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

17 VIASAT, INC., VIASAT
COMMUNICATIONS, INC., f/k/a
18 WILDBLUE COMMUNICATIONS,
INC.,

19 Plaintiffs,

20 vs.

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

22 Defendants/Counterclaim
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
ALTERNATIVELY FOR A NEW
TRIAL (1 Of 12), REGARDING
BREACH OF CONTRACT
DAMAGES**

Date: July 22, 2014

Time: 9:00 a.m.

Place: Courtroom 15A

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Rules

Fed. R. Civ. P. 59.....3

1 The jury in this case returned a \$123 million breach-of-contract verdict
2 against SS/L, which it divided into (1) \$102 million in separate, non-overlapping
3 contract damages and (2) \$21 million in damages that overlapped with its patent
4 damages. There is no basis in the evidence to support either figure.¹

5 After receiving the jury's verdict, this Court commented that "the
6 102,000,000, that's sort of a surprise to the Court." 4/24/14 Trial Tr., at 3218:14-15.
7 And for good reason. ViaSat advanced no evidence whatsoever at trial to justify
8 any amount of separate breach-of-contract damages, much less \$102 million.
9 Rather, its damages expert presented ViaSat's contract claims solely as an
10 alternative justification for identical damages in the event that ViaSat did not
11 prevail on its patent claims:

12 Q. If the jury finds both patent infringement and
13 breach of contract, will ViaSat get both patent
14 infringement and breach of contract damages, adding
those two numbers together?

15 A. No.

16 Q. What will happen in that scenario?

17 A. You only get - - you get one or the other. You don't
18 get them both.

19 4/3/14 Trial Tr., at 1806:10-17. But once the jury awarded ViaSat compensation on
20 each of its patent claims, there was no evidentiary basis upon which to award \$102
21

22
23 ¹ SS/L hereby moves for judgment as a matter of law ("JMOL") pursuant to Rule
24 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.

1 million more to ViaSat as contract damages. This Court should vacate the jury's
2 award of \$102 million in contract damages.

3 Granting JMOL as to the \$102 million, however, ought not to end this
4 Court's inquiry into the breach-of-contract damages. In the event that this Court
5 grants JMOL as to ViaSat's patent claims, ViaSat may seek refuge in the jury's
6 finding of \$21 million in overlapping patent/contract damages. Moreover, ViaSat
7 must establish the existence of damages, whether overlapping or not, as an element
8 of its contract claims. ViaSat's contract-damages presentation, however, was almost
9 non-existent; of the fifty pages of trial transcript consumed by the direct
10 examination of its damages expert, ViaSat devoted just a single page to contract
11 damages. ViaSat's expert was able to say so little about contract damages because
12 he simply assumed that contract damages could be calculated the same way as
13 patent damages. That assumption, however, overlooks critical distinctions between
14 contract and patent claims, including that the Build Contract bars lost profits as
15 damages (absent a finding of intent that was not made here) and that, unlike patent
16 claims, the protections of both asserted contracts end upon the publication of the
17 proprietary concepts claimed by ViaSat.

18 As a result, the Court should enter JMOL for SS/L on ViaSat's breach of
19 contract claim or, in the alternative, on ViaSat's breach of contract damages. At the
20 very least, SS/L is entitled to JMOL that there are no separate breach of contract
21 damages, let alone any that would total \$102 million.

22 I. LEGAL STANDARD

23 Judgment as a matter of law ("JMOL") may be granted and a jury verdict can
24 be overturned "if the evidence, construed in the light most favorable to the

1 nonmoving party, permits only one reasonable conclusion, and that conclusion is
2 contrary to the jury's verdict." *Lucent Techs., Inc. v. Gateway Inc.*, 580 F.3d 1301,
3 1309 (Fed. Cir. 2009) (quoting *Pavao v. Pagay*, 307 F.3d 915, 918 (9th Cir. 2002)).
4 "[O]n posttrial JMOL motions, district court judges must scrutinize the evidence
5 carefully to ensure that the 'substantial evidence' standard is satisfied." *Id.* at 1336.
6 Substantial evidence is "more than a mere scintilla" and is "such relevant evidence
7 as a reasonable mind might accept as adequate to support a conclusion." *The Johns*
8 *Hopkins Univ. v. Datascope Corp.*, 543 F.3d 1342, 1348 (Fed. Cir. 2008) (quotation
9 marks and citation omitted). "Under Rule 50, a court should render judgment as a
10 matter of law when a party has been fully heard on an issue and there is no legally
11 sufficient evidentiary basis for a reasonable jury to find for that party on that issue."
12 *Reeves v. Sanderson Plumbing Prods.*, 530 U.S. 133, 149 (2000).

13 Whether to grant a new trial on some or all issues, pursuant to Fed. R. Civ. P.
14 59, is a matter of the trial court's discretion. *City Solutions, Inc. v. Clear Channel*
15 *Commc'ns*, 365 F.3d 835, 843 (9th Cir. 2004). Courts apply a lower standard of
16 proof to motions for new trial than they do to JMOL motions. *William Inglis v. ITT*
17 *Cont'l Baking Co.*, 668 F.2d 1014, 1026–7 (9th Cir. 1981) "[T]he trial court may
18 grant a new trial, even though the verdict is supported by substantial evidence, if
19 'the verdict is contrary to the clear weight of the evidence or is based upon evidence
20 which is false, or to prevent, in the sound discretion of the trial court, a miscarriage
21 of justice.'" *Wordtech Sys. v. Integrated Networks Solutions, Inc.*, 609 F.3d 1308,
22 1313 (Fed. Cir. 2010) (quoting *United States v. 4.0 Acres of Land*, 175 F.3d 1133,
23 1139 (9th Cir. 1999)). In deciding a motion for new trial, the court "has the right,
24 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 Damages awards cannot be based on guesswork or "speculation or optimism,
6 but must be established by evidence." *Hebert v. Lisle Corp.*, 99 F.3d 1109, 1119
7 (Fed. Cir. 1996); see *Lakeside–Scott v. Multnomah County*, 556 F.3d 797, 803 (9th
8 Cir. 2009) (judgment as a matter of law "is appropriate when the jury could have
9 relied only on speculation to reach its verdict"); *Oiness v. Walgreen Co.*, 88 F.3d
10 1025, 1031 (Fed. Cir. 1996) (jury's damages award cannot be "based only on
11 speculation or guesswork"). Nor can a damages award stand if any part of the
12 calculation leading to it is unsupported or contrary to law. *Uniloc USA, Inc. v.*
13 *Microsoft Corp.*, 632 F.3d 1292, 1317 (Fed. Cir. 2011). That is, "[b]eginning from a
14 fundamentally flawed premise and adjusting it based on legitimate considerations
15 specific to the facts of the case nevertheless results in a fundamentally flawed
16 conclusion." *Lucent Techs., Inc. v. Microsoft Corp.*, 837 F. Supp. 2d 1107, 1112
17 (S.D. Cal. 2011) (quoting *Unisplay, S.A. v. Am. Elec. Sign Co.*, 69 F.3d 512, 517
18 (Fed. Cir. 1995)).

19 II. BACKGROUND

20 ViaSat asserted both patent and breach-of-contract claims against SS/L
21 relating to two satellite projects, Jupiter-1 and NBN. At trial, ViaSat sponsored its
22 damages model through the testimony of its economic expert, Dr. Daniel Slottje.
23 The fifty pages of the trial transcript encompassing his direct examination focused
24 almost entirely on patent damages, 4/3/14 Trial Tr., at 1757 to 1807 – which he

1 calculated at \$635.1 million for infringement by Jupiter-1, *id.* at 1803:20 to 1804:1,
2 and \$24.9 million for infringement by NBN, *id.* at 1804:21-25.

3 Dr. Slottje's testimony about the purported breach-of-contract damages
4 against SS/L spans only a single page of those fifty. *Id.* at 1804:2-20 & 1805:17-24.
5 And even what testimony he did provide was sparse and conclusory (quoted below
6 in its entirety):

7 Q. Let's turn to ViaSat's breach of contract claim for
8 the Jupiter-1 satellite. In your opinion, what are the
9 damages that ViaSat should be awarded for its breach of
10 contract claim?

11 A. Six hundred and thirty-five point one million
12 dollars.

13 Q. And why is that?

14 A. Because my understanding is that the -- the
15 contracts covered the primary -- what you've been hearing
16 a lot of talk about the primary technology of capacity
17 maximization, NGSO blanking and frequency reuse, and
18 those same things, if they're not covered under the patent,
19 it's my understanding that if the contract's breached and
20 covers those same things, then the same economic harm
21 would be done to ViaSat. So total contract damages
22 would be the same amount of money which, again, is to
23 put ViaSat back the position it would be in if its
24 technology hadn't been breached by the contract.

Q. Is your opinion the same even if the jury doesn't
find for ViaSat on its patent claims for some reason?

A. Yes, for the reasons I just explained.

...

Q. And would you please summarize your opinion as
to the damages that ViaSat should receive with respect to
its breach of contract claim for the -- with respect to the

1 breach of -- with respect to the NBN satellite and capacity
2 tool?

3 A. It would be exactly the same with respect to the
4 satellites and then the capacity tool would also add \$4.3
million more, for a total of \$29.2 million.

5 *Id.*

6 Dr. Slottje's testimony provided no basis for non-overlapping patent and
7 breach of contract damages for Jupiter-1. Rather, Dr. Slottje explained that breach
8 of contract damages for Jupiter-1 should represent "the same economic harm" and
9 therefore be "the same amount of money." *Id.* Breach of contract damages for
10 Jupiter-1 would come into play only "if [the asserted technologies are] not covered
11 under the patent, it's my understanding that if the contract's breached and covers
12 those same things." For example, under ViaSat's damages theory, if the jury had
13 found the '827 NGSO patent to be invalid, but had found ViaSat to possess
14 contractual rights to the NGSO switch described in the '827 patent, then the jury
15 could have awarded ViaSat as breach of contract damages the same measure of '827
16 patent damages that would have been denied to ViaSat. Indeed, so as to leave no
17 doubt that the alleged damages for patent infringement and breach of contract were
18 entirely overlapping and identical, Dr. Slottje explicitly testified that "you only get
19 one or the other. You don't get them both." *Id.* at 1806:10-17.

20 As to NBN, Dr. Slottje again indicated that breach-of-contract damages
21 "would be exactly the same" as patent damages. *Id.* at 1805:17-24. For NBN,
22 however, Dr. Slottje identified a single category of contract damages that did not
23 overlap with his patent damages: for misappropriation of the NBN capacity tool.
24

1 His entire testimony relating to those damages, however, amounted to 11 words:
2 "and then the capacity tool would also add \$4.3 million more." *Id.*

3 Before the close of evidence, SS/L moved for judgment as a matter of law as
4 to ViaSat's breach-of-contract damages. Doc. No. 966. The jury later returned a
5 verdict finding that SS/L directly infringed ViaSat's three patents with respect to the
6 Jupiter-1 satellite, and also that SS/L breached its contracts with ViaSat. Doc. No.
7 1014, at 2-3, 8. As to Jupiter-1, the jury awarded patent damages of \$58 million in
8 lost profits and \$123 million in reasonable royalties. *Id.* at 9. The jury further
9 awarded \$123 million in breach of contract damages, *id.* at 12, \$102 million of
10 which it indicated were non-overlapping with the patent damages, *id.* at 13.

11 **III. THERE IS NO EVIDENCE TO SUPPORT SEPARATE BREACH OF**
12 **CONTRACT DAMAGES OF \$102 MILLION**

13 Putting aside the infirmities of ViaSat's breach-of-contract damages theories
14 generally (discussed below), there simply was no record evidence from which a
15 reasonable jury could have awarded ViaSat \$102 million in breach-of-contract
16 damages separate from its patent damages. ViaSat expressly recognized that its
17 patent and contract damages models covered the same ground. The jury award of
18 \$102 million grants ViaSat damages that it did not (and could not) seek. This Court
19 must correct that error and prevent ViaSat from receiving a double recovery.

20 **A. Insufficient Evidence Supports Separate Breach of Contract**
21 **Damages as to Jupiter-1.**

22 The only evidence offered by ViaSat to support its breach-of-contract
23 damages request is the testimony of Dr. Slottje. And Dr. Slottje confined his
24 breach-of-contract damages analysis to the two satellite projects at issue in this trial
– Jupiter-1 and NBN. In other words, Dr. Slottje did not opine that SS/L's alleged

1 breach of contract caused harm from other satellite projects or to other parts of
2 ViaSat's satellite business; he was asked only about contract damages arising from
3 Jupiter-1 and NBN. 4/3/14 Trial Tr., at 1804-05.

4 With respect to Jupiter-1, Dr. Slottje provided literally zero evidence of how
5 SS/L's breach caused any separate, non-overlapping contract damages. Rather, he
6 testified that he understood ViaSat's Jupiter-1 breach-of-contract theories to relate
7 to the same technologies as its patent claims, and to come into play only to the
8 extent those patent claims were unsuccessful: "[T]he contracts covered the primary
9 -- what you've been hearing a lot of talk about the primary technology of capacity
10 maximization, NGSO blanking and frequency reuse, and those same things, if
11 they're not covered under the patent, it's my understanding that if the contract's
12 breached and covers those same things, then the same economic harm would be
13 done to ViaSat." *Id.* at 1804:8-14.² Dr. Slottje thus provided no opinion that ViaSat
14 suffered any contract damages that did not overlap with its patent damages. To the
15 contrary, he was clear that ViaSat was not attempting to recover separate contract
16 damages were it to prevail on both its patent and contract claims. *Id.* at 1806:10-17
17 ("[Y]ou only get one or the other. You don't get them both.").

18 In light of this testimony, there is no evidentiary basis for awarding ViaSat
19 any separate contract damages relating to any harm Jupiter-1 supposedly caused to
20 ViaSat. ViaSat's expert was clear that his contract damages arose from the same

21
22 ² SS/L has separately filed JMOLs with respect to ViaSat's asserted lost profits and
23 royalty damages for its patent claims, as well as a JMOL challenging the
24 recoverability of both lost profits and a reasonable royalty on the same patent
claims. To the extent that the methodologies ViaSat used to calculate its patent
damages are relevant to this motion, SS/L incorporates herein those other damages
JMOLs.

1 technologies as his patent damages and were not to be awarded in the event ViaSat
2 was successful in its patent claims. The jury did award damages for each of
3 ViaSat's patent claims. Accordingly, the jury's separate \$102 million verdict for
4 contract damages has no evidentiary support with respect to Jupiter-1.

5 **B. Insufficient Evidence Supports Separate Breach of Contract**
6 **Damages as to NBN.**

7 Analytically, the NBN contract-damages situation is different, but the
8 ultimate consequence is the same – ViaSat presented insufficient evidence of any
9 non-overlapping contract damages attributable to NBN. Dr. Slottje testified that
10 contract damages for NBN would be \$24.9 million that overlapped with NBN
11 patent damages, plus an additional non-overlapping \$4.3 million to account for the
12 NBN capacity tool. *Id.* at 1804-05.

13 The jury found that SS/L did not infringe with respect to NBN. This does not
14 mean, however, that there is an evidentiary basis to replace the absent NBN patent
15 damages with contract damages. Dr. Slottje purported to apply the *Georgia-Pacific*
16 factors in his analysis of NBN patent damages, *id.* at 1805:1-4, and he then
17 concluded that his NBN contract damages were calculated "exactly the same" as
18 were its patent damages, *id.* at 1805:17-24. Yet he provided no detailed analysis of
19 his NBN royalty model – whether for patent damages or contract damages. His only
20 comment about the NBN model was to explain that NBN damages would be less
21 than Jupiter-1 damages because ViaSat did not compete with NBN. *Id.* at 1805.

22 Putting aside SS/L's other complaints about Dr. Slottje's Jupiter-1 analysis, at
23 least for that satellite he attempted to describe and apply a methodology to
24

1 damages. For NBN, on the other hand, Dr. Slottje said next to nothing.³ He
2 provided no explanation for his royalty, no specific analysis of the *Georgia-Pacific*
3 factors, nor any analysis of the alleged capacity increase for NBN attributable to
4 ViaSat's technologies.⁴ As the Federal Circuit observed in *Whitserve, LLC v.*
5 *Computer Pkgs., Inc.*, 694 F.3d 10 (Fed. Cir. 2012), more than just cursory analysis
6 is necessary for an expert to invoke *Georgia Pacific*:

7 We do not require that witnesses use any or all of the
8 *Georgia-Pacific* factors when testifying about damages in
9 patent cases. If they choose to use them, however, reciting
10 each factor and making a conclusory remark about its
11 impact on the damages calculation before moving on does
12 no more than tell the jury what factors a damages analysis
13 could take into consideration. *See Lucent*, 580 F.3d at
14 1329 (explaining that a "damages award cannot stand
15 solely on evidence which amounts to little more than a
16 recitation of royalty numbers" and jurors cannot rely on
17 "superficial testimony" with "no analysis"). Expert
18 witnesses should concentrate on fully analyzing the
19 applicable factors, not cursorily reciting all fifteen. And,
20 while mathematical precision is not required, some
21 explanation of both why and generally to what extent the
22 particular factor impacts the royalty calculation is needed.

18 ³ Dr. Slottje's entire NBN damages analysis appears on pages 1804 and 1805 of the
19 transcript.

20 ⁴ ViaSat's technical expert, Mr. Sturza, testified about alleged capacity increases
21 provided to Jupiter-1 through the use of ViaSat's '043 technology. 4/3/14 Trial Tr.,
22 at 1663:16 to 1664:10. He was conspicuously silent, however, about any NBN
23 capacity increases. And the alleged Jupiter-1 capacity increases were central to Dr.
24 Slottje's reasonable royalty analysis. *E.g.*, 4/3/14 Trial Tr., at 1795:21-24; 1801:6-
25. Accordingly, ViaSat cannot simply adopt the Jupiter-1 reasonable royalty
analysis as a proxy for an absent NBN royalty analysis, because there is no record
evidence of a critical NBN fact – the alleged NBN capacity increase attributable to
ViaSat's technology.

1 *Id.* at 31. The Federal Circuit would surely find Dr. Slottje's analysis to have been
2 insufficient to support patent damages for NBN had the jury found NBN
3 infringement. Because Dr. Slottje admitted his patent analysis was the same as his
4 contract analysis, his contract analysis must therefore also fail.

5 Moreover, even assuming that Dr. Slottje's NBN patent damages were
6 calculated based on capacity increases attributable to the '043 patent – which
7 neither he nor ViaSat's technical expert ever mentioned – the jury found that the
8 NBN satellites did not infringe the '043 patent. There is therefore no evidence
9 identifying how SS/L's alleged breaches caused ViaSat to suffer the same \$24.9
10 million in claimed NBN patent damages.

11 The only item of contract damages in the entire trial for which ViaSat
12 articulated a non-overlapping damages theory is for \$4.3 million arising from the
13 NBN capacity tool. Yet as ViaSat argued at trial, the capacity tool and the '043
14 patent are the same technology. 3/25/14 Trial. Tr., at 80:17-20 ("And this is -- this
15 is another word for the technology that's embodied in this ['043] patent. It's coding
16 and capacity management [tool]. Maximization tool is another phrase that you'll see
17 in the documents.") (ViaSat opening statement). Because the jury found that the
18 NBN satellites did not infringe the '043 patent, there is no basis for any assertion
19 that SS/L employed ViaSat's technologies in the NBN capacity tool.

20 In any event, the record is wholly lacking to support an award of even \$4.3
21 million in NBN capacity tool damages. Dr. Slottje's analysis of the \$4.3 million
22 amounted to 11 words in the transcript: "and then the capacity tool would also add
23 \$4.3 million more." *Id.* at 1806:23-24. Dr. Slottje presented no explanation and no
24 evidence as to how he arrived at this \$4.3 million figure. The \$4.3 million is simply

1 *ipse dixit*, appearing from thin air. This is easily insufficient evidence to support an
 2 award of \$4.3 million: "When an expert opinion is not supported by sufficient facts
 3 to validate it in the eyes of the law, or when indisputable record facts contradict or
 4 otherwise render the opinion unreasonable, it cannot support a jury's verdict."
 5 *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 242
 6 (1993) (finding that expert testimony was not sufficient to defeat JMOL because
 7 expert's opinion was not based on sufficient facts to support jury verdict); *see also*
 8 *General Elec. Co. v. Joiner*, 522 U.S. 136, 146 (1997) ("But nothing in either
 9 *Daubert* or the Federal Rules of Evidence requires a district court to admit opinion
 10 evidence that is connected to existing data only by the *ipse dixit* of the expert.").

11 **C. To Award Both Patent and Breach of Contract Damages Would**
 12 **Lead to an Improper Double Recovery.**

13 "Generally, the double recovery of damages is impermissible." *Aero Prods.*
 14 *Int'l, Inc. v. Intex Recreation Corp.*, 466 F.3d 1000, 1017 (Fed. Cir. 2006). One
 15 scenario in which a double recovery may occur is when "claims arise out of the
 16 same set of operative facts." *Id.* at 1020. In that situation, "there may be only one
 17 recovery." *Id.*

18 Here, undeniably ViaSat's contract and patent damages arose from the same
 19 set of operative facts.⁵ Dr. Slottje cited no technologies allegedly misappropriated
 20 by SS/L in breach of contract that were not also allegedly covered by ViaSat's
 21 patents. Instead, he expressly premised his contract damages model on the

22
 23 ⁵ By separate JMOL, which is incorporated herein, SS/L has challenged ViaSat's
 24 double recovery of lost profits and reasonable royalty damages on its patent claims.
 The present motion differs in that it seeks vacatur of the \$102 million in separate
 contract damages, which overlap with the patent claims.

1 assumption that if certain concepts were "not covered under the patent, it's my
2 understanding that if the contract's breached and covers those same things." 4/3/13
3 Trial Tr., at 1804:11-14. It thus cannot be disputed that ViaSat's contract and patent
4 claims arose from the "same set of operative facts," rendering a double recovery
5 between them improper. *See Junker v. Eddings*, 396 F.3d 1359, 1368 (Fed. Cir.
6 2005) ("Furthermore, the dollar amount that Junker now seeks as damages for
7 breach of contract is identical to the dollar amount the jury awarded him for
8 infringement. Both claims arose out of the same set of operative facts regarding
9 Galt's unauthorized use of the design Junker had developed. The circumstances at
10 least suggest that awarding Junker the damages he seeks on his breach-of-contract
11 claim would constitute a double recovery."). Accordingly, this Court must vacate
12 the jury's \$102 million contract award as a double recovery with its patent damages.

13 **IV. VIASAT FAILED TO ESTABLISH ANY BREACH OF CONTRACT** 14 **DAMAGES**

15 As set forth above, this Court must grant JMOL as to the jury's award of a
16 separate \$102 million in contract damages. ViaSat, however, additionally failed to
17 establish breach of contract damages in any amount, whether overlapping or
18 separate. As such, ViaSat is entitled to no additional recovery in the event that its
19 patent claims fail, and this Court should also grant JMOL as to the jury's breach of
20 contract finding in light of ViaSat's failure to establish an essential element of the
21 claim.

22 **A. ViaSat Presented Insufficient Evidence of Contract Damages.**

23 ViaSat asserted that SS/L breached the March 2006 NDA, which is governed
24 by California law, and the Build Contract, which is governed by New York law. To
prove damages under either California or New York law, a plaintiff must establish

1 proximate causation – *i.e.*, the position the plaintiff would have been in but for the
2 defendant's breach.⁶ And under California and New York law, breach of contract
3 damages must be reasonably foreseeable, with a high standard against awarding
4 consequential damages such as lost profits (and, in particular, future lost profits).⁷
5 Thus, the simple assertion that a contract had been breached is not sufficient to
6 establish damages. The plaintiff must instead identify the nature of the breach and
7 provide sufficient evidence that the breach proximately caused specific damages.

8 Here, ViaSat and Dr. Slottje did no such thing. In his contract analysis, Dr.
9 Slottje never identified the date of any contractual breaches – such as when SS/L
10 allegedly received information subject to the parties' contracts and when SS/L

11 ⁶ See, *e.g.*, Cal. Civ. Code §§ 3300 & 3301 (providing "no damages can be
12 recovered for a breach of contract which are not clearly ascertainable in both their
13 nature and origin" and the amount of damages is "the amount which will
14 compensate the party aggrieved for all the detriment proximately caused thereby");
15 *St. Paul Fire & Marine Ins. Co. v. Am. Dynasty Surplus Lines Ins. Co.*, 101 Cal.
16 App. 4th 1038, 1060 (2002) ("Causation of damages in contract cases requires that
17 the damages be proximately caused by the defendant's breach."); *Seidman v. Indus.*
Recycling Props., Inc., 106 A.D.3d 983, 985 (N.Y. 2013) ("Damages are intended
to return the parties to the point at which the breach arose and to place the
nonbreaching party in as good a position as it would have been had the contract
been performed.").

18 ⁷ *Ash v. N. Am. Title Co.*, 223 Cal. App. 4th 1258, 1268 (2014) ("[C]ontract
19 damages are generally limited to those within the contemplation of the parties when
the contract was entered into or at least reasonably foreseeable by then at that time;
20 consequential damages beyond the expectations of the parties are not
recoverable."); *Goodstein Constr. Corp. v. City of New York*, 604 N.E.2d 1356,
21 1361 (N.Y. 1992) ("[I]t must be shown 'that the particular damages were fairly
within the contemplation of the parties to the contract at the time it was made.'");
22 *Kenford Co., Inc. v. Erie County*, 493 N.E.2d 234, 235 (1986) ("If it is a new
23 business seeking to recover for loss of future profits, a stricter standard is imposed
24 for the obvious reason that there does not exist a reasonable basis of experience
upon which to estimate lost profits with the requisite degree of reasonable
certainty.").

1 allegedly disclosed or used those concepts in breach of those contracts. Nor did he
2 (or any other ViaSat expert) establish the extent to which those breaches either
3 added capacity to the Jupiter-1 or NBN satellites that they otherwise would not
4 have had or otherwise damaged ViaSat. Instead, Dr. Slottje's cursory contract
5 analysis simply applied his same measure of patent damages to the contract case.
6 *E.g.*, 4/3/14 Trial Tr., at 1804. For multiple reasons, the equivalency Dr. Slottje
7 painted between patent and contract damages is legally improper and provides
8 insufficient evidence to support any contract award.

9 First, the lost profit damages that Dr. Slottje imported from his patent
10 analysis are not compatible with a breach of contract analysis. There is no evidence
11 that the parties contemplated any amount – let alone \$58 million – in liability for
12 lost profits to the Jupiter satellite at the time of the execution of the contract.
13 *Goodstein*, 604 N.E.2d at 1361. No evidence was introduced at trial to suggest that
14 the parties could have reasonably foreseen that SS/L's liability would include
15 ViaSat's alleged lost profits based on lost subscribers to Hughes. To recover lost
16 profits for breach of contract, there must be evidence that the parties expected SS/L
17 to "bear the responsibility for any lost profits sustained" by ViaSat." *Olsenhaus*
18 *Pure Vegan, LLC v. Elec. Wonderland, Inc.*, 983 N.Y.S. 2d 506, 508 (App. Div.
19 2014). Yet neither of the agreements, nor any other evidence suggests "that lost
20 profits were within the parties' contemplation." *Awards.com, LLC v. Kinko's, Inc.*,
21 42 A.D. 3d 178, 183 (N.Y. 2007); *see also id.* at 184 ("Plaintiffs' claim for \$276
22 million in alleged lost profits, based on sheer speculation, demonstrates the
23 unreasonableness of such an inference [of an intent to assume the risk of lost
24 profits]."). To the contrary, the Build Contract specifically excludes the recovery of

1 lost profits as damages, Grinstein Decl., Ex. A, at § 27.1, except in cases of gross
2 negligence or willful misconduct (at which point a \$100 million cap applies), *id.* at
3 § 27.3. ViaSat neither pursued nor obtained a finding that SS/L's contractual
4 conduct was willful or grossly negligent. Indeed, for purposes of patent
5 infringement, the jury specifically found that SS/L did not act willfully.

6 Second, Dr. Slottje's reasonable royalty analysis cannot support any award of
7 breach of contract damages because the date of the hypothetical negotiation he
8 selected occurred after publication of ViaSat's patent applications—and thus the
9 "proprietary" concepts underlying ViaSat's breach of contract claim. Dr. Slottje's
10 entire damages analysis was premised on the notion that the concepts protected by
11 the March 2006 NDA and the Build Contract "cover [the] same things" as ViaSat's
12 patents. *E.g.*, 4/3/14 Trial Tr., at 1804:7-17. Dr. Slottje therefore assumed a single
13 hypothetical negotiation date of August 2011 for a reasonable royalty award on
14 both ViaSat's patent or breach of contract claims because that was the date the first
15 of ViaSat's patents issued (and thus the date of first alleged patent infringement).
16 *E.g.*, *id.* at 1780:3-18.

17 But, by Dr. Slottje's hypothetical negotiation date in 2011, all three of
18 ViaSat's asserted patents had already been published years earlier, in 2009.
19 Grinstein Decl., Ex. B ('043 patent, showing publication on January 22, 2009);
20 Grinstein Decl., Ex. C ('875 patent, showing publication on March 25, 2009);
21 Grinstein Decl., Ex. D ('827 patent, showing publication on April 9, 2009). In fact,
22 ViaSat had already made several of its alleged proprietary concepts public even
23 earlier than that. For example, ViaSat asserts that it developed the partial CONUS
24 idea of placing gateways in spatially isolated regions of the United States,

1 separating them from user beams so as to permit full frequency reuse. 3/25/14 Trial
2 Tr., at 72:6-13 (ViaSat opening argument). Yet Mr. Dankberg admitted that during
3 a conference call with stock analysts on January 8, 2008, he publicly disclosed the
4 idea of a partial CONUS beam map in which there was full reuse of spectrum
5 between gateways and feeder beams. 3/26/15 Trial Tr., at 273:13-19.⁸ Indeed, he
6 further admitted that he could not sue "anybody" if they had read the conference
7 call transcript and decided to implement this partial CONUS design on their own
8 satellite. *Id.* at 273:20 to 274:1.

9 Both contracts specifically exclude from their protection any concepts that
10 become public through no fault of the recipient. Grinstein Decl., Ex. F at ¶1;
11 Grinstein Decl., Ex. A at §28.1. There is therefore absolutely zero basis on which the
12 jury could conclude that SS/L would have agreed to pay a reasonable royalty in
13 2011 on a breach of contract theory to license alleged "proprietary" concepts that
14 had already been publicly disclosed by ViaSat and therefore lost any "proprietary"
15 status no later than two years earlier. *Grp. One, Ltd. v. Hallmark Cards, Inc.*, 254
16 F.3d at 1050 (Fed. Cir. 2001) (endorsing argument that "once formerly secret
17 material is published, it ceases to be a secret, and therefore it cannot be
18 misappropriated—regardless of whether the party accused of misappropriation was
19 aware of the publication."); *Stutz Motor Car of Am., Inc. v. Reebok Int'l, Ltd.*, 909
20 F.Supp. 1353, 1359 (C.D. Cal. 1995), *aff'd*, 113 F.3d 1258 (Fed. Cir. 1997)
21 ("[D]isclosure of a trade secret in a patent places the information comprising the
22 secret into the public domain."). To the contrary, since the concepts were already

23
24 ⁸ Were this not enough, ViaSat further publicly disclosed its partial CONUS beam
map via its FCC filing on June 23, 2008. Grinstein Decl., Ex. E, at VST03501751.

1 made public in 2009—and thus free for anyone to use (so long as they did not
2 infringe an issued patent)—ViaSat could not have suffered any harm on its breach
3 of contract theory claim after the publication date.

4 Third, ViaSat did not attempt to offer any other measure of damages for
5 breach of contract—such as a reasonable royalty premised on an earlier
6 hypothetical negotiation date (*i.e.*, one occurring when the "proprietary" concepts
7 could still be considered secret) or "head start" damages stemming from pre-
8 publication breaches. In theory, ViaSat could have attempted to argue that SS/L
9 would have paid a reasonable royalty at an earlier hypothetical negotiation date,
10 such as in 2007 when ViaSat alleges SS/L began breaching the March 2006 NDA.
11 *Cf.*, *Celeritas Techs., Ltd. v. Rockwell Int'l Corp.*, 150 F.3d 1354, 1359-60 (Fed.
12 Cir. 1988). But ViaSat quite consciously chose not to do so because it wished to rest
13 its inflated reasonable royalty analysis on SS/L's awareness of the non-comparable
14 capacity leases that were only negotiated much later in 2009. 4/3/14 Trial Tr., at
15 1787:19 to 1788:17. Similarly, if ViaSat alleged an earlier hypothetical negotiation
16 date, that would have provided SS/L with even more time to "design-around"
17 ViaSat's alleged patented and proprietary concepts—a result ViaSat no doubt
18 wished to avoid. The only evidence presented at trial shows that SS/L would not
19 have agreed to pay any license for "proprietary" technology during the assumed
20 hypothetical negotiation date of August 2011 (when all such concepts were public).
21 And there is no evidence that SS/L would have agreed to pay anything at an earlier
22 hypothetical negotiation date, because ViaSat elected not to present such evidence.
23 *See, e.g., Grail Semiconductor, Inc. v. Mitsubishi Electric & Electronics USA, Inc.*,
24

1 170 Cal. Rptr. 3d 581, 589 (Ct. App. 2014) (finding on facts before it no basis for
2 reasonable royalty award on breach of contract theory).

3 Alternatively, ViaSat could have attempted to offer some sort of "head start"
4 damages analysis, which is the statutory measure of damages in California for
5 misappropriation of trade secrets. *Celeritas*, 150 F.3d at 1360 (noting under
6 California's trade secrets law, "liability for . . . misappropriation of . . . trade secrets
7 may be statutorily limited to the 'head start' period") (citing Cal. Civ. Code
8 §3426.3). But, once again, ViaSat did not even attempt to do so because SS/L
9 unquestionably had no "head start." SS/L did not even enter into the contracts for
10 the sale of the Jupiter and NBN satellites until after ViaSat published its alleged
11 proprietary concepts via its patent applications. Perhaps ViaSat could have
12 attempted to articulate some theory of damages as to how SS/L's disclosure of any
13 alleged proprietary information to Hughes before 2009 caused any harm to ViaSat
14 (despite the fact that the Jupiter contract was not even entered into until after ViaSat
15 itself published its patent applications). But ViaSat made no attempt to do so at trial
16 and there is thus no evidence in the record to support any award of breach of
17 contract damages on such a theory.

18 Finally, both Dr. Slottje's reasonable royalty and lost profit patent analyses –
19 which he simply imported into his contract damages – rely upon his assumptions
20 regarding capacity increases attributable to each of the patents and the supposed
21 value of capacity provided by non-comparable, downstream lease agreements. By
22 separate JMOL motions (incorporated herein), SS/L has challenged the sufficiency
23 of the evidence with respect to those analyses. In any event, Dr. Slottje simply
24 assumed that the contractual breaches resulted in the same capacity increases as the

1 patent infringement, demonstrating once again that he assumed that the identical
2 technology was involved. There is no evidence in the record regarding how the
3 alleged contractual breaches actually impacted capacity, nor any separate
4 application by Dr. Slottje of that evidence to damages.

5 **B. JMOL is Appropriate as to ViaSat's Contract Claim Because**
6 **ViaSat Failed to Prove Contract Damages.**

7 Under both California and New York law, damages is an essential element of
8 a breach of contract claim. As such, failure to introduce competent evidence of
9 damages defeats not only a damages award but also liability for breach of contract.⁹

10 For example, in *Patent Scaffolding Co. v. William Simpson Constr. Co.*, 64
11 Cal. Rptr. 187, 191 (Ct. App. 1967), the California Court of Appeal held that
12 because the plaintiff "suffered no uncompensated detriment caused by [the
13 defendant's] breach of contract," the plaintiff's entire claim for breach of contract
14 failed as a matter of law. The court held that "[a] breach of contract without damage
15 is not actionable." *Id.* (emphasis added). See also *St. Paul Fire & Marine Ins. Co.*,
16 101 Cal. App. 4th at 1060-61 (holding that "[a]n essential element of a claim for
17 breach of contract are damages resulting from the breach" and that a claim for
18 breach of contract failed where it was clear that the defendant's alleged breach
19 "caused no damage" to the plaintiff.). Similarly, in *Proper v. State Farm Mut. Auto*
20 *Ins. Co.*, 63 A.D.3d 1486, 1487 (N.Y. App. Div. 2009), the court held that
21 "[b]ecause plaintiffs failed to support their claim [for breach of contract] with
22 admissible evidence that they suffered damages, [the] Supreme Court properly

23 ⁹ The present motion focuses on one missing element of ViaSat's breach claim –
24 damages. By separate JMOL, which is incorporated herein, SS/L seeks JMOL on
breach of contract liability on additional grounds.

1 dismissed the complaint." That is because "[f]ailure to prove the essential element
2 of damages is fatal to a cause of action for breach of contract." *Id.* This Court has
3 recognized the same principle previously. *Louiseau v. VISA USA Inc.*, No. 09-CV-
4 2177-H (JMA), 2010 WL 4542896, at *2 (S.D. Cal. Feb. 10, 2010) (Huff, J.)
5 ("Because Plaintiff failed to plead an essential element [damages] of the breach of
6 contract action, the Court grants Defendants' motion to dismiss Plaintiff's breach of
7 contract claim.") (citing California cases).

8 Here, because ViaSat utterly failed to present any competent evidence of
9 breach of contract damages flowing from any particular contractual breach, the
10 breach of contract claim must fail as a matter of law.

11 **V. ALTERNATIVELY, SS/L IS ENTITLED TO A NEW TRIAL**

12 Alternatively, SS/L is entitled to a new trial on ViaSat's breach of contract
13 claim. For the reasons set forth above, SS/L is, at the very least, entitled to a new
14 trial because the contract verdict is against the clear weight of the evidence.
15 *Wordtech*, 609 F.3d at 1313.

16 **VI. CONCLUSION**

17 This Court should grant SS/L judgment as a matter of law on ViaSat's breach
18 of contract claim, due to ViaSat's complete failure to introduce evidence of
19 damages proximately caused by any breach of contract. At the very least, the Court
20 should vacate the jury's damages award of \$102 million in separate breach of
21 contract damages. In the alternative, SS/L respectfully requests a new trial on
22 ViaSat's breach of contract claim.

1 Dated: June 13, 2014

By: /s/ Joseph S. Grinstein

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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 ALTERNATIVELY FOR A NEW TRIAL (1 OF 12), REGARDING BREACH OF CONTRACT DAMAGES** to be served on opposing counsel via the Court's CM/ECF system.

Dated: June 13, 2014

By: /s/ Joseph S. Grinstein