

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

SUNOCO PARTNERS MARKETING &)
TERMINALS L.P.,)

Plaintiff,)

v.)

Civil Action No. 17-1390-LPS-CJB

POWDER SPRINGS LOGISTICS, LLC,)
AND MAGELLAN MIDSTREAM)
PARTNERS, L.P.,)

REDACTED - PUBLIC VERSION

Defendants.)

MEMORANDUM ORDER

Presently before the Court in this patent infringement action is Defendants Powder Springs Logistics, LLC (“PSL” or “Powder Springs”) and Magellan Midstream Partners, L.P.’s (“Magellan” and collectively with PSL, “Defendants”) *Daubert* motion, filed pursuant to Federal Rule of Evidence 702, which seeks to exclude the damages opinions of Plaintiff Sunoco Partners Marketing & Terminals L.P.’s (“Plaintiff” or “Sunoco”) expert Dr. Keith R. Ugone (the “Motion”). (D.I. 375) For the reasons that follow, the Court GRANTS Defendants’ Motion.¹

I. BACKGROUND

A. Procedural Background

¹ Under these circumstances, where the Court grants Defendants’ Motion but will provide Sunoco an opportunity to submit a supplemental damages report, its ruling on this *Daubert* motion is a non-dispositive ruling. *See Integra LifeScis. Corp. v. HyperBranch Med. Tech., Inc.*, C.A. No. 15-819-LPS-CJB, 2018 WL 2551053, at *1 (D. Del. May 8, 2018); *see also Insight Equity v. Transitions Optical, Inc.*, No. 10-cv-635 (RGA), 2016 WL 7031281, at *1 (D. Del. Nov. 30, 2016) (“A decision granting Defendant’s *Daubert* motion and denying Plaintiff an opportunity to submit a revised damages theory would be dispositive.”).

Sunoco filed the instant patent case on October 4, 2017. (D.I. 1) The case was thereafter referred to the Court to hear and resolve all pretrial matters, up to and including case-dispositive motions. (D.I. 15)

Briefing on the instant Motion was completed on November 1, 2019, (D.I. 407), and the Court held oral argument on the Motion (as well as other motions) on November 13, 2019, (D.I. 441 (“Tr.”)). A 7-day trial is set to begin on March 9, 2020. (D.I. 83 at 13)

B. Factual Background

1. Overview

In this case, Sunoco alleges that Defendants’ butane blending system, which allows Defendants to inject butane into gasoline product flowing through an interstate pipeline maintained by Colonial Pipeline Company (“Colonial”) at the Powder Springs facility, and Defendants’ related butane blending activities, infringe claims of United States Patent Nos. 6,679,302 (the “302 patent”), 7,032,629 (the “629 patent”), 9,207,686 (the “686 patent”), 9,494,948 (the “948 patent”) and 9,606,548 (the “548 patent” and collectively with the other patents, “the asserted patents”). (D.I. 149 at ¶¶ 1-2, 19-25; D.I. 404, ex. 5 at ¶¶ 52, 67) Sunoco further alleges that Magellan’s blending systems and butane blending activities at nine other locations infringe claims of the asserted patents. (D.I. 149 at ¶¶ 26-33; D.I. 404, ex. 5 at ¶¶ 52, 67) The asserted patents relate to systems and methods for the blending of butane into gasoline. (See D.I. 171 at 1; D.I. 176 at 1)

2. Sunoco’s Acquisition of Texon Distributing L.P.’s Patents and Butane Blending Business

In 2010, Sunoco paid approximately \$140 million to acquire two of the asserted patents (the '302 and '629 patents)² and nearly all of the interest in Texon Distributing L.P.'s ("Texon") butane blending business, including (but not limited to) employees, trade secrets, equipment and existing blending contracts. (D.I. 380, ex. 1 at SUN_MAG_00291109, SUN_MAG_0029115-16; D.I. 404, ex. 5 at ¶¶ 42, 46(a), 148) In a June 2010 presentation to investors relating to the acquisition, Sunoco discussed the \$140 million price in connection with Texon's "patented blend technology for sophisticated butane blending into gasoline to capture margin spread between gasoline and butane" and "turnkey, full service offering to customers." (D.I. 404, ex. 5 at ¶ 148 (internal quotation marks and citation omitted))³

3. Sunoco's Butane Supply Agreements

Following the 2010 acquisition of Texon, Sunoco entered into contracts called "butane supply agreements" with third party terminal operators. (*See id.* at ¶ 104) Pursuant to these agreements, Sunoco provides [REDACTED]. (*Id.*; *see also* D.I. 378, ex. A at ex. 3) That is not all that Sunoco provides. Pursuant to [REDACTED].

² Following this acquisition, Sunoco filed continuation patent applications that resulted in the '686, '548 and '948 patents. (*See* D.I. 176 at 3 n.3; D.I. 376 at 3 n.3)

³ At the time of the acquisition, the '302 and '629 patents (as well as a third patent not asserted in this case) were held by MCE Blending, LLC ("MCE Blending"), [REDACTED]. (D.I. 380, ex. 1 at SUN_MAG_0029300; *id.*, ex. 2 at 30-31; D.I. 404, ex. 5 at ¶ 45(b)(c)) [REDACTED]. (D.I. 380, ex. 2 at 30-31; D.I. 404, ex. 5 at ¶ 45(b)) As part of the \$140 million acquisition of Texon, [REDACTED]. (D.I. 380, ex. 1 at SUN_MAG_0029298; *see also* D.I. 404, ex. 5 at ¶ 42) MCEC and Texon were also parties to a [REDACTED] and as a result of the [REDACTED] in accordance with the [REDACTED]. (D.I. 380, ex. 1 at SUN_MAG_0029298; D.I. 404, ex. 1 at ¶ 37(b)(ii); D.I. 404, ex. 3 at 296; D.I. 404, ex. 15 at 215-16)

these agreements, Sunoco additionally constructs and installs the butane blending system, supplies butane to the terminal and provides various maintenance and support services. (D.I. 404, ex. 5 at ¶ 104; *see also* D.I. 380, ex. 5 at SUN_MAG_0026822) Sunoco's former Vice President of Refined Products, James Myers, testified with respect to these agreements that Sunoco provides its butane blending customers "a basket of services to make it as easy as possible" on them; to that end, Sunoco does "all the design, the engineering, the construction all the maintenance of the systems. We . . . supply the butane. We do some regulatory oversight support. . . . [W]e do hedging." (D.I. 380, ex. 6 at 53-54; *see also id.*, ex. 7 at SUN_MAG_0039252) In exchange, Sunoco receives a percentage of the profits from blending butane. (D.I. 404, ex. 5 at ¶ 106) Sunoco's "general objective" is to share evenly in the profits derived from butane blending with the terminal operator. (*Id.*; *see also id.* at ¶ 80; D.I. 378, ex. A at ex. 3)

4. Defendants' Accused Blending Systems

Magellan designed and installed its own butane blending systems at the ten terminals that are accused by Sunoco of infringement in this case. (D.I. 149 at ¶ 26; D.I. 271 at ¶ 26; D.I. 404, ex. 5 at ¶¶ 52, 176) In 2012 and 2013, Magellan and Sunoco competed for the installation of an automated butane blending system on Colonial's pipeline. (D.I. 404, ex. 5 at ¶ 176; *id.*, ex. 12 at 149; *id.*, ex. 21 at 24)⁴ Colonial ultimately awarded the contract to Magellan. (*Id.*, ex. 5 at ¶

⁴ In the course of this bidding process, Sunoco touted to Colonial its "Turn-Key Butane Blending Offering" which includes: (1) proprietary blending systems including technology, patents and design and construction; (2) customized design and engineering; (3) financial options such as butane/gasoline hedges and capital investment; (4) butane certification and distribution; (5) regulatory compliance; and (6) customer service. (D.I. 380, ex. 8 at SUN_MAG_0044058)

176; *id.*, ex. 21 at 94-95) During the negotiations, Magellan had projected that the overall net present value of the project was greater than [REDACTED]. (*Id.*, ex. 5 at ¶¶ 173, 176)

Pursuant to the contract, Magellan and Colonial formed PSL, which became operational in 2017. (D.I. 271 at ¶ 20; D.I. 404, ex. 5 at ¶ 49) PSL has blended approximately [REDACTED] barrels of butane into gasoline and earned approximately [REDACTED] [REDACTED]. (D.I. 404, ex. 5 at ¶ 173 (Table 30); *see also* D.I. 403 at 6) At the other nine terminals accused of infringement, Magellan has blended [REDACTED] gallons of butane into gasoline and earned profits of approximately [REDACTED] from 2011 through 2018. (D.I. 404, ex. 5 at ¶¶ 110, 114 (Tables 19 and 20); *see also* D.I. 403 at 6)

II. DISCUSSION

A. Legal Standard

Rule 702 of the Federal Rules of Evidence 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 were examined in detail 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. Del. 2010).

As to this Motion, 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). Such testimony should amount to “more than subjective belief or unsupported speculation[.]” and a court’s focus in examining this factor must be on “principles and methodology” rather than on the expert’s conclusions. *Daubert*, 509 U.S. at 590, 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 omitted).⁵

B. Analysis

⁵ The Court has fairly wide discretion in determining whether to admit or exclude expert testimony. *See Pineda v. Ford Motor Co.*, 520 F.3d 237, 243 (3d Cir. 2008). Overall, “Rule 702 embodies a ‘liberal policy of admissibility.’” *B. Braun*, 749 F. Supp. 2d at 222 (quoting *Pineda*, 520 F.3d at 243). The burden is placed on the party offering expert testimony (here, Sunoco) to show that it meets each of the standards for admissibility. *Id.* (citing *Daubert*, 509 U.S. at 592 n.10).

Defendants' challenge relates to the issue of apportionment in the damages context. Thus, the Court will first summarize the relevant law in this area. Thereafter, it will go on to assess Dr. Ugone's damages opinion and address the underlying merit of Defendants' Motion.

1. Relevant Law Regarding Damages and Apportionment

Upon a finding of infringement of a valid patent, a patentee is entitled to 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. The purpose of compensatory damages in patent cases is "not to punish the infringer, but to make the patentee whole." *Pall Corp. v. Micron Separations, Inc.*, 66 F.3d 1211, 1223 (Fed. Cir. 1995). To that end, under 35 U.S.C. § 284 ("Section 284"), damages awarded for patent infringement "must reflect the value attributable to the infringing features of the product, and no more." *Commonwealth Sci. & Indus. Research Organisation v. Cisco Sys., Inc.*, 809 F.3d 1295, 1301 (Fed. Cir. 2015) (internal quotation marks and citation omitted).

Generally, there are two alternative types of compensatory damages that may be recovered in a patent case: (1) the patentee's lost profits; or (2) the "reasonable royalty [the patentee] would have received through arms-length bargaining." *Lucent Techs., Inc. v. Gateway, Inc.*, 580 F.3d 1301, 1324 (Fed. Cir. 2009). The United States Court of Appeals for the Federal Circuit has explained that "apportionment is an important component of damages law generally, and . . . it is necessary in both reasonable royalty and lost profits analysis." *Mentor Graphics Corp. v. EVE-USA, Inc.*, 851 F.3d 1275, 1287 (Fed. Cir. 2017); *see also Ericsson, Inc. v. D-Link Sys., Inc.*, 773 F.3d 1201, 1226 (Fed. Cir. 2014) ("Indeed, apportionment is required even for non-royalty forms of damages[.]").

More specifically, with regard to reasonable royalty damages, “[a] patentee is only entitled to a reasonable royalty attributable to the infringing features” and therefore “[t]he patentee ‘must in every case give evidence tending to separate or apportion the defendant’s profits and the patentee’s damages between the patented feature and the unpatented features.’” *Power Integrations, Inc. v. Fairchild Semiconductor Int’l, Inc.*, 904 F.3d 965, 977 (Fed. Cir. 2018) (quoting *Garretson v. Clark*, 111 U.S. 120, 121 (1884)); *see also Elbit Sys. Land and CAI Ltd. v. Hughes Network Sys., LLC*, 927 F.3d 1292, 1301 (Fed. Cir. 2019) (“[T]he apportionment requirement [dictates] that a royalty should reflect the value of patented technology.”); *Ericsson*, 773 F.3d at 1226 (“As a substantive matter, it is the ‘value of what was taken’ that measures a ‘reasonable royalty’ under [Section] 284.”) (internal quotation marks and citation omitted). And as for lost profits damages, a patentee generally applies a four-factor test articulated in *Panduit Corp. v. Stahl Brothers Fibre Works, Inc.*, 575 F.2d 1152, 1156 (6th Cir. 1978) (the “Panduit factors”) to demonstrate its entitlement to such damages. The Federal Circuit has explained that “[i]f the application of the *Panduit* factors does not result in the separation of profits attributable to the patented device and the profits attributable to [non-patented features], it appears that apportionment is necessary.” *WesternGeco L.L.C. v. ION Geophysical Corp.*, 913 F.3d 1067, 1073 (Fed. Cir. 2019).

A narrow exception to the general rule requiring apportionment is the entire market value rule. *LaserDynamics, Inc. v. Quanta Comput., Inc.*, 694 F.3d 51, 67 (Fed. Cir. 2012). The entire market value rule “permits recovery of damages based on the value of a patentee’s entire apparatus containing several features when the patent related feature is the basis for customer demand.” *Zimmer Surgical, Inc. v. Stryker Corp.*, 365 F. Supp. 3d 466, 491 (D. Del. 2019)

(applying entire market value rule to lost profits damages analysis); *see also LaserDynamics*, 694 F.3d at 67 (“In effect, the entire market value rule acts as a check to ensure that [reasonable] royalty damages being sought under [Section] 284 are in fact ‘reasonable’ in light of the technology at issue.”). In order to satisfy the entire market value rule, a patentee must “present evidence showing that the [patented feature] drove demand for the [entire apparatus]; [i]t is not enough to merely show that the [patented feature] is viewed as valuable, important, or even essential to the use of the [entire apparatus].” *Id.* at 68.

2. Dr. Ugone’s Damages Opinion

In this case, Sunoco seeks lost profits damages, and alternatively, reasonable royalty damages. (D.I. 404, ex. 5 at ¶¶ 71, 72, 117) To calculate both lost profits damages and reasonable royalty damages, Sunoco’s damages expert, Dr. Ugone, relied upon Sunoco’s butane supply agreements. (*Id.* at ¶¶ 71, 195) In connection with lost profits damages, Dr. Ugone explained that “Sunoco is seeking lost profits damages *associated with its lost butane supply agreements* with Magellan and Colonial.” (*Id.* at ¶ 71 (emphasis added)) Dr. Ugone assumed that absent Defendants’ alleged infringement, Defendants and Sunoco would have agreed to enter into a similar butane supply agreement; he then applied the profit-sharing arrangements from Sunoco’s other butane supply agreements to the profits Defendants made using the accused systems. (*Id.* at ¶¶ 103, 110) And similarly with respect to reasonable royalty damages, Dr. Ugone opined that Sunoco’s lost opportunity cost was equal to a lost butane supply agreement; he concluded that Sunoco would not accept a royalty for anything less than it would have received from such an agreement. Accordingly, he concluded that Sunoco would have sought a

████ profit-sharing arrangement and he opined that the proper royalty rate is at least █████. (*Id.* at ¶¶ 137-42, 193-200; D.I. 380, ex. 13 at 135, 142, 148-149)

As described above, it is undisputed that under Sunoco's butane supply agreements, Sunoco not only licenses its patents but also provides its customers with "a basket of services" beyond those licenses with respect to butane blending. (D.I. 380, ex. 6 at 53-54; D.I. 408, ex. 2 at 121-22; Tr. at 133) Dr. Ugone's report acknowledges this. (D.I. 380, ex. 4 at ¶ 104; Tr. at 119) And Dr. Ugone also acknowledges that the non-patented services provided under the butane supply agreements "lead to increased total profits earned from butane blending." (D.I. 380, ex. 4 at ¶ 22(e); D.I. 408, ex. 2 at 125-26 (Dr. Ugone agreeing that the provision of a butane supply source provided advantages to customers)) Dr. Ugone opined that in the hypothetical negotiation between Sunoco and Defendants, Defendants would negotiate for a bare license to the patents (and not for the additional services provided by the butane supply agreements). (D.I. 380, ex. 4 at ¶¶ 21(e), 22(f) n.16, 128(f); Defendants' Summary Judgment and Daubert Hearing Presentation, Slide DDX-149) Nevertheless, he concluded that Defendants "would be willing to pay the same royalty as Sunoco's" customers with a butane supply agreement. (D.I. 380, ex. 13 at 142-43)

3. Dr. Ugone's Opinion Fails to Apportion the Value of the Patents From the Remainder of the Services Provided Pursuant to the Butane Supply Agreements

With their Motion, Defendants assert that Dr. Ugone's opinions are unreliable (and therefore must be excluded under *Daubert*) because he ignored "blackletter damages law that, *in every case*, the patentee must apportion damages so it only receives damages tied to its claimed invention." (D.I. 376 at 1-2 (certain emphasis in original)) According to Defendants, while Dr.

Ugone looked to Sunoco's butane supply agreements to set the royalty rate for the parties' hypothetical negotiation and to calculate lost profits, he failed to calculate the value of the patents alone—as compared to the value of the remainder of the “basket of services” undisputedly provided by Sunoco pursuant to these butane supply agreements—in arriving at that rate. (D.I. 376 at 1-2, 9-13; D.I. 407 at 1-2, 5-6) Nor did Dr. Ugone demonstrate that the patents drive the demand for the butane supply agreements, which (according to Defendants) he must do in order for this failure of apportionment to be excused here. (D.I. 376 at 1, 12-13)⁶

Sunoco makes a few arguments in response. None are persuasive.

First, Sunoco briefly suggests that the facts of this case are different from the “typical case that requires apportionment[.]” such that apportionment of the kind called for by Defendants is not required here. (Tr. at 127, 149-50; *see also* D.I. 403 at 8) Those “typical case[s]” involve accused products made up of multiple components, where not every such component reads on the patent claims being asserted in the case. (Tr. at 127-28; D.I. 403 at 8) For example, in *Uniloc USA, Inc. v. Microsoft Corp.*, 632 F.3d 1292 (Fed. Cir. 2011), the asserted claim recited a software registration system to deter copying of software, and the accused product was Microsoft's Product Activation feature, which acted as a gatekeeper to Microsoft's Word XP, Word 2003, and Windows XP software programs. *Id.* at 1296-97. The Federal Circuit held that

⁶ Defendants further argue that Dr. Ugone's opinions should be excluded because he failed to “fit” his damages analysis to the facts of the case. That is, because Dr. Ugone opines that Defendants would be willing to pay the same rate as Sunoco's other butane supply agreement customers—despite the fact that Defendants would only be negotiating for a bare license to the patents-in-suit (and not for other services typically provided in those agreements)—Defendants argue that Dr. Ugone's damages analysis does not “match the facts of the case[.]” (D.I. 376 at 13) Because the Court agrees with Defendants' first basis for exclusion (i.e., lack of a reliable methodology), it need not further assess this independent ground for exclusion.

the district court did not abuse its discretion in granting a new trial on damages, where the plaintiff's damages expert applied a royalty rate to the total revenue of Microsoft Office and Windows products as a "check" to determine whether his damages calculation was appropriate, despite the fact that the asserted patent only covered one component of that software. *Id.* at 1311. It was undisputed that the claimed component of the Microsoft Office and Windows products (the Product Activation feature) did not create the basis for customer demand for those products. *Id.* at 1319. Thus, the *Uniloc* Court concluded that it was improper to award damages based on Microsoft's entire revenue from all the accused products in the case. *Id.* at 1319-21.

Here, Sunoco notes that, in contrast to the facts of cases like *Uniloc*, Defendants' accused product does not constitute "a small, distinct feature" of a larger product. (Tr. at 128) Instead, Sunoco is asserting that "each [of Defendants'] accused butane blending system as a whole infringes the patents in suit[.]" (*Id.*) It thus argues that Dr. Ugone need not concern himself with an "apportionment" requirement under these circumstances. (*Id.* at 128, 150)

It is true that the present facts are not the same as those in cases like *Uniloc*. However, the Court is not persuaded that an expert needs to "apportion" damages only in situations where a defendant's accused product is made up of multiple components, only some of which infringe. After all, the concept of apportionment is meant to ensure that a patentee is awarded damages adequate to compensate for the defendant's *infringement*, such that damages are tied to the scope of the claimed invention. *Cf. ResQNet.com, Inc. v. Lansa, Inc.*, 594 F.3d 860, 869 (Fed. Cir. 2010) ("At all times, the damages inquiry must concentrate on compensation for the economic harm caused by infringement of the claimed invention."); *Trell v. Marlee Elecs. Corp.*, 912 F.2d 1443, 1447 (Fed. Cir. 1990) ("[A] particular fee is not the correct measure of damages unless

that which is provided by the patentee to its licensees for that fee is commensurate with that which the defendant has appropriated.”) (internal quotation marks and citation omitted). Dr. Ugone relies on Sunoco’s butane supply agreements as the basis for his suggested rates, and he applies a rate equal to the *entire value* of the agreements. Yet because the agreements indisputably do not cover the patents alone, and instead also provide Sunoco’s customers with a host of additional services that also have value, Dr. Ugone was required to analyze those agreements and apportion: (a) the value attributable to the patent license rights from (b) the value attributable to the additional “basket of services” provided by the agreements. In only that way could one ensure that Dr. Ugone’s ultimate damages calculations are tied to the actual scope of the claimed invention.⁷

⁷ See, e.g., *Mondis Tech. Ltd. v. LG Elecs., Inc.*, — F. Supp. 3d —, 2019 WL 4894363, at *5, *8 (D.N.J. Sept. 24, 2019) (vacating a jury’s compensatory damages award where plaintiff’s damages expert based its damages case on a set of license agreements but “[n]one of these licenses can be said to have apportionment built in” as none of them “reflects the value attributable to the features of the product which infringe claims 14 and 15 of the ‘180 patent, and no more”); *VirnetX Inc. v. Apple Inc.*, 324 F. Supp. 3d 836, 849-52 (E.D. Tex. 2017) (rejecting defendant’s argument that plaintiff’s expert’s damages model, which relied on the plaintiff’s licensing policy, failed to apportion the incremental value that the patented invention added to the end product, where the evidence demonstrated that companies paid an apportioned value to plaintiffs under the licenses for the patented technology such that the real-world market had already done the required apportionment analysis); *In re Maxim Integrated Prods., Inc. MDL No. 2354*, Master Docket Misc. No. 12-244, 2015 WL 5311264, at *7 (W.D. Pa. Sept. 11, 2015) (rejecting the defendant’s argument that plaintiff’s opinion failed to apportion damages for unpatented features and features already licensed to defendant through other licenses, where the plaintiff’s licenses that formed the basis of the expert’s damages opinion inherently allocated value to plaintiff’s patented technology); *Skyhook Wireless, Inc. v. Google, Inc.*, CIVIL ACTION NO. 10-11571-RWZ, 2015 WL 13620764, at *9 (D. Mass. Feb. 18, 2015) (rejecting defendant’s argument that plaintiff’s damages expert failed to apportion his royalty rate to isolate the value of the asserted patents from other things included in the product licenses that formed the basis for the expert’s opinions, because the expert expressly stated that the average-per-unit rate from the licenses needed to be further apportioned to reflect the value of the asserted patents within the plaintiff’s technology/product license fee, and where the expert made discounts for the value of the services included with the product licenses and the relative importance of the patents to the

Second, Sunoco asserts that even assuming that it is required to apportion the value of the patents from the value provided by the remainder of the butane supply agreements, Dr. Ugone *did* perform such apportionment throughout his opinion. (D.I. 403 at 9-10) According to Sunoco, Dr. Ugone “apportioned the Patents” in connection with his analyses of the Panduit factors (for lost profits damages) and the factors set out in *Georgia-Pacific Corp. v. United States Plywood Corp.*, 318 F. Supp. 1116, 1120 (S.D.N.Y. 1970) (for reasonable royalty damages). (D.I. 403 at 9 (citing D.I. 404, ex. 5 at ¶¶ 79-80, 82-88, 90-91, 132-36, 143-47, 161-63, 172-74, 189-90); Sunoco’s Response to Defendants’ Motion To Exclude Hearing Presentation, Slides 12, 15) The problem with this argument, however, is that while Dr. Ugone’s report may attempt to value the patents generally, or explain why there was demand for the patented product in general, he never engages in an apportionment analysis in which he assesses the *value of the patents in relation to the other many aspects of the butane supply agreements* on which his damages calculation rates are based. (D.I. 407 at 5-6)

It is true that an expert’s analysis of the *Panduit* factors relating to lost profits can incorporate the value attributable to a patented feature, (*id.* at 5), when those factors have been applied to assess demand for a patented system itself, *see Mentor Graphics Corp.*, 870 F.3d at 1300 (finding that further apportionment beyond consideration of the *Panduit* factors was not required, where it was “undisputed” that the patented features were what imbued the combined

product licenses); *cf. Ultratec, Inc. v. Sorenson Commc 'ns Inc.*, No. 13-cv-346-bbc, 2014 WL 5080411, at *1-3 (W.D. Wis. Oct. 9, 2014) (finding that plaintiff’s damages expert’s reliance on supply agreements that included much more than patent licenses was not unreliable, where the expert made adjustments to the overall royalty rate in light of the portions of the agreements that covered components beyond the asserted patents; thus, the expert appropriately considered the differences between the agreements and the more basic hypothetical patent licenses).

features that made up the emulator with marketable value). But here, Sunoco seeks “lost profits damages associated with *its lost butane supply agreements*” with Defendants. (D.I. 404, ex. 5 at ¶ 71 (emphasis added)) Therefore, the apportionment requirement cannot be satisfied without Dr. Ugone having assessed the value of the rate attributable solely to the patent license that makes up but one portion of such agreements. (D.I. 407 at 5-6); *cf. WesternGeco L.L.C.*, 913 F.3d at 1073 (“If the application of the *Panduit* factors does not result in the separation of profits attributable to the patented device and the profits attributable to [non-patented features], it appears that apportionment is necessary.”).

With respect to Dr. Ugone’s *Georgia-Pacific* analysis relating to reasonable royalty, the analysis is similar. Again, Sunoco does not point to any portion of Dr. Ugone’s report where he “assesses the value of the patented system as compared to the value of the remaining aspects of the butane supply agreements.” (D.I. 407 at 6; *see also* Sunoco’s Response to Defendants’ Motion To Exclude Hearing Presentation, Slide 15; Tr. at 154)

And third, Sunoco argues that Dr. Ugone’s damages analysis is appropriate because he concluded “that the Patents formed the basis of the butane supply agreements[.]” (D.I. 403 at 8; *see also* Tr. at 136, 149, 152) If Dr. Ugone *could* sufficiently demonstrate that the patent licenses provided in these butane supply agreements were the key driver motivating third parties to enter into these butane supply agreements—i.e., if he were to demonstrate why the entire market value rule-equivalent applies here in the rate context—then there would not be a need to apportion the value of the patents from the butane supply agreements. (*See* D.I. 376 at 13) But Sunoco’s answering brief cites to nothing that actually supports the assertion that Dr. Ugone engaged in this analysis. (*See* D.I. 407 at 3; Tr. at 154) Instead, in claiming that Dr. Ugone

conducted this type of analysis, Sunoco's brief simply cites to deposition testimony regarding the extent to which "the [p]atents drove the \$140 million valuation for Sunoco" with regard to the Texon acquisition. (D.I. 403 at 8 (citing *id.* at 4)) But this is an entirely separate issue from a conclusion that the patents drive demand for the butane supply agreements that Sunoco enters into with its customers. (See D.I. 407 at 3 & n.3)⁸

The reason why Sunoco's brief is wanting in this regard is that Dr. Ugone, in fact, did not conduct any such analysis.⁹ Indeed, Dr. Ugone opines in his report that in a hypothetical negotiation, Sunoco itself would be emphasizing non-patented benefits (such as reduced supply costs and increased efficiency) that arise from a "broader supply agreement commercial relationship" which lead to increased total profits. (D.I. 404, ex. 5 at ¶ 22(e); Tr. at 153) Thus,

⁸ In support of its assertion that the patents drive the entire value of the butane supply agreements, Sunoco points to the circumstances relating to Magellan's own purchase of the Perimeter terminal. (D.I. 403 at 5; Tr. at 148) The Perimeter terminal utilized a patented blending system. (D.I. 404, ex. 5 at ¶ 106 n.230; *id.*, exs. 18-19) Despite already possessing butane supply and logistics and having no need for construction, maintenance, operations or other services provided by Sunoco's butane supply agreements, Magellan assumed Perimeter's butane supply agreement with Sunoco. (*Id.*, exs. 18-19) However, this fact does not remedy Dr. Ugone's failure to apportion. That is because Dr. Ugone does not use Magellan's acquisition of the existing Perimeter butane supply agreement as part of any apportionment analysis; indeed, Dr. Ugone's report makes only a passing mention (in a footnote) of the fact that this Perimeter agreement even existed. (D.I. 407 at 5 (citing D.I. 404, ex. 5 at ¶ 106 n.230))

⁹ In a slide presentation Sunoco handed up during oral argument, Sunoco points to a portion of Dr. Ugone's report in which he opines that during the hypothetical negotiation, Sunoco would assert (and Defendants would accept) that "the patented technology is the principal driver of demand for Sunoco's butane supply agreements, which encompass a wide array of conveyed sales, such as maintenance and support services for the licensed blending services." (Sunoco's Response to Defendants' Motion To Exclude Hearing Presentation, Slide 19 (citing Ugone Appendix A at 7); Tr. at 138-39) Sunoco did not cite to this portion of Dr. Ugone's report in its answering brief, nor did it include this portion of the report as an exhibit in support of its brief. (D.I. 403; D.I. 404) And this conclusory statement, without more, does nothing to persuasively demonstrate that the patents indeed drove demand for the butane supply agreements at issue.

Sunoco has not pointed to any portion of Dr. Ugone's expert report in which he clearly articulates why the value of the licensed patents drive demand for Sunoco's customers to enter into these butane supply agreements.¹⁰

III. CONCLUSION

In sum, the Court agrees that Dr. Ugone's opinion is unreliable because: (1) he failed to apportion the value of the patents from the value of the remainder of the "basket of services" provided by the butane supply agreements that underpin his damage calculations; and (2) he failed to otherwise demonstrate that no such apportionment is required, because the patented technology is the driver for customers to enter into those agreements. Accordingly, the Court excludes Dr. Ugone's damages report.

The Court further orders that Sunoco be provided an opportunity to present a supplemental expert damages report to address the deficiencies in Dr. Ugone's analysis, based on facts currently in the record. If Sunoco serves such a report, Sunoco shall make Dr. Ugone available for a short deposition. Defendants may also file a rebuttal damages report addressing Dr. Ugone's supplemental report.

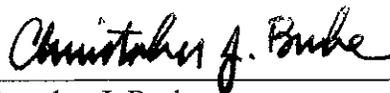
For the foregoing reasons, the Court GRANTS Defendants' Motion. To the extent that Sunoco wishes to serve a supplemental expert damages report, it shall do so by no later than

¹⁰ In its answering brief, Sunoco points to certain deposition testimony as indicating that the patents do drive demand in this way. (D.I. 403 at 5 (citing D.I. 404, ex. 7 at 114, 220-21; *id.*, ex. 10 at 163-64)) But Sunoco does not include any citation to a portion of Dr. Ugone's report in which Dr. Ugone actually referenced this testimony. Similarly, during oral argument, Sunoco's counsel contended that all of the other services beyond the patent licenses provided by the butane supply agreements simply allow the terminal operators to use the accused system and maximize their blending opportunity. (Tr. at 143) Whatever the merit of this argument, it is just that—attorney argument. Again, Sunoco points the Court to no portion of *Dr. Ugone's report* wherein its expert himself makes this point.

January 20, 2020. The parties shall meet and confer to agree on a schedule for any related deposition and rebuttal damages report.

Because this Memorandum Order may contain confidential information, it has been released under seal, pending review by the parties to allow them to submit a single, jointly proposed, redacted version (if necessary) of the Memorandum Order. Any such redacted version shall be submitted no later than **January 8, 2020**, for review by the Court, along with a motion for redaction that includes a clear, factually detailed explanation as to why disclosure of any proposed redacted material would “work a clearly defined and serious injury to the party seeking closure.” *Pansy v. Borough of Stroudsburg*, 23 F.3d 772, 786 (3d Cir. 1994) (internal quotation marks and citation omitted). The Court will subsequently issue a publicly-available version of its Memorandum Order.

Dated: January 3, 2020



Christopher J. Burke
UNITED STATES MAGISTRATE JUDGE