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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 (3
OF 12), REGARDING LOST
PROFITS DAMAGES**

Date: July 22, 2014

Time: 9:00 a.m.

Place: Courtroom 15A

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1 **I. INTRODUCTION**

2 Lost profits damages may be awarded only upon a showing that “‘but for’ the
3 infringing activity, the patentee would have made the infringer’s sales.” *Shockley v.*
4 *Arcan, Inc.*, 248 F.3d 1349, 1362 (Fed. Cir. 2001) (emphasis added). To be eligible
5 for lost profits damages, therefore, ViaSat was required to adduce credible evidence
6 to allow a jury to find that, but for the infringement, ViaSat would have made sales
7 that were instead made by SS/L. Such evidence is plainly not present here—nor
8 could it be, because ViaSat and SS/L offer entirely different products and compete
9 in entirely different markets. Instead, relying on allegations that SS/L contributorily
10 infringed and induced infringement, ViaSat argued that lost profits damages should
11 be calculated based on sales that ViaSat allegedly lost to Hughes. ViaSat’s third-
12 party lost profits damages theory is contrary to Federal Circuit law where, as here,
13 there is no contributory or induced infringement.

14 Even if ViaSat’s alleged loss of sales to Hughes were compensable through
15 this patent infringement action against SS/L—which it is not—the evidence ViaSat
16 introduced at trial in support of this damages theory is clearly insufficient. ViaSat’s
17 internal documents reveal no anticipated loss of subscribers to Hughes; no concern
18 about competition from Hughes; and contain no warnings to investors that ViaSat
19 might be affected by Hughes’s Jupiter satellite. Trial Tr. vol. VIII, 1824:13-20, Apr.
20 4, 2014 (attached as Exhibit 1 to the supporting declaration of Rachel S. Black¹).
21 Indeed, ViaSat’s CEO publicly admitted after filing this lawsuit that “the market for
22

23 ¹ All exhibits referenced herein are attached to the Declaration of Rachel S. Black
24 in Support of SS/L’s Motion for Judgment as a Matter of Law (Renewed), or a New
Trial (3 of 12), Regarding Lost Profits Damages, filed concurrently herewith.

high-speed satellite broadband in the United States is so large . . . that ViaSat’s Exede has not been affected” by Hughes’s Jupiter-based service. Black Decl. Ex. 1 (Trial Tr. 1826:1-22). The only evidence that ViaSat offered to support these damages, thus, was a speculative and economically unsound damages model. In the face of this legally and factually insufficient evidence, the jury verdict awarding lost profits damages cannot be sustained, and the award of \$58 million in lost profits damages must be vacated, or in the alternative, a new trial on damages is required.²

II. LEGAL STANDARD

Judgment as a matter of law (“JMOL”) may be granted and a jury verdict can be overturned “only ‘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) (quoting *Pavao v. Pagay*, 307 F.3d 915, 918 (9th Cir. 2002)). “[O]n posttrial JMOL motions, district 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

² SS/L hereby moves for judgment as a matter of law (“JMOL”) pursuant to Rule 50(a) and, 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.

By separate motion, which is incorporated herein by reference, SS/L has moved to vacate the lost profits award on the grounds that ViaSat may not recover damages for both lost profits and a reasonable royalty. See SS/L’s Mot. for JMOL (Renewed), or a New Trial (4 of 12), Regarding Double Counting of Damages, filed concurrently herewith. If the Court grants this motion and enters judgment of no lost profits, that motion becomes moot.

1 as a reasonable mind might accept as adequate to support a conclusion.” *The Johns*
2 *Hopkins Univ. v. Datascope Corp.*, 543 F.3d 1342, 1348 (Fed. Cir. 2008) (quotation
3 marks and citation omitted). “Under Rule 50, a court should render judgment as a
4 matter of law when a party has been fully heard on an issue and there is no legally
5 sufficient evidentiary basis for a reasonable jury to find for that party on that issue.”
6 *Reeves v. Sanderson Plumbing Prods.*, 530 U.S. 133, 149 (2000).

7 In the damages context, an award may not be based on guesswork or
8 “speculation or optimism, but must be established by evidence.” *Hebert v. Lisle*
9 *Corp.*, 99 F.3d 1109, 1119 (Fed. Cir. 1996); see *Lakeside–Scott v. Multnomah*
10 *Cnty.*, 556 F.3d 797, 803 (9th Cir. 2009) (judgment as a matter of law “is
11 appropriate when the jury could have relied only on speculation to reach its
12 verdict”); *Oiness v. Walgreen Co.*, 88 F.3d 1025, 1031 (Fed. Cir. 1996) (jury’s
13 damages award may not be “based only on speculation or guesswork”). Nor may a
14 damages award stand if any part of the calculation leading to it is unsupported or
15 contrary to law. *Uniloc USA, Inc. v. Microsoft Corp.*, 632 F.3d 1292, 1317, 1321
16 (Fed. Cir. 2011). That is, “[b]eginning from a fundamentally flawed premise and
17 adjusting it based on legitimate considerations specific to the facts of the case
18 nevertheless results in a fundamentally flawed conclusion.” *Lucent Techs., Inc. v.*
19 *Microsoft Corp.*, 837 F. Supp. 2d 1107, 1112 (S.D. Cal. 2011) (quoting *Unisplay,*
20 *S.A. v. Am. Elec. Sign Co.*, 69 F.3d 512, 517 (Fed. Cir. 1995)).

21 Whether to grant a new trial on some or all issues, pursuant to Fed. R. Civ. P.
22 59, is a matter of the trial court’s discretion. *City Solutions, Inc. v. Clear Channel*
23 *Comm’ns*, 365 F.3d 835, 843 (9th Cir. 2004). Courts apply a lower standard of
24 proof to motions for new trial than they do to JMOL motions. *William Inglis v. ITT*

1 *Cont'l Baking Co.*, 668 F.2d 1014, 1026–7 (9th Cir. 1981) “[T]he trial court may
2 grant a new trial, even though the verdict is supported by substantial evidence, if
3 ‘the verdict is contrary to the clear weight of the evidence or is based upon evidence
4 which is false, or to prevent, in the sound discretion of the trial court, a miscarriage
5 of justice.’” *Wordtech Sys. v. Integrated Networks Solutions, Inc.*, 609 F.3d 1308,
6 1313 (Fed. Cir. 2010) (quoting *United States v. 4.0 Acres of Land*, 175 F.3d 1133,
7 1139 (9th Cir. 1999)). In deciding a motion for new trial, the court “has the right,
8 and indeed the duty, to weigh the evidence” and may evaluate the credibility of the
9 witnesses. *Murphy v. City of Long Beach*, 914 F.2d 183 (9th Cir. 1990); *United*
10 *States v. Kellington*, 217 F.3d 1084, 1095 (9th Cir. 2000). The court is not required
11 to view the evidence from the perspective most favorable to the prevailing party.
12 *Kellington*, 217 F.3d at 1095.

13 **III. ARGUMENT**

14 There is no legally sufficient basis for the jury’s award of lost profits
15 damages. Lost profits may not be based on the patentee’s lost sales to a third party,
16 where the patentee and the alleged infringer do not compete in the sale of that
17 product and the alleged infringer does not contributorily infringe or induce
18 infringement. Even if ViaSat’s lost profits theory were sound, the evidence ViaSat
19 offered to support the damages award is speculative, based on false assumptions,
20 and/or unsupported by the evidence. And finally, lost profits are unavailable under
21 *Panduit*. Dr. Slottje’s lost profits analysis does not contain the sound economic
22 proof required to support a lost profits award of any amount, and it certainly does
23 not meet the heightened burden to support the future lost profits that the jury
24 awarded.

A. Damages May Not Be Awarded Based On ViaSat's Alleged Loss Of Customers To Hughes

“To recover lost profits, ‘a patent owner must prove a causal relation between the infringement and its loss of profits.’” *Shockley*, 248 F.3d at 1362 (quoting *BIC Leisure Prods., Inc. v. Windsurfing Int'l, Inc.*, 1 F.3d 1214, 1218 (Fed. Cir. 1993)). “In other words, the burden rests on the patentee to show a reasonable probability that ‘but for’ the infringing activity, the patentee would have made the infringer’s sales.” *Id.* It is undisputed that SS/L and ViaSat are not direct competitors. Black Decl. Ex. 1 (Trial Tr. 1820:19-1821:6). ViaSat does not make or sell satellites that use its patented technology or that compete with Jupiter, and SS/L does not sell broadband services. It is also undisputed that ViaSat did not lose any sales of broadband services to SS/L. Black Decl. Ex. 1 (Trial Tr. 1821:20-23). It is therefore improper to award lost profits damages based on ViaSat’s alleged loss of sales to a third party using the allegedly infringing Jupiter satellite, when the jury found that SS/L does not contributorily infringe or induce infringement of ViaSat’s patents.

The Federal Circuit has consistently made clear that a patentee must directly compete with the alleged infringer in order to for lost profits to be properly awarded. *See, e.g., Mitutoyo Corp. v. Cent. Purchasing, LLC*, 499 F.3d 1284, 1291 (Fed. Cir. 2007) (affirming denial of lost profits where the patentee’s and alleged infringer’s “products compete for entirely different market segments” and there was no evidence “to suggest overlap among the consumers buying the companies’ respective goods”); *Rite-Hite Corp. v. Kelly Co. Inc.*, 56 F.3d 1538, 1545 (Fed. Cir. 1995) (“To recover lost profits, the patentee must show a reasonable probability that, ‘but for’ the infringement, it would have made the sales that were made by the

1 infringer.”); *BIC Leisure Prods.*, 1 F.3d at 1218 (“The patent owner must show that
 2 ‘but for’ the infringement, it would have made the infringer’s sales.”); *Gyromat*
 3 *Corp. v. Champion Spark Plug Co.*, 735 F.2d 549, 553 (Fed. Cir. 1984) (“The
 4 critical inquiry in determining whether to award lost profits is whether Gyromat
 5 [the patentee] has shown a reasonable probability that it would have made the
 6 infringing sales that Champion [the alleged infringer] made.”); *Stickle v. Heublein,*
 7 *Inc.*, 716 F.2d 1550, 1561 (Fed. Cir. 1983) (“Appellees [in the business of selling
 8 fryers] suffered no loss in the sense of lost profits from [infringer’s] use of the
 9 infringing fryers.”).³ (emphasis added to all quotations). Because ViaSat and SS/L
 10 do not compete, and SS/L does not contributorily infringe or induce infringement of
 11 ViaSat’s patents, under these well-established precedents, lost profits damages are
 12 not available.

13 Before trial, ViaSat defeated SS/L’s *Daubert* challenge to exclude lost
 14 profits, pointing to “Hughes’ infringing use” of the Jupiter satellite. ViaSat’s Opp.
 15 to Defs.’ Mot. to Exclude Opinions of ViaSat’s Damages Expert Dr. Slottje (Dkt.
 16 595) at 7 & n.5. This Court denied the *Daubert* challenge before the jury’s finding
 17

18 ³ Likewise, the Federal Circuit has made clear that where, as here, the patentee does
 19 not practice the invention claimed by the patents in suit, lost profits damages are
 20 unavailable. *See, e.g., Hebert*, 99 F.3d at 1119 (“When the patentee does not seek to
 21 make and sell the invention, lost profits are not an appropriate measure of
 22 damages.”); *Lindemann Maschinenfabrik GmbH v. Am. Hoist & Derrick Co.*, 895
 23 F.2d 1403, 1406 n.2 (Fed. Cir. 1990) (“Because [the patentee] did not compete in
 24 the sale of its invention in the United States, it did not, as it could not, seek
 damages on the basis of lost profits.”); *Cornell Univ. v. Hewlett-Packard Co.*, 01-
 CV-1974, 2008 WL 2222189, at *1 (N.D.N.Y. May 27, 2008) (J. Rader, sitting by
 designation) “Because [the patentee] does not manufacture or sell products
incorporating the patented device, it has not sought and is not entitled to lost
 profits.”).

1 on contributory and induced infringement, relying on *Presidio Components, Inc. v.*
2 *American Technical Ceramics Corp.*, 702 F.3d 1351, 1360 (Fed. Cir. 2012), for the
3 proposition that the Federal Circuit has not “establish[ed] a threshold requirement
4 that the plaintiff always show direct competition between its own and an infringing
5 product in order to receive lost profits damages.” 2/11/14 Order Granting in Part
6 and Denying in Part Defs.’ Mot. to Exclude Opinions of ViaSat’s Damages Expert,
7 at 10 (Dkt. # 772). But *Presidio* did not address the issue before this Court –
8 whether a patentee may recover lost profits from an alleged infringer based on a
9 third party’s use of the product, where the patentee and the alleged infringer do not
10 compete in the sale of that product – much less where, as the jury found here, the
11 alleged infringer does not induce infringement or contributorily infringe. Rather,
12 the *Presidio* Court determined that the patentee’s product “directly competed” with
13 the alleged infringing product that the defendant sold – thus, that they were direct
14 competitors. 702 F.3d at 1360.

15 The *Panduit* factors also make clear that the patentee and the alleged
16 infringer must be competitors to award lost profits. See *Panduit Corp. v. Stahlin*
17 *Bros. Fibre Works, Inc.*, 575 F.2d 1152, 1156 (6th Cir. 1978) (discussing “sales
18 made by the infringer” as a basis for lost profits). Under *Panduit*, a patentee must
19 prove four elements to demonstrate eligibility for lost profits: “(1) a demand for the
20 patented product, (2) the absence of an acceptable, non-infringing substitute for the
21 patented product, (3) the patent owner’s manufacturing and marketing capability to
22 exploit the demand for the patented product, and (4) the amount of profit the patent
23 owner would have expected to make if the patent owner had made the infringer’s
24 sales.” *SmithKline Diagnostics*, 926 F.2d at 1165 (emphasis added, footnote

1 omitted). Here, the patented product is a high capacity broadband communications
2 satellite– not satellite broadband subscriptions – and SS/L’s sale was a single sale
3 of the Jupiter satellite to Hughes.

4 Again, Federal Circuit precedent is consistent. For example, the Federal
5 Circuit has stated that the first *Panduit* factor “presupposes that demand for the
6 infringer’s and patent owner’s products is interchangeable,” and the second *Panduit*
7 factor “presupposes that the patentee and the infringer sell substantially similar
8 products in the same market.” *BIC Leisure Prods.*, 1 F.3d at 1218-19; *see DePuy*
9 *Spine, Inc. v. Medtronic Sofamor Danek, Inc.*, 567 F.3d 1314, 1331 (Fed. Cir. 2009)
10 (the first *Panduit* factor “simply asks whether demand existed for the ‘patented
11 product,’ i.e., a product that is ‘covered by the patent in suit’ or that ‘directly
12 competes with the infringing device.’”) (quoting *Rite-Hite*, 56 F.3d at 1548-49).
13 But here, ViaSat and SS/L do not sell similar products and do not compete in the
14 same market. The only evidence ViaSat offered concerned Hughes’s similar
15 product (a satellite broadband service) and its competition with Hughes.

16 The third *Panduit* factor requires that the patentee have “manufacturing and
17 marketing capability to exploit the demand for the patented product.” *SmithKline*
18 *Diagnostics*, 926 F.2d at 1165 (emphasis added). Evidence that ViaSat had the
19 manufacturing and marketing capability to sell more satellite broadband
20 subscriptions cannot satisfy this. And the fourth *Panduit* factor requires that ViaSat
21 show the amount of profit it “would have expected to make if [it] had made the
22 infringer’s sales.” *Id.* (emphasis added). Once again, ViaSat lost no sales to SS/L.
23 Black Decl. Ex. 1 (Trial Tr. 1821:20-23).

24 Finally, permitting a lost profits damages award to be based on Hughes’s use

1 runs afoul of the requirement that lost profits under the patent statute be
2 “objective[ly] foreseeab[le].” *Rite-Hite*, 56 F.3d at 1546; *Grain Processing*, 185
3 F.3d at 1349 (“Full compensation includes any foreseeable lost profits the patent
4 owner can prove.”) (emphasis added). It is not reasonably foreseeable that SS/L’s
5 alleged infringement would expose it to lost profits entirely based on ViaSat’s
6 alleged lost subscribers to Hughes. This is particularly the case in light of (1) the
7 undisputed testimony that there was enough demand in the market for both ViaSat-
8 1 and Jupiter⁴; (2) ViaSat’s CEO Mark Dankberg’s public statements that ViaSat’s
9 broadband service was not affected at all by Jupiter and that the market was “big
10 enough for both” Black Decl. Ex. 1 (Trial Tr. 1826:16-19); and (3) the nature of the
11 market such that both ViaSat’s ability to gain new subscribers and Hughes’s ability
12 to allegedly take such subscribers from ViaSat is dependent upon brand
13 recognition, marketing, and sales staff, among other factors unrelated to the
14 patented invention, Black Decl. Ex. 2 (Trial Tr. vol. X, 2583:24-2584:8, Apr. 9,
15 2014).

16 **B. Dr. Slottje’s Lost Profits Analysis Fails at Every Step**

17 Even if the Court determines that ViaSat may seek lost profits from SS/L
18 based on Hughes’s use of the Jupiter satellite, the jury’s lost profits award is
19 insufficient as a matter of law because the lost profits analysis proffered by ViaSat,
20 through Dr. Slottje, is too speculative to support a lost profits award of any amount.
21 Each of the steps in Dr. Slottje’s analysis is riddled with errors, based on false

22 ⁴ ViaSat’s President and COO, Richard Baldrige testified that there was enough
23 demand to satisfy multiple satellites, such that both companies are building
24 additional high capacity satellites to fill the demand. Black Decl. Ex. 3 (Trial Tr.
vol. II, 376:25-7, Mar. 26, 2014); Black Decl. Ex. 2 (Trial Tr. 2602:10-21).

1 assumptions, and/or unsupported by the evidence.

2 “In general, a patent owner must prove causation in fact by showing (1) a
3 demand for the patented product, (2) an absence of acceptable non-infringing
4 substitutes, (3) the manufacturing and marketing capability to exploit the demand,
5 and (4) the amount of profit the patent owner would have made (‘the *Panduit*
6 factors’).” *Calico Brand, Inc. v. Ameritek Imports, Inc.*, 527 Fed. Appx. 987, 995
7 (Fed. Cir. 2013). A patentee is not entitled to lost profits if it fails to establish any
8 of these requirements. *SmithKline Diagnostics, Inc. v. Helena Labs. Corp.*, 926
9 F.2d 1161, 1165 (Fed. Cir. 1991). “To show ‘but for’ causation, the patentee must
10 reconstruct the market to determine what profits the patentee would have made had
11 the market developed absent the infringing product.” *Ericsson, Inc. v. Harris Corp.*,
12 352 F.3d 1369, 1377 (Fed. Cir. 2003). Lost profits cannot be speculative or be
13 based on “faulty assumptions and a lack of reliable economic testimony relevant to
14 th[e] market.” *Oiness*, 88 F.3d at 1032.

15 There is a “heightened burden” to prove future lost profits damages.
16 *TruePosition Inc. v. Andrew Corp.*, 568 F. Supp. 2d 500, 526 (D. Del. 2008). “The
17 burden of proving future injury is commensurately greater than that for damages
18 already incurred, for the future always harbors unknowns.” *Brooktree Corp. v.*
19 *Advanced Micro Devices, Inc.*, 977 F.2d 1555, 1581 (Fed. Cir. 1992).

- 20 1. Dr. Slottje’s assumption that “but for” the alleged infringement,
21 SS/L would have produced only a 32 Gbps alternative satellite is
unsupported by the evidence.

22 Dr. Slottje’s lost profits model was based on the incorrect assumption that
23 because the patented technology allegedly contributed 78 Gbps of capacity to the
24 Jupiter satellite, in his “but for world,” without the use of ViaSat’s patented

1 technology, SS/L would have been able to build only a 32 Gbps Jupiter satellite for
2 Hughes.⁵ Black Decl. Ex. 4 (Trial Tr. vol. VII, 1765:8-9, Apr. 3, 2014). He based
3 this assumption on the “technical experts.” Black Decl. Ex. 4 (Trial Tr. 1766:4-8).
4 But the testimony of those experts (Dr. Bartone and Mr. Sturza) regarding the
5 alleged capacity increases on a patent-by-patent basis was conclusory and is
6 insufficient to support the 78 Gbps capacity increase on which Dr. Slottje based his
7 lost profits model.⁶ See SS/L’s Mot. for J. as a Matter of Law (Renewed), or a New
8

9 ⁵ Dr. Slottje also incorrectly assumed that the Jupiter satellite has only 110 Gbps of
10 capacity, whereas SS/L presented the un rebutted testimony of Hughes’s Executive
11 Vice President and General Manager North America Division, Paul Gaske, that
12 Jupiter’s actual capacity is 120 Gbps. Black Decl. Ex. 2 (Trial Tr. 2590:13-21).
13 Even if ViaSat’s technology allowed for a 78 Gbps increase in capacity, therefore,
14 that would result in a 42 Gbps alternative satellite, not a 32 Gbps alternative. Dr.
15 Slottje’s lost profits model, based on a 32 Gbps alternative, is based on this flawed
16 factual premise and fails for this reason alone.

17 ⁶ Dr. Bartone incorrectly calculated the ‘875 capacity increase based on the single
18 claim limitation that increases capacity – the separation of gateway and user beams
19 present in dependent Claim 12 – and did not factor in the capacity decrease from
20 the overlapping gateways and user beams that Claim 12 also requires. Black Decl.
21 Ex. 4 (Trial Tr. 1544:5-19); Black Decl. Ex. 1 (Trial Tr. 1925:21-1927:2); Black
22 Decl. Ex. 2 (Trial Tr. 2502:4-10).

23 When calculating the capacity increase attributable to the ‘043 patent, Mr. Sturza
24 offered no explanation as to why he calculated the increase as compared to a seven
color system, and there is no evidence in the record to support such an assumption.
Black Decl. Ex. 4 (Trial Tr. 1664:3-7). Moreover, ViaSat’s own evidence showed
that slightly modified beam spacings would reduce capacity by only a small amount
and would not infringe. Black Decl. Ex. 1 (Trial Tr. 2002-06; 2013:21-2014:1).

Finally, Mr. Sturza relied on the capacity available from the NGSO spectrum to
calculate the capacity increase allegedly attributable to the ‘827 patent. Black Decl.
Ex. 4 (Trial Tr. 1689:22-1692:2). But ViaSat did not invent the use of the NGSO
spectrum, and there is no evidence that an interfering NGSO satellite will launch
during Jupiter’s life. At a minimum, Mr. Sturza should have discounted the
capacity increase by the risk that NGSO interference will never occur.

1 Trial (2 of 12), Regarding Reasonable Royalty Damages, Part IV.C, filed
2 concurrently herewith and incorporated by reference herein.

3 Dr. Slottje also failed to take into account SS/L's ability to implement non-
4 infringing alternatives that demonstrate that SS/L could have built more than a 32
5 Gbps satellite without using ViaSat's technology. For example, it is undisputed that
6 SS/L built a 45 Gbps satellite (iPSTAR) that ViaSat did not accuse of infringement,
7 and that this satellite would have achieved 110 to 130 Gbps had it been built as a
8 Ka-band only satellite over the United States. Black Decl. Ex. 1 (Trial Tr. at 1860-
9 65; 2102-03). Additionally, Boeing and Lockheed Martin both bid the Jupiter-1
10 project and proposed a satellite at or around 100 Gbps, and neither company is
11 accused of offering to sell an infringing satellite. Black Decl. Ex. 1 (Trial Tr.
12 1904:22-1905:21). And the 45 Gbps NBN satellite – which Dr. Slottje assumed
13 infringed and assumed had a capacity increase attributable to the '043 technology –
14 does not infringe ViaSat's patents. Black Decl. Ex. 3 (Trial Tr. 279:19-24); Black
15 Decl. Ex. 4 (Trial Tr. 1805:7-16). Dr. Slottje's failure to even consider this
16 evidence renders his opinion unreliable.

17 ViaSat's two key witnesses, Mr. Dankberg and Mark Miller (ViaSat's Vice
18 President and Chief Technical Officer), both admitted that one could “build and
19 launch a 100-gigabit-per-second satellite and that doesn't necessarily mean they've
20 stolen anything from [ViaSat].” Black Decl. Ex. 5 (Trial Tr. vol. I, 234:10-13, Mar.
21 25, 2014) (Dankberg); see Black Decl. Ex. 1 (Trial Tr. 1869:24-1870:10) (Miller);
22 Black Decl. Ex. 6 (Trial Ex. S-283). Dr. Slottje's only response to this testimony—
23 by ViaSat's own employees—was that such a satellite would be “economically
24 infeasible,” but offered no analysis to support that conclusion. Black Decl. Ex. 1

1 (Trial Tr. 1875:14-23).

2 SS/L also proposed a variety of non-infringing alternative designs through its
3 experts that also belie Dr. Slottje's assumption that but for the alleged infringement,
4 SS/L would have had only a 32 Gbps non-infringing satellite. Black Decl. Ex. 4
5 (Trial Tr. 1720-21); Black Decl. Ex. 1 (Trial Tr. 1925-30, 1936-37, 1983-84, 1995-
6 97); Black Decl. Ex. 2 (Trial Tr. 2500:10-2506:16). ViaSat did not provide
7 sufficient evidence showing that those alternatives would have been infringing,
8 infeasible, unavailable to SS/L, or unacceptable to Hughes.⁷

9 Dr. Slottje's 32 Gbps alternative satellite, on which the entire lost profits
10 damages award is based, is simply not credible and has insufficient evidentiary
11 support in the record to support the lost profits award.

12 2. Dr. Slottje's assumption that there would be 324,520 overflow
13 Jupiter subscribers is contradicted by the evidence.

14 The next step of Dr. Slottje's lost profits analysis also has no evidentiary
15 support because it was based on an incorrect number of projected Jupiter
16 subscribers. Dr. Slottje projected future Hughes's subscribers through the end of his
17 lost profits period – the second quarter of 2016 – using only three quarters of

18 ⁷ For the '875, Dr. Bartone simply testified Jupiter would be "locked down" after
19 the date of the critical design review such that it would be "very, very difficult" to
20 move gateways to eliminate any overlapping gateway and user beams. Black Decl.
21 Ex. 4 (Trial Tr. 1547:20-25). Mr. Sturza's testimony on the '043 non-infringing
22 alternatives was similarly cursory; he merely stated that SS/L "had not implemented
23 any design in terms of the design around," that he was "not aware of any
24 commercially offered products that would provide viable noninfringing
alternatives," and that the other "potential options" "would have essentially drastic
reduction in capacity of the system, but they wouldn't be viable." Black Decl. Ex. 4
(Trial Tr. 1665:6-19). Regarding the '827, he testified that the only viable
alternative was to refrain from using the NGSO spectrum altogether. Black Decl.
Ex. 4 (Trial Tr. 1720:3 – 1721:8).

1 Hughes's actual subscriber data and applied a compound quarterly growth rate of
2 9.54%. This resulted in a projection of over one million Jupiter subscribers by the
3 second quarter of 2016. Black Decl. Ex. 4 (Trial Tr. 1674:8-25).

4 This projection has no basis in the evidence and is inconsistent with
5 Hughes's actual projections. Mr. Gaske testified that Hughes projects that it will
6 have only 850,000 subscribers in June 2016, will never fill to capacity, and will
7 never have one million subscribers. Black Decl. Ex. 2 (Trial Tr. 2584:9-2585:3).
8 Hughes's projections show a maximum of 674,651 subscribers in the fourth quarter
9 of 2015, Black Decl. Ex. 7 (Trial Ex. V13 at HUGHES-169175), whereas Dr.
10 Slottje's projections showed total Jupiter subscribers at 844,397 in the fourth
11 quarter of 2015. Black Decl. Ex. 8 (Trial Demonstrative PDX11-38); *see also* Black
12 Decl. Ex. 9 (Trial Ex. V12 at HUGHES-165494) (Hughes "unofficial estimate"
13 projecting only 517,765 subscribers in 2015). ViaSat did not offer any alternative
14 calculation based on Hughes' corrected projections. Thus, the 324,520 subscribers
15 that Dr. Slottje assumed ViaSat would capture from Hughes is inaccurate,
16 unreliable, and cannot constitute a legally sufficient evidentiary basis for an award
17 of lost profits.

18 3. Dr. Slottje's assumption that all of the Jupiter overflow
19 subscribers would be captured by ViaSat is unsupported by the
20 evidence.

21 Dr. Slottje's third step in his lost profits analysis also lacks evidentiary basis.
22 Dr. Slottje determined the number of Jupiter subscribers that he assumed would
23 have been available for ViaSat to capture in the "but for" world by subtracting the
24 number of subscribers he assumed that a 32 Gbps Jupiter satellite could support
(315,000) from the number of Jupiter subscribers he projected. Black Decl. Ex. 4

1 (Trial Tr. 1767:2-4). He then calculated how many of the Jupiter overflow
2 subscribers would have been captured by ViaSat each quarter: he assumed that for
3 seven quarters, 100% of the available Jupiter subscribers would have been captured
4 by ViaSat, and for the eighth quarter, he assumed that 99% would have been
5 captured by ViaSat, until the number of captured subscribers reached 324,520.
6 Black Decl. Ex. 4 (Trial Tr. 1771:22-25); Black Decl. Ex. 1 (Trial Tr. 1830:21-
7 1831:6); Black Decl. Ex. 2 (Trial Tr. 2607:16-25).

8 Dr. Slottje performed no market analyses and did not review a single piece of
9 market data to support this remarkable assumption that all Hughes's overflow
10 subscribers and potential future overflow subscribers would migrate to ViaSat for
11 seven quarters; let alone survey Hughes's subscribers to determine whether they
12 actually subscribed to Jupiter because "they want[ed] satellite broadband" – rather
13 than because they received a mailer or responded to advertising or a sales call, or
14 because of price, availability, quality of bundling, brand recognition, or any other
15 reason. Black Decl. Ex. 4 (Trial Tr. 1767:13). Rather, he relied on what he termed
16 "revealed preferences" to support his faulty assumption that 100% of the available
17 Jupiter subscribers (many of whom are projected future subscribers) for seven
18 consecutive quarters were so partial to satellite broadband that they would have
19 subscribed to ViaSat's service. Black Decl. Ex. 1 (Trial Tr. 1833:24-4).

20 Dr. Slottje's assumption is directly contradicted by the evidence. ViaSat itself
21 admitted that it competes "with dial-up, with satellite, with fixed wireless, with
22 DSL, [and] with cable," as does Jupiter.⁸ See, e.g., Black Decl. Ex. 1 (Trial Tr.

23 _____
24 ⁸ Dr. Slottje's attempt to evade this undisputed evidence by declaring the "satellite
broadband market" to be a distinct sub-market with "two players" is insufficient

1 1827:7-10); Black Decl. Ex. 2 (Trial Tr. 2581:8-19; 2582:3-24). Moreover, Dr.
2 Slottje admitted that there is uncertainty as to what broadband competition would
3 exist during his future lost profits period. Black Decl. Ex. 1 (Trial Tr. 1835:10-19).
4 He further admitted that it would be “inappropriate to assume a one-to-one capture
5 rate because of the fact that we know there are other forms of broadband that are
6 out there” that Jupiter subscribers may have purchased instead of satellite
7 broadband, and he did not even know if the Hughes subscribers he said would have
8 chosen ViaSat instead had even heard of ViaSat, leaving no support for Dr.
9 Slottje’s assumption that 100% of those subscribers could have chosen ViaSat’s
10 service in the but-for world. Black Decl. Ex. 1 (Trial Tr. 1834:12-1835:3, 1837:13-
11 2). Indeed, even ViaSat’s Senior Vice President of Broadband Services, Kevin
12 Harkenrider, testified that it would be speculative to assume that every overflow
13 customer who signed up for Jupiter would have signed up for ViaSat. Black Decl.
14 Ex. 1 (Trial Tr. 1838:7-1839:4).

15 In addition to these infirmities in Dr. Slottje’s analysis, he failed to consider
16 _____
17 (... cont’d)
18 under the law because there is no evidence of a two-supplier market. Black Decl.
19 Ex. 1 (Trial Tr. 1827:6). “Accurately identifying a two-supplier market ‘requires an
20 analysis which excludes alternatives to the patented product with disparately
21 different prices or significantly different characteristics.’” *Siemens Med. Solutions*
22 *USA, Inc. v. Saint-Gobain Ceramics & Plastics, Inc.*, 637 F.3d 1269, 1288 (Fed.
23 Cir. 2011) (quoting *Micro Chem., Inc. v. Lextron, Inc.*, 318 F.3d 1119, 1124 (Fed.
24 Cir. 2003)). Dr. Slottje performed no such analysis and did not consider the
“realities of the marketplace.” *SmithKline Diagnostics*, 926 F.2d at 1166 (affirming
district court’s rejection of the patentee’s theory of a two-supplier market as
“inaccurate, not credible and against the great weight of the evidence,” reasoning
that “if the realities of the market are that others would likely have captured sales
made by the infringer, despite a difference in the products, it follows that the ‘but
for’ test is not met.”).

1 that approximately 2% of Jupiter-1 subscribers have line of site issues that would
2 make them unable to subscribe to ViaSat-1. Black Decl. Ex. 2 (Trial Tr. 2583:2-
3 19); Black Decl. Ex. 1 (Trial Tr. 1835:5-9). His calculations also captured Jupiter
4 subscribers from Spokane, where ViaSat does not have a beam, and from California
5 and Maine, who do not have access to ViaSat-1. Black Decl. Ex. 2 (Trial Tr.
6 2579:24-2581:6).

7 Dr. Slottje also admitted that for ViaSat-1 to capture Hughes subscribers, the
8 overflow customers have to be in a location where ViaSat has a beam that has room
9 to accommodate the subscribers. Black Decl. Ex. 1 (Trial Tr. 1840:8-16; 1845:22-
10 1846:4. But when Dr. Slottje performed his lost profits calculations, he was
11 unaware that certain ViaSat-1 beams were reaching capacity and thus could not
12 accommodate any overflow Jupiter subscribers. Black Decl. Ex. 1 (Trial Tr.
13 1841:11-1842:16). Indeed, he did not even recall reviewing any ViaSat beam fill
14 projections—which project that a total of 30 beams will be closed by the end of Dr.
15 Slottje’s lost profits period. Black Decl. Ex. 1 (Trial Tr. 1845:7-21; 1846:15-19);
16 Black Decl. Ex. 10 (Trial Ex. S-186B). Nor did Dr. Slottje determine whether any
17 of the “overflow” subscribers from Jupiter were from Jupiter beams that in the “but
18 for” world will never fill – whereas Mr. Gaske testified that about 1/3 of Jupiter’s
19 beams are never projected to fill. Black Decl. Ex. 2 (Trial Tr. 2585:4-9).

20 Dr. Slottje’s assumptions, with no supporting market analysis and indeed
21 undermined and sometimes contradicted by the record evidence, are too speculative
22 to support a lost profits award.

23 4. Dr. Slottje’s profit per subscriber figure is unsupported by the
24 evidence

Dr. Slottje’s \$77 “actual profit per subscriber” per quarter, based on ViaSat-1

1 and WildBlue past subscription revenue through June 2013, is similarly lacking in
2 evidentiary support. Black Decl. Ex. 1 (Trial Tr. 1848:6-21); Black Decl. Ex. 11
3 (Trial Ex. V-1374 at Tab Subs_Revs). In calculating this figure, Dr. Slottje not only
4 ignored evidence that it takes up to two years for a ViaSat retail subscriber to
5 become profitable, but also failed to include \$700-\$800 of subscriber acquisition
6 costs per retail subscriber. Black Decl. Ex. 1 (Trial Tr. 1849:25-1852:8). He
7 reasoned it would be “wrong to take ... into account” such costs – which included
8 the satellite dish that each subscriber needs outside of the home – because they
9 were a “fixed cost” that ViaSat “would still have to incur” whether “in a but-for
10 world or a real world.” Black Decl. Ex. 1 (Trial Tr. 1852:5-8). He did not explain
11 how ViaSat would have to incur these “fixed costs” in the actual world if it did not
12 acquire the “but for” subscribers. The result of this omission was to exclude
13 between \$151 and \$173 million of costs from the lost profits model. Black Decl.
14 Ex. 1 (Trial Tr. 1855:11-1156:7); Black Decl. Ex. 2 (Trial Tr. 2617:21-2620:23).
15 This omission of millions of dollars of costs from his lost profits calculation renders
16 his model fundamentally flawed.

17 5. Dr. Slottje’s lost profits analysis required the jury to speculate as
18 to how to apply his model to calculate its own award.

19 Using the \$77 profit per subscriber per quarter figure and the 324,520 Jupiter
20 subscribers he assumed would have subscribed to ViaSat in his “but for” world, Dr.
21 Slottje calculated \$175.2 million in lost profits. Black Decl. Ex. 4 (Trial Tr.
22 1772:12-18). He did not offer any alternative lost profits calculation. He failed to
23 inform the jury how he performed the present value calculation or how a change in
24 any of the numbers would affect the lost profits analysis. Thus, when the jury
determined that not all of the lost profits Dr. Slottje suggested were appropriate, it

1 was left without any tools to calculate an alternative lost profits award. Because
2 damages awards cannot be based on such guesswork, *Oiness*, 88 F.3d at 1031, even
3 a lost profits award of less than the full amount requested cannot be supported.

4 **C. Lost Profits Are Unavailable Under *Panduit***

5 Finally, the jury award must be vacated because ViaSat did not meet its
6 burden of proving that lost profits are available under *Panduit*. As set forth above,
7 the *Panduit* factors require that SS/L and ViaSat sell products that compete in the
8 same market. Because SS/L and ViaSat are not competitors, lost profits are not
9 available for this reason alone. But even if lost profits were legally available to
10 ViaSat as a non-competitor, ViaSat did not provide sufficient evidence to meet the
11 second and fourth *Panduit* factors.

12 The second *Panduit* factor requires ViaSat to demonstrate the absence of a
13 non-infringing substitute. The overwhelming evidence suggests that there were
14 non-infringing substitutes to both the Jupiter satellite and to ViaSat's satellite
15 broadband service. As discussed above, it is undisputed that SS/L could have built a
16 100 Gbps satellite without infringing, and there is insufficient evidence that the
17 patented technology contributed 78 Gbps of capacity to the Jupiter satellite on a
18 patent-by-patent basis. Also, as discussed above, the uncontested evidence shows
19 there are multiple broadband alternatives available on the market throughout the
20 lost profits period, that the broadband market is an extremely competitive one, and
21 that satellite broadband competes with DSL, cable, fiber, and wireless providers.
22 Black Decl. Ex. 1 (Trial Tr. 1826:23-1827:10); Black Decl. Ex. 2 (Trial Tr. 2581:8-
23 19; 2582:3-24). Moreover, Dr. Slottje provided no analysis in support of a two-
24 supplier market. *See supra* n.8. Dr. Slottje's unsupported assumption that there is a

1 distinct market for satellite broadband that does not compete with other forms of
2 broadband does not constitute “sound economic proof of the nature of the market
3 and likely outcomes with infringement factored out” as required to claim lost
4 profits. *Grain Processing Corp. v. Am. Maize-Prods. Co.*, 185 F.3d 1341, 1350
5 (Fed. Cir. 1999).

6 Finally, as set forth above, ViaSat did not present sufficient evidence of the
7 amount of profit it “would have expected to make if [it] had made the infringer’s
8 sales” to satisfy the fourth *Panduit* factor. *SmithKline Diagnostics*, 926 F.2d at
9 1165 (emphasis added). ViaSat presented no evidence that ViaSat lost any sales to
10 SS/L. But even if it were proper for ViaSat to base lost profits on the broadband
11 subscribers it allegedly lost to Hughes, as discussed above, Dr. Slottje’s lost profits
12 model is speculative and is neither a reasonable approximation of such losses, nor is
13 Dr. Slottje’s model based on reliable economic proof. *See Grain Processing*, 185
14 F.2d at 1345; *Lam, Inc. v. Johns-Manville Corp.*, 718 F.2d 1056, 1066 (Fed. Cir.
15 1983).

16 **IV. CONCLUSION**

17 For the reasons stated above, SS/L’s JMOL motion should be granted that
18 ViaSat is not entitled to any lost profits, or in the alternative, a new trial on
19 damages should be granted.

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1 Dated: June 13, 2014

By: /s/ Rachel S. Black

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CERTIFICATE OF SERVICE

I hereby certify that, on June 13, 2014, I caused the foregoing **SS/L'S MOTION FOR JUDGMENT AS A MATTER OF LAW (RENEWED), OR A NEW TRIAL (3 OF 12), REGARDING LOST PROFITS DAMAGES** to be served on opposing counsel via the Court's CM/ECF system.

Dated: June 13, 2014

By: /s/ Rachel S. Black