

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

INTEGRA LIFESCIENCES CORP., )  
INTEGRA LIFESCIENCES SALES LLC, )  
CONFLUENT SURGICAL, INC., and )  
INCEPT LLC, )

Plaintiffs, )

v. )

Civil Action No. 15-819-LPS-CJB

HYPERBRANCH MEDICAL )  
TECHNOLOGY, INC., )

Defendant. )

**MEMORANDUM ORDER**

In this action filed by Plaintiffs Integra LifeSciences Corp., Integra LifeSciences Sales LLC, Confluent Surgical, Inc. and Incept LLC (collectively, “Plaintiffs” or “Integra”) against Defendant HyperBranch Medical Technology, Inc. (“Defendant” or “HyperBranch”), presently before the Court are: (1) Defendant’s *Daubert* Motion (“Defendant’s Motion”) to exclude testimony offered by Plaintiffs’ proffered damages expert, John C. Jarosz, (D.I. 395); and (2) Plaintiffs’ *Daubert* Motion (“Plaintiffs’ Motion,” and with Defendant’s Motion, “the Motions”) to exclude testimony offered by Defendant’s proffered damages expert, Douglas Kidder, (D.I. 396). For the following reasons, the Court DENIES both Motions, as set out below.<sup>1</sup>

**I. BACKGROUND**

Plaintiffs filed the instant case on September 15, 2015. (D.I. 1) Plaintiffs allege infringement of United States Patent Nos. 7,009,034 (the “034 patent”), 7,332,566 (the “566

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<sup>1</sup> Under the circumstances here, the resolution of these *Daubert* Motions is properly treated as non-dispositive, and the Motions are resolved by the Court pursuant to 28 U.S.C. § 636(b)(1)(A) and D. Del. LR 72.1(a)(2). *See, e.g., Withrow v. Spears*, 967 F. Supp. 2d 982, 987 n.1 (D. Del. 2013) (citing cases).

patent”), 7,592,418 (the “418 patent”), 8,003,705 (the “3705 patent”) and 8,535,705 (the “5705 patent”) (“the asserted patents”).<sup>2</sup> On September 25, 2015, Chief Judge Leonard P. Stark referred this case to the Court to hear and resolve all pretrial matters, up to and including the resolution of case-dispositive motions. (D.I. 15)

Briefing on the instant Motions were completed on December 21, 2017, (D.I. 460, 463), and the Court heard oral argument on the Motions (and various other summary judgment and *Daubert* motions filed in the case) on January 5, 2018, (D.I. 482 (hereinafter, “Tr.”)). A 7-day trial is set to begin on April 16, 2018. (D.I. 173)

## II. LEGAL STANDARD

Rule 702 governs the admissibility of qualified expert testimony, providing that an expert witness may testify if: “(a) the expert’s scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue; (b) the testimony is based on sufficient facts or data; (c) the testimony is the product of reliable principles and methods; and (d) the expert has reliably applied the principles and methods to the facts of the case.” Fed. R. Evid. 702. Rule 702’s requirements have been examined in detail by the Supreme Court of the United States in *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993), and have been said to embody “three distinct substantive restrictions on the admission of expert testimony: qualifications, reliability, and fit.” *Elcock v. Kmart Corp.*, 233 F.3d 734, 741 (3d Cir. 2000); *see also B. Braun Melsungen AG v. Terumo Med. Corp.*, 749 F. Supp. 2d 210, 222 (D.

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<sup>2</sup> Plaintiffs originally also alleged infringement of United States Patent No. 6,566,406, but Plaintiffs do not appear to currently be asserting any claims from that patent. (*See, e.g.*, D.I. 402 at ix)

Del. 2010).<sup>3</sup> As to these Motions, at issue is the reliability and “fit” of the proposed expert testimony.

With regard to the requirement of reliability, Rule 702 mandates that the relevant expert testimony “must be supported by appropriate validation—*i.e.*, ‘good grounds,’ based on what is known.” *Daubert*, 509 U.S. at 590; *see also Schneider ex rel. Estate of Schneider v. Fried*, 320 F.3d 396, 404 (3d Cir. 2003). This reliability requirement applies not only to an expert providing “scientific” knowledge, but also to one providing “technical” or “other specialized” knowledge in a case (*i.e.*, testimony that may not necessarily be categorized as “scientific”). *See Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 146-47 (1999). Such testimony should amount to “more than subjective belief or unsupported speculation.” *Daubert*, 509 U.S. at 590. In examining whether the reliability factor has been met, a court’s focus must be on “principles and methodology” rather than on the conclusions generated by the expert. *Id.* at 595; *see also Daddio v. Nemours Found.*, 399 F. App’x 711, 713 (3d Cir. 2010).

As to the “fit” requirement, it “goes primarily to relevance” as the testimony must “assist the trier of fact to understand the evidence or to determine a fact in issue” and have “a valid . . . connection to the pertinent inquiry as a precondition to admissibility.” *Daubert*, 509 U.S. at 591-92 (internal quotation marks and citations omitted); *see also Schneider*, 320 F.3d at 404. The standard for fit, however, is “not high; it is met when there is a clear ‘fit’ connecting the issue in the case with the expert’s opinion that will aid the jury in determining an issue in the case.” *Meadows v. Anchor Longwall & Rebuild, Inc.*, 306 F. App’x 781, 790 (3d Cir. 2009) (citations

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<sup>3</sup> In applying Rule 702 to a patent action, the Court will look to the law of the regional circuit. *Info-Hold, Inc. v. Muzak LLC*, 783 F.3d 1365, 1371 (Fed. Cir. 2015).

omitted).

Overall, “Rule 702 embodies a ‘liberal policy of admissibility.’” *B. Braun Melsungen AG*, 749 F. Supp. 2d at 222 (quoting *Pineda v. Ford Motor Co.*, 520 F.3d 237, 243 (3d Cir. 2008)). Nonetheless, the burden is placed on the party offering expert testimony to show that it meets each of the standards for admissibility. *Id.* (citing *Daubert*, 509 U.S. at 592 n.10).<sup>4</sup>

### III. DISCUSSION

#### A. Defendant’s Motion

Defendant argues that Mr. Jarosz’s damages opinions relating to reasonable royalty and price erosion should be excluded for three reasons. (See D.I. 463 at 23) First, Defendant asserts that Mr. Jarosz’s reasonable royalty opinion should be excluded because he improperly invokes the Entire Market Value Rule (“EMVR”). (D.I. 402 at 45-47; D.I. 463 at 23-25) Second, Defendant argues that Mr. Jarosz’s reasonable royalty opinion should be excluded because he failed to apportion damages on a claim-by-claim basis. (D.I. 402 at 47-48; D.I. 463 at 25-26) Third, Defendant contends that Mr. Jarosz’s price erosion calculation should be excluded

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<sup>4</sup> Although the Court held oral argument on the pending summary judgment and *Daubert* motions, (D.I. 482), neither party sought an evidentiary hearing as to the Motions or suggested that the factual record was insufficiently developed such that a hearing of that type was required. The United States Court of Appeals for the Third Circuit has held that a trial court need not conduct an evidentiary hearing on a *Daubert* challenge if the record is sufficient to allow the Court to make a determination on the issues in dispute. *See, e.g., Oddi v. Ford Motor Co.*, 234 F.3d 136, 151-55 (3d Cir. 2000); *Maldonado v. Walmart Store No. 2141*, Civil Action No. 08-3458, 2011 WL 1790840, at \*13 n.10 (E.D. Pa. May 10, 2011). Here, the relevant expert reports were provided to the Court, as was certain of the experts’ deposition testimony regarding those reports. The parties also ably addressed issues relating to the relevant expert reports in their briefing. In light of this, the Court has determined that the record before it is sufficient to allow for a decision on the admissibility of Mr. Jarosz’s and Mr. Kidder’s testimony under *Daubert*. *See, e.g., Furlan v. Schindler Elevator Corp.*, 516 F. App’x 201, 205-06 (3d Cir. 2013); *Oddi*, 234 F.3d at 151-55; *Maldonado*, 2011 WL 1790840, at \*13 n.10.

because it is not reliable and fails to fit the evidence of the case. (D.I. 402 at 48-52; D.I. 463 at 26-27) The Court finds that each of these arguments goes to the weight of the evidence, and not to the admissibility of Mr. Jarosz's opinions.

### 1. EMVR

Infringement damages must “separate or apportion the defendant’s profits and the patentee’s damages between the patented feature and the unpatented features[.]” *LaserDynamics, Inc. v. Quanta Comput., Inc.*, 694 F.3d 51, 67 (Fed. Cir. 2012) (quoting *Garretson v. Clark*, 111 U.S. 120, 121 (1884)). Accordingly, reasonable royalties must generally “be based not on the entire product, but instead on the smallest salable patent-practicing unit.” *Id.* (internal quotation marks omitted). The EMVR is a narrow exception to the apportionment requirement, allowing “for the recovery of damages based on the value of an entire [product] containing several features, when the feature patented constitutes the basis for customer demand.” *TWM Mfg. Co. v. Dura Corp.*, 789 F.2d 895, 901 (Fed. Cir. 1986); *see also Versata Software, Inc. v. SAP Am., Inc.*, 717 F.3d 1255, 1268 (Fed. Cir. 2013) (“A patentee may assess damages based on the entire market value of the accused product only where the patented feature creates the basis for customer demand or substantially creates the value of the component parts.”) (quotation omitted). Therefore, if the patented feature creates the basis for consumer demand of a multi-component product, a royalty may be calculated based on the value of the complete product, even though the patent does not cover the complete product. *See LaserDynamics*, 694 F.3d at 67-68; *Lucent Techs., Inc. v. Gateway, Inc.*, 580 F.3d 1301, 1336-37 (Fed. Cir. 2009).

Mr. Jarosz's reasonable royalty opinion utilizes the total revenue of the Accused Products as the royalty base. (D.I. 443 at 45) HyperBranch argues that invocation of the EMVR is

improper here, where Mr. Jarosz conceded that: (1) other unpatented features (such as the packaging and applicator of the Accused Products) provide value to the Accused Products, and (2) the patents-in-suit are not the only drivers of demand. (D.I. 463 at 23-24; *see also* D.I. 419, ex. 176 at ¶¶ 253, 255)) HyperBranch cites in support to *LaserDynamics, Inc. v. Quanta Comput., Inc.*, 694 F.3d 51 (Fed. Cir. 2012), in which the patent at issue claimed a method for optical disc drive discrimination utilized in laptop computers. (D.I. 463 at 24) HyperBranch argues that Mr. Jarosz’s opinion does not satisfy the threshold inquiry for invoking the EMVR set out in that case. (*Id.*) In *LaserDynamics*, the Court held that the plaintiff’s reliance on the EMVR was impermissible because plaintiff did not present evidence showing that the patented method “*alone drives the market for laptop computers.*” *LaserDynamics*, 694 F.3d at 68 (emphasis added).

However, it is important to consider the full context of that statement from *LaserDynamics*. The *LaserDynamics* Court went on to further explain the relevant inquiry:

Put another way, if given a choice between two otherwise equivalent laptop computers, only one of which practices optical disc discrimination, proof that consumers would choose the laptop computer having the disc discrimination functionality says nothing as to *whether the presence of that functionality is what motivates consumers to buy a laptop computer in the first place*. It is this latter and higher degree of proof that must exist to support an entire market value rule theory.

*LaserDynamics*, 694 F.3d at 68 (emphasis added); *see also, e.g., Lucent Techs.*, 580 F.3d at 1337-38 (holding that because the “date-picker” feature used in Microsoft Outlook’s e-mail software was only a tiny feature of one part of a much larger software program, the EMVR could not be invoked because “there was no evidence that anybody anywhere at any time ever bought Outlook . . . *because* it had [the patented] date picker”) (internal quotation marks and citation