IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

YODLEE, INC., Plaintiff, v. PLAID TECHNOLOGIES INC., Defendant.	Civil Action No. 14-1445-LPS-CJB PROPOSED PUBLIC VERSION

MEMORANDUM ORDER

I. BACKGROUND

On October 12, 2016, defendant Plaid Technologies, Inc. ("Plaid") filed a motion to exclude testimony of plaintiff Yodlee, Inc.'s ("Yodlee") expert, Mark A. Robinson. (D.I. 261) The Court heard argument on this and other motions on November 10, 2016. (*See* D.I. 314 ("Tr."))

II. LEGAL STANDARDS

In *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 597 (1993), the Supreme Court explained that Federal Rule of Evidence ("FRE") 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." FRE 702(a) requires that expert testimony "help the trier of fact to understand the evidence or to determine a fact in issue." 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." FRE 702(b)-(d). There are three distinct requirements for proper 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 Elcock v. Kmart Corp.*, 233 F.3d 734, 741 (3d Cir. 2000).

III. DISCUSSION

A. Lost Profits

1. *Existing Customers*

Plaid contends that Robinson's lost profits opinion as to existing customers "impermissibly seeks disgorgement of Plaid's profits." (D.I. 262 at 5) In Plaid's view, [redacted] (D.I. 262 at 6 (citing D.I. 263-1 at 102-105 of 128)) Yodlee responds that its expert appropriately and conservatively "estimates that, in the but-for world, Yodlee would have earned [redacted] because it is undisputed that [redacted]" (D.I. 286 at 1)

Robinson is using Plaid's financial information as a proxy for Yodlee's revenues. Plaid is free to attack the credibility of this input into Robinson's analysis. But Plaid is incorrect when it asserts that Robinson's methodology results in an impermissible attempt to recover Plaid's lost profits. Plaid's concerns go to the weight to be accorded to Robinson's analysis, not to its admissibility.

2. *Prospective Customers*

Plaid takes issue with several aspects of Robinson's lost profits opinion as applied to prospective customers. Plaid contends that Robinson's expected revenue estimates impermissibly rely on unsupported spreadsheets generated by Yodlee for this litigation, Robinson did not attempt to verify the numbers provided by Yodlee employees, Yodlee [redacted] Robinson fails to apply a revenue "churn" rate in his calculations, and Robinson fails to account for competitors in the market. (D.I. 262 at 8; *see id.* at 7-9) These issues, again, go to weight rather than admissibility. While it appears that the spreadsheets Robinson relied upon contain some curious results, and Robinson admitted at his deposition that he did not verify the data himself (*see* D.I. 263-2 at 37-42 of 63), Robinson's methodology is not rendered inadmissibly unreliable and unhelpful due to these purported deficiencies.

B. Reasonable Royalty

"Upon finding for the claimant the court shall award the claimant damages adequate to compensate for the infringement, but in no event less than a reasonable royalty for the use made of the invention by the infringer . . . ." 35 U.S.C. § 284. Plaid seeks to exclude the entirety of Robinson's reasonable royalty analysis as based on a relative value apportionment "plucked out of thin air" and an "arbitrary profit-split methodolog[y] unthethered to the facts of the case." (D.I. 262 at 9, 12 (internal quotation marks omitted)) Plaid also takes issue with Robinson's refusal to incorporate in his analysis a prior license between Yodlee and CashEdge, and argues that Robinson proposes a "baseless" effective royalty rate over 90%. (D.I. 262 at 15; *see id.* at 13)

1. *Apportionment*

If infringement is shown, the jury will need to "apportion the defendant's profits and the patentee's damages between the patented feature and the unpatented features using reliable and tangible evidence." *Ericsson, Inc. v. D-Link Sys., Inc.*, 773 F.3d 1201, 1226 (Fed. Cir. 2014) (internal quotation marks omitted). "The essential requirement is that the ultimate reasonable royalty award must be based on the incremental value that the patented invention adds to the end product." *Id.*

Plaid seeks to exclude Robinson's relative value allocation estimate, characterizing it as "[a]bstract qualitative testimony . . . [un]anchored to a quantitative market valuation." (D.I. 262 at 9) Plaid argues that Robinson's allocations are arbitrary, lack a factual basis, and impermissibly rely on conversations with Yodlee employees and on marketing documents. (*Id.* at 10) In Plaid's view, "nothing [Robinson] cites would explain why the '077/'783 patents contribute 60% of the value to Plaid's products versus, for example, 0.5% or 2%." (*Id.*)

Yodlee responds that Robinson's report includes reference to the "specific contributions of the patented invention to the overall functionality of the [accused] products," analysis of customer comments and other internal documents, results from a Plaid survey, and other evidence. (D.I. 286 at 6-7) Yodlee notes that apportionment is an inexact science subject to estimation and approximation. (*See id.* at 6)

The Court is not entirely persuaded by either side's arguments. On the one hand, it is inappropriate for Robinson to rely on statements from Yodlee employees if those individuals are not subject to deposition by Plaid and cannot be called as witnesses at trial (because, for example, they were not identified in Yodlee's Rule 26 disclosures). On the other hand, Plaid appears to know from Robinson who the employees are on whom he relied, there is sufficient time before trial for Plaid to depose these individuals, and there may be good cause to permit Yodlee to supplement its disclosures even at this late date. Similarly, with respect to the allocation percentages, Plaid's contention that Robinson "pick[ed] numbers out of a hat" (D.I. 262 at 10) (internal quotation marks omitted) is an overstatement, but Robinson can – and must – do more to explain how he arrived at the numbers to which he intends to testify at trial.

Accordingly, the Court will grant Plaid's motion with respect to apportionment, but without prejudice to Yodlee's ability to serve a supplemental report to correct the deficiencies discussed herein.

2. *Profit Split*

Plaid also seeks to exclude Robinson's reasonable royalty analysis as using an "impermissible rule-of-thumb profit split." (D.I. 262 at 12) In calculating a reasonable royalty resulting from a hypothetical negotiation, *see Lucent Techs., Inc. v. Gateway, Inc.*, 580 F.3d 1301, 1324 (Fed. Cir. 2009) (citing *Georgia–Pacific Corp. v. U.S. Plywood Corp.*, 318 F.Supp. 1116, 1120 (S.D.N.Y.1970)), Robinson determines Plaid and Yodlee's respective maximum and minimum "economic positions." (*See* D.I. 263-1 at 87 of 128) His analysis results in no overlap (i.e., the maximum amount Plaid is willing to pay for a license is less than the minimum amount Yodlee is willing to accept). As Robinson notes, "both parties would need to compromise in order to arrive at a reasonable royalty." (*Id.* at 88 of 128) He then proceeds to choose a rate between Plaid's maximum and Yodlee's minimum. (*See id.*) Plaid, contending that Robinson provides no basis for this final result, characterizes his selections as "completely arbitrary." (D.I. 262 at 13)

Plaid further alleges that Robinson fails to account for the fact that the parties price their products differently, [redacted]. (*Id.*) This is significant because [redacted]

[redacted] In Plaid's view, "that is the difference between saying Celsius on one end of the negotiation range and Fahrenheit on another." (Tr. at 69)

Yodlee argues in response that Robinson arrives at his final royalty rate through his "detailed analysis of the *Georgia-Pacific* factors" (D.I. 286 at 9), which he says in his report "dominate[]" the hypothetical negotiation (D.I. 263-1 at 88 of 128). With respect to the differences in the parties' pricing structures, Yodlee asserts that "Robinson expressly adjusts for this difference, using an assumption that favors Plaid . . . [redacted] (D.I. 286 at 10)[1]

The Court does not find such an "express" representation in Robinson's report; at best, this assumption is implicit. Further, Robinson's general incorporation of his *Georgia-Pacific* factors analysis (*see* D.I. 263-1 at 88 of 128) provides insufficient support for the actual numbers he chooses between the parties' respective economic positions. In sum, the Court agrees with Plaid that Robinson's failure to expressly account for varying pricing structures and the lack of a sufficiently detailed explanation for how he reached the "compromises" set out in Table 15 (*id.*) renders Robinson's reasonable royalty analysis, as presently articulated, insufficiently reliable. Nonetheless, as with the defects identified with respect to apportionment, Robinson will have an opportunity to serve a supplemental report to correct the defects identified herein with respect to profit split.

3. *CashEdge License*

Plaid contends that Robinson's failure to incorporate in his analysis an earlier Yodlee

[1]The parties disagree as to how this purported assumption impacts the final result. (*Compare* D.I. 298 at 6 n.2 *with* D.I. 286 at 10-11)

licensing agreement with CashEdge is further evidence of his report's unreliable nature. (D.I. 262 at 13-14) Yodlee responds by noting, among other things, that the Yodlee-CashEdge license was "executed seven years before the time set for the hypothetical negotiation in this case," and that there have been "significant changes to Yodlee and the industry" in the meantime. (*Id.* at 11) The Court agrees with Yodlee that Robinson's lack of reliance on the Yodlee-CashEdge license goes to the weight of Robinson's testimony rather than its admissibility.

4. *High Royalty Rate*

Plaid asserts that Robinson's "effective royalty rate was 92% of Plaid's overall revenue" (D.I. 262 at 15), adding that "[a] royalty that leaves an alleged infringer with no profits is not reasonable" (D.I. 298 at 7). Yodlee responds that Plaid's profit "does not cap the proper royalty owed for infringement," citing [redacted] (D.I. 286 at 11-12) Plaid's criticisms of the size of the royalty rate to which Robinson opines go to the weight and not admissibility of his opinion.

IV. CONCLUSION

For the reasons stated above, **IT IS HEREBY ORDERED THAT**:

1. Plaid's motion to exclude (D.I. 261) is **DENIED IN PART** and **GRANTED IN PART**.

A. The motion is denied with respect to Robinson's lost profits analysis.

B. The motion is granted with respect to Robinson's reasonable royalty analysis. Yodlee and Robinson will be permitted an opportunity to serve a supplemental expert report, to address the identified defects, provided that Robinson be made available for a deposition and that Plaid will be given an opportunity to file a supplemental expert report as well.

2. Because this Memorandum Order is being issued under seal, the parties shall meet and confer and shall, no later than January 31, submit a proposed redacted version. Thereafter, the Court will issue a public version.

January 27, 2017
Wilmington, Delaware

HON. LEONARD P. STARK
UNITED STATES DISTRICT COURT