

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE**

ANDOVER HEALTHCARE, INC.,

Plaintiff,

v.

3M COMPANY,

Defendant.

Civil Action No. 13-843-LPS
[REDACTED]

PUBLIC VERSION

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MEMORANDUM OPINION

October 18, 2016
Wilmington, Delaware

Henry P. Stark

STARK, U.S. District Judge:

Pending before the Court are the parties' cross-motions for summary judgment on 3M Company's laches and equitable estoppel defenses (D.I. 221, 227), 3M's motion for summary judgment of indefiniteness, noninfringement, and no willfulness (D.I. 223), 3M's motion to preclude Andover CEO Thomas Murphy from testifying as an expert (D.I. 218), and 3M's motion to preclude certain opinions of Andover damages expert Arthur Cobb (D.I. 215). For the reasons discussed below, the motions will be denied.

I. BACKGROUND

Andover Healthcare, Inc. ("Plaintiff" or "Andover") sued 3M Company ("Defendant" or "3M") for infringement of U.S. Patent No. 6,156,424 (the "'424 patent") in May 2013. (See D.I. 1) The '424 patent, which issued on December 5, 2000, is entitled "Cohesive Products." Andover claims to have "invented the world's first non-natural rubber latex cohesive bandage." (D.I. 1 Ex. A; D.I. 222 at 1) Cohesive bandages are designed to adhere to themselves rather than using metal clips or pins to stay wrapped. Plaintiff contends that several of 3M's latex-free cohesive bandage offerings infringe the '424 patent.

In 1998 and 1999, after Andover filed the application that led to the '424 patent but before the patent issued, [REDACTED]

[REDACTED] Andover alleges that 3M then reverse-engineered its products and began manufacturing similar, infringing products of its own in a bid to avoid losing market share and customer relationships. 3M responds that the accused products were deliberately designed to avoid infringement.

[REDACTED]

and the movant is entitled to judgment as a matter of law.” The moving party bears the burden of demonstrating the absence of a genuine issue of material fact. *See Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 585-86 (1986). An assertion that a fact cannot be – or, alternatively, is – genuinely disputed must be supported either by citing to “particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials,” or by “showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact.” Fed. R. Civ. P. 56(c)(1)(A) & (B). If the moving party has carried its burden, the nonmovant must then “come forward with specific facts showing that there is a genuine issue for trial.” *Matsushita*, 475 U.S. at 587 (internal quotation marks omitted). The Court will “draw all reasonable inferences in favor of the nonmoving party, and it may not make credibility determinations or weigh the evidence.” *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 150 (2000).

To defeat a motion for summary judgment, the nonmoving party must “do more than simply show that there is some metaphysical doubt as to the material facts.” *Matsushita*, 475 U.S. at 586; *see also Podobnik v. U.S. Postal Serv.*, 409 F.3d 584, 594 (3d Cir. 2005) (stating party opposing summary judgment “must present more than just bare assertions, conclusory allegations or suspicions to show the existence of a genuine issue”) (internal quotation marks omitted). The “mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment;” a factual dispute is genuine only where “the evidence is such that a reasonable jury could return a verdict for the nonmoving

party.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986). “If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted.” *Id.* at 249-50 (internal citations omitted); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986) (stating entry of summary judgment is mandated “against a party who fails to make a showing sufficient to establish the existence of an element essential to that party’s case, and on which that party will bear the burden of proof at trial”). Thus, the “mere existence of a scintilla of evidence” in support of the nonmoving party’s position is insufficient to defeat a motion for summary judgment; there must be “evidence on which the jury could reasonably find” for the nonmoving party. *Anderson*, 477 U.S. at 252.

B. Laches

Laches is “neglect or delay in bringing suit to remedy an alleged wrong, which taken together with lapse of time and other circumstances, causes prejudice to the adverse party and operates as an equitable bar.” *A.C. Aukerman Co. v. R.L. Chaides Const. Co.*, 960 F.2d 1020, 1028-29 (Fed. Cir. 1992) (en banc). To establish the defense of laches, a defendant must prove, by a preponderance of the evidence, that: (1) the plaintiff delayed in filing suit for an “unreasonable and inexcusable” length of time after the plaintiff “knew or reasonably should have known of its claim against the defendant”; and (2) the defendant suffered material prejudice or injury as a result of the plaintiff’s delay. *Id.* at 1028. A presumption of laches arises if a patentee delayed filing suit for six years after it had actual or constructive knowledge of the defendant’s acts of alleged infringement. *See id.* at 1035-37. This presumption shifts the burden of production to the plaintiff, who must provide evidence sufficient to rebut the presumption.

A showing of material prejudice, whether economic or evidentiary in nature, is “essential

to the laches defense.” *Id.* at 1033. Economic prejudice may exist where a defendant will “suffer the loss of monetary investments or incur damages which likely would have been prevented by earlier suit.” *Id.* Courts are tasked with looking to changes in the alleged infringer’s economic position; infringement damages alone are insufficient. *Id.* Evidentiary prejudice may be shown where a court’s “ability to judge the facts” is undermined by reason of a party’s inability to present a “full and fair defense on the merits” due to loss of tangible evidence, the unavailability of a witness, or faded or unreliable memories of long past events. *Id.*

Even where both undue delay and prejudice are demonstrated, “application of the defense of laches is committed to the sound discretion of the district court,” requiring a court to consider the totality of circumstances before granting relief on the basis of laches. *Id.* at 1032. A finding of laches bars pre-suit damages. *See id.* at 1041.

C. Equitable Estoppel

In order to establish equitable estoppel, an alleged infringer must show by a preponderance of the evidence that: (1) the patentee, through misleading words, conduct, or silence, led the alleged infringer to reasonably to infer that the patentee did not intend to enforce its patent rights; (2) the alleged infringer relied on the patentee’s conduct; and (3) due to its reliance, the alleged infringer will be materially prejudiced if the patentee is allowed to proceed with its claim. *See id.* at 1041, 1046.

“Unlike laches, which requires an examination of whether a patentee’s conduct was reasonable or excusable, estoppel focuses on the effect of the patentee’s conduct on the alleged infringer, not on the reasons for the patentee’s conduct.” *Wafer Shave, Inc. v. Gillette Co.*, 857 F. Supp. 112, 119 (D. Mass. 1993). Hence, the alleged infringer “must show that, in fact, it

substantially relied on the misleading conduct of [the patentee] in connection with taking some action.” *Aukerman*, 960 F.2d at 1042-43. As with laches, prejudice may be economic or evidentiary. *See id.* at 1043. There is no shifting presumption with respect to equitable estoppel. A finding of equitable estoppel bars the suit in its entirety. *See id.* at 1041.

D. Indefiniteness

A patent’s specification must “conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as [the] invention.” 35 U.S.C. § 112, ¶ 2. A claim is void as indefinite if, “read in light of the specification delineating the patent, and the prosecution history, [the claim] fail[s] to inform, with reasonable certainty, those skilled in the art about the scope of the invention.” *Nautilus, Inc. v. Biosig Instruments, Inc.*, 134 S.Ct. 2120, 2124 (2014). Patent “claims themselves provide substantial guidance as to the meaning of particular claim terms.” *Schindler Elevator Corp. v. Otis Elevator Co.*, 593 F.3d 1275, 1282 (Fed. Cir. 2010) (internal quotation marks omitted). The inherent limitations of language must be taken into account, and “[s]ome modicum of uncertainty is the price of ensuring the appropriate incentives for innovation.” *Teva Pharm. USA, Inc. v. Sandoz, Inc.*, 789 F.3d 1335, 1341 (Fed. Cir. 2015) (internal quotation marks omitted). But a patent must still be precise enough to “afford clear notice of what is claimed, thereby apprising the public of what is still open to them.” *Id.* (internal quotation marks omitted). 3M bears the burden of proving “any fact critical to a holding on indefiniteness” by clear and convincing evidence. *See Intel Corp. v. VIA Techs., Inc.*, 319 F.3d 1357, 1366 (Fed. Cir. 2003).

E. Non-infringement

When an accused infringer moves for summary judgment of non-infringement, such relief may be granted only if one or more limitations of the claim(s) in question does not read on an element of the accused product, either literally or under the doctrine of equivalents. *See Chimie v. PPG Indus., Inc.*, 402 F.3d 1371, 1376 (Fed. Cir. 2005); *see also TechSearch, L.L.C. v. Intel Corp.*, 286 F.3d 1360, 1369 (Fed. Cir. 2002) (“Summary judgment of noninfringement is . . . appropriate where the patent owner’s proof is deficient in meeting an essential part of the legal standard for infringement, because such failure will render all other facts immaterial.”). Thus, summary judgment of non-infringement can only be granted if, after viewing the facts in the light most favorable to the non-movant, there is no genuine issue as to whether the accused product is covered by the claims (as construed by the Court). *See Pitney Bowes, Inc. v. Hewlett-Packard Co.*, 182 F.3d 1298, 1304 (Fed. Cir. 1999).

F. Willfulness

35 U.S.C. § 284 provides the Court with the “discretion to award enhanced damages against those guilty of patent infringement.” *Halo Elecs., Inc. v. Pulse Elecs., Inc.*, 136 S. Ct. 1923, 1935 (2016). The sort of “egregious” conduct warranting such an enhancement has been described as “willful, wanton, malicious, bad-faith, deliberate, consciously wrongful, flagrant, or – indeed – characteristic of a pirate.” *Id.* at 1932. The plaintiff bears the burden of showing such conduct by a preponderance of the evidence. *See id.* at 1934. Knowledge of the allegedly infringed patent is a prerequisite for enhancement, and “[p]roof of an objectively reasonable litigation-inspired defense to infringement is no longer a defense to willful infringement.” *WBIP, LLC v. Kohler Co.*, 829 F.3d 1317, 1341 (Fed. Cir. July 19, 2016). Willfulness is a “classical jury question of intent,” and “an infringer’s subjective bad faith alone may support an award of

enhanced damages.” *Id.* at 1340-41 (internal quotation marks omitted).

G. Motions to Preclude

In *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 597 (1993), the Supreme Court explained that Federal Rule of Evidence 702 creates “a gatekeeping role for the [trial] judge” in order to “ensur[e] that an expert’s testimony both rests on a reliable foundation and is relevant to the task at hand.” The rule requires that expert testimony “help the trier of fact to understand the evidence or to determine a fact in issue.” Fed. R. Evid. 702(a). Expert testimony is admissible only if “the testimony is based on sufficient facts or data,” “the testimony is the product of reliable principles and methods,” and “the expert has reliably applied the principles and methods to the facts of the case.” Fed. R. Evid. 702(b)-(d). There are three distinct requirements for admissible expert testimony: (1) the expert must be qualified; (2) the opinion must be reliable; and (3) the expert’s opinion must relate to the facts. *See generally Elcock v. Kmart Corp.*, 233 F.3d 734, 741-46 (3d Cir.2000).

III. DISCUSSION

A. Summary Judgment: Laches and Equitable Estoppel

Each party seeks summary judgment with respect to 3M’s laches and equitable estoppel defenses. In order to obtain its requested relief, 3M must show that the record evidence, taken in the light most favorable to Andover, could only be found by a reasonable factfinder to establish each of the elements of one or both defenses. A showing of material prejudice is required for both defenses. As applied to laches, a presumption of prejudice applies due to Andover’s delay of more than six years in pursuing this action. *See Aukerman*, 960 F.2d at 1037.

3M claims that it has suffered economic prejudice by virtue of its investment in and

marketing of its accused product line throughout the relevant period, including the development and commercialization of additional variants and features. 3M asserts evidentiary prejudice from lost memories and the loss of records relating to [REDACTED] as well as certain prior art formulations.

Andover contends that 3M's marketing and development efforts were undertaken for business purposes and not "as a result of" Andover's silence or conduct at any time. [REDACTED]

[REDACTED] Andover similarly disputes the evidentiary prejudice to 3M, noting that a large number of documents have been exchanged in discovery, all relevant witnesses have been deposed, and relevant product testing data remains available.

The Court concludes that genuine disputes of material fact exist regarding (at least) the extent of prejudice to 3M. There is sufficient evidence in the record to support both parties' positions, including sufficient evidence to permit a finding that Andover has rebutted the presumption of material economic and evidentiary prejudice to 3M. For example, as for economic prejudice, a reasonable factfinder could conclude either that 3M changed its plans based on its belief – after up to 13 years without patent litigation – it would not be sued, or, alternatively, could conclude that 3M's business decisions were always motivated to gain market share and were unaffected by a belief that Andover had decided not to sue. Nor is the Court persuaded that the only reasonable conclusion from the record is that evidentiary imperfections have materially prejudiced 3M's efforts to prepare a "full and fair" defense. 3M's references to witnesses who testified that their recollection would be greater closer to the events rather than 17 years later (*see, e.g.*, D.I. 228 at 8-9 (excerpting testimony of Thulin and Murphy)), and referring

to “lost” prior art (*see id.* at 9, 15), do not convince the Court that it should exercise its discretion and find laches without even hearing the parties’ evidence at trial. For these reasons, both parties’ motions fail with respect to material prejudice. 3M’s motion must therefore be denied, as must Andover’s motion with respect to laches.²

The motions must be denied with respect to equitable estoppel as well. The Court has found a genuine dispute of material fact with respect to material prejudice to 3M. The Court reaches the same conclusion with respect to misleading conduct, which focuses on the alleged infringer’s perception of events. *See Wafer Shave, Inc.*, 857 F. Supp. at 118. Similarly, with regard to the element of reliance, there are genuine factual disputes about why 3M undertook the marketing and development actions that it did. Accordingly, both parties’ motions for summary judgment with respect to equitable estoppel will be denied.

B. Summary Judgment: Indefiniteness

3M contends that the term “cohesive” is indefinite as a matter of law and the asserted claims of the ‘424 patent are, therefore, invalid. The Court construed “cohesive” to mean “sticks to itself and not (at least to any significant degree) to other materials.” (D.I. 142 at 4) 3M asserts that the patent lacks any instruction as to how the invention’s cohesiveness is to be tested. 3M contends that the patent does not provide objective boundaries for determining whether an object is cohesive, particularly with regard to whether an object adheres to other materials to “any

²Another factor weighing in favor of denying the motions is the Supreme Court’s grant of certiorari in *SCA Hygiene Products v. First Quality Baby Products*, 2016 WL 309607 (U.S. May 2, 2016), which presents the question of whether and to what extent laches may be applied to a claim of patent infringement. The Supreme Court will likely issue an opinion in *SCA Hygiene* before this Court holds a bench trial on the issue of laches, and the Court will benefit from any guidance provided by the Supreme Court.

significant degree.” While the Court shares some of 3M’s concerns, it is unpersuaded that 3M is entitled to summary judgment.

The ‘424 patent is “directed to cohesive products, and more particularly to cohesive tapes and bandages.” (‘424 patent at col. 1 ll. 3-4) The specification leaves little doubt that the overarching goal is the production of natural latex rubber-free alternatives to the cohesive products prominent in the market at the time of the invention, using similar formulations and manufacturing methods. (*See, e.g., id.* at col. 1 ll. 46-52)

At claim construction, the Court disagreed with Andover’s contention that the patent demonstrates a clear intent to limit the scope of its claims to a single embodiment. Still, a skilled artisan attempting to ascertain the claims’ boundaries would have the benefit of the intrinsic record’s focus on, for example, ankle tape that sticks to itself but not to any significant degree to other surfaces or materials (*id.* at col. 3 ll. 55-61), and the prosecution history’s characterization of cohesive materials as those that, “as a practical matter,” adhere only to themselves (*see* D.I. 246 Ex. 2 at 10). The specification, after comparing the relative “window[s] of cohesiveness” for formulations involving natural rubber latex and a synthetic alternative, explains that failing to fall in range “produces either a non-cohesive or an amorphous pressure-sensitive adhesive, neither of which is useful for the present invention.” (‘424 patent col. 6 ll. 41-45) The applicant claims to have “identified the borderline between cohesion and pressure-sensitivity” for various formulations of its elastomer and tackifying agents, and provides examples of formulations falling on that borderline. (*Id.* at col. 10 l. 16 to col. 11 l. 6)

There is intrinsic and extrinsic evidence suggesting that a skilled artisan would use a “touch test” as one method of determining whether a product adheres as a practical matter to

materials other than itself. (*See id.* at col. 10 ll. 11-14 (“Good cohesion was achieved . . . as measured by touch-testing.”); D.I. 246 Ex. 3 at 14³) 3M correctly notes that “[a] party cannot transform’ the legal matter of indefiniteness into a factual matter ‘simply by having an expert offer an opinion on it’” (D.I. 224 at 10 (quoting *Teva*, 789 F.3d at 1342)), but there is some suggestion – even in 3M’s expert’s testimony – that use of a finger touch test to compare relative adhesion can be useful (D.I. 268 Ex. 22 at 87:15-89:3).

3M asks where the dividing line is between an object that adheres less-than-significantly to other objects and one that adheres more-than-significantly to other objects. But 3M offers little to support a finding that a skilled artisan would be unable to discern that line with reasonable certainty. 3M argues that “*whether* a product feels sticky to the touch, and *how* sticky it feels are inherently subjective determinations.” (D.I. 267 at 3) But these points fail to account fully for a skilled artisan’s experience and ability to compare materials. *Cf. DDR Holdings, LLC v. Hotels.com, L.P.*, 773 F.3d 1245, 1260 (Fed. Cir. 2014) (“[T]hough [defendant] attempts to characterize ‘look and feel’ as purely subjective, the evidence demonstrates that ‘look and feel’ had an established, sufficiently objective meaning in the art.”). Put another way, a reasonable factfinder, drawing all reasonable inferences in favor of Andover, would not have to find that the record establishes, by clear and convincing evidence, that a skilled artisan would be unable to distinguish (i) a product that is too adherent to materials other than itself to be of practical use from (ii) other useful formulations. Instead, the record reveals a genuine, material fact dispute

³3M has moved to exclude Mr. Murphy’s expert opinions and urges the Court to give Mr. Murphy’s testimony on these points “no weight.” (*See* D.I. 267 at 5) But the Court may not make credibility determinations at the summary judgment stage. *See Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 150 (2000).

over whether cohesiveness has a “sufficiently objective meaning in the art.” *Id.* On the record presently before the Court, 3M’s motion for summary judgment must be denied.

C. Summary Judgment: Non-infringement

3M moves for summary judgment of non-infringement based on tests revealing that the accused products attach to polyurethane foam and therefore “stick . . . significant[ly]” to materials other than themselves, placing them outside of the ‘424 patent’s scope as construed. Andover responds by pointing out that the *open cell* polyurethane foam utilized by 3M has a structure that, at the microscopic level, contains “thousands of webbed holes,” which trap the accused product’s fibers. (D.I. 244 at 14-15) Andover demonstrated at oral argument, and 3M does not seem to contest, that the accused product does not attach to *closed cell* polyurethane foam, which has a smooth surface. (*See* Tr. at 72)

Andover argued in its brief that the accused product’s “elastomer is *not* sticking to the foam” and, therefore, remains cohesive. (D.I. 244 at 15) However, as 3M pointed out in its reply, the ‘424 patent’s relevant claims include not only a cohesive *elastomer* but a cohesive *product*. (D.I. 267 at 8) In 3M’s view, it is clear that the product as a whole is “sticking” to open cell polyurethane foam. Andover counters that the “mechanical attachment” in 3M’s tests is insufficient, and that, “in the context of this invention,” for something to “stick,” it must “adhere chemically.” (Tr. at 73; *see also* D.I. 244 at 15)⁴

3M has not demonstrated entitlement to summary judgment on this record. The record, instead, reveals an unresolved, genuine, material question of what material is doing the

⁴At oral argument, it became clear that 3M’s view is that even use of an arrow, knife, or nail to cause a material to “stick” to something else may mean the material is not cohesive. (*See* Tr. at 69-70)

“sticking.” 3M’s motion will be denied.

D. Summary Judgment: Willfulness

3M moved for summary judgment of no willfulness prior to the Supreme Court’s decision in *Halo Electronics, Inc. v. Pulse Electronics, Inc.*, 136 S. Ct. 1923 (2016), which altered the willfulness standard. Thereafter, the parties submitted supplemental briefs to address the impact of *Halo* on the instant motion. (D.I. 284, 287)

3M contends that summary judgment is appropriate based on evidence that 3M “intentionally designed its product to not have crystallinity – a feature required by the ‘424 patent.” (D.I. 284 at 1) 3M argues that a “strong infringement defense” remains a factor in whether damages should be enhanced, and that “this is not the kind of ‘egregious case’ necessary to support a finding of enhanced damages.” (*Id.* at 3)

There is evidence in the record to support a reasonable finding that 3M sought to design around the ‘424 patent in order to avoid infringement. But there is also evidence in the record suggesting that 3M set out to reverse-engineer Andover’s product (and perhaps infringe a patent it knew was pending). The parties’ experts strenuously disagree as to whether the accused products display crystallinity in such a way that brings them within the ‘424 patent’s scope. Willfulness is ordinarily a question to be resolved by the jury. *See WBIP*, 829 F.3d at 1341. Given the genuine, material disputes over the nature of 3M’s conduct and the accused products’ physical properties, 3M’s motion will be denied.

E. Motion to Preclude: Dr. Murphy

3M moves to preclude Andover CEO Thomas Murphy from testifying as an expert witness, based on his “blatant and direct financial interest in the outcome of this case.” (D.I. 219

at 2)

3M analogizes this situation to one in which a retained expert will receive greater compensation depending on the outcome of a case, a situation in which some courts preclude experts from testifying. *See Taylor v. Cottrell, Inc.*, 795 F.3d 813, 816-17 (8th Cir. 2015) (collecting cases). *But see In re Zenith Elecs. Corp.*, 241 B.R. 92, 102 (Bankr. D. Del. 1999) (citing *Universal Athletic Sales Co. v. American Gym, Recreational & Athletic Equipment Corp.*, 546 F.2d 530 (3d Cir.1976)); *Tagatz v. Marquette Univ.*, 861 F.2d 1040, 1042 (7th Cir. 1988) (“It is unethical for a lawyer to employ an expert witness on a contingent-fee basis, but it does not follow that evidence obtained in violation of the rule is inadmissible. The trier of fact should be able to discount for so obvious a conflict of interest.”).

Also, 3M relies on *Perfect 10, Inc. v. Giganews, Inc.*, 2014 WL 10894452 (C.D. Cal. Oct. 31, 2014). That case is distinguishable, as it involved a sole shareholder, and the court was skeptical that the shareholder “qualifies as an expert for the purposes of [the] litigation at all.” *Id.* at *6.

3M’s clever argument has some appeal, but ultimately fails. At oral argument, 3M’s counsel posited that Mr. Murphy’s expert opinions should be excluded because

But this contention only holds if the Court disregards Andover’s corporate existence. Any recovery in this case will initially go to Andover, *not* Murphy. On the record before it, the Court has no basis to ignore Andover’s existence.

In the end, the Court concludes that Dr. Murphy’s indirect financial interest in the

outcome of the litigation [REDACTED] can be handled appropriately on cross-examination. See *Ridgway Nat. Bank v. N. Am. Van Lines, Inc.*, 326 F.2d 934, 939 (3d Cir. 1964). 3M's concerns go to weight and not admissibility. See *In re Unisys Sav. Plan Litig.*, 173 F.3d 145, 167 (3d Cir. 1999).

F. Motion to Preclude: Arthur Cobb

3M seeks to exclude Andover's damages expert, Arthur Cobb's, opinions on price erosion. Specifically, 3M criticizes Mr. Cobb's purported failure to account for the effect of a hypothetical price increase by Andover on consumer demand for Andover's product. But a reasonable factfinder could conclude that Mr. Cobb did, at least in effect, account for this impact. If the jury agrees with Andover that the relevant market has only two suppliers – Andover, and 3M, with its infringing product – then it could also conclude that in the hypothetical one-supplier market Andover could charge higher prices without experiencing reduced sales. See generally *Amstar Corp. v Envirotech Corp.*, 823 F.2d 1538, 1543 (Fed. Cir. 1987) (“In a market with only two viable competitors, one may infer that the patentee would have made the infringer's sales or charged higher prices but for the infringing competition.”). A reasonable factfinder is not, of course, obligated to accept this reasoning, but 3M's criticisms of it go to the weight to be given to Mr. Cobb's opinions and not their admissibility.

IV. CONCLUSION

For the foregoing reasons, the Court will deny the motions. An appropriate Order follows.

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE**

ANDOVER HEALTHCARE, INC.,

Plaintiff,

v.

3M COMPANY,

Defendant.

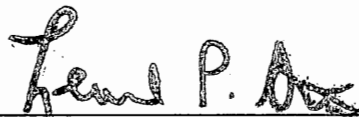
Civil Action No. 13-843-LPS

ORDER

At Wilmington this 18th day of October, 2016, consistent with the Memorandum Opinion issued this date, IT IS HEREBY ORDERED that:

1. The parties' cross-motions for summary judgment with respect to 3M Company's ("3M") laches and equitable estoppel defenses (D.I. 221, 227) are DENIED.
2. 3M's motion for summary judgment with regard to indefiniteness, non-infringement, and no willfulness (D.I. 223) is DENIED.
3. 3M's motion to preclude Thomas Murphy from testifying as an expert (D.I. 218) is DENIED.
4. 3M's motion to preclude certain opinions of Arthur Cobb (D.I. 215) is DENIED.

Because the Memorandum Opinion is issued under seal, the parties shall meet and confer and, no later than October 20, 2016, submit a proposed redacted version of it. Thereafter, the Court will issue a public version of the Memorandum Opinion.



UNITED STATES DISTRICT JUDGE