

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF DELAWARE

E.I. DUPONT DE NEMOURS AND  
COMPANY,

Plaintiff,

v.

UNIFRAX I LLC,

Defendant.

Civil Action No. 14-1250-RGA

**MEMORANDUM ORDER**

This memorandum addresses Defendant Unifrax I LLC's Renewed Motions for Judgment as a Matter of Law ("JMOL") that the Asserted Patent Claims are not Infringed or Invalid and, in the Alternative, For a New Trial. (D.I. 366) I have reviewed the briefing for these motions. (D.I. 370; D.I. 375; D.I. 385).

**I. LEGAL STANDARD**

**A. Judgment as a Matter of Law**

Judgment as a matter of law is appropriate if "the court finds that a reasonable jury would not have a legally sufficient evidentiary basis to find for [a] party" on an issue. FED. R. CIV. P. 50(a)(1). "Entry of judgment as a matter of law is a 'sparingly' invoked remedy, granted only if, viewing the evidence in the light most favorable to the nonmovant and giving it the advantage of every fair and reasonable inference, there is insufficient evidence from which a jury reasonably could find liability." *Marra v. Phila. Hous. Auth.*, 497 F.3d 286, 300 (3d Cir. 2007) (citation omitted).

In assessing the sufficiency of the evidence, the Court must give the nonmovant, "as [the] verdict winner, the benefit of all logical inferences that could be drawn from the evidence

presented, resolve all conflicts in the evidence in his favor and, in general, view the record in the light most favorable to him.” *Williamson v. Consol. Rail Corp.*, 926 F.2d 1344, 1348 (3d Cir. 1991). The Court may “not determine the credibility of the witnesses [nor] substitute its choice for that of the jury between conflicting elements in the evidence.” *Perkin-Elmer Corp. v. Computervision Corp.*, 732 F.2d 888, 893 (Fed. Cir. 1984). Rather, the Court must determine whether the evidence reasonably supports the jury’s verdict. *See Gomez v. Allegheny Health Servs. Inc.*, 71 F.3d 1079, 1083 (3d Cir. 1995); 9B *Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure* § 2524 (3d ed. 2008) (“The question is not whether there is literally no evidence supporting the party against whom the motion is directed but whether there is evidence upon which the jury might reasonably find a verdict for that party.”).

Where the movant bears the burden of proof, the Third Circuit applies a stricter standard. *Fireman’s Fund Ins. Co. v. Videfreeze Corp.*, 540 F.2d 1171, 1177 (3d Cir. 1976). To grant judgment as a matter of law in favor of a party that bears the burden of proof on an issue, the Court “must be able to say not only that there is sufficient evidence to support the [movant’s proposed] finding, even though other evidence could support as well a contrary finding, but additionally that there is insufficient evidence for permitting any different finding.” *Id.*

## **B. New Trial**

Federal Rule of Civil Procedure 59(a)(1)(A) provides, in pertinent part: “The court may, on motion, grant a new trial on all or some of the issues—and to any party— . . . after a jury trial, for any reason for which a new trial has heretofore been granted in an action at law in federal court . . . .” Among the most common reasons for granting a new trial are: (1) the jury’s verdict is against the clear weight of the evidence, and a new trial must be granted to prevent a miscarriage of justice; (2) newly discovered evidence exists that would likely alter the outcome of the trial; (3) improper conduct by an attorney or the court unfairly influenced the verdict; or

(4) the jury’s verdict was facially inconsistent. *See Zarow-Smith v. N.J. Transit Rail Operations, Inc.*, 953 F. Supp. 581, 584–85 (D.N.J. 1997).

The decision to grant or deny a new trial is committed to the sound discretion of the district court. *Allied Chem. Corp. v. Daiflon, Inc.*, 449 U.S. 33, 36 (1980); *Olefins Trading, Inc. v. Han Yang Chem Corp.*, 9 F.3d 282, 289 (3d Cir. 1993). Although the standard for granting a new trial is less rigorous than the standard for granting judgment as a matter of law—in that the Court need not view the evidence in the light most favorable to the verdict winner—a new trial should only be granted where “a miscarriage of justice would result if the verdict were to stand” or where the verdict “cries out to be overturned” or “shocks [the] conscience.” *Williamson*, 926 F.2d at 1352–53.

## **II. DISCUSSION**

### **A. Judgment as a Matter of Law of Non-Infringement**

Defendant argues that the accused product, 3G11, contains “carrier material” because (1) it includes polydimethylsiloxane (“PDMS”), an organic silicone-based polymer additive, or (2) the refractory layer of 3G11 has silane. Sufficient evidence supports a finding that the PDMS present in 3G11 is not a carrier. (*See, e.g.*, PTX-22; Tr. 1483:11–14, 1226:20–1227:1, 697:18–699:4, 1241:24–1242:15). Sufficient evidence supports a finding that silane is not a carrier. (*See, e.g.*, Tr. 633:12–634:20, 637:16–638:12; PTX-175).

Defendant makes the new claim construction argument that if a material serves more than one function, such as, as both a dispersant and a carrier, then that material would count towards the “100% by weight” limitation because it qualifies as a carrier. Defendant did not argue this specific issue in its claim construction briefing. (*See generally* D.I. 74). Defendant had numerous opportunities to raise this specific issue prior to trial, but Defendant did not do so. Indeed during summary judgment arguments, Defendant represented that “the correct claim

construction is the one the Court gave which is there cannot be resin or adhesive in the vermiculite.” (D.I. 282, 26:10–17). I do not understand Defendant’s citations at D.I. 370, page 34, footnote 17 to amount to an adequate request for additional claim construction of this issue. Defendant did not preserve this specific argument as a basis for JMOL at trial either. Thus, this argument is waived. *See, e.g., LG Elecs. U.S.A., Inc. v. Whirlpool Corp.*, 798 F. Supp. 2d 541, 551 (D. Del. 2011) (“A party dissatisfied with a jury verdict may not prevail on a post-verdict motion for JMOL based on grounds not raised in the pre-verdict motion for JMOL.”); *Duro-Last, Inc. v. Custom Seal, Inc.*, 321 F.3d 1098, 1107 (Fed. Cir. 2003) (“[I]t would be constitutionally impermissible for the district court to re-examine the jury’s verdict and to enter JMOL on grounds not raised in the pre-verdict JMOL.”). Even if it were not waived, I think Defendant’s new construction is an overly broad interpretation of what counts towards the 100% by weight limitation. Defendant’s new construction seems to contemplate that even *residual* dispersants could count towards this limitation. *See Kaneka Corp. v. Xiamen Kingdomway Grp. Co.*, 790 F.3d 1298, 1304 (Fed. Cir. 2015) (“A claim construction that excludes a preferred embodiment is ‘rarely, if ever, correct.’”). For the reasons given in my Markman opinion, that cannot be the correct reading. (*See, e.g.,* D.I. 86 at p. 14 (noting that the specification provides that “[t]he refractory layer may comprise some residual dispersant arising from incomplete drying of the platelet dispersion during manufacture”)).

Defendant also argues that the construction given for the “capable of activation” limitation is improper. For the reasons provided in my construction of this limitation, I disagree. (D.I. 294).

#### **B. Judgment as a Matter of Law of Invalidity**

Defendant argues that no reasonable jury could find that FyreWrap Combi-Film 3G7 product does not anticipate the asserted claims. There is sufficient evidence to support a finding

that it does not anticipate. (*See, e.g.*, Tr. 230:20–231:1, 280:6–282:4, 276:5–12, 266:5–267:7, 267:19–268:3, 269:1–12, 349:11–352:5; 443:16–24, 440:24–442:5, 445:17–23, 448:12–21, 449:20–450:14, 459:22–460:2, 461:22–462:4, 468:5–9, 472:10–24, 481:14–482:8, 439:9–20, 476:16–477:20; PTX-46; PTX-54; PTX-74; PTX-75; PTX-125; PTX-148; PTX-161; PTX-163; PTX-169; PTX-59; PTX-143; DTX-100; DTX-115; PTX-126; PTX-127; PTX-132).

Defendant argues that no reasonable jury could find that the Mormont reference does not anticipate or render obvious the asserted claims. There is sufficient evidence to support a finding that it does not anticipate or render obvious the asserted claims. (*See, e.g.*, DTX-114 at ¶¶ 33, 74; Tr. 1218:13–18, 1480:17–21, 1480:24–1481:5, 1479:1–3, 1485:8–15; PTX-27).

### **C. New Trial**

A new trial is not warranted as an alternative to JMOL for the reasons discussed above. Defendant further argues that a new trial is warranted because of (1) some of DuPont’s arguments to the jury, (2) the jury was not properly instructed on conception, and (3) the verdicts on infringement and validity are contradictory.

Defendant argues that Plaintiff made statements to the jury suggesting that carrier materials only include the examples listed in my construction of “100% by weight.” (D.I. 370 at 33–34 (citing to Tr. 1839:4–15, 1756:9–11, 1757:2–5, 1757:20–21, 1762:9–13, 1840:22–1841:4)).

During the cross-examination of Dr. Nosker, Defendant objected, “Mr. Levine is suggesting to the jury that the construction of the claim is that only resins can be carriers when, in fact, it is the carrier such as a resin or adhesive. I’m just concerned that if he continues to suggest that, they’re going to be confused.” (Tr. 1208:2–9). I overruled that objection, stating that Mr. Levine “hasn’t explicitly suggested that. You know, it seems like something you could bring up on redirect.” (Tr. 1208:10–13).

Before I excused the jury to begin deliberations, Defendant further requested “a corrective instruction that carriers are not limited to the examples of resins, adhesives paper or cloth. I think that Mr. Levine implied strongly that it is a limiting construction and it’s not.” (Tr. 1848:10–15). I overruled that objection, stating, “I think the instruction that I’ve given that’s in the book as to what it is is sufficient, so I’m not going to give that.” (Tr. 1849:2–5).

There is no miscarriage of justice here. I do not think a jury was misled to believe that a carrier can only be resins or adhesives. Mr. Levine never argued that a carrier can only be resins or adhesives. Indeed, Mr. Levine made clear that resin and adhesives are merely examples of carriers. (Tr. 1839:10–19). My construction, which was provided to the jury, further served to mitigate juror confusion.

Defendant further argues that to the extent my construction did not exclude the presence of any material serving as a binder, such as an organosilicon additive, from the inorganic refractory layer, this was in error. I reject this argument for the reasons stated above. Defendant waived this new claim construction argument. Even if it the argument was preserved, it would be an improper construction. Again, Defendant’s new construction seems to contemplate that even residual dispersants could count towards the “100% by weight” limitation.

Defendant argues that the jury was improperly instructed on conception because the instruction only referred to the requirement for conception of a “complete and operative invention” and “complete idea.” I disagree. Defendant’s alternative proposal that conception refers to an “appreciation for and possession of each and every claim limitation” is unnecessary and confusing.

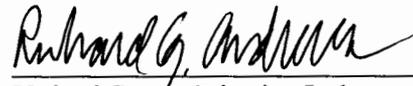
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Defendant argues that the verdicts are inconsistent. I disagree. There is sufficient evidence for the jury to find that there was a meaningful difference between DEHESIVE 480 and the silicone resin of Mormont.

### III. CONCLUSION

For the foregoing reasons, Defendant's renewed motions for judgment as a matter of law is **DENIED**. Defendant's request for a new trial is **DENIED**.

**IT IS SO ORDERED** this 12 day of September 2017.

  
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United States District Judge

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**MEMORANDUM OPINION**

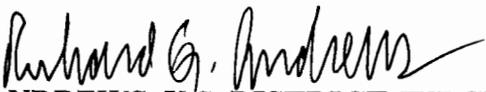
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September 12, 2017

  
ANDREWS, U.S. DISTRICT JUDGE:

This Memorandum Opinion addresses Plaintiff E.I. du Pont de Nemours and Company's Post-Trial Motion for a Permanent Injunction, Supplemental Damages, and Interest. (D.I. 367). I have reviewed the briefing for this motion. (D.I. 368; D.I. 376; D.I. 383). On May 19, 2017, I entered judgment for Plaintiff that Defendant's FyreWrap Combi-Film 3G11 infringed U.S. Patent No. 8,607,926 (the "'926 patent"). (D.I. 346). I also entered judgment for Plaintiff that the '926 patent was not invalid. (*Id.*).

## I. DISCUSSION

### A. Permanent Injunction

Courts "may grant injunctions in accordance with the principles of equity to prevent the violation of any right secured by patent, on such terms as the court deems reasonable." 35 U.S.C. § 283. "According to well-established principles of equity, a plaintiff seeking a permanent injunction must satisfy a four-factor test before a court may grant such relief." *eBay Inc. v. MercExchange, LLC*, 547 U.S. 388, 391 (2006). "A plaintiff must demonstrate: (1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction." *Id.* "The essential attribute of a patent grant is that it provides a right to exclude competitors from infringing the patent." *Acumed LLC v. Stryker Corp.*, 551 F.3d 1323, 1328 (Fed. Cir. 2008).

#### 1. Irreparable Injury

"To satisfy the first *eBay* factor, the patentee must show that it is irreparably harmed by the infringement." *Apple Inc. v. Samsung Elecs. Co.*, 809 F.3d 633, 639 (Fed. Cir. 2015). "This requires proof that a 'causal nexus relates the alleged harm to the alleged infringement.'" *Id.*

“This just means that there must be proof that the infringement causes the harm.” *Id.* “Where two companies are in competition against one another, the patentee suffers the harm—often irreparable—of being forced to compete against products that incorporate and infringe its own patented inventions.” *Douglas Dynamics, LLC v. Buyers Prods. Co.*, 717 F.3d 1336, 1345 (Fed. Cir. 2013).

Defendant’s predecessor Combi-Film 396 product was dissatisfactory to Boeing. (Tr. 286:7–24). There is evidence that the predecessor product would not have qualified under Boeing’s new specification. (Tr. 946:20–947:4, 992:15–24, 847:12–22). Defendant’s 3G11 product uses Plaintiff’s patented flame barrier laminate design to qualify for this specification and compete in this market. (Tr. 747:16–748:3). Defendant is Plaintiff’s only competitor in Boeing’s flame barrier laminate market. (Tr. 1500:10–16). Plaintiff projected that its Nomex XF would have sales of \$32 million in 2013 to 2015. (Tr. 193:4–194:9). Defendant’s presence in the market directly reduced Plaintiff’s sales. (*See, e.g.*, Tr. 776:9–19, 199:9–200:4; PTX-259; PTX-388).

This reduction in sales reflects a causal nexus relating the harm to the infringement. Had Defendant not infringed Plaintiff’s design, Defendant would not have qualified its 3G11 product and would not have been able to compete in the flame barrier market under Boeing’s new specification. Defendant thus would not have cut into sales of Nomex XF. Plaintiff and Defendant are direct competitors. There is sufficient evidence establishing irreparable harm to Plaintiff. *See Robert Bosch LLC v. Pylon Mfg. Corp.*, 659 F.3d 1142, 1152 (Fed. Cir. 2011).

Defendant notes that Defendant took the 3G11 product off the market and no longer offered it for sale as of May 19, 2017. (D.I. 377 ¶ 4). This is not a persuasive reason to deny the request for an injunction. *See, e.g., Cartier, Inc. v. Four Star Jewelry Creations, Inc.*, 2003 WL

21056809, at \*6 (S.D.N.Y. May 8, 2003) (“[A] bare promise by a party in the course of litigation to discontinue past or ongoing misconduct does not justify denial of injunctive relief, since such unilateral action hardly suffices to ensure that the party will not, in the future, reverse course and resume its challenged activities.”). Defendant fails to “make an affirmative showing that continuing infringement was, practically speaking, nearly impossible.” *Lyons P’ship, L.P. v. Morris Costumes, Inc.*, 243 F.3d 789, 800 (4th Cir. 2001).

## **2. Remedies Available at Law**

Monetary damages are inadequate to compensate Plaintiff here because Plaintiff would be forced to compete against a rival gaining market share with Plaintiff’s technology. *See Douglas*, 717 F.3d at 1345 (“[M]ere damages will not compensate for a competitor’s increasing share of the market, a market which [Plaintiff] competes in, and a market that [Plaintiff] has in part created with its investment in patented technology.”). Additionally, Plaintiff asserts that it never agreed to a royalty payment through a license to the technology. Defendant does not dispute this. (*See generally* D.I. 376).<sup>1</sup> Furthermore, a royalty would not adequately compensate Plaintiff, unless the royalty rate were greater than or equal to Plaintiff’s profit margin of \$1.19 per square foot. Presently, Plaintiff’s profit margins on Nomex XF are greater than Defendant’s profit margins on 3G11. (*See* Tr. 769:24–771:14, 771:16–772:14; D.I. 340, 1550:11–1551:11).

## **3. Balance of Hardships**

This factor weighs in Plaintiff’s favor because requiring Plaintiff to compete against its own invention would be a substantial hardship. *See Robert Bosch*, 659 F.3d at 1156

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<sup>1</sup> *See also Acumed*, 551 F.3d at 1328 (“The fact of the grant of previous licenses . . . may affect the district court’s discretionary decision concerning whether a reasonable royalty from an infringer constitutes damages adequate to compensate for the infringement.”).

("[R]equiring [Plaintiff] to compete against its own patented invention, with the resultant harms described above, places a substantial hardship on [Plaintiff].").

#### **4. Public Interest**

Defendant argues that an injunction would harm the public interest because the public is better off with a multiple-supplier market for products affecting public safety. Defendant provides some evidence that Plaintiff may have had supply issues with its product. (Tr. 1528:13–1535:17). Plaintiff provides evidence that suggests that there would not be a public safety issue. (Tr. 838:13–840:4, 490:1–503:13, 1528:11–1535:17, 1564:2–1571:20). Overall, I am not concerned with Plaintiff's ability to supply its product. Even if there were concerns, it could still be appropriate to award an injunction. *See WBIP, LLC v. Kohler Co.*, 829 F.3d 1317, 1343 (Fed. Cir. 2016) ("Congress has expressly indicated that injunctions may be granted in cases involving lifesaving goods, such as pharmaceutical drugs."). It is also the case that "copies of patented inventions have the effect of inhibiting innovation and incentive." *Douglas*, 717 F.3d at 1346. Guarding against such copies could foster the development of more technologies aimed at enhancing public safety. Overall, the public interest leans towards a grant of a permanent injunction.

Plaintiff meets the four-factor test in *eBay*. The request for a permanent injunction is granted.

#### **5. Terms of the Injunction**

Plaintiff requests "a permanent injunction to prohibit Unifrax from selling the infringing 3G11 flame barrier laminate or any substantially similar products." (D.I. 368 at p. 19). Defendant argues that the injunction should be limited in scope to only the specific 3G11 product found infringing that was described in JTX-15 and PTX-1 and described at trial by DuPont as

including a PEEK film, a pressure sensitive adhesive as described in JTX-2, and a vermiculite layer without any carrier material such as resin or adhesive. Plaintiff's request is adopted. Defendant's position is unreasonably narrow and there is support for Plaintiff's position. *See, e.g., United Constr. Prod., Inc. v. Tile Tech, Inc.*, 843 F.3d 1363, 1372 (Fed. Cir. 2016) ("We see no problem with the use of the term 'substantially similar' in the injunction to the extent that it prevents [Defendant] from infringing [Plaintiff's] patent . . ."). I note that the injunction should not be understood to exclude a valid design-around that retains the 3G11 name.

Defendant argues that Plaintiff should post an injunction bond in the amount of \$1.75 million pending appeal. Although this is a matter of course in the preliminary injunction context, Defendant does not point to any clear authority requiring this in the permanent injunction context. *See* Fed. R. Civ. P. 65(c). Defendant cites to *Contour Design, Inc. v. Chance Mold Steel Co.*, 2013 WL 2102149 (D.N.H. May 14, 2013), for the proposition that the failure to request an injunction bond pending appeal can limit the ability of a party that is ultimately successful on appeal from recovering damages for the erroneous issuance of a permanent injunction. While this may be the case, this argument is not entirely persuasive because there appears to be an unjust enrichment exception to this rule. *See Contour Design, Inc.*, 2013 WL 2102149 at \*3. Furthermore, I think the risk of incorrectly issuing an injunction is much lower if it is issued after a full trial than if it were issued without the benefit of a full trial. Thus, I do not think that it is reasonable to require Plaintiff to post an injunction bond under the present circumstances.

Defendant alternatively requests that Plaintiff file an "undertaking" providing that the amount of damages for which Plaintiff might be liable will not be limited or negated, should it be liable for any, as a result of a wrongful issuance of the injunction. Defendant cites to *Continuum*

*Co. v. Incepts, Inc.*, 873 F.2d 801, 804 (5th Cir. 1989), for this proposition, but this case pertained to an interlocutory injunction. Thus, I am also not persuaded that requiring an undertaking is a reasonable term.

Defendant argues that the injunction should automatically dissolve if the existing judgment is vacated or reversed, or the patent is found invalid, unenforceable or expires. Defendant further requests that it be allowed to move to dissolve the injunction should Boeing, Triumph, or Airbus develop a need for the enjoined product in the interests of public safety. Plaintiff argues that existing mechanisms are adequate. I agree with the Plaintiff. Defendant provides no hint as to why existing mechanisms would be inadequate.

The terms of the permanent injunction should conform to the discussion above.

#### **B. Supplemental Damages**

Defendant argues that no supplemental damages are warranted because the jury verdict fully compensated Plaintiff. “[T]he amount of supplemental damages following a jury verdict ‘is a matter committed to the sound discretion of the district court.’” *SynQor, Inc. v. Artesyn Techs., Inc.*, 709 F.3d 1365, 1384 (Fed. Cir. 2013). “Typically, supplemental damages are calculated based on the jury's damages verdict.” *Veracode, Inc. v. Appthority, Inc.*, 137 F. Supp. 3d 17, 84 (D. Mass. 2015).

At the time of trial, Defendant only produced sales information for 3G11 through February 2017. (PTX-386). From October 2014 through February 2017, the proper royalty base is 5,930,488 sq. ft. (Tr. 1560:10–12). The jury awarded damages of \$3,272,000. (D.I. 332 at 3). Defendant acknowledges that between March 1st and May 19th of 2017, Defendant sold 120,312.5 sq. ft. of 3G11. (*See* D.I. 377 ¶ 3). By dividing \$3,272,000 by 5,930,488 sq. ft., Plaintiff requests a royalty rate of \$0.55 per square foot (resulting in \$66,171.87 of supplemental

damages). Defendant argues that the proper rate is \$0.38 per square foot (resulting in \$45,718.75 of supplemental damages). Defendant's theory of how the jury arrived at the \$3,272,000 figure is as follows. Plaintiff's damages expert opined that the appropriate royalty rate was \$0.64 per square foot. (Tr. 768:14–19). Defendant's damages expert opined that the appropriate royalty rate was \$0.12 per square foot. (Tr. 1560:5–14). The average of \$0.64 per square foot and \$0.12 per square foot is \$0.38 per square foot. In addition to the 5,930,488 sq. ft. sales figure, another sales figure communicated to the jury was 8,610,438 sq. ft. The 8,610,438 sq. ft. figure is based on sales of 3G11 from December 2013 through February 2017. (Tr. 1550:4–1551:11; D.I. 378-1 at 16). Multiplying \$0.38 per square foot by 8,610,438 sq. ft. yields a \$3,271,966.44 figure. Rounding this figure to the nearest hundred results in the damages figure of \$3,272,000.

I am adopting Plaintiff's \$0.55 per square foot royalty. Defendant's royalty theory requires too much guesswork. One would have to assume that the jury compromised on a royalty of \$0.38 per square foot. One would have to assume that the jury applied an improper royalty base, one that no one suggested as a royalty base. One would have to assume that the jury ignored expert testimony that the proper royalty base is 5,930,488 sq. ft. (Tr. 1560:5–14). One would also have to assume that the jury ignored my jury instruction that specified that the date that damages would begin to be calculated would be October 1, 2014. (D.I. 325 at 44). Considering everything, I find that the royalty rate for the calculation of supplemental damages is \$0.55 per square foot.

Defendant argues that the award of supplemental damages is improper because Plaintiff has been fully compensated based on the jury's improper use of sales prior to October 2014. Because I decline to find that the royalty rate was based on the jury's improper use of sales prior to October 2014, an award of supplemental damages in full is proper.

Plaintiff, in reply, further requests the timing of Defendant's sales so Plaintiff can calculate pre-judgment interest on those sales. This request is reasonable and is granted.

**C. Pre-Judgment Interest**

Plaintiff seeks pre-judgment interest on 3G11 sales after October 1, 2014. Plaintiff argues that pre-judgment interest should be set at the prime rate, compounded quarterly. Defendant argues that the rate should be set at Plaintiff's corporate bond rate or the Treasury-Bill ("T-Bill") rate, compounded annually. "Courts have recognized that the prime rate best compensate[s] a patentee for lost revenues during the period of infringement because the prime rate represents the cost of borrowing money, which is 'a better measure of the harm suffered as a result of the loss of the use of money over time.'" *IMX, Inc. v. LendingTree, LLC*, 469 F. Supp. 2d 203, 227 (D. Del. 2007). Thus, I agree with Plaintiff that pre-judgment interest should be set at the prime rate, compounded quarterly. See, e.g., *Ironworks Patents, LLC v. Apple, Inc.*, 2017 WL 2535877, at \*14 (D. Del. June 12, 2017); *LG Display Co. v. AU Optronics Corp.*, 722 F. Supp. 2d 466, 475 (D. Del. 2010). Again, because I decline to find that the jury improperly used sales prior to October 2014, an award of pre-judgment interest in full is proper.

**D. Post-Judgment Interest**

Plaintiff agrees that the date of judgment is May 19, 2017. (D.I. 383 at 15). 28 U.S.C. § 1961(a) provides, "Such interest shall be calculated from the date of the entry of the judgment, at a rate equal to the weekly average 1-year constant maturity Treasury yield, as published by the Board of Governors of the Federal Reserve System, for the calendar week preceding[] the date of the judgment." The parties dispute whether to use the weekly average rate for the week ending on May 12, 2017 or May 19, 2017. The weekly average rate for the week ending on May 12, 2017 is 1.13%. (BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM, <https://www.federal>

reserve.gov/datadownload/Preview.aspx?pi=400&rel=H15&preview=H15/H15/RIFLGFCY01\_N.WF (last visited Aug. 30, 2017)). The rate for the week ending on May 19, 2017 is 1.10%. (*Id.*) I think that under a plain reading of the statute, “the calendar week preceding[] the date of the judgment” must be a week that is over before the day of the date of the judgment. Thus, the proper weekly average rate here is the weekly average rate for the week ending on May 12, 2017. *See Allen v. Dist. of Columbia*, 2017 WL 2634635, at \*13 (D.D.C. June 16, 2017).

## **II. CONCLUSION**

Within five days the parties shall submit a proposed final judgment consistent with this Memorandum Opinion.