necessary” to effectuate the parties’
16 intent).

17 c. Article 39.2(B) Is Not a Non-Compete Agreement

18 ViaSat’s appears to take the unsupportable position that if any intellectual
19 property right ever attached to ViaSat information, then SS/L was entirely
20 prohibited from using that information—even if no one else in the world would be
21 so constrained by ViaSat’s IP rights and would remain free to incorporate it into
22 satellite designs.⁴ ViaSat, for example, asserted breaches of Article 39 based on a

23 ⁴ Mr. Dankberg, for example, testified that, under Article 39 of the Build Contract,
24 “SS/L was uniquely prohibited from implementing things that other third parties
might not be because of the intellectual property provisions.” Trial Tr. 59.

1 variety of “patent-pending” technologies even though patent applications are
2 afforded only limited property rights under 35 U.S.C. § 154(d) that are not at issue
3 in this case. Trial Tr. 765. Nevertheless, ViaSat argued that Article 39.2(B) of the
4 Build Contract somehow transforms the narrow IP rights afforded by 35 U.S.C. §
5 154(d) into a blanket prohibition on use—and one that applies solely to SS/L.

6 ViaSat’s reading of Article 39.2(B) thus improperly transforms a simple
7 grant of a limited license into a non-compete agreement. This interpretation is
8 directly contrary to New York law, which requires a clear indication of the parties’
9 intent to enter into restrictive covenants such as non-compete agreements:

10 Restrictive covenants are enforced where the intention of the parties is
11 clear and the confinement agreed upon is reasonable and not offensive to
12 public policy. They are construed strictly, however, against those who
13 formulate or seek to enforce them and doubts and ambiguities are
resolved in favor of free use of the property so that the restrictions are
narrowed rather than broadened in their application.

14 *Silverstein v. Shell Oil Co.*, 40 A.D.2d 34, 36 (N.Y. App. Div. 1972), *aff’d*, 309
15 N.E.2d 131 (N.Y. 1974). Article 39.2(B) manifests no such clear intent.

16 Indeed, the non-compete agreement ViaSat attempts to read into Article
17 39.2(B) may well be impermissible under New York law. Knowing that the
18 technology in this case cannot be “proprietary” to ViaSat, ViaSat’s entire argument
19 about Article 39 of the Build Contract is that it should extend beyond the
20 protections for proprietary information in Article 28. But non-compete provisions
21 under New York law are typically limited to helping protect trade secrets and other
22 confidential information. *Cf. Columbia Ribbon & Carbon Mfg. Co., Inc. v. A-1-A*
23 *Corp.*, 42 N.Y.2d 496, 499, 369 N.E.2d 4, 6 (1977) (invalidating restrictive
24 covenant not to compete “unrestrained by any limitations keyed to uniqueness,

1 trade secrets, confidentiality or even competitive unfairness”); *Am. Inst. of Chem.*
2 *Engineers v. Reber-Friel Co.*, 682 F.2d 382, 387 (2d Cir. 1982) (restrictive
3 covenants “rigorously examined”); *DAR & Associates, Inc. v. Uniforce Servs., Inc.*,
4 37 F. Supp. 2d 192, 197 (E.D.N.Y. 1999) (non-compete agreements in commercial
5 contracts must balance “competing public policies in favor of robust competition
6 and freedom of contract”).

7 Article 39.2(B) simply cannot bear ViaSat’s proposed reading as a sweeping
8 use prohibition. Article 39.2(B) is a limited license and nothing more. If SS/L used
9 any ViaSat IP beyond the scope of its license, ViaSat could bring suit under the
10 common law or statutory rights which constitute ViaSat IP. Article 39.2(B),
11 however, does not create a free-floating cause of action for breach of contract that
12 restrains SS/L from competing for other satellite projects in a way no other satellite
13 manufacturer would be restrained by ViaSat IP.⁵ Properly interpreted as a mere
14 grant of a limited license, Article 39.2(B) contains no reciprocal promises for SS/L
15 to breach, and judgment as a matter of law must enter as to ViaSat’s claim for
16 breach of this provision of the Build Contract.

17
18 ⁵ If ViaSat is correct that the Build Contract replaces ViaSat’s intellectual property
19 rights with a blanket prohibition on use under the Build Contract, it would
20 constitute an improper contractual expansion of ViaSat’s patent rights and should
21 thereby preclude ViaSat’s patent claims. *See Princo Corp. v. Int’l Trade Comm’n*,
22 616 F.3d 1318, 1328 (Fed. Cir. 2010) (“When the patentee has used restrictive
23 conditions on licenses or sales to broaden the scope of the patent grant, we have
24 held that an accused infringer may invoke the doctrine of patent misuse to defeat
the patentee’s claim.”); *id.* (“patent misuse is thus grounded in the policy-based
desire to ‘prevent a patentee from using the patent to obtain market benefit beyond
that which inheres in the statutory patent right’”). Alternatively, such blanket
contractual prohibition would make this case purely a contract matter under state
law over which the Court lacks subject matter jurisdiction.

1 2. Article 39.2(D)

2 Article 39.2(D), meanwhile, imposes two specific prohibitions: (1) filing for
3 patents on ViaSat's intellectual property; and (2) reverse engineering ViaSat's
4 intellectual property. But ViaSat failed to introduce evidence to support a finding of
5 breach of either of these narrow prohibitions. Notably, both prohibitions require
6 some ViaSat intellectual property on which SS/L files a patent or reverse engineers.
7 The entirety of the evidence ViaSat has introduced to prove up a breach of Article
8 39.2(D), however, involved the "Option 3 email," Ex. E (V-517), which as a matter
9 of law is not proprietary to ViaSat and does not constitute ViaSat IP. *See* Dkt. No.
10 720. ViaSat's provisional patent applications also lack common law or statutory
11 rights that could qualify them for protection under the Build Contract.

12 a. ViaSat Has No IP Rights in Option 3

13 Option 3 is not "intellectual property" under the Build Contract because it is
14 not "matter in which an Intellectual Property Right subsists." Ex. D at SSL0099738.
15 As earlier discussed, "Intellectual Property Right(s)" include only "common law
16 and statutory proprietary rights with respect to Intellectual Property." *Id.* Option 3
17 plainly fails to meet these criteria. Yet ViaSat witnesses testified repeatedly that
18 Option 3 is somehow ViaSat "intellectual property" (if not "proprietary") even
19 though—as a matter of law—ViaSat can offer no explanation of what "common
20 law or statutory proprietary rights" subsist in Option 3 such that it could be
21 protected as intellectual property under the Build Contract.

22 First, as to purported "common law" proprietary rights in Option 3, ViaSat
23 has implied that there might be contractual rights under an asserted NDA. But the
24 Court has already ruled that no such proprietary rights exist in Option 3. *See* Dkt.

1 No. 720 at 8; *see also Convolv, Inc. v. Compaq Computer Corp.*, 527 F. App'x 910
 2 (Fed. Cir. 2013).⁶ Option 3 also not contain any ViaSat trade secret because it was
 3 not a secret—it was circulated freely among SS/L, AtContact, and TimesArrow.⁷

4 Second, as to purported “statutory” rights in the form of statutory protection
 5 for patents, Option 3 does not contain the ideas claimed in the '875 patent because
 6 it is not conception evidence; in fact, it teaches away from the “proximate” beams
 7 that are at the heart of the '875. Trial Tr. 223. For the same reason, Option 3 does
 8 not contain the ideas claimed in any '875 patent applications. Moreover, ViaSat's
 9 General Counsel admitted that the only possible rights in patent applications were
 10 those under § 154(d), which ViaSat does not contend subsist in Option 3:

11 Q: When [the Build Contract is] talking about patent
 12 applications, it's talking about the common law and
 13 statutory proprietary rights with respect to patent
 14 applications, correct?

15 A: That's correct.

16 Q: And do you know, sir, that there are actually statutory
 17 rights that are associated with patent applications?

18 A: I'm not sure whether -- well, statutory rights and
 19 common law rights, we elicit both here. I mean, I think
 20 that patent applications are themselves, until they're
 21 published, probably considered trade secrets.

22 Q: But, sir, you understand that a patent application
 23 actually can have statutory proprietary rights under 35
 24 U.S.C. 154(d)?

A: Yes, that's true.

Q: And that's no an assertion in this case, that that

21 ⁶ The Court has ruled that, as in *Convolv*, ViaSat and SS/L waived all other
 22 common law rights by virtue of their NDAs. Dkt. No. 720 at 8. The application of
 23 Federal Circuit law to this issue is clear: the **NDAs** at issue in this case control the
 24 entirety of the parties' relationship regarding confidential disclosures. *Convolv*,
 527 F. App'x at 925.

⁷ In fact, ViaSat was not even a participant in the Option 3 email.

1 particular statutory provision is at issue in this case,
2 correct?

3 A: I don't believe so.

4 Trial Tr. 765. ViaSat can articulate no other common law or statutory rights in
5 Option 3 either, because there are none. ViaSat's attempts to apply its Article 39
6 arguments to Option 3 all fail as a matter of law.⁸

7 b. ViaSat Has No IP Rights in Provisional Patent
8 Applications

9 For similar reasons, ViaSat's provisional patent applications also cannot form
10 the basis for breach of the Build Contract. Again, provisional patent applications
11 are not the subject of any "common law or statutory proprietary rights" such that
12 they could be protected under the Build Contract. Cf. 35 U.S.C. § 154(d) (creating
13 provisional rights based on published patent applications, not provisional
14 applications, and even then only under limited circumstances not at issue in this
15 case). ViaSat's late-2006 provisional applications simply cannot constitute evidence
16 supporting a claim for breach of Article 39.

17 c. ViaSat Has No IP Rights in Other Concepts

18 ViaSat similarly failed to establish statutory or common law rights any other
19 concepts it claims might constitute Purchaser Intellectual Property under the Build

20 ⁸ In any event, ViaSat has also failed to introduce any evidence that SS/L breached
21 the Build Contract based on the patent filings of its employee Doug Burr. Any
22 filings prior to the effective date of the Build Contract in January 2008 are
23 irrelevant. The Court has explicitly held that the Build Contract, by its plain terms,
24 does not apply retroactively. Dkt. No. 720 at 8. ViaSat also cannot prove breach
based on a continuation of the Burr patent filed in 2010. Ex. F (V-1193B). There
was no evidence whatsoever introduced at trial that any continuation of the Burr
patent was based on Option 3.

1 Contract. And as to any intellectual property ViaSat may possess—for example, the
2 patents in suit—ViaSat failed to provide any evidence that SS/L reverse engineered
3 or filed for a patent on that IP, as required to establish breach of the Build Contract.

4 **C. Article 22 of the Build Contract**

5 The limited license provision of Article 22.2.3 provides:

6 Purchaser hereby grants to Contractor a non-exclusive, non-transferable,
7 non-assignable, non-sublicensable, revocable, limited license to possess
8 and use a single copy of the Capacity Measurement Tool during the time
9 period described above solely for purposes of Contractor’s measurement
10 of the capacity of the Satellite to be provided under this Contract.

11 Ex. D at SSL0099821. Article 22.2.4, meanwhile, includes a discrete set of
12 prohibitions on use of ViaSat’s Capacity Tool:

13 Contractor agrees that it will not modify, adapt, create a derivative work,
14 of, merge, translate, decompile, disassemble, or otherwise reverse
15 engineer Purchaser’s Capacity Measurement Tool.

16 *Id.* Article 22’s structure is thus parallel to Article 39. Article 22.2.3 provides a
17 limited license, while Article 22.2.4 imposes prohibitions. For basically the
18 same reasons discussed above as to Article 39.2(B), ViaSat simply has no claim
19 for breach of Article 22.2.3. And as to either provision, ViaSat has not provided
20 sufficient evidence from which a jury could conclude that SS/L breached any of
21 the prohibitions on use of ViaSat’s capacity tool.

22 ViaSat’s expert Mr. Sturza admitted that SS/L never possessed the source
23 code for ViaSat’s capacity tool and that SS/L “couldn’t take the code it didn’t have”
24 from the ViaSat tool. Trial Tr. 1694-95. This is consistent with the testimony of
SS/L’s expert, Dr. Helgert. Trial Tr. 2016. Mr. Sturza also conceded he did not
know of or review logs of SS/L employees who accessed the capacity tool, and

1 admitted that the ViaSat tool and SS/L's tools for Jupiter and NBN were written in
2 different programming languages. *See* Trial Tr. 1693-97.

3 As a result, Mr. Sturza limited himself to the argument that SS/L "copies its
4 functionality." Trial Tr. 1694-95. Even if true, mere imitation without any
5 manipulation (*e.g.*, modification, adaptation, or reverse engineering) of the tool
6 itself is not covered by the narrow prohibitions described in Article 22.2.4. There is
7 no sufficient evidentiary basis for the jury to have found direct manipulation of
8 ViaSat's capacity tool that could constitute a breach of Article 22.

9 **III. MARCH 2006 NDA & BUILD CONTRACT ARTICLE 28**

10 The remainder of ViaSat's breach of contract case involves SS/L and
11 ViaSat's March 2006 NDA and the NDA provision (Article 28) of the Build
12 Contract. In order to prevail its breach of NDA claims, ViaSat needed to prove that
13 SS/L disclosed to third parties information which was not already known to SS/L,
14 was not publicly known, and was marked as proprietary to ViaSat. ViaSat's mere
15 insinuation that the Jupiter-1 and ViaSat-1 satellites look similar in various respects
16 is not substantial evidence that could satisfy ViaSat's burden. Rather, as to every
17 allegedly proprietary concept, the only reasonable conclusion based on the evidence
18 is that such concept was known to SS/L, known publicly, and/or not marked
19 proprietary to ViaSat at the time of SS/L's allegedly improper disclosure.

20 **A. Contractual Prerequisites**

21 The March 2006 NDA and Article 28 of the Build Contract do not apply to
22 material that was already known to SS/L or to material that became known publicly
23 through no fault of SS/L. *See* Exs. B-D. Additionally, to qualify for protection
24 under the non-disclosure agreements, material must be marked "Proprietary" at or

1 immediately after the time of exchange by means of a written legend. *See id.*; *see*
2 *also, e.g.*, Trial Tr. 196-97. That marking requirement is a material element of each
3 contract and it is an essential element of ViaSat's claim. *Convolve, Inc. v. Compaq*
4 *Computer Corp.*, 527 Fed. Appx. 910, 921 (Fed. Cir. 2013) (affirming grant of
5 summary judgment of no liability under NDAs because the plaintiff had not
6 complied with a marking requirement). As such, ViaSat could not prevail on its
7 breach of contract claims unless it showed that the material it alleged SS/L
8 disclosed was not already known to SS/L, was not publicly known, and was marked
9 proprietary according to the terms of the NDAs.

10 1. ViaSat Concedes that No Information Exchanged Before May 4,
11 2007, Was Marked "Proprietary."

12 There is no dispute that the first time ViaSat ever marked any document
13 "Proprietary" and sent it to SS/L was May 4, 2007. *E.g.*, Trial Tr. 376-77. That
14 document was a draft specification of the ViaSat-1 satellite that the parties agree
15 also contained SS/L intellectual property. Ex. G (V-1206); *see also* Dkt. No. 720.

16 2. The Parties Did Not Waive the Marking Requirement.

17 The Court has already rejected ViaSat's argument that the parties' waived the
18 marking requirement. Dkt. No. 720 at 8. To the extent ViaSat continues to press its
19 waiver argument and seeks reconsideration of the Court's finding that the marking
20 requirement was never waived, SS/L incorporates by reference the arguments made
21 in their summary judgment briefing on this issue, Dkt. Nos. 516, 654, and in their
22 opposition to ViaSat's motion for reconsideration of the Court's order that the
23 Option 3 email is not proprietary to ViaSat, Dkt. No. 977.⁹

24 ⁹ As discussed at summary judgment, ViaSat itself swore under oath three times
that:

B. Alleged Proprietary Information

ViaSat's breach of NDA claims were initially premised on SS/L's allegedly improper disclosure of the following allegedly proprietary information:

- i. The in-orbit C/I test ViaSat allegedly proposed to Defendants for the ViaSat-1 satellite;
- ii. The Capacity Measurement Tool allegedly proprietary to ViaSat and information gained therefrom;
- iii. ViaSat's alleged proprietary concepts regarding dynamic NGSO switching;
- iv. ViaSat's implementation, including the details enabling such implementation, of the 4-color frequency reuse scheme utilized in the proprietary specifications ViaSat drafted and designated for the ViaSat-1 satellite;
- v. ViaSat's implementation, including the details enabling such implementation, of the spatial separation plan between the gateway and user beams utilized in the proprietary specifications ViaSat drafted and designated for the ViaSat-1 satellite;

(... cont'd)

(a) it was ViaSat's standard course of conduct to identify proprietary information via written legend when it transmitted such materials in written form, and (b) it was ViaSat's standard course of conduct to verbally identify proprietary information when communicated orally, and then follow up such identification with a summary written document in the applicable time period

Dkt. No. 516-2, Ex. A at 7:17-19, 8:22-24, 10:2-4. ViaSat thus admitted that its course of conduct was to comply with the marking requirement. Such behavior does not "warrant the conclusion that the parties intended to modify the written contract." *Convolve*, 527 at 923. Rather, SS/L and ViaSat's continued marking "leads to precisely the opposite conclusion." *Id.* at 924. The evidence introduced at trial did nothing to undermine the Court's grant of summary judgment, and it would be improper to revise the Court's summary judgment ruling based on trial testimony anyway. *See Dillon v. Cobra Power Corp.*, 560 F.3d 591, 595 (6th Cir. 2009).

1 vi. ViaSat-1's beam placement plan, the implementation and specifics of
2 which were set forth in the proprietary specifications ViaSat drafted and
3 designated for the ViaSat-1 satellite; and

4 vii. Portions of the specifications for the ViaSat-1 satellite, both draft and final.

5 Dkt. No. 842 (Pre-Trial Order) at 14-15. As to each of these ideas ViaSat
6 introduced insufficient evidence to prove that (1) SS/L did not already know them,
7 (2) they were not already known in the industry, and (3) ViaSat had marked the
8 information as proprietary as of SS/L's allegedly improper disclosure. The trial
9 record does not contain a single disclosure meeting these criteria. No reasonable
10 juror could look at the record and conclude that any properly-marked information
11 sent by ViaSat to SS/L, not already known to SS/L and not known to the public,
12 was then disclosed to Hughes or other third parties in violation of the asserted
13 NDAs. Judgment as a matter of law is therefore appropriate.

14 1. C/I Test

15 ViaSat introduced no evidence regarding SS/L's alleged misappropriation of
16 a C/I Test. It cannot support the verdict against SS/L on breach of contract claims.

17 2. Capacity Tool

18 ViaSat attempted to argue that SS/L disclosed secrets from ViaSat's capacity
19 tool by creating a tool for Jupiter and NBN Co. But, as discussed above, there is no
20 dispute that the source code for ViaSat's tool was never made available to SS/L,
21 meaning SS/L simply could not have copied ViaSat's tool and given it to Hughes or
22 NBN Co. Trial Tr. 1694-95 (Sturza); *id.* 2015-17 (Helgert). And it would have been
23 impossible to use ViaSat's tool on other satellites anyway. Trial Tr. 1941-42.

24 ViaSat's theory of breach thus must be limited to allegedly improper
disclosure of the more general concepts underlying ViaSat's capacity tool. But

1 ViaSat failed to introduce evidence sufficient to show that those concepts were not
2 already known to SS/L or to the public (including Hughes) long before any of the
3 NDAs at issue were even signed, let alone before SS/L ostensibly “learned” about
4 capacity measurement from ViaSat. The high-level concepts about calculating
5 capacity that are necessarily the basis for ViaSat’s claims were little more than
6 basic link budget calculations implemented as a matter of practice within SS/L on
7 its Direct Broadcast Satellite projects since the 1990s. *See* Trial Tr. 2014-18; 2025;
8 2538-41. And SS/L was familiar with the use of capacity tools on prior high-
9 capacity broadband satellites like iPSTAR. Trial Tr. 2119-22.

10 There can also be no dispute as to the public nature of ViaSat’s allegedly
11 proprietary capacity measurement concepts. The sorts of calculations claimed by
12 ViaSat have been commonly taught to college students for decades. Trial Tr. 1941.
13 Hughes’ Dave Roos confirmed that he had long been familiar with the link budgets
14 underlying capacity measurement, and that the formulas employed date back to the
15 1940s. Trial Tr. 1940-41. Indeed, the evidence at trial showed it was Hughes that
16 provided SS/L with the formulas and parameters it wanted to use to measure
17 capacity, rather than the other way around. Trial Tr. 2541-43; Ex. H (S-524).

18 Moreover, in 2003, Nakasuga and his colleagues publicly disclosed ViaSat’s
19 allegedly proprietary approach of varying the numbers of colors and beam spacing,
20 calculating C/I, calculating bits/Hz, and repeating the process iteratively. Ex. I (S-
21 2428); Trial Tr. 2170-72. Indeed, the paper includes a flow chart that closely
22 parallels one created by Mark Miller in 2007, which ViaSat used to corroborate its
23 invention of a “statistical capacity analysis.” *Compare* S-2428 fig. 2 with V-220 at
24 SSL0134293. ViaSat attempted to rebut Nakasuga 2003 as invalidating prior art to

1 the '043 patent by arguing that it failed to disclose interference-dominated locations
2 and failed to disclose maximization of capacity. See Trial Tr. 2713. But ViaSat
3 offered no evidence to rebut the fact that Nakasuga 2003 clearly disclosed ViaSat's
4 allegedly proprietary approach to capacity measurement, let alone substantial
5 evidence sufficient to meet its burden that its capacity tool was not publicly known.

6 In 2004, Rinaldo and DeGaudenzi also publicly disclosed a 5,000-point
7 capacity tool, compared to the 3,165-point tool used by Mark Miller. Ex. K (S-11);
8 Trial Tr. 2175-77. Even if a capacity tool with such granularity were novel to SS/L,
9 ViaSat cannot dispute that such a tool was already publicly available.

10 3. Dynamic NGSO Switching

11 ViaSat has attempted to claim that the idea of "dynamic NGSO switching"
12 was proprietary to it, but has produced no evidence that the idea was ever
13 disclosed—much less used—by SS/L. ViaSat's sole piece of evidence that Jupiter-1
14 has a dynamic NGSO switch is Hughes' FCC application stating that "[t]here will
15 be sufficient additional spectrum on [Jupiter-1] to allow Hughes to dynamically
16 shift operations out of the NGSO spectrum for the duration of any in-line events."
17 Ex. L (V-522) at SSL0397453; Trial Tr. 1710. For one thing, this statement utterly
18 fails to establish that Jupiter-1 actually has a dynamic NGSO switch. It is
19 undisputed that Jupiter-1 does not use a ganged/redundant switch configuration
20 (like the switch on ViaSat-1) or a ferrite switch, as would be necessary to engage in
21 dynamic NGSO switching. Trial Tr. 2496. And the simple, coaxial NGSO switch
22 on Jupiter-1 has never been used even a single time, let alone dynamically. Trial Tr.
23 1698-99. ViaSat thus cannot have suffered any damages—an essential element of
24 ViaSat's breach of contract claims—from any disclosure by SS/L to Hughes of

1 dynamic NGSO switching. *See Loiseau v. VISA USA Inc.*, 2010 WL 4542896, at *2
2 (S.D. Cal. Feb. 10, 2010) (Huff, J.) (“A breach of contract claim requires a showing
3 of appreciable and actual damage.”); *St. Paul Fire & Marine Ins. Co. v. Am.*
4 *Dynasty Surplus Lines Ins. Co.*, 101 Cal. App. 4th 1038, 1060-61 (2002); *Seidman*
5 *v. Indus. Recycling Props., Inc.*, 106 A.D.3d 983, 985 (N.Y. 2013).¹⁰

6 Moreover, “dynamic NGSO switching” was not a concept that qualified for
7 protection under the NDAs. First, to the extent the concept was employed on the
8 Jupiter-1 satellite, the technology used was actually invented by (and thus, needless
9 to say, known to) SS/L. *See* Defendants’ JMOL (6 of 12) Regarding Inventorship of
10 the ’827 Patent. Second, the evidence at trial showed that the concept of switchable
11 access to the NGSO spectrum to avoid interference was “publicly” known at least
12 to Hughes, and that Hughes actually suggested the use of switchable NGSO filters
13 to SS/L. Trial Tr. at 1927-38.

14 “Dynamic NGSO switching” was also more widely known to the public, as
15 evidenced by the AtContact (Ex. M), FCC Third Report (Ex. N), Skybridge (Ex.
16 O), and Weidman (Ex. P) references discussed by Dr. Schindall. *See* Defendants’
17 JMOL (10 of 12) Regarding Invalidity of the ’827 Patent. ViaSat’s cursory rebuttal
18 of, for example, the AtContact FCC Application—consisting of nothing more than
19 Mr. Sturza’s say-so that the reference does not disclose dynamic NGSO
20 switching—does not constitute substantial evidence that dynamic NGSO switching
21 was not publicly disclosed by that reference. *See* Trial Tr. 2723. The same goes for
22 the Skybridge presentation, which ViaSat could only distinguish as a system of

23 ¹⁰ Defendants’ arguments regarding ViaSat’s failure to prove damages from breach of contract
24 more generally are discussed in Defendants’ Renewed Motion for Judgment as a Matter of Law
as to Breach of Contract Damages.

1 NGSO satellites sharing spectrum with other NGSO satellites. *Id.* 2724. ViaSat
2 could provide no evidence to rebut the fact that, well before the parties' NDAs or
3 any alleged improper disclosure by SS/L, it was publicly known how to switch the
4 NGSO spectrum on and off to avoid interference.

5 4. Four-Color Reuse Scheme

6 There is also no basis on which the jury could have found breach due to
7 disclosure by SS/L of a four-color re-use scheme. First and foremost, SS/L and
8 Hughes began discussing four-color re-use at least as early as March 2007, well
9 before ViaSat first marked any information proprietary in May 2007. *See, e.g.*, Ex.
10 Q (S-1699) at SSL0911234. SS/L's exchange of ideas regarding four-color re-use
11 with Hughes simply cannot be the basis for a breach of the NDAs.

12 Moreover, such a basic concept as four-color re-use was employed and made
13 public by the MITRE Corporation more than 30 years ago in its research for
14 NASA. Ex. R (S-1165). Four-color re-use was also specifically known to SS/L, as
15 established by the 2004 AMC-17 proposal it created before ViaSat ever entered the
16 satellite business, much less started talking with SS/L. Ex. S (S-1446) at 2-2; Ex. T
17 (S-1450). SS/L was also familiar with four-color re-use from its work on iPSTAR,
18 a satellite that launched in 2005. Trial Tr. 2094-95. And Hughes was also already
19 familiar with full-frequency re-use at least from its Spaceway-3 system, which
20 again pre-dates the NDAs at issue. Trial Tr. 1953.

21 5. Spatially Separated Gateways and User Beams

22 There is also no basis on which the jury could have found breach due to any
23 disclosure by SS/L of the concept of spatially separated gateways and user beams.
24 Once again, SS/L and Hughes began discussing four-color re-use at least as early as

1 March 2007, well before ViaSat first marked any information proprietary in May
2 2007. Trial Tr. 1914; Ex. Q (S-1699) at SSL0911241.

3 The concept was also known to SS/L independently of ViaSat, as again
4 established by its 2004 proposal for AMC-17. Ex. S; Ex. T. Hughes had also used
5 spatially-separated gateway and user beams to permit frequency re-use on
6 Spaceway-3, and initiated the request for spatial separation on Jupiter-1. Trial Tr.
7 1908-10. And other satellite designers, including but not limited to the MITRE
8 corporation, were using the concept as far back as the early 1980s. Ex. R (S-1165).
9 This is yet another concept facially ineligible for protection under the NDAs, and as
10 to which ViaSat provided no evidence to demonstrate otherwise.

11 6. Partial CONUS Coverage

12 Any claim for breach based on alleged disclosure by SS/L of “partial
13 CONUS coverage” could begin and end with Mark Dankberg’s admission that
14 ViaSat did not invent partial CONUS coverage. Trial Tr. 224. In any event, there is
15 again no dispute that SS/L and Hughes were discussing partial CONUS coverage
16 well before ViaSat’s first proprietary marking. Ex. Q (S-1699); Trial Tr. 1913-16.

17 7. ViaSat-1 Specification (Including Beam Placement Plan)

18 ViaSat attempted to argue that SS/L improperly sent portions of the ViaSat
19 satellite specification to Hughes. But its only evidence on this point was metadata
20 in draft specification sent to Hughes, which named ViaSat’s Mark Miller as the
21 author. Ex. U (V-575). On cross-examination, Mr. Miller was not able to identify a
22 single portion of that document that actually contained ViaSat’s proprietary
23 information. Trial Tr. 1385-98. The reason is not surprising: the language sent to
24 Hughes was SS/L’s boilerplate describing SS/L’s own proprietary satellite bus

1 design and other standard SS/L deliverables. *E.g.*, Trial Tr. 794-97. The evidence
 2 plainly showed that the only portion of the document that could contain ViaSat
 3 proprietary information—section 3.3—was entirely blank. See Ex. U; Trial Tr.
 4 1943-45. The document, presented in a highly prejudicial and misleading fashion at
 5 the end of a trial day, was irrelevant to the issues in this case, and no reasonable
 6 juror could conclude from it that any ViaSat information was ever sent to Hughes.

7 There is similarly no evidence that SS/L ever disclosed ViaSat's beam
 8 placement plan was ever exchanged with anyone outside SS/L, even though ViaSat
 9 itself disclosed that beam placement plan the whole world in a public filing by
 10 ViaSat in June 2008. Ex. V (V-1328).¹¹

11 C. Option 3 / Burr Patent Application

12 Despite the inordinate amount of trial time ViaSat spent discussing the
 13 Option 3 email and Doug Burr's April 2007 patent application, neither had any
 14 relevance to ViaSat's claims for breach of the NDAs. ViaSat attempted to argue
 15 that Doug Burr's patent application contained material described in the 2006
 16 "Option 3" email and was improperly sent to the PTO. But the Option 3 email was
 17 not proprietary to ViaSat, Dkt. No. 720, and the Burr patent application was filed
 18 before any document marked "proprietary" to ViaSat ever existed, Ex. F-G. The
 19 Burr patent is no evidence of a breach of the NDAs.

20 IV. EQUITABLE ESTOPPEL

21 If the foregoing leaves any doubt that SS/L did not disclose ViaSat
 22 proprietary information, the trial record amply supports equitably estopping ViaSat

23
 24 ¹¹ ViaSat's June 2008 filing, for that matter, also disclosed partial CONUS coverage, separation
 of gateway and user beams, and information about four-color re-use. *Id.*

1 from asserting its breach of contract claims against SS/L.¹² To the extent any of
 2 ViaSat's allegedly proprietary concepts were disclosed to Hughes and incorporated
 3 on Jupiter-1, SS/L was simply responding to Hughes' requests and requirements.
 4 *See, e.g.*, Ex. Q & Trial Tr. 1913-16 (partial CONUS, spatial separation, four-color
 5 re-use); Ex. W & Trial Tr. 1929-32 (NGSO switching); Ex. H & Trial Tr. 1938-41
 6 (parameters for capacity measurement and maximization). ViaSat, however, had
 7 assured SS/L in October 2007 that SS/L could respond to customer requirements
 8 without running afoul of the parties' agreements as to the treatment of proprietary
 9 information. *See* Ex. X (V-291); Ex. Y (V-389); Trial Tr. 1002-12. And in reliance
 10 on those promises, SS/L continued to design the Jupiter-1 satellite to Hughes'
 11 specifications when it otherwise could have entertained other design options.

12 V. CONCLUSION

13 SS/L respectfully requests entry of judgment as a matter of law that SS/L did
 14 not breach the March 2006 NDA or the ViaSat-1 Build Contract.

15
 16 Dated: June 13, 2014

By: /s/ Mark Musico

17 Marc M. Seltzer
 18 Amanda K. Bonn
 19 SUSMAN GODFREY L.L.P.

20 ¹² Equitable estoppel applies where one party acts in justifiable reliance on another's
 21 representations and permitting the enforcement of rights against the reliant party would be unjust.
 22 *See Roseview Farms, Inc. v. Pfister*, 198 A.D.2d 339, 341 (N.Y. App. Div. 1993) (equitable
 23 estoppel "is imposed by law in the interest of fairness to prevent the enforcement of rights which
 24 would work fraud or injustice upon the person against whom enforcement is sought and who, in
 justifiable reliance upon the opposing party's words or conduct, has been misled into acting upon
 the belief that such enforcement would not be sought"); *In re Marriage of Recknor*, 138 Cal. App.
 3d 539, 546 (Cal. Ct. App. 1982) ("The elements of estoppel are representation or promise; made
 with knowledge of the facts; to a party ignorant of the truth; with the intent that the other party act
 on it; when the other party has, in fact been induced to rely on it.").

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CERTIFICATE OF SERVICE

I hereby certify that, on June 13, 2014, I caused the foregoing **SS/L'S SS/L'S
SS/L'S MOTION FOR JUDGMENT AS A MATTER OF LAW (RENEWED),
OR A NEW TRIAL (12 OF 12), REGARDING BREACH OF CONTRACT** to
be served on opposing counsel via the Court's CM/ECF system.

Dated: June 13, 2014

By: /s/ Mark Musico