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

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

19 Plaintiffs,
20 vs.

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

22 Defendants/Counterclaim
23 Plaintiffs.
24

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

Hon. Marilyn L. Huff

[REDACTED PUBLIC VERSION]

**DEFENDANTS' REPLY IN
SUPPORT OF THEIR MOTION TO
EXCLUDE OPINIONS OF
VIASAT'S DAMAGES EXPERT DR.
DANIEL SLOTTJE**

Date: January 31, 2014

Time: 1:00 p.m.

Place: Courtroom 15A

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INTRODUCTION

ViaSat urges the Court to dismiss Defendants' objections to Dr. Slottje's inflated damages opinion as mere "quibbles" about the "precision" of Dr. Slottje's model that go to the "weight" to be given his opinion, not the admissibility. Opp. at 9. But this motion does not amount to mere quibbles over topics more appropriate for cross examination. The Federal Circuit has repeatedly instructed district courts to reject expert opinions on damages that are not grounded in economic reality. Asking [REDACTED] as a royalty in damages than SS/L even expected to make in profits on the accused satellite easily qualifies this as one such opinion.

ViaSat attempts to justify the excessive damages it is seeking by pointing to profits that Hughes expects to receive and the "economic reality of the satellite market." Opp. at 18. But ViaSat's endeavor to downplay the exorbitance of Dr. Slottje's damages cannot overcome the clear shortcomings of Dr. Slottje's analysis—such as his assumption that ViaSat-1 would have captured 100% of Hughes's subscribers [REDACTED], when he admits that [REDACTED]. ViaSat is also unable to camouflage the obvious unreasonableness of a royalty that assumes the value of the patented technology is equivalent to the value of capacity on a finished, launched, and insured satellite, and is based on the threat of an unquantifiable, invented "reputational harm" that no witness or document even mentions and is not supported by any evidence.

Professor Slottje may be a well-educated, seasoned expert, but his opinions in this case are too far reaching, are completely removed from the facts, and must be excluded.

I. DR. SLOTTJE’S LOST PROFITS OPINION MUST BE EXCLUDED

A. ViaSat’s Cannot Obtain Lost Profits from a Non-Competitor

ViaSat does not point to one case that holds that a party can receive lost profits from a defendant with which it does not compete. In *King Instruments Corp. v. Perego*, 65 F.3d 941, 947 (Fed. Cir. 1995), the patent holder and the defendant both sold competing products: “[Plaintiff and defendant] market competing machines....” *Id.* at 944. It stands for the unremarkable proposition that if the patent holder’s competing product does not practice the patented invention yet still competes with the infringing product sold by the defendant, lost profits may be available.

Although ViaSat claims that this case “is analogous” to *Minco, Inc. v. Combustion Engineering, Inc.*, 95 F.3d 1119 (Fed. Cir. 2003), it admits that the *Minco* parties competed with one another on sales of fused silica – the product produced by the patented rotary furnace. The only other case cited by ViaSat supporting its claim to lost profits as a non-competitor is *Grain Processing*, which also involved a parties who “competed head-to-head as the only significant suppliers” of the patented product. *Grain Processing Corp. v. Am. Maize-Prods. Co.*, 185 F.3d 1341 at 1349 (Fed. Cir. 1999). ViaSat’s theory of liability for lost profits from a non-competitor is completely unsupported and should be excluded.

B. Dr. Slottje’s Lost Profits Opinion Ignores Broadband Alternatives, Is Speculative and Unreliable, and Lacks Evidentiary Support

ViaSat does not establish a lack of non-infringing substitutes and cannot support Dr. Slottje’s unreliable presumption of a “but for” [REDACTED], a 100% capture rate, or the static [REDACTED] on which Dr. Slottje’s lost profits opinion relies. These shortcomings of Dr. Slottje’s analysis are not

1 “unsubstantiated quibbles with the precision of Dr. Slottje’s model,” as ViaSat would
2 hope; instead, they are fatal to ViaSat’s recovery of lost profits. Opp. at 9.

3 Although ViaSat attempts to overcome the shortcomings of Dr. Slottje’s
4 analysis by complaining that Defendants “have not independently calculated either a
5 capture rate or the capacity of the ViaSat-1 satellite,” it is not Defendants’ burden to
6 do so. Opp. at 9. Indeed, ViaSat weaves this theme throughout its brief, erroneously
7 suggesting that it is Defendants’ burden to demonstrate the availability of lost profits
8 for ViaSat. *See, e.g.*, Opp. at 13 (“Defendants have not calculated that figure [of
9 alleged lost subscribers] themselves....”); Opp. at 14 (“Defendants have not offered
10 any opinion as to the actual subscriber capacity of the ViaSat-1 satellite.”); Opp. at
11 16 (“Defendants make no effort to quantify the effect of this [beam by beam]
12 variation on Prof. Slottje’s model”¹). But it is not Defendants’ burden to correct
13 Dr. Slottje’s shortcomings – it is ViaSat’s burden to prove lost profits with
14 reasonable certainty, and it has failed to do so.

15 1. Dr. Slottje’s proposed “distinct satellite submarket” is
16 contradicted by the evidence.

17 Dr. Slottje’s only analysis to support his conclusion of the absence of non-
18 infringing substitutes was to state based on no data whatsoever that people who
19 purchased satellite internet prefer satellite internet, thus concluding that a [REDACTED]
20 [REDACTED] exists. 12/16/13 Bageant
21 Decl.,² Ex. 1 at 33. ViaSat attempts to justify this conclusion by arguing that

22 ¹ This is actually incorrect; Defendants’ expert did conduct a beam by beam analysis.
23 *See*. Ex. 2 at Appendix Tables 1.0-15.0.

24 ² Exhibits cited to herein as “Ex. __” were filed as exhibits to the 12/16/13 Decl. of
P. Bageant in Support of Defs.’ Mot. to Exclude Opinions of Dr. Daniel Slottje.

1 terrestrial broadband is different and serves a different market. But this litigation-
 2 motivated position is completely inconsistent with ViaSat's real-world position that
 3 ViaSat-1's satellite internet service competes with DSL, cable, and wireless internet.
 4 Ex. 10; Ex. 2 at 51-52.³ Indeed, Dr. Slottje even admitted that [REDACTED]
 5 [REDACTED] Ex. 1 at 30. Dr. Slottje's doctrine of
 6 "revealed preference" cannot ignore the real-life fact that satellite internet competes
 7 with other forms of broadband and cannot overcome the law that lost profits are not
 8 available where there are acceptable non-infringing substitutes available on the
 9 market at the time of infringement. *Grain Processing*, 185 F.3d at 1348-50.

10 ViaSat attempts to overcome this deficiency by arguing that it is "beyond
 11 reasonable dispute" that ViaSat-1 lost subscribers – [t]he only question is how many
 12 such subscribers lost." Opp. at 13. But even if it were true that ViaSat-1 did lose
 13 subscribers to Jupiter, ViaSat still must meet its burden of proving with "reasonable
 14 probability that [it] would have made the asserted sales 'but for' the infringement."
 15 *Grain Processing*, 185 F.3d at 1349. It cannot do so based on Dr. Slottje's
 16 unsupported declaration that "terrestrial broadband is not a strong substitute for
 17

18 ³ See also [http://www.viasat.com/broadband-satellite-networks/high-capacity-](http://www.viasat.com/broadband-satellite-networks/high-capacity-satellite-system)
 19 [satellite-system](http://www.viasat.com/broadband-satellite-networks/high-capacity-satellite-system) (stating that ViaSat-1 is "[c]ompeting with DSL, mobile wireless for
 20 fixed use, and cable – 40% of new subscribers have other alternatives") (emphasis
 21 added); [www. exede.com/what-is-exede.com](http://www.exede.com/what-is-exede.com) ("Don't suffer any longer with slow
 22 cable, DSL, or dial-up – super fast Exede Internet is available almost anywhere.");
 23 <http://investors.viasat.com/releasedetail.cfm?ReleaseID=814289> ("[Exede] is
 24 proving to be a popular, competitive alternative to residential DSL and wireless
Internet.") (emphasis added); [http://www.viasat.com/files/assets/web/ViaSat-](http://www.viasat.com/files/assets/web/ViaSat-1_FAQ_3_09_V3.pdf)
[1 FAQ 3 09 V3.pdf](http://www.viasat.com/files/assets/web/ViaSat-1_FAQ_3_09_V3.pdf) ("ViaSat-1 is a ViaSat-led project to build a satellite system
 that is designed to propel satellite into the mainstream of broadband access choices
 alongside DSL and cable by putting more, cheaper bits in space.") (emphasis added).

1 satellite broadband.” Opp. at 11.

- 2 2. Dr. Slottje’s presumption of a [REDACTED] ignores
 3 straightforward design modifications that SS/L would have
 4 implemented that would have resulted in much more capacity.

5 ViaSat attempts to excuse Dr. Slottje’s complete failure to consider evidence
 6 of the non-infringing alternatives satellite designs SS/L could have implemented [REDACTED]

7 by suggesting that Defendants’ disclosure of such alternatives was late. Opp. at 13.

8 But even assuming Dr. Slottje’s “two-player submarket” satellite broadband theory is
 9 correct, Defendants’ evidence of non-infringing alternatives was properly raised in
 10 its responsive expert reports. *Micro Chemical, Inc. v. Lextron, Inc.*, 318 F.3d 1119,
 11 1125 (Fed. Cir. 2003) (stating that once “the patentee shows two suppliers in the
 12 relevant market,” the burden “going forward then shifts to the infringer” who may
 13 “rebut the presumption” by showing non-infringing alternatives) (emphasis added);
 14 see, e.g., *BASF Corp. v. Aristo, Inc.*, No. 2:07 CV 222 PPS, 2012 WL 2159252, at
 15 *2, *7 (N.D. Ind. June 12 2012) (allowing supplemental responsive report on
 16 availability of non-infringing alternatives). Moreover, ViaSat’s counsel deposed
 17 Defendants’ experts who discussed the non-infringing alternatives, and yet Dr.
 18 Slottje still failed to consider such alternatives and has yet to issue a supplemental
 19 opinion. Dr. Slottje’s refusal to even consider the evidence that SS/L would have
 20 built a non-infringing satellite with more than his assumed [REDACTED]
 21 alternative is fatal to Dr. Slottje’s lost profits analysis.

- 22 3. Dr. Slottje’s “but for” 100% capture rate [REDACTED] is
 23 completely unsupportable, as is his assumption that ViaSat can
 24 accommodate 1 [REDACTED].

Although ViaSat argues that Dr. Slottje did not use a 100% capture rate, a

1 even cursory look at Dr. Slottje's model reveals otherwise—Dr. Slottje assumes that
2 ViaSat-1 would capture all of Jupiter's available subscribers for [REDACTED]
3 [REDACTED]. Ex. 1 at Ex. 5A-5G. And [REDACTED]
4 [REDACTED]. *Id.* at Ex. 5E-5G.
5 Although Dr. Slottje does [REDACTED] that
6 he assumes ViaSat-1 would have captured from Jupiter, choosing this arbitrary cap
7 cannot overcome the unsupportable 100% capture rate he uses until the cap is
8 reached. Nor can the other allegedly "conservative" assumptions that Dr. Slottje used
9 overcome the other unsupported assumptions on which his lost profits model is
10 based. *Cf. Uniloc USA, Inc. v. Microsoft Corp.*, 632 F.3d 1292, 1321 (Fed. Cir. 2011)
11 ("Beginning from a fundamentally flawed premise and adjusting it based on
12 legitimate considerations pecific to the facts of the case nevertheless results in a
13 fundamentally flawed conclusion.")

14 Dr. Slottje admitted in deposition that ViaSat-1 does not have the ability to
15 capture all of Jupiter's subscribers on a beam by beam basis, and that [REDACTED]
16 [REDACTED]
17 [REDACTED] Ex. 3 at 224-26:1. Yet he applied a one-to-one capture rate for seven
18 quarters. Doing so renders his lost profits analysis fundamentally flawed.

19 ViaSat attempts to convince the Court that Dr. Slottje did [REDACTED]
20 [REDACTED] Opp. at 16, but the deposition
21 testimony cited in support of this proposition reveals otherwise, and even Dr. Slottje
22 himself admitted he [REDACTED] Ex. 3 at 266:9-11. Dr.
23 Slottje made an unreliable, unsupported assumption that [REDACTED]
24 [REDACTED]

1 despite his admission that [REDACTED]. Ex. 3 at 225:24-226:1.

2 Finally, ViaSat notably fails to provide any explanation to support Dr.

3 Slottje's assumption that ViaSat-1's subscriber capacity will [REDACTED]

4 [REDACTED] despite ViaSat's own projections that [REDACTED]

5 [REDACTED]
6 [REDACTED]. Ex. 4 at 102:9-104:18; 107:9-12. ViaSat's own witness admits

7 that [REDACTED]

8 [REDACTED] – it is not intended to account for ViaSat's own

9 [REDACTED]. Cannon Decl. in Support of Opp., Ex. 24 at 83:13-

10 17. ViaSat-1's [REDACTED] also does not justify Dr.

11 Slottje's failure to account for [REDACTED]. Opp. at 15.

12 II. DR. SLOTTJE'S PROPOSED ROYALTY MUST BE EXCLUDED

13 A. A \$587.1 Million Royalty Is Not Reasonable

14 The Federal Circuit defines a reasonable royalty as the amount that a licensee
15 "would be willing to pay as a royalty and yet be able to manufacture ... a patented
16 article, in the market, at a reasonable profit." *Applied Md. Resources Corp. v. U.S.*
17 *Surgical Corp.*, 435 F.3d 1356, 1361 (Fed. Cir. 2006) (quoting *Trans-World Mfg.*
18 *Corp. v. Al Nyman & Sons, Inc.*, 750 F.2d 1552, 1568 (Fed. Cir. 1984)) (emphasis
19 added). Dr. Slottje altogether ignores this definition and proposes a royalty that
20 Defendants would never have been willing to pay and that would have never
21 permitted them to build Jupiter "at a reasonable profit" – much less without losing
22 several hundreds of millions of dollars.

23 ViaSat incorrectly suggests that Dr. Slottje need not consider that [REDACTED]

24 [REDACTED] rather than pay a \$587.1 million royalty

1 because an “infringing satellite **was** made, and a royalty must be determined.” Opp.
2 at 19. That flies in the face of decades of authority that require the consideration of
3 what a willing licensor would be willing to pay and the alternatives the licensor
4 would have considered. *See id.*, *see, e.g., Apple, Inc. v. Motorola, Inc.*, No. 1:11-cv-
5 08540, 2012 WL 1959560 (N.D. Ill. May 22, 2012).

6 ViaSat readily admits that Dr. Slottje based his royalty on the assumption that
7 SS/L would have been facing reputational harm that is [REDACTED]
8 [REDACTED] but cites to no authority suggesting that it is proper to base a royalty on
9 such an unquantifiable threat – a threat that Dr. Slottje simply made up and for which
10 he cites absolutely no evidentiary support. Opp. at 20. Such a theory is not “based on
11 sound economic and factual predicates” and must be excluded. *LaserDynamics, Inv.*
12 *v. Quanta Computer, Inc.*, 694 F.3d 51, 61 (Fed. Cir. 2012).

13 ViaSat’s misreads *Trans-World Manufacturing Corp.* in its attempt to
14 convince the Court that *Trans-World* supports Dr. Slottje’s opinion of a royalty that
15 is over [REDACTED]. *Trans-*
16 *World* stands for the opposite proposition – that a party’s anticipated profits should
17 be considered when determining the amount the party would have been willing to
18 pay for a royalty in the hypothetical negotiation. 750 F.2d at 1568. Where evidence
19 of anticipated profits is lacking, evidence of actual profits generally are admissible.
20 Dr. Slottje’s failure to consider Defendants’ anticipated profits and their willingness
21 to pay renders his opinion unreliable.

22 *Rite-Hite* also cannot save Dr. Slottje’s opinion – in that case, the Federal
23 Circuit held that a royalty “based on a significant portion of the patentee’s profits”
24 was not unreasonable. *Rite-Hite Corp. v. Kelley Co., Inc.*, 56 F.3d 1538, 1555 (Fed.

1 Cir. 1995).

2 Finally, ViaSat also attempts to justify the extraordinary royalty that Dr.
3 Slottje proposes by suggesting—for the first time—that [REDACTED]

4 [REDACTED]
5 Opp. at 19. That figure baffles the mind, when even Dr. Slottje admits that
6 [REDACTED] Even three such
7 satellites would cost less than the whopping [REDACTED]

8 **B. Dr. Slottje’s Royalty Is Based on Irrelevant Capacity Leases That**
9 **Do Not Reflect the Value of the Patented Technology**

10 Dr. Slottje considered five actual and proposed capacity leases that ranged
11 from [REDACTED]
12 [REDACTED] as the value of ViaSat’s technology. Ex.
13 1 at 61. ViaSat apparently overlooked this language in Dr. Slottje’s report when it
14 proclaimed that Dr. Slottje “does not simply adopt the effective per-Gbps prices in
15 these transactions as his royalty rate” because [REDACTED]

16 [REDACTED]
17 [REDACTED] in the two leases he selected as benchmarks. Opp. at 24 (emphasis
18 added). Indeed, this was the only basis on which ViaSat attempts to distinguish
19 *DataQuill*—which excluded an expert’s reliance on a revenue sharing agreement
20 that, similar to the capacity leases and proposals at issue here, was “not comparable
21 in any way to the license that would have been reached at the hypothetical
22 agreement,” even though the expert purported to consider the agreement under
23 *Georgia-Pacific* factor 11—as does Dr. Slottje. *DataQuill Ltd. v. High Tech*
24 *Computer Corp.*, No. 08-cv-543, 2012 WL 1284381, at *6 (S.D. Cal. Apr. 16, 2012).

1 Dr. Slottje cites to no evidence suggesting that the price of leasing capacity on
2 a launched, insured satellite is a valid benchmark for valuing the patented technology
3 or that it would have been a relevant consideration at the hypothetical negotiation.
4 He cites to no patent license that is based on the market value of satellite capacity,
5 and he fails to consider the differences in value between capacity on a completed,
6 launched, insured satellite on the one hand, and a patent license that allegedly would
7 permit a manufacturer to build a satellite with increased capacity on the other hand.

8 Finally, ViaSat attempts to justify Dr. Slottje's reliance on the capacity leases
9 and proposals by pointing to Defendants' expert's report – which is not the subject of
10 this Motion or any *Daubert* motion, for that matter. Suffice it to say that ViaSat's
11 allegations concerning Defendants' expert's analysis are baseless.

12 **C. ViaSat Does Not Justify Dr. Slottje's Alleged "Reasonableness**
13 **Checks"**

14 ViaSat makes no attempt to distinguish Dr. Slottje's alleged reasonableness
15 checks with those excluded in *Uniloc*, and again attempts to justify Dr. Slottje's
16 improper analysis by offering a baseless criticism of Defendants' expert's opinion.
17 ViaSat cannot justify a \$587.1 million royalty by pointing to irrelevant data points
18 such as the acquisition price of entire companies, Hughes's expected profits, or
19 ViaSat's total subscriber income. These data points are not at all relevant to the value
20 of the patented technology and must be excluded.

21 **CONCLUSION**

22 For the reasons stated above and in Defendants' opening Motion, Defendants
23 respectfully request that the Court exclude Dr. Slottje's unreliable lost profits and
24 reasonable royalty opinions.

1 Dated: January 13, 2014

By: /s/ Rachel S. Black

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CERTIFICATE OF SERVICE

I hereby certify that, on January 13, 2014, I caused the foregoing
**DEFENDANTS' REPLY IN SUPPORT OF THEIR MOTION TO EXCLUDE
OPINIONS OF VIASAT'S DAMAGES EXPERT DR. DANIEL SLOTTJE** to
be served on opposing counsel via the Court's CM/ECF system.

Dated: January 13, 2014 By: /s/ Rachel S. Black