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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
Plaintiffs.

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

Hon. Marilyn L. Huff

**SS/L'S MOTION FOR A NEW
TRIAL (5 OF 12)**

Date: July 22, 2014

Time: 9:00 a.m.

Place: Courtroom 15A

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1 Defendant Space Systems/Loral, LLC ("SS/L") hereby renews its motion for
2 a mistrial and seeks a new trial under Rule 59.

3 I. INTRODUCTION

4 Before trial, the Court ruled on summary judgment that the "Option 3" email
5 was not proprietary to ViaSat under the March 8, 2006 NDA and that the "separate
6 'IP' provision" of the Build Contract—Article 39—did not alter that conclusion.
7 Dkt. 720 at 8. Yet ViaSat spent nearly the entirety of its case attempting to prove
8 that (1) the key concepts disclosed in the "Option 3" email belong to ViaSat; (2)
9 Doug Burr stole those ideas in filing for his patent application; and (3) SS/L
10 breached its contractual obligations by disclosing those concepts in Mr. Burr's
11 patent filings and also to Hughes. In so doing, ViaSat devoted the lion's share of its
12 trial presentation to an inflammatory and legally meritless breach of contract claim,
13 turning what was billed as a patent infringement case into a smear campaign against
14 a small number of SS/L employees who were not even in a position to transfer
15 information from the ViaSat-1 program to Hughes. The unfair prejudice that SS/L
16 suffered as a result of the erroneous admission of such evidence is apparent on the
17 face of the verdict itself: the jury awarded \$102 million in separate, non-
18 overlapping contract damages despite the fact that ViaSat's own damages expert
19 opined that no such separate breach of contract damages existed.

20 In light of the Court's summary judgment ruling, as a matter of law, none of
21 the concepts in the "Option 3" email belongs to ViaSat, and therefore SS/L's
22 disclosure of them through either the Burr patent or otherwise cannot establish a
23 contractual breach. The Court allowed the evidence to be introduced at trial—over
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1 SS/L's motion in limine and later objections—based in large part on ViaSat's
2 representation that "Option 3" and the Burr patent filings would be relevant to
3 showing "secondary indicia" of non-obviousness of the '875 patent. This
4 representation was revealed to be false on Day 1 of the trial, when Mr. Dankberg
5 himself admitted "Option 3" did not evidence his conception of the '875 patent.

6 It is difficult to overstate the extent to which the "Option 3" email, the
7 concepts therein, and the Doug Burr patent filings influenced this trial. Because
8 "Option 3" is not proprietary and is not the '875 patent, SS/L was entitled to use
9 such concepts in any subsequent satellite—and doing so would actually design-
10 around the '875 patent (which, unlike the "Option 3" email, requires at least one
11 feeder beam be proximate to a service beam). And yet ViaSat was allowed to
12 devote substantial time each day of the trial to (1) arguing that SS/L stole "Option
13 3" from ViaSat and (2) conflating "Option 3" with the '875 patent.

14 As a result, ViaSat's counsel turned this trial into a side-show about a
15 document and the concepts it disclosed that, as a matter of law, do not belong to
16 ViaSat. The prejudicial effect of this evidence was to leave the impression that SSL
17 and its employees are "bad actors" and sway the jury to find liability and award
18 damages based on its passion and prejudice. Because the trial was tainted by the
19 admission of evidence and argument regarding "Option 3" and the Burr patent
20 filings—and because the damages verdict was clearly excessive and reflects that
21 passion and prejudice impacted both liability and damages—SS/L respectfully
22 requests a new trial on all issues.

23 SS/L also renews its request for a mistrial and requests a new trial based on
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1 the Court's issuance of an *Allen* charge to the jury after conducting an in-chambers
2 inquiry that identified a numerical division among the jury. It is settled Ninth
3 Circuit law that "[i]f the trial judge gives an *Allen* charge after inquiring into the
4 numerical division of the jury, the charge is per se coercive and requires reversal."
5 *United States v. Williams*, 547 F.3d 1187, 1205 (9th Cir. 2008) (quotation marks
6 and citations omitted) (emphasis added). That is what happened here; after a juror
7 reported feeling "physically threatened" by another juror, the Court conducted
8 interviews of each juror, during which the Court learned that the jury was divided,
9 with two jurors in the minority position, including the juror who had been accused
10 of issuing a threat. Because the *Allen* charge issued after the Court's inquiry, it
11 risked being perceived as directed to the minority-view juror, and was thus per se
12 coercive, requiring a new trial.

13 II. STATEMENT OF FACTS

14 During opening statements, ViaSat argued over objection that SS/L
15 "specifically recognized ViaSat's proprietary information" stemming from the
16 "Option 3" email and "separating out the two beams, having separation between the
17 two beams and being able to reuse the frequency of those two beams." Trial Tr. at
18 73-75. ViaSat argued that SS/L, through Doug Burr, filed a patent "in an attempt to
19 steal Mr. Dankberg's revolutionary idea" embodied in the "Option 3" email. *Id.* at
20 73; 75-76 (emphasis added).

21 Remarkably, ViaSat's counsel then admitted that the Doug Burr "patent is
22 irrelevant" because it is "not being asserted" against ViaSat. *Id.* at 76 (emphasis
23 added). ViaSat urged the jury to consider it anyway: "That's not honestly. That's not
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1 being trustworthy. That's breaching your trust." *Id.*

2 Following opening statement, the "Option 3" issue permeated the entirety of
3 the trial. Nearly every witness was asked about it, either expressly by name (the
4 "Option 3" email) or by the three-part mantra ViaSat's counsel used to describe the
5 "Option 3" concepts: "one, partial CONUS coverage, two, gateways located outside
6 of user beams and, three, gateways reusing all available frequency in a single
7 system"¹ This three part mantra—which simply recites the features of the
8 "Option 3" email—is not the '875 patent because it lacks any proximate feeder and
9 service beams. On Day 1 of the trial, ViaSat's president Mr. Dankberg (and one of
10 the named inventors on the '875 patent) admitted as much:

11 Q. Okay. Do you contend that this E-mail is evidence of your
12 conception of the '875 patent?

13 A. I don't think so. I don't think so. I wouldn't say that.

14 Trial Tr. at 227.

15 At the end of the fourth day of ViaSat's case, the Court noted that "I thought
16 this was a patent case and we haven't quite got there yet." Trial Tr. at 1088. ViaSat's
17 counsel answered , "we're going to be getting to it, your Honor." Trial Tr. at 1088.
18 It wasn't until the fifth day that ViaSat moved all of its patents into evidence. Trial
19 Tr. at 1345 ("We haven't moved one of the patents in yet.").

20 Based on the erroneous admission of the "Option 3" email and Burr patent

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22 ¹ *E.g.*, Trial Tr. at 162-64, 219-27, 260-65, 284-85, 394-400, 406-07, 409, 411, 414-
23 26, 464-65, 474-75, 472-74, 496, 519-21, 531-35, 568-59, 636-49, 527-35, 554-68,
24 671-73, 640-46, 650, 753-54, 785, 816-19, 841, 873-78, 879, 892, 924, 934, 962,
1025-56, 1049-53, 1247, 1434-35, 1456-57, 1469, 1474-75, 1557, 1586, 1591,
1953, 2522, 2689-2690.

1 filings—and counsel's improper arguments and questioning suggesting "Option 3"
2 was ViaSat's proprietary information or intellectual property—SS/L repeatedly
3 moved for a mistrial, both orally and in writing. *See, e.g.*, Trial Tr. at 546, 756,
4 1489-97, 2357, 3175-78. Moreover, SS/L asked on multiple occasions for a limiting
5 instruction regarding the "Option 3" email, which the Court declined to issue in the
6 form SS/L requested and did not issue at all until the end of the second week of
7 trial, during the testimony of ViaSat's first expert witness, and after ViaSat had
8 finished calling every fact witness in its case. *See, e.g.*, Trial Tr. at 362, 380-83,
9 394, 571, 754-55. When the Court finally issued an instruction, it told the jury only:

10 The Option 3 email—and the specific exhibit number is V-517—is
11 not proprietary to ViaSat. Under the terms of the NDA, the parties had
12 to mark it as proprietary or within 30 days, then mark it. And this was
13 not done. So the Court has ruled that it's not proprietary as to the
14 nondisclosure agreement.

15 Trial Tr. at 1556. This instruction compounded the problem by allowing the jury to
16 believe that the "Option 3" email might be proprietary under some other contract, or
17 that its contents might otherwise be ViaSat's intellectual property, when under both
18 the law and the terms of the contract the exact opposite was true.

19 Jury deliberations were, in the Court's own words, "highly unusual." For the
20 first three days of deliberations, the jury repeatedly submitted notes with questions
21 regarding exhibits and the law. Dkt. Nos. 978, 979, 986. On the morning of the fifth
22 day, one juror, Juror No. 5 pressed the panic button in the jury room, which SSL
23 understands resulted in the U.S. Marshalls being alerted of a disturbance. Trial Tr.
24 3099-3101. Juror No. 5 sent a note to the Court stating, "I will not return to this
jury. I was physically threatened and will no longer be able to tolerate the stress."

1 Trial Tr. 3101; Ct. Ex. 24. The jury was excused for a day and a half. Two days
2 later, the Court conducted individual inquiries of each juror, during which the Court
3 and the parties learned that the jury was under remarkable stress (*Id.* at 3143-33),
4 there was no verdict on any verdict questions (*Id.* at 3155, 3159), and, importantly,
5 Juror No. 5, who had felt threatened, was in the majority while the juror who
6 allegedly made the threat (Juror No. 6) was in the minority (*Id.* at 3157-58).

7 Juror No. 5 was excused from further service, but the Court determined that
8 the remaining jurors could continue with their deliberations, and invited motions
9 from either party. *Id.* at 3174. SS/L renewed its motion for a mistrial at this time.
10 *Id.* at 3175-77. The Court denied SS/L's motion without prejudice (*id.* at 3177), but
11 noted "it's not a frivolous motion. And no matter what the outcome of the case, then
12 the Court will carefully look at all available options." *Id.* at 3179. The Court also
13 told the parties that it intended to "repeat the instruction that they should not
14 hesitate to change their views if the discussion persuades you that you should." *Id.*
15 at 3178. Neither party objected. The Court then gave the jury an *Allen* charge in
16 which the Court stressed the importance of "listen[ing] to the views of your fellow
17 jurors," and instructed the jury "[d]o not hesitate to change your opinion if the
18 discussion persuades you that you should" and "[i]t is important that you attempt to
19 reach a unanimous verdict." *Id.* at 3116-17.

20 The verdict demonstrated that ViaSat's appeals to passion and prejudice—
21 and the irrelevant and highly prejudicial evidence concerning the "Option 3"
22 concepts and the Burr patent—worked. The jury awarded an astonishing \$102
23 million in separate breach of contract damages. This, notwithstanding that (1)
24

1 ViaSat's own damages expert testified that the contract damages and the patent
2 damages would be the same if all patents were valid and infringed and (2) ViaSat
3 presented zero other evidence as to separate damages for the alleged breach of
4 contract. See Dkt. No. 1046. This completely unsupported award of \$102 million in
5 separate breach of contract damages was "a surprise to the Court." Trial Tr. at 3218.

6 III. LEGAL STANDARD

7 The authority to grant a new trial "is confided almost entirely to the exercise
8 of discretion on the part of the trial court." *Allied Chem. Corp. v. Daiflon*, 449 U.S.
9 33, 36 (1980) (per curiam). Historically recognized grounds for a new trial are that
10 "the verdict is against the weight of the evidence, that the damages are excessive, or
11 that, for other reasons, the trial was not fair to the party moving." *Molski v. M.J.*
12 *Cable, Inc.*, 471 F.3d 724, 729 (9th Cir. 2007) (quoting *Montgomery Ward & Co. v.*
13 *Duncan*, 311 U.S. 243, 251 (1940)). "An erroneous ruling that affects the
14 substantial rights of a party is grounds for reversal, unless it affirmatively appears
15 from the whole record that it was not prejudicial." *Millenkamp v. Davisco Foods*
16 *Int'l, Inc.*, 562 F.3d 971, 976 (9th Cir. 2009) (reversing denial of new trial where
17 erroneous admission of two exhibits and jury instructions prejudiced the
18 defendant). The Court should order a new trial on both damages and liability if it
19 finds that (1) the damages verdict is excessive, (2) the excessive damage award may
20 have resulted from passion and prejudice, and (3) the verdict on liability is also
21 tainted by passion and prejudice. *Seymour v. Summa Vista Cinema, Inc.*, 809 F.2d
22 1385, 1387 (9th Cir. 1987); see also *Minneapolis, St. Paul & Sault Ste. Marie Ry. v.*
23 *Moquin*, 283 U.S. 520, 521-22 (1931) ("In actions under the federal statute no
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1 verdict can be permitted to stand which is found to be in any degree the result of
2 appeals to passion and prejudice. . . . A litigant gaining a verdict thereby will not be
3 permitted the benefit of calculation, which can be little better than speculation, as to
4 the extent of the wrong inflicted upon his opponent.").

5 IV. ARGUMENT

6 A. The Erroneous Admission of "Option 3" and Burr Patent Evidence Substantially Prejudiced SS/L, Requiring a New Trial.

7 1. This Evidence Is Irrelevant to Breach of Contract.

8 Before trial, the Court held as a matter of law that the "Option 3" email is not
9 proprietary to ViaSat. Dkt. 720 at 8 (*Convolve, Inc. v. Compaq Computer Corp.*,
10 527 Fed. Appx. 910, 921-24 (Fed. Cir. 2013)). The Court held that not only is
11 "Option 3" not proprietary under the March 8, 2006 NDA, but that its status was not
12 subsequently changed by the "separate 'IP Provision' in the Build contract," which
13 ViaSat argued "supercedes the earlier NDAs and prohibits SS/L's disclosure of
14 ViaSat's information." *Id.* at 8 (citing ViaSat's brief, Dkt. 620 at 8, which referenced
15 Article 39 of the Build Contract as "the 'IP Provision'"). The Court held that ViaSat
16 failed to demonstrate "that the parties intended that provision"—Article 39 or the
17 "IP Provision"—to apply retroactively to past disclosures of information," such as
18 the "Option 3" email. *Id.* Nevertheless, ViaSat argued repeatedly throughout the
19 trial that Doug Burr copied or "stole" the "Option 3" ideas, notwithstanding the
20 Court's earlier ruling, based on Article 39 of the Build Contract. This was error for
21 several reasons.

22 First, the Court had already expressly rejected both of these arguments in its
23 Order granting SS/L's partial summary judgment motion pretrial. ViaSat argued
24

1 there, as it did in opposition to SS/L's mistrial motion, that Article 39 of the Build
2 Contract—which ViaSat refers to as "the 'IP Provision'"—rendered the concepts in
3 "Option 3" its Intellectual Property after the fact because ViaSat included such
4 concepts in its patent applications. *See* Dkt. 620 at 3-4. ViaSat already had
5 presented to the Court email exchanges and notes regarding SS/L's treatment of
6 information exchanged with customers as "customer sensitive" and statements by
7 Mickey Targoff to ViaSat's executives in support of its waiver argument. *See id.* at
8 4-10. The Court rejected all of this evidence and argument based on *Convolve*,
9 concluding that (1) "ViaSat's argument regarding the Build Contract"—including
10 the "separate 'IP Provision'"—"fails to raise a genuine issue of material fact" and (2)
11 the unilateral waiver evidence "did not generate a genuine issue of material fact
12 because it was not 'indicative of the mutual intent of both parties.'" Dkt. 720 at 8
13 (quoting *Convolve*, 527 Fed. Appx. At 923-24).

14 Second, as a matter of law, Article 39 is a limited license, with the exception
15 that it prohibits either party from (a) filing patents on the "Intellectual Property" of
16 another party or (b) reverse-engineering the other party's "Intellectual Property."
17 Ex. A at Art. 39. A limited license implies no negative covenants and cannot serve
18 as the basis for a breach of contract action based on improper disclosure. The
19 Federal Circuit has held that "[a] nonexclusive patent license is simply a promise
20 not to sue for infringement," and "[t]he conveyance of such a license does not
21 obligate the licensee to do anything; it simply provides the licensee with a
22 guarantee that it will not be sued for engaging in conduct that would infringe the
23 patent in question." *U.S. Phillips Corp. v. Int'l Trade Comm'n*, 424 F.3d 1179, 1189
24

1 (Fed. Cir. 2005) (emphasis added).

2 Third, neither Doug Burr nor SS/L's alleged copying of the "Option 3" email
3 can evidence misappropriation of "Intellectual Property" for the simple reason that
4 the "Option 3" email is not ViaSat's property. The Build Contract defines
5 "Purchaser Intellectual Property" as material "in which an Intellectual Property
6 Right subsists" Ex. A at SSL0099738. "Intellectual Property Right," in turn,
7 includes only "common law and statutory proprietary rights with respect to
8 Intellectual Property." *Id.* ViaSat had no statutory or proprietary rights in the
9 "Option 3" email as a matter of law under *Convolve*. ViaSat argued that it had
10 rights in the "Option 3" email insofar as those concepts were incorporated into
11 ViaSat's patent applications by virtue of Article 39.2(d) of the Build Contract. But
12 ViaSat had no common law or proprietary rights in any patent applications because
13 (1) patent applications are published and therefore can have no trade secret
14 protection or contractual protection as being "proprietary," and (2) statutory rights
15 in published patent applications are limited and conferred only by 35 U.S.C. §
16 154(d), and the undisputed evidence shows that ViaSat did not claim any
17 provisional rights in its patent applications under 35 U.S.C. § 154(d). See Trial Tr.
18 at 765 (Lippert testimony acknowledging that section 154(d) not at issue).

19 In any event, ViaSat did not assert provisional rights in patent applications as
20 an issue in the Pre-Trial Order, thereby waiving the issue. Dkt. 842. Furthermore,
21 35 U.S.C. § 154(d) applies only where "the invention as claimed in the patent is
22 substantially identical to the invention as claimed in the published patent
23 application." 35 U.S.C. § 154(d). Claims are substantially identical only if they are
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1 "without substantive change," which changes include narrowing amendments to
2 overcome prior art rejections. *See, e.g., Bloom Eng'g Co. v. N. Am. Mfg. Co.*, 129
3 F.3d 1247, 1250 (Fed. Cir. 1997). The undisputed evidence here is that ViaSat
4 amended its claims repeatedly in the fall of 2011—well after Mr. Burr filed any of
5 his patent applications—to overcome rejections based on prior art. *See, e.g., Ex. C.*

6 Finally, the Court at times seemed to suggest that while the "Option 3" email
7 itself might not be proprietary, the "concepts" or "material" or "information" it
8 disclosed still could be. For example, the Court indicated that it "didn't agree that
9 the material—I can say the Option 3 e-mail is not proprietary" and that it did not
10 agree to "say any concept theory, whatever, anything in the Option 3 e-mail is not
11 proprietary." Trial Tr. at 380-81. The Court suggested that this is "a nuance, but it's
12 a significant one." *Id.* at 382. Respectfully, that is not the case. Under the NDA, the
13 Build Contract, and binding Federal Circuit authority set forth in *Convolve* and
14 other cases, because the "Option 3" email itself is not proprietary, it follows as a
15 matter of law that the concepts it contains are also not proprietary to ViaSat.

16 The March 8, 2006 NDA protects "Proprietary Information," and holds that
17 such information is subject to the marking requirements. Ex. D at ¶1. Moreover, it
18 expressly provides that "Proprietary Information" cannot "include any information .
19 . . that (a) is already known to the receiving party at the time of its disclosure; (b) is
20 or becomes publicly known through no wrongful act of the receiving party; (c) is
21 independently developed by the receiving party" *Id.* The undisputed evidence
22 at trial is that the "Option 3" email disclosed to SSL the "concepts" of (1) partial
23 CONUS, (2) complete separation of gateway and user beams, and (3) full frequency
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1 reuse between the two (the very mantra that ViaSat repeated over and over again
2 throughout the trial). As a result, such ideas or concepts, as a matter of law, are
3 simply not proprietary or, for the reasons discussed above, Viasat's "Intellectual
4 Property." *Cf., On-Line Tech. v. Bodenseewerk Perkin-Elmer*, 386 F.3d 1133, 1141
5 (Fed. Cir. 2004) ("After a patent has issued, the information contained within it is
6 ordinarily regarded as public and not subject to protection as a trade secret. . . .
7 Moreover, the nondisclosure agreement in this case specifically provided that the
8 obligation of confidentiality created by this agreement 'will not apply to any
9 information . . . which becomes publicly available other than by breach of this
10 agreement."").

11 In *Convolve*, for example, the plaintiff claimed trade secrets in "the concept
12 that it is important to move to a higher order dynamic model of a disk drive for the
13 purpose of designing trajectories to produce faster and acoustically quieter disk
14 drives" and "the concept that 'abrupt current and voltage saturation should be
15 avoided to optimize vibration reduction." *Convolve*, 527 Fed. Appx. at 917
16 (emphasis added). The court, however, found that for each alleged trade secret "the
17 substance" of the trade secret was either (1) generally known in the industry or (2)
18 not properly marked proprietary under the governing NDAs. *See id.* at 918-19 (at
19 least three references to "the substance" of the "trade secret") (emphasis added).
20 Likewise, here, any "concept" or "substance" disclosed in the "Option 3" email
21 cannot be proprietary information or intellectual property of ViaSat.

22 Ninth Circuit and California case law are in accord. In *Buffets, Inc. v. Klinke*,
23 73 F.3d 965, 968 (9th Cir. 1996), the Ninth Circuit noted "the important distinction
24

1 between copyright law and trade secrets law," wherein "copyright does not protect
2 an idea itself, only its particular expression" while "trade secrets law protects the
3 author's very ideas if they possess some novelty and are . . . disclosed only on the
4 basis of confidentiality." In *Balboa Ins. Co. v. Trans Global Equities*, 267 Cal. Rptr.
5 787, 800 (Ct. App. 1990), the California Court of Appeal recognized the same
6 principle, noting that "[t]rade secret law protects content irrespective of form of
7 expression" while "copyright law protects form of expression but not the underlying
8 ideas." (emphasis added). In the context of proprietary information, any attempt to
9 draw a line between the particular form of expression in the "Option 3" email itself
10 and the ideas or concepts it discloses is contrary to Federal Circuit, Ninth Circuit,
11 and California case law.

12 **2. The Evidence Is Irrelevant to Patent Validity.**

13 ViaSat argued pretrial that the "Option 3" email was a conception document
14 for its patent and, therefore, it should be allowed to introduce this email and
15 question witnesses about it because any copying of the "Option 3" email would be
16 secondary indicia of non-obviousness of the '875. That claim was shown to be false
17 during the first witness examination at trial.

18 **a. The "Option 3" Email Is Irrelevant to Conception.**

19 Whether Mr. Dankberg conceived of the '875 patent by the date of the
20 August 2006 "Option 3" email was not relevant to any issue in this case. The
21 Federal Circuit has held that evidence of conception is "not relevant here where [the
22 defendant] did not plead any challenge to the named inventors' inventorship."
23 *Tavory v. NTP, Inc.*, 297 Fed. Appx. 976, 981 (Fed. Cir. 2008). SS/L introduced no
24 prior art falling between the dates of the "Option 3" email and the '038 Provisional

1 to which ViaSat sought to claim priority, such that Mr. Dankberg's conception as of
2 August 2006 would allow him to "swear behind."

3 Moreover, even if Mr. Dankberg's conception as of that date were an issue,
4 the "Option 3" email is irrelevant to that inquiry as a matter of law. On Day 1 of the
5 trial, Mr. Dankberg—the alleged inventor of the '875 patent and source of the
6 "Option 3" concepts in the email—testified that the email is not evidence of his
7 conception of the '875 patent:

8 Q. Okay. Do you contend that this E-mail is evidence of your
conception of the '875 patent?

9 A. I don't think so. I don't think so. I wouldn't say that.

10 Trial Tr. at 227 (Dankberg testimony). As Mr. Dankberg testified, the "Option 3"
11 email is not evidence of his conception because Claim 12 of the '875 patent requires
12 that at least one gateway or feeder beam be proximate to (or overlapping) a user
13 beam. Trial Tr. at 253; '875 Patent at Claim 1. The "Option 3" email, by contrast,
14 discloses—in a non-proprietary communication—the key concepts of (1) partial
15 CONUS, (2) gateway beams completely separated from user beams, and (3) full
16 frequency reuse between the two. The email discloses covering "approximately
17 75%" of CONUS with—*i.e.*, partial CONUS. Ex. B at 1. It discloses "tak[ing] the
18 other 25% or so of the US that we do not cover and put gateway beams there," *i.e.*,
19 gateways completely separated from user beams. *Id.* And it discloses using "1.5
20 GHz (the entire Ka-band licensed, including the 500 MHz of co-primary plus the
21 1GHz of primary that we just used for user beams," *i.e.*, full frequency reuse
22 between the gateway and user beams. *Id.* But despite the fact that the "Option 3"
23 email provided these ideas to SS/L with no NDA protection, and despite the fact
24

1 that it does not represent the claims of the '875 patent, this trilogy of concepts
2 became ViaSat's mantra at trial. *See, e.g.*, Trial Tr. at 521 ("Mr. Burr . . . prior to
3 seeing this option three E-mail, you personally were not aware of any satellite
4 design or proposal that included, one, partial CONUS coverage, two gateways
5 located outside of user beams, and, three, gateways reusing all available frequency
6 in a single system, true?"). ViaSat thus centered its entire case around ideas that
7 were neither proprietary nor patented.

8 In light of its own inventor's testimony, ViaSat resorted to arguing that the
9 "Option 3" email was evidence of the "genesis of the '875 patent," and the
10 "motivation behind the '875 invention," rather than its "conception." ViaSat has
11 cited no authority explaining the concepts of "genesis" or "motivation" as opposed
12 to "conception" in patent law. To the contrary, the Federal Circuit has made clear
13 that "[c]onception is the touchstone inventorship, the completion of the mental part
14 of invention," or "[t]he formation in the mind of the inventor, of a definite and
15 permanent idea of the complete and operative invention" *Burroughs Wellcome*
16 *Co. v. Barr Labs., Inc.*, 40 F.3d 1223, 1227-28 (Fed. Cir. 1994) (internal quotation
17 marks and citations omitted) (emphasis added). The "Option 3" email cannot
18 evidence conception because it is not the complete '875 "invention."

19 b. The Burr Patent is Irrelevant to Non-Obviousness.

20 Because the "Option 3" email is not evidence of the '875 patent's conception,
21 any supposed linkage between it and the Doug Burr patent filings is irrelevant to
22 secondary indicia of non-obviousness (*e.g.*, copying).

23 The Federal Circuit held in *Amazon* that evidence of copying "is legally
24 irrelevant" unless the allegedly-copied item "is shown to be an embodiment of the

1 claims." *Amazon.com, Inc.*, 239 F.3d at 1336 (emphasis added). The "Option 3"
 2 email is not an embodiment of Claim 12 of the '875 patent because it lacks the
 3 proximate gateway feature. As a result, under Federal Circuit law, whether Doug
 4 Burr copied the "Option 3" email is "legally irrelevant" to secondary indicia of non-
 5 obviousness. That is because "objective evidence of non-obviousness must be
 6 commensurate in scope with the claims which the evidence is offered to support."
 7 *In re Grasselli*, 713 F.2d 731, 743 (Fed. Cir. 1983); *see also MeadWestVaco Corp.*
 8 *v. Rexam Beauty & Closures, Inc.*, 731 F.3d 1258, 1264-65 (Fed. Cir. 2013)
 9 (reversing district court's findings of secondary considerations of non-obviousness
 10 because "[t]he district court's analysis of the secondary considerations of
 11 nonobviousness involved only fragrance-specific uses, but the claims now at issue
 12 are not fragrance-specific" and "objective evidence of non-obviousness must be
 13 commensurate in scope with the claims") (quotation marks and citations omitted).

14 Indeed, ViaSat's introduction of the Doug Burr patent filings was even more
 15 insidious because its expert on the '875 patent's validity did not even opine that Mr.
 16 Burr's patent filings were copied from "Option 3." Instead, ViaSat's expert opined
 17 that Mr. Burr's patent filings evidenced copying of ViaSat's '038 provisional,
 18 notwithstanding the lack of even a scintilla of evidence in the record that Mr. Burr
 19 ever saw the '038 provisional. Trial Tr. at 2688-89.² In short, the admission of such
 20 evidence was completely irrelevant to secondary indicia—and yet ViaSat was
 21 permitted to leave the jury with the false impression that (a) SS/L's lack of any pre-

22
 23 ² Similarly, Dr. Bartone attempted to argue that the fact that SS/L hadn't built a
 24 satellite with "Option 3" concepts evidenced failure to achieve the '875 patent—
 notwithstanding that "Option 3" is not the '875 patent. *E.g.*, Trial Tr. at 2689-90.

1 ViaSat history building a satellite with "Option 3" shows that the '875 patent is
2 valid and (b) any post-ViaSat history of SS/L using "Option 3" shows that it stole
3 ViaSat's property or infringed the '875 patent. Neither is true as a matter of law.

4 c. "Option 3" and the Burr Patent were Unfairly Prejudicial.

5 Despite the irrelevance of the "Option 3" email and Burr patent filings to
6 either the patent or contract claims in this case, they became the focal point of the
7 trial. ViaSat's counsel discussed the "Option 3" email at length during opening
8 statement, arguing that it reflected "ViaSat's proprietary information," that SSL
9 "recogniz[ed] . . . ViaSat's technology [in] . . . spa[t]ial isolation between user and
10 gateway beams," and that Mr. Burr filed his patent "in an attempt to steal Mr.
11 Dankberg's revolutionary idea" reflected in the "Option 3" email. Trial Tr. at 73-76
12 (emphasis added). Remarkably, ViaSat's counsel did make one entirely accurate
13 and telling admission about Doug Burr's patent filings in opening statement: "So
14 this patent is irrelevant. It's not being asserted." *Id.* at 76 (emphasis added).

15 Based on ViaSat's acknowledgement that the Burr patent is irrelevant, the
16 only explanation for ViaSat's decision to introduce it into evidence and devote
17 substantial time during every single day of the trial to discussing it is because, as
18 ViaSat's counsel urged in opening statement (and again in closing argument), it
19 wanted the jury to be moved by passion and prejudice and to draw the improper
20 inference that SSL as a company is "not honest[]" and was "not being trustworthy."
21 Trial Tr. at 76; *see also id.* at 2694 ("These are bad actors, and they need to be
22 taught a lesson or else they're going to go out and do it again to somebody else.").

23 By SS/L's count, ViaSat raised the Doug Burr patent and/or "Option 3" (or its
24 concepts) with Mr. Dankberg, Mr. Burr, Mr. Lippert, Mr. Sawdey, Mr. Harms, Mr.

1 Morris, Mr. Roos, Mr. Tillman, Ms. Shockey, Dr. Helgert, Dr. Bartone, Dr.
2 Schindall, Mr. Chan, Mr. Hoeber, and Mr. Targoff. Mr. Dankberg admitted that
3 "Option 3" did not evidence conception of the '875 patent and even claimed on
4 cross-examination that the "Option 3" email was how ViaSat had communicated its
5 "proprietary" concepts to SS/L (notwithstanding the Court's summary judgment
6 ruling that the "Option 3" email is not proprietary). Trial Tr. at 201:15-20. And yet
7 the Court repeatedly declined to issue a limiting instruction until near the end of the
8 second week of trial, by which time the damage had already been done—ViaSat
9 had already questioned ten different fact witnesses about this material. Trial Tr. at
10 162-64 (Dankberg), 394-400, 406-07, 409, 411 (Shockey), 464-65, 474-75
11 (Harms), 521, 531-35, 568-69, 636, 638-47, 650 (Burr), 841 (Tillman), 873-78,
12 879, 891-92 (Sawdey), 924, 934, 962, 1025-26 (Hoeber), 1050-53 (Chan), 1247
13 (Targoff), and 1434-35 (Morris); *see also* n.1.

14 Ms. Shockey (who had no connection to the Jupiter program and therefore
15 could not have disclosed any confidential information to Hughes) was questioned
16 extensively about Mr. Burr's provisional patent and its alleged relationship to the
17 "Option 3" email. *See, e.g.*, Trial Tr. at 394-400, 406-07, 409, 414-26. Mr. Harms,
18 via deposition, was asked about the "Option 3" mantra and its relationship to the
19 Burr patent filings. *See, e.g.*, Trial Tr. at 464-65, 472-75, 496. Mr. Burr (who,
20 again, had no connection to the Jupiter program) was questioned extensively about
21 (1) whether he had copied concepts from the "Option 3" email in his patent
22 applications; (2) whether he had taken his own October 6, 2006 presentation and
23 beam map—which the Court also ruled was not proprietary to ViaSat as a matter of
24

1 law—and removed a ViaSat logo before including it in his patent filings; and (3)
2 whether he had ever heard of a "design or proposal" before "Option 3" that had the
3 "Option 3" concepts (*i.e.*, the three-part mantra). *See, e.g.*, Trial Tr. at 516-41, 553-
4 75, 632-49, 656-58, 671-73. Mr. Lippert, when asked about internal ViaSat
5 documents on cross-examination volunteered that the "Option 3" email—which was
6 sent by someone not employed by ViaSat to SS/L (and thus was not a ViaSat
7 document, let alone an internal one)—showed ViaSat's development of its
8 "intellectual property." *See, e.g.*, Trial Tr. at 751-54.

9 ViaSat's questioning of Mr. Tillman—a marketing employee who had no
10 assignment on the ViaSat-1 project—concluded with a dramatic recitation of partial
11 CONUS, separation of gateway and user beams, and full frequency reuse being
12 employed on Jupiter as well as ViaSat-1 (all of which ceased being proprietary
13 ideas once the "Option 3" email was transmitted to SS/L), ending with improper
14 commentary from counsel that it "sounds pretty identical to me." *See, e.g.*, Trial Tr.
15 at 841. Mr. Hoeber was asked about "partial CONUS," "gateway separated from
16 user beams," and "full frequency reuse" and whether "it's okay for [another SSL
17 employee] to tell [Hughes] how they did it on ViaSat." *See, e.g.*, Trial Tr. at 962-63.
18 Jim Sawdey, via deposition, was questioned extensively regarding the "Option 3"
19 email and whether the concepts therein had been disclosed to Hughes. *See, e.g.*,
20 Trial Tr. at 872-910. Hampton Chan was questioned regarding the Doug Burr
21 patent filings and its disclosure of the "Option 3" concepts. *See, e.g.*, Trial Tr. at
22 1049-53. And Dr. Bartone discussed the "Option 3" email at length, opined that
23 SSL misappropriated ViaSat's intellectual property stemming therefrom (despite the
24

1 fact that no such intellectual property exists), and went so far as to say SSL
2 presented to Hughes "the ViaSat concept, which is the user beams all on the eastern
3 part of the United States, the spatially isolated gateways in the western part of the
4 region . . . [and] that those spatially isolated gateways are going to operate on the
5 whole frequency" Trial Tr. at 1456-1459, 1469-71 (emphasis added).

6 SS/L repeatedly objected to evidence regarding the Doug Burr patent, moved
7 for a mistrial, and requested a limiting instruction at least six times before the Court
8 gave one. *See, e.g.*, Trial Tr. at 241-42, 362, 380-81, 394, 571, 786. Even then, the
9 instruction the Court gave was insufficient, as the Court refused to instruct the jury
10 that (1) the concepts contained in the "Option 3" email were not proprietary to
11 ViaSat; (2) the "Option 3" email and its concepts were not protected under the
12 "separate 'IP' Provision" of the Build Contract, which had no retroactive effect
13 according to the Court's summary judgment ruling; or (3) that other documents
14 were not proprietary to ViaSat (including SSL's own October 6, 2006 presentation).
15 *See, e.g.*, Trial Tr. at Trial Tr. at 380-81. The Court's first limiting instruction did
16 not even come until after ViaSat had examined ten different fact witnesses about
17 the document. *See, e.g.*, Trial Tr. at 2297, 2446, 2490-93, 2547-48. And indeed, the
18 Court's limiting instruction may have caused further prejudice to SSL by implying
19 that the "Option 3" email—or the concepts it contained—while not "proprietary"
20 under the NDA could otherwise be protected.

21 The Federal Circuit has not hesitated to reverse and order a new trial where,
22 as here, irrelevant and highly prejudicial "bad actor" evidence is admitted and
23 emphasized throughout the trial. *See Magnivision, Inc. v. Bonneau Co.*, 115 F.3d
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1 956, 958 (Fed. Cir. 1997). In that case, the district court ruled pre-trial that the
2 defendant's inequitable conduct claim failed as a matter of law. "Despite the grant
3 of summary judgment, at trial, [the defense] raised the same issue of improper
4 procedures, now calling them 'prosecution irregularities.'" *Id.* at 957. Moreover,
5 "[t]hroughout the trial, [the defense] pressed through witnesses and argument the
6 issue of 'prosecution irregularities,' and told the court and the jury that the
7 presumption of validity was lost." *Id.* The Federal Circuit reversed and remanded
8 for a new trial, holding that "the pervasiveness with which [the defense] pressed the
9 issue that the examiner had not complied with the rules," which was "[r]einforced
10 by the incorrect jury instruction," tainted the trial with irrelevant and unfairly
11 prejudicial evidence. *Id.* at 957-59. The Federal Circuit held that "[t]he issue of
12 prosecution irregularities' was simply irrelevant" and also unfairly prejudicial
13 because it "suggest[ed] decision on an improper basis" *Id.* at 961 (quotation
14 marks and citation omitted). The Federal Circuit noted that the "presentation of this
15 issue at trial, in over fifty pages of transcript and during six days of the nine-day
16 trial," illustrates the fact that "if evidence of marginal probative worth necessitates
17 lengthy rebuttal, it imparts disproportionate weight to the issue." *Id.* The fact that
18 "[t]he assertions and innuendos of impropriety were magnified by repetition" and
19 "implicit[ly] endors[ed]" through the jury charge "added weight to [their]
20 prejudicial impact."

21 This case is on all fours with *Magnivision*. There, as here, the Court issued a
22 pretrial ruling that rendered key disputed evidence irrelevant to any triable issue.
23 *Magnivision, Inc.*, 115 F.3d at 959. There, as here, the proponent of the damaging
24

1 evidence attempted to side-step the Court's summary judgment ruling and introduce
2 the evidence under a slightly-renamed theory (there, "prosecution irregularities"
3 rather than "inequitable conduct"; here, "intellectual property" rather than
4 "proprietary information" and "genesis" rather than "conception"). *Id.* There, as
5 here, the evidence became the focus of the trial, being emphasized in opening
6 statements, closing arguments, through multiple witness examinations, and in the
7 majority of the trial days and much of the trial transcript. *Id.* at 960. There, as here,
8 the prejudicial impact of such evidence was magnified by a jury instruction that
9 called further attention to the issue, but presented an incomplete and potentially
10 misleading view of the legal implications of the evidence. *Id.* For the foregoing
11 reasons, SS/L is entitled to a new trial.

12 **3. Because Passion and Prejudice Impacted Both Liability and**
13 **Damages, a New Trial on All Issues is Required.**

14 SS/L is further entitled to a new trial because it is clear that (1) the jury
15 awarded excessive damages that were motivated by passion and prejudice and (2)
16 such passion and prejudice likely tainted the liability finding as well. There is zero
17 basis in the record for the jury's award of \$102 million in separate, non-overlapping
18 breach of contract damages. *See* Dkt. 1046. Moreover, as set forth in SS/L's co-
19 pending motions, the jury's award of a "reasonable royalty" of \$123 million and
20 "lost profits" of \$58 million are also excessive. *See* Dkt. 1036, 1040. The
21 "reasonable royalty" eclipses SS/L's anticipated profits on Jupiter-1 by nearly a
22 factor of seven—with absolutely zero evidence in the record to support that SSL
23 would have agreed to pay such an amount. Dkt. 1036. The jury further awarded \$58
24 million in "lost profits" in addition to the reasonable royalty, despite the fact that (1)

1 this compensates ViaSat twice for the same sale and (2) SS/L and ViaSat are not
2 competitors (and thus ViaSat has not "lost" any sales to SSL). Dkt. 1040.

3 The \$102 million awarded by the jury for breach of contract are not based on
4 any evidence. They are not based on any argument by counsel. They are not based
5 on anything except passion and prejudice of the jury. That passion and prejudice
6 cannot be divorced from the improper "Option 3" and Doug Burr patent filing
7 evidence that was allowed to permeate the trial, including via opening statement,
8 extensive testimony throughout the entirety of the case, and a closing exhortation
9 by ViaSat's counsel to punish bad actors at SS/L. Where, as here, the damages
10 award is excessive, the excessive damages are the result of passion or prejudice,
11 and there is a risk that such passion or prejudice also affected liability, a new trial
12 on all issues must be ordered. *Minneapolis, St. Paul & Sault Ste. Marie Ry.*, 283
13 U.S. at 521-22 (holding a new trial must be ordered if the verdict is "in any degree
14 the result of appeals to passion and prejudice"); *Edwards v. Sears, Roebuck & Co.*,
15 512 F.2d. 276, 286 (5th Cir. 1975) (new trial required where excessive damages
16 resulted from passion and prejudice, which also tainted the liability verdict).

17 **A. The *Allen* Charge, After the Court Learned of the Jury's
18 Numerical Division, Was Per Se Error Requiring a New Trial**

19 The Ninth Circuit evaluates *Allen* charges "to determine if the instruction,
20 when challenged, improperly affected the verdict."³ *United States v. Beattie*, 613

21 ³ The same standards regarding the coerciveness of *Allen* instructions apply to civil
22 cases as well. *See, e.g., United States v. Brown*, 411 F.2d 930, 934 & n.4 (7th Cir.
23 1969) ("In order to avoid the potential for prejudice and coercion to which we have
24 referred, district courts in this Circuit are required henceforth to charge deadlocked
juries in both criminal and civil cases in a manner consistent with the recommended
standards. . . . We perceive no distinction between criminal and civil cases.").

1 F.2d 762, 765 (9th Cir. 1980). The Court "must examine the instruction 'in its
2 context and under all the circumstances' to see if it had a coercive effect upon the
3 jury." *Id.* (quoting *Jenkins v. United States*, 380 U.S. 445, 446 (1965)). "If a trial
4 judge inquires into the numerical division of the jury and then gives an Allen
5 charge, the charge is per se coercive and requires reversal." *Id.* (citing *Brasfield v.*
6 *United States*, 272 U.S. 448, 450 (1926)) (emphasis added). The Supreme Court has
7 noted that inquiry into numerical division "can rarely be resorted to without
8 bringing to bear in some degree, serious, although not measurable, and improper
9 influence upon the jury" *Brasfield v. United States*, 272 U.S. 448, 450 (1926).
10 "Even when the judge does not inquire but is inadvertently told of the jury's
11 division, reversal is necessary if the holdout jurors could interpret the charge as
12 directed specifically at them—that is, if the judge knew which jurors were the
13 holdouts *and* each holdout juror knew that the judge knew he was a holdout."
14 *United States v. Ajiboye*, 961 F.2d 892, 894 (9th Cir. 1992).

15 That is precisely the situation that arose in this case, following the Court's
16 inquiry into a "rare" and "highly unusual incident" of potential jury misconduct.
17 Trial Tr. at 3178. During interviews to ascertain if any juror misconduct had taken
18 place, the Court learned that the juror whom the Court ultimately excused (Juror
19 No.5) was in the majority and the juror alleged to have acted in a threatening
20 manner (Juror No. 6) was one of two hold-outs. None of the jurors ever indicated
21 that the jury was deadlocked or having trouble reaching a verdict.

22 Against this backdrop, and immediately after denying a renewed motion for a
23 mistrial, the Court *sua sponte* issued an *Allen* instruction and exhorted the jury to
24

1 "listen[] to the views of your fellow jurors and "not hesitate to change your opinion
2 if the discussion persuades you that you should." The Court reminded the jury of
3 the importance of reaching a unanimous verdict. The *Allen* charge was per se
4 coercive in light of (1) the Court's prior inquiries into whether Juror No. 5 was in
5 the majority or minority and (2) the knowledge the Court thereby gained that there
6 was a 5-2 split with Juror No. 6 in the minority. In particular, coming as it did
7 following extensive juror interviews into whether Juror No. 6 had committed
8 misconduct—including questions to multiple jurors as to whether Juror No. 6 had
9 threatened to kill anyone on the jury and whether Juror No. 5 was in the majority or
10 minority—the *Allen* charge could only be interpreted as being directed to Juror No.
11 6. After receiving the *Allen* charge, the jury did not send any further notes until it
12 reported its verdict on April 24, 2014.

13 The incident that triggered this inquiry was certainly unusual and alarming. It
14 was appropriate for the Court to investigate potential juror misconduct by
15 questioning individual jurors. But after that investigation revealed that there was a
16 divided jury, that Juror No. 6 was in the minority, and that he was perceived as
17 threatening because of his physical stature combined with his impassioned
18 arguments regarding the case, the Court's *sua sponte* decision to issue an *Allen*
19 instruction immediately thereafter was *per se* coercive and reversible error under
20 Ninth Circuit law. It ran the unacceptable risk of being perceived as directed toward
21 Juror No. 6 and encouraging him, in particular, to consider changing his mind.

22 V. CONCLUSION

23 For the reasons set forth above, SS/L requests a new trial on all issues.
24

1
2 Dated: June 13, 2014

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CERTIFICATE OF SERVICE

I hereby certify that, on June 13, 2014, I caused the foregoing **SS/L'S MOTION FOR A NEW TRIAL (5 of 12)** to be served on opposing counsel via the Court's CM/ECF system.

Dated: June 13, 2014

By: /s/ Amanda K. Bonn

