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MEMORANDUM OPINION

September 29, 2020
Wilmington, Delaware



STARK, U.S. District Judge:

Pending before the Court in these related patent infringement actions are Plaintiffs 3G Licensing, S.A. (“3G”), Koninklijke KPN N.V. (“KPN”), and Orange S.A.’s (“Orange”) (collectively, “Plaintiffs”) Motion for Partial Summary Judgment (D.I. 267);¹ Defendants HTC Corporation (“HTC”), Lenovo Holding Co., Inc., Lenovo (United States) Inc. (collectively, “Lenovo”), Motorola Mobility LLC (“Motorola”), BlackBerry Limited and BlackBerry Corporation’s (collectively, “BlackBerry” and, together with HTC, Lenovo, and Motorola, “Defendants”) Motion for Summary Judgment (D.I. 272); Defendants’ Motion to Exclude Expert Testimony (D.I. 270); and HTC’s Motion for Summary Judgment (C.A. No. 17-83 D.I. 352). The Court heard argument on the motions on April 17, 2020. (*See* D.I. 230) (“Tr.”) For the following reasons, Plaintiffs’ Motion for Partial Summary Judgment and Defendants’ Motion for Summary Judgment will be granted in part and denied in part, and Defendants’ Motion to Exclude Expert Testimony and HTC’s Motion for Summary Judgment will be denied.

I. LEGAL STANDARDS

A. Summary Judgment

Under Rule 56(a) of the Federal Rules of Civil Procedure, “[t]he court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact 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

¹ Unless otherwise noted, all references to the docket index (“D.I.”) are to entries in C.A. No. 17-82.

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. Daubert and Federal Rule of Evidence 702

In *Daubert v. Merrell Dow Pharmaceuticals, 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.” Rule 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.” Fed. R. Evid. 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).

II. DISCUSSION

A. Plaintiffs’ Motion For Partial Summary Judgment

1. Defendants’ Abandoned Affirmative Defenses

Defendants do not oppose the Court granting summary judgment on the affirmative defenses it is no longer pursuing. (*See* D.I. 292 at 2) The Court will do so.

2. Defendants' Invalidation References

The Court will grant summary judgment that Defendants may not rely on International Publication No. WO/01/03461 to Kall et al. (the "Nokia" reference) as prior art to asserted U.S. Patent No. 7,995,091 ("'091 patent"). (D.I. 268 at 4) Defendants do not dispute that (1) the '091 patent claims priority to the '663 patent; (2) the '663 patent claims priority to a Patent Cooperation Treaty application (the "PCT application"); (3) the PCT application claims priority to foreign application GBO0026700.5 ("UK Application") that has a priority date of November 1, 2000; and (4) the Nokia reference published on January 11, 2001. (D.I. 292 at 3) Instead, Defendants argue Plaintiffs cannot invoke 35 U.S.C. § 365(b) to claim priority to the UK Application. (D.I. 292 at 3-4, 6) (citing D.I. 269 Ex. 6 at 1; D.I. 294 Ex. C at -4423)

The '663 patent applicant explicitly claimed priority to the PCT application under 35 U.S.C. § 365(b) in a December 22, 2003 declaration. (D.I. 294 Ex. C at -4422-23) The PCT application, in turn, satisfied every requirement of § 365(b): it was filed within 12 months of the UK application as 35 U.S.C. § 119(a) requires; it designated the United States; and it claimed priority to the UK application. (D.I. 269 Ex. 7 at -7290; *see also* 35 U.S.C. § 365(b)) Accordingly, an unbroken chain links the '091 patent to the UK application, and the '091 patent can claim the UK application's priority date of November 1, 2000. Because the Nokia reference was published more two months after this date, no reasonable juror could find the Nokia reference to be prior art to the '091 patent. *See Mahurkar v. C.R. Bard, Inc.*, 79 F.3d 1572, 1576 (Fed. Cir. 1996).²

² Because the Court concludes Plaintiffs can claim priority to the UK application under 35 U.S.C § 365(b), it need not and will not address the parties' dispute as to whether Plaintiffs may also claim priority under 35 U.S.C. § 365(c).

The Court will also grant summary judgment that Defendants may not rely on “GSM Admitted Prior Art” as a single prior art reference. (*See, e.g.* D.I. 294 Ex. K Ex. A at ¶ 104) While Defendants’ expert, Dr. Kakaes, opined that several GSM standards “were meant to be used together, thus forming a single reference” (*id.* at ¶ 132), the Federal Circuit has explained that the GSM standard consists of “several prior art references with separate dates of creation, rather than a single prior reference.” *Kyocera Wireless Corporation v. International Trade Commission* 545 F.3d 1340, 1351 (Fed. Cir. 2008) (“[T]he GSM standard is not a single reference”). Defendants’ attempt to distinguish *Kyocera*, by arguing Dr. Kakaes identified the specific standards encompassed by what Defendants deem the “GSM Admitted Prior Art” (D.I. 292 at 8) (citing D.I. 294 Ex. K Ex. A at ¶¶ 104, 130-35), is unavailing. The “GSM Admitted Prior Art,” even viewed as merely a subset of the GSM standard addressed in *Kyocera*, is “several prior art references” rather than “a single reference.” 545 F.3d at 1351. Thus, Defendants cannot rely on “GSM Admitted Prior Art” as a single reference.

The Court will deny Plaintiffs’ request for summary judgment that Defendants not be permitted to rely on four references (GSM 09.91, the GSM Book, the Alamouti Paper, and “various GSM standards”) that Defendants did not specifically disclose in their invalidity contentions. While the Court agrees with Plaintiffs that Defendants failed to timely disclose these four references, Plaintiffs have not persuaded the Court that the “extreme sanction” of excluding this evidence is warranted. *See In re Paoli R.R. Yard PCB Litig.*, 35 F.3d 717, 791-92 (3d Cir. 1994). The first trial in these actions is not scheduled to begin until January 2021 (more than three months from now and nearly a year after the filing of Plaintiffs’ motion) and, considering all the circumstances, there remains sufficient time to cure any potential unfair prejudice to Plaintiffs. Plaintiffs have not shown they were surprised by Defendants’ reliance on

the four references, and the references are important in that Defendants use them to rebut 3G's expert report and establish the knowledge of a POSA at the time. (D.I. 292 at 12-14) There is no evidence that Defendants' failure to disclose the four references in question was in bad faith or willful. On balance, then, it is appropriate to allow Defendants to rely on these references. *See Konstantopoulos v. Westvaco Corp.*, 112 F.3d 710, 719 (3d Cir. 1997) (citing *Meyers v. Pennypack Woods Home Ownership Ass'n*, 559F.2d 894, 904-05 (3d Cir. 1977)).

3. Defendants' FRAND Affirmative Defenses

The Court will grant summary judgment on Defendants' FRAND affirmative defenses. The Court has previously held that Defendants have the burden of proving essentiality. (*See* D.I. 269 Ex. 14 at 29-30) No reasonable juror could find that Defendants have satisfied this burden.

It is undisputed that Defendants did not analyze whether the relevant standard infringes any claim of the asserted patents or whether any non-infringing alternatives exist. (*See* D.I. 292 at 14-24; D.I. 268 at 17; *see also Intel Corp. v. Future Link Sys., LLC*, 268 F. Supp. 3d 605, 610-12 (D. Del. 2017)) Nor have Defendants come forward with other evidence from which a reasonable jury could find that any of the asserted patents are essential.

Defendants contend that Orange and 3G's "Assignment Agreement" obligated 3G to license the asserted patents on FRAND terms regardless of their essentiality. (D.I. 292 at 16-19) (citing D.I. 294 Ex. U at §§ 5.4, 6.8) No reasonable juror could agree with this interpretation.

The Assignment Agreement was made [REDACTED]

[REDACTED]

[REDACTED] (D.I. 307 Ex. 6 at -496, Ex. 7 at -561)

(emphasis added)

Defendants point to evidence that Plaintiffs have believed their patents are standard-essential. (*See, e.g.* D.I. 269 Exs. 25-32; D.I. 274 Ex. G at 166, Ex. H at 170, Ex. I at 277-86) But essentiality depends on objective findings, i.e., whether practicing the relevant standard *in fact* infringes the asserted patents and whether non-infringing alternatives *in fact* exist. *See Intel Corp.*, 268 F. Supp. 3d at 610-12. Pointing to Plaintiffs' beliefs on these points (even accepting Defendants have done so) is insufficient to meet Defendants' burden.

The Court's ruling only precludes Defendants from asserting a FRAND *affirmative defense*. That is, Defendants will be unable to argue that any of the asserted patents are standard-essential and FRAND-encumbered (and the Court will not ask the jury to make any finding on this issue). The Court's ruling does *not*, however, prohibit Defendants from introducing FRAND-related evidence to establish the proper damages award. Further, contrary to Plaintiffs' suggestion at the hearing (*see* Tr. at 44), the Court's decision does *not* mean that Plaintiffs have affirmatively proven that the asserted patents are *not* standard-essential and are *not* FRAND-encumbered.

4. Lenovo's Patent Exhaustion And Misuse Defenses

The Court will grant Plaintiffs' request for summary judgment on Lenovo's patent exhaustion and misuse defenses, as Lenovo has abandoned them. (*See* D.I. 292 at 24 n.4)

5. Lenovo and BlackBerry's Other Defenses

a. Lenovo's Judicial Estoppel Defense

The Court will grant summary judgment to Plaintiffs on Lenovo's judicial estoppel defense.

Judicial estoppel applies where (1) "the party to be estopped [has] taken two positions that are irreconcilably inconsistent" and (2) "the party changed his or her position in bad faith –

i.e., with intent to play fast and loose with the court.” *In re Kane*, 628 F.3d 631, 638 (3d Cir. 2010). While Lenovo identifies evidence from which it might be found that Lenovo met the first prong of this test (*see, e.g.*, D.I. 294 Exs. V, W, X at 12-13, Y at 12-13), it identifies no evidence that Plaintiffs acted in bad faith. Thus, the only reasonable conclusion is that judicial estoppel cannot be proven.

b. Blackberry’s Equitable Estoppel Defense

The Court will grant summary judgment to Plaintiffs on Blackberry’s equitable estoppel defense.

To establish equitable estoppel in the context before the Court, 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 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 A.C. Aukerman Co. v. R.L. Chaides Const. Co.*, 960 F.2d 1020, 1041, 1046 (Fed. Cir. 1992) (en banc). Here, no reasonable factfinder could find from the record that Blackberry relied on Plaintiffs’ conduct. Blackberry says it “is *entitled* to rely on representations made to standards bodies and other commitments contained in agreements between competitors in a patent pool or subsequent assignees” (D.I. 292 at 30) (emphasis added), but there is an absence of evidence that Blackberry, in fact, *did* rely on any representations (even if it would have been entitled to do so). Likewise, Blackberry points to no evidence it “relied on 3G’s stated commitments in adopting standards related technology.” (D.I. 292 at 31)

c. Lenovo's And Blackberry's Waiver Defense

Lenovo's and Blackberry's waiver defense is contingent on 3G having FRAND obligations. (*See, e.g.*, D.I. 292 at 26 (Lenovo arguing "3G has a contractual obligation to license the Asserted Patents on FRAND terms" and, thus, waived its right to non-FRAND recovery); *id.* at 31)³ However, as already explained above, Defendants have not met their burden to produce evidence from which a reasonable juror could find that the asserted patents are standard-essential. Thus, the Court will grant summary judgment on Lenovo's and Blackberry's waiver defenses.

B. Defendants' Motion for Summary Judgment

1. '091 Patent

a. Patentable subject matter

Citing the now-familiar *Alice/Mayo* test,⁴ Defendants contend that the asserted claims of '091 patent are directed to non-patentable subject matter pursuant to 35 U.S.C. § 101. Defendants have failed to show they are entitled to summary judgment on this issue.

At step 1, Defendants argue that the asserted claims are directed to the abstract idea of "users switching between modes of communication" because they do not require automation. (D.I. 273 at 5-7) (citing, e.g., D.I. 276 Ex. G at 12-13, Ex. H at 12-13, Ex. K at 16, Ex. L. at 791,

³ Under Delaware law, a party proves waiver of a contractual requirement or condition by showing "(1) there is a requirement or condition to be waived, (2) the waiving party must know of the requirement or condition, and (3) the waiving party must intend to waive that requirement or condition." *AeroGlobal Capital Mgmt., LLC v. Cirrus Indus., Inc.*, 871 A.2d 428, 444 (Del. 2005).

⁴ At *Alice/Mayo* step one, the Court determines whether the patent claims are directed to an abstract idea; at step two, the Court determines whether the claims contain "an inventive concept" that "transform[s] the nature of the claim into a patent-eligible application." *Alice Corp. v. CLS Bank Int'l*, 573 U.S. 208, 217-18, 221 (2014); *see also Elec. Commc'n Techs., LLC v. ShoppersChoice.com, LLC*, 958 F.3d 1178, 1181 (Fed. Cir. 2020).

793-94) However, Defendants' own expert testified that the '091 patent "contemplates both automatic and manual initiation of a second call." (D.I. 296 Ex. 67 at ¶ 134) Defendants have failed to meet their burden at step 1.

Defendants have also failed to meet their burden at step 2. Defendants argue "the claimed initiation of a second call is not a technologically inventive process" because it is simply "a standard voice call." (D.I. 273 at 7) (citing D.I. 302 at 120, D.I. 147 at 137-38) A reasonable juror could disagree. Plaintiffs' experts opine that the claimed processor was unconventional and represented an "important technical improvement" over prior devices. (D.I. 296 Ex. 61 at ¶¶ 413-14, 588-90, Ex. 64 at ¶¶ 132-47) Further, while Defendants argue the '091 patent claims lack "technological specifics" (D.I. 273 at 7-8) (citing D.I. 276 Ex. J. at ¶¶ 176-82), the Court already found in connection with its claim construction order that claim 1 "provides an input-output structure for the processor and explains how the processor interacts with the other components of the claim" (D.I. 157 at 14-15).

Thus, the Court will deny Defendants' motion. The parties will be provided an opportunity to state their positions as to whether the Court's decision resolves the Section 101 issue or whether, instead, there is something left to this defense to be tried to the jury.

b. Non-Infringement

Defendants seek summary judgment that the accused products do not infringe claim 1 of the '091 patent because they do not meet the claim limitations of "two calls" and the "initiat[ion]" of a second call. The record reveals genuine disputes of material fact on both issues. While Defendants offer evidence that the "SIP standards and [REDACTED] confirm there is only one call" (D.I. 273 at 12) (citing D.I. 276 Ex. P at ¶¶ 343-46, Ex. Q at ¶¶ 149-53, 184-87), Plaintiffs' expert, Dr. Madisetti, opined that his review of this same evidence

leads him to conclude that the accused products can make two calls (D.I. 296 Ex. 64 at ¶¶ 355-62, 426-33, 492-96, Ex. 62 at ¶¶ 116-46). The Court has no basis to determine at this time that a reasonable jury could not credit Dr. Madisetti's analysis. Likewise, while Defendants refer to [REDACTED] (D.I. 273 at 11) (citing D.I. 276 Ex. Q at ¶¶ 197-204, Ex. S at ¶¶ 14, 292-98, 374-406, 607, 676), Dr. Madisetti looked at the same [REDACTED] and concluded "the first call is discontinued by placing it on hold and a second call is initiated" (D.I. 296 Ex. 62 at ¶ 109; *see also id.* at ¶¶ 105-15). Again, it appears to the Court that a reasonable jury could credit Dr. Madisetti's analysis.⁵

c. Non-Infringement by Motorola and Lenovo Unlocked Phones

Motorola and Lenovo contend that their accused "unlocked" devices do not infringe the '091 patent because they do not include AT&T, Verizon, or T-Mobile's "'native device' video calling functionality." (D.I. 273 at 15-16) (citing, e.g., D.I. 276 Ex. AC at 148-52, 154-57, Ex. Q at ¶¶ 136-37) But Defendants are not correct that "3G only accuses native video calling applications installed on Motorola and Lenovo devices of infringing the '091 patent." (D.I. 273 at 15-16) Plaintiffs' expert, Dr. Cohen, opined that his theory of infringement is "agnostic" on whether an application is "well understood or if its functionality [is] just built into the operating system" – i.e., whether it is a native device video calling application – and is, instead, based on [REDACTED] and the extent to which Motorola or Lenovo represented that they satisfied [REDACTED]." (D.I. 296 Ex. 68 at 545, 547) Dr. Cohen also cited testimony of Lenovo and Motorola witnesses that the accused products were designed according to [REDACTED]

⁵ The parties did not ask the Court to construe the term "call." (*Compare* D.I. 275 at 9-10 (citing D.I. 276 Ex. V. at 9, 97) *with* D.I. 295 at 13-14 (citing D.I. 296 Ex. 62 at ¶ 94, Ex. 71 at 122))

[REDACTED] (D.I. 296 Ex. 70 at ¶¶ 209-18) He elsewhere cited testimony and documents from which it could be found that these [REDACTED] include the accused functionalities. (*See generally* D.I. 296 Ex. 60 Ex. N) Thus, a reasonable juror could conclude that all Motorola and Lenovo devices include the accused functionalities, regardless of whether they include a native video calling application. Thus, the Court will deny summary judgment.

**d. Non-Infringement by HTC or Blackberry
Phones Not Sold to AT&T, T-Mobile, or Verizon**

HTC and Blackberry contend that their phones which are not sold to AT&T, T-Mobile, or Verizon do not infringe the '091 patent because Plaintiffs “presented no evidence that products sold to other carriers are configured to use the accused functionality.” (D.I. 273 at 16-17) (citing, e.g., D.I. 276 Ex. AK at 29, 31, Ex. S at ¶¶ 267, 307-09, 309, 311, 314, 318, 324, 338, 340-41, 349, 356-57, 409, 431) HTC and Blackberry assert that “products with the same chipset sold to different carriers are configured differently, including with respect to the accused functionality.” (D.I. 273 at 17) Plaintiffs’ expert, Dr. Madisetti, pointed to evidence from which he formed the opinion that when “[REDACTED]” and, hence, HTC or Blackberry devices using Sprint as a carrier “would have the same chip-level functionality and operation” as those same devices using AT&T, T-Mobile, or Verizon as a carrier. (D.I. 296 Ex. 64 at ¶¶ 165-67, Ex. 75 at ¶¶ 151-52) Dr. Madisetti also identified accused HTC and Blackberry devices that, he opines, complied with [REDACTED] this evidence, when viewed in the light most favorable to Plaintiffs, suggests that these devices used [REDACTED] (D.I. 296 Ex. 64 at ¶¶ 158-169, Ex. 75 at ¶¶ 141-54) The Court has no basis at this time to conclude that a reasonable jury could not credit Dr. Madisetti’s opinions. Accordingly, the Court will deny summary judgment.

2. '564 Patent

a. Plaintiffs' Doctrine of Equivalents Theory

Defendants move for summary judgment that they do not infringe the asserted claims of U.S. Patent No. 7,993,564 ("564 patent") under the doctrine of equivalents ("DOE"). Genuine disputes of material fact preclude an award of summary judgment. (*See, e.g.*, D.I. 295 at 22) (citing D.I. 296 Ex. 69 at ¶¶ 218-28, 235-49, Ex. 70 at ¶¶ 164-78) None of Defendants' bases for why Plaintiffs cannot prevail on a DOE theory warrants a grant of summary judgment.

Defendants argue that Plaintiffs' DOE theory impermissibly vitiates a required claim limitation. In support of this position, Defendants insist that "[t]he accused products perform multiplication in the *opposite order* as the claims," so a finding that these products infringe would improperly render certain claim limitations "superfluous." (D.I. 273 at 20) (citing D.I. 276 Ex. AL Ex. E at 9-10, Ex. M at 321-22, 392, 438) While Plaintiffs do not dispute that the accused products perform multiplication in the opposite order, their expert, Dr. Cohen, provides evidence that the accused products nevertheless "accomplish[] the essential goal of precoding in . . . claims 5 and 13 of the '564 Patent, which is that elements of each row of the source matrix are combined with the columns of the precoding matrix." (D.I. 296 Ex. 69 at ¶¶ 218-28, 235-49, Ex. O at 3-9) Based on Dr. Cohen's analysis, a reasonable juror could find that the accused products infringe the asserted '564 patent claims under the doctrine of equivalents.

Defendants argue that Plaintiffs cannot press their DOE theory of infringement due to prosecution history estoppel. Specifically, they contend that the patent applicant amended the claims during prosecution to exclude Plaintiffs' proposed equivalent. (D.I. 273 at 21-23) (citing D.I. 276 Ex. E at 3, 5-9) However, Plaintiffs have proven, by a preponderance of the evidence, that "the rationale underlying [Plaintiffs'] amendment [] bear[s] no more than a tangential

relation to the equivalent in question.” *Integrated Tech. Corp. v. Rudolph Techs., Inc.*, 734 F.3d 1352, 1356 (Fed. Cir. 2013); *see also Festo Corp. v. Shoketsu Kinzoku Kogyo Kabushiki Co., Ltd.*, 344 F.3d 1359, 1368 (Fed. Cir. 2003) (“Questions relating to the application and scope of prosecution history estoppel [] fall within the exclusive province of the court.”). While the prosecution history is somewhat murky, the Court is persuaded by Plaintiffs’ expert, Dr. Cohen, that the patentee amended the claims to disclaim “space-time codes,” not to impose any particular order of multiplying the matrices. (D.I. 295 at 25) (citing D.I. 296 Ex. 68 at 337, 340, 343, 347, 486-88, 495-96, 499, Ex. 70 at ¶ 176) Defendants respond only that Dr. Cohen’s testimony was “new and conclusory” (D.I. 273 at 23), but Dr. Cohen supported his conclusions with specific references to the prosecution history, including the applicant’s statement that “[t]he method disclosed in V. Le Nir et al. consists of using space-time codes which, contrarily to the present application, does not allow the benefit from the maximum capacity” (D.I. 296 Ex. 68 at 495-96) (citing D.I. 276 Ex. E at -1108-09). Thus, Dr. Cohen’s testimony is unrebutted on this point and establishes that the “objectively apparent reason for the amendment” was to disclaim space-time codes, which bears no more than a tangential relationship to the equivalent now at issue. Accordingly, the Court will not bar Plaintiffs’ DOE theory of infringement.

b. Non-Infringement of Claim 13

Defendants move for summary judgment of non-infringement of claim 13 of the ’564 patent on the grounds that Plaintiffs’ expert, Dr. Cohen, offered no evidence that the QRD with MMSE criterion algorithm (“QRD”) is the structural equivalent of the “without ordering” algorithm or the Cholesky algorithm (“Cholesky”). (D.I. 273 at 24) (citing D.I. 276 Ex. B at 4) Plaintiffs respond by pointing to Dr. Cohen’s testimony that his discussion of “all of the attributes of QR[D]” in expert report exhibits “would be the basis of my finding that [QRD and

Cholesky] are equivalent” – although acknowledging that Dr. Cohen conceded he did not “explicitly compare [QRD] to Cholesky.” (D.I. 296 Ex. 68 at 472-77) In the Court’s view, without expert opinion making the explicit comparison, no reasonable juror could find that these algorithms are equivalent. Therefore, the Court will grant Defendants summary judgment of non-infringement of claim 13.

3. '818 Patent

a. Non-Infringement

Defendants seek summary judgment that they do not infringe U.S. Patent No. 6,856,818 (“’818 patent”). In doing so, Defendants first make a new claim construction argument: that claim 18 of the ’818 patent, which recites that “the processor is arranged to select one data record, from the plurality of data records, to access in response to the first memory access message,” requires “selecti[ng] a data record . . . *in response to* the receipt of a memory access message identifying the specific data record.” (D.I. 273 at 27) (citing ’818 patent at 11:26-35) Defendants then argue that the accused products do not satisfy this claim limitation. (D.I. 273 at 27) (citing D.I. 276 Ex. P at ¶ 165, Ex. AP at ¶¶ 130-43)

The Court does not adopt Defendants’ proposed construction. The plain language of the claim, which prefaces the phrase “in response to the first memory access message” with the phrase “to access” (not “to select”) indicates that receipt of the memory access message triggers “access” of the data records rather than “select[i]on” of these records. (*See* D.I. 295 at 28) The claim goes on to recite that “the selection be[] performed . . . independent of the content of the first memory access message,” further supporting the Court’s conclusion. Defendants’ citation to portions of the specification describing preferred embodiments does not persuade the Court that Defendants’ construction is correct. (*See* D.I. 273 at 28 (citing ’818 patent at 6:54-58, 7:41-

at 10-12, Ex. 99 at -078).

Thus, the Court will deny Defendants' motion for summary judgment of non-infringement of the '818 patent.

b. Pre-Suit Damages

Defendants move for summary judgment of no pre-suit damages on the grounds that Plaintiffs failed to comply with 35 U.S.C. § 287 by failing to address patent marking in their complaints. (D.I. 273 at 31-33) (citing D.I. 19, 21, 75). However, in challenging Plaintiffs' compliance with § 287, the initial burden is on *Defendants* "to articulate the products [they] believe[] are unmarked 'patented articles' subject to § 287." *Arctic Cat Inc. v. Bombardier Recreational Prods. Inc.*, 876 F.3d 1350, 1368 (Fed. Cir. 2017). To satisfy their burden, Defendants "need only put the patentee on notice that he or his authorized licensees sold specific unmarked products which [Defendants] believe[] practice the patent." *Id.* Once Defendants do so, the burden shifts to Plaintiffs "to prove the products identified do not practice the patented invention." *Id.*

While Defendants identify several [REDACTED] products they contend were "unmarked" (D.I. 276 Ex. I at ¶¶ 505, 526, 537, Ex. AP at ¶¶ 178-83), they do not challenge Plaintiffs' contention that Defendants "did not identify *any* specific products" until *after* fact discovery closed (D.I. 295 at 36 (citing D.I. 276 Ex. BH at 34-35, Ex. BJ at 39-49, Ex. BI at 46, Ex. BD at 32-33, D.I. 296 Ex. 106 at ¶¶ 505, 526, 537)). The Court is not going to permit this untimely-produced evidence to be admitted, so Defendants cannot be granted summary judgment of no pre-suit

damages on this basis.⁶ *See Pavo Sols. LLC v. Kingston Tech. Co., Inc.*, 2019 WL 4390573, at *3 (C.D. Cal. June 26, 2019).

Additionally, a reasonable juror could find that the products identified by Defendants as unmarked do not actually practice the patented invention. Defendants appear to argue that the “unmarked” [REDACTED] products practice the asserted patents because they “comply with the 3G and/or LTE standard” and “the asserted patents are essential to the 3G and LTE standard.” (D.I. 273 at 30) (citing D.I. 276 Ex. I at ¶¶ 505, 526, 537) However, a reasonable juror could find that Defendants have failed to prove the asserted patents are standard-essential, in the absence of objective evidence (as opposed to Plaintiffs’ alleged subjective opinions) that (1) practicing the 3G and LTE standards infringes any claim of the asserted patents or (2) any non-infringing alternatives exist. *See Intel Corp.*, 268 F. Supp. 3d at 610-12. For this additional reason, summary judgment is not warranted.

C. Defendants’ Motion to Exclude

1. Daniel Lindsay’s Opinions

The Court will not exclude Daniel Lindsay’s assumption that the hypothetical license would use non-FRAND rates. This is consistent with the Court’s rulings above in connection with Defendants’ FRAND affirmative defenses. Lindsay’s analysis is sufficiently reliable to be

⁶ At the hearing, Defendants suggested that the Court should admit belated evidence of the [REDACTED] products to be consistent with the Court’s prior refusal to strike Blackberry licenses that Plaintiffs belatedly produced with opening expert reports. (*See* Tr. 79-81) In denying Defendants’ request to strike the late-produced licenses, the Court conducted a *Pennypack* analysis and concluded – based on factors including the lack of evidence Plaintiffs acted in bad faith or with willful disregard of the scheduling order – that the pertinent factors did not support striking. (*See* C.A. No. 17-83 D.I. 329) The considerations presented here are different, including that Defendants did not respond to interrogatories seeking identification of any “unmarked patent article[s]” and did not identify such products until they filed their non-infringement expert’s rebuttal report. (D.I. 295 at 36-37; *see also Arctic Cat*, 876 F.3d at 1368)

helpful to the jury. Lindsay also offered opinions based on an assumption that the hypothetical license *would* use FRAND rates, and the Court agrees with Plaintiffs that “[t]here is nothing improper with a damages expert offering alternative opinions depending on whether a patent is subject to a FRAND encumbrance.” (D.I. 295 at 42)

The Court will not exclude Lindsay’s opinion regarding his “5-7x” multiplier. Defendants have not persuaded the Court that Lindsay’s multiplier merely “regurgitate[s]” the perspective of 3G corporate representative David Muus, an employee for third party Sisvel U.K.; as Plaintiffs show, Muus’ opinion was one of several sources Lindsay considered in reaching his multiplier opinion. (D.I. 295 at 44) (citing D.I. 296 Ex. 118 at ¶¶ 156-65, Ex. 119 at ¶¶ 68-79) In addition, Defendants have not shown that Muus’ opinion was unreliable. Defendants’ arguments about Blackberry’s licenses with ██████████ go to the weight rather than admissibility of Lindsay’s opinion. (See D.I. 295 at 46)

The Court will not exclude Lindsay’s upward adjustment of the royalty rate based on his presumption of validity and infringement. The Court is not persuaded that Lindsay’s adjustment in the face of uncertainty renders his opinion unreliable. See *Robocast, Inc. v. Microsoft Corp.*, 2014 WL 202399, at *3 (D. Del. Jan. 16, 2014). Moreover, because “mathematical precision is not required” in analyzing damages, “experts may supplement quantitative evidence with the expert’s own experience and judgment.” *Plastic Omnium Advanced Innovation & Research v. Donghee Am., Inc.*, 387 F. Supp. 3d 404, 414 (D. Del. 2018).

Finally, the Court will not exclude Lindsay’s opinions based on the ██████████ agreement. Lindsay testified that he discussed this agreement with Plaintiffs’ technical experts (D.I. 296 Ex. 120 at 110-11, 116), and it will be for the jury to resolve any dispute about the technical comparability of the agreement, including assessing Defendants’ expert’s opinions

about it. (*See* D.I. 296 Ex. 123 at ¶ 159) (stating opinion “taking into account . . . the supposed technical comparability (as believed by the Plaintiffs)”)

2. Dr. Cohen’s ’564 Patent Validity Opinions

The Court will not exclude Dr. Cohen’s ’564 patent validity opinions. The Court is not persuaded that Dr. Cohen offered a new construction of the “same column precoding” limitation, let alone one that contradicts the Court’s construction regarding the order of matrix multiplication. Defendants can challenge Dr. Cohen’s view that the patentee disclaimed “space-time codes” during trial.

3. Drs. Cohen and Madisetti’s DOE Opinions

The Court will not exclude Dr. Cohen and Dr. Madisetti’s DOE opinions for the ’818 and ’091 patents. The Court has denied Defendants’ motion for summary judgment of no literal infringement of the ’818 and ’091 patents. *See Robocast, Inc. v. Apple Inc.*, 39 F. Supp. 3d 552, 561 (D. Del. Apr. 22, 2014) (“Because I have already denied [defendant’s] request for a finding of no literal infringement, I do not reach those arguments [related to DOE]”). The challenged opinions are not improperly conclusory or unreliable. The deficiencies Defendants perceive go to weight and credibility, not admissibility.

D. HTC’s Motion for Summary Judgment

HTC argues there is no factual dispute that “HTC has sold, offered to sell, or imported into the United States any of the accused products.” (C.A. No. 17-83 D.I. 353 at 4) In the Court’s view, however, a reasonable juror could find that HTC did undertake these actions, based on HTC sales agreements that (1) defined HTC as the “Seller” or “Supplier” to U.S. customers, (2) identified the products being sold, and (3) required HTC to deliver these products to the United States. (*See* D.I. 296 Exs. 54, 55, 56) While the parties dispute the meaning of

HTC Controller Hsiu-Fen Lai's deposition testimony (D.I. 295 at 3-4; D.I. 308 at 18), this evidence, when viewed in the light most favorable to Plaintiffs, would support a reasonable juror's finding that HTC sold the accused products in the United States. (*See* D.I. 310 Ex. BV at 31, 35, 41, 68, 72, 74) Therefore, the Court will deny HTC's motion for summary judgment.

III. CONCLUSION

An appropriate order follows.

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

3G LICENSING, S.A.,
ORANGE, S.A.,

Plaintiffs,

v.

BLACKBERRY LIMITED and
BLACKBERRY CORPORATION,

Defendants.

C.A. No. 17-82-LPS

3G LICENSING, S.A.,
KONINKLIJKE KPN N.V.,
ORANGE, S.A.,

Plaintiffs,

v.

HTC CORPORATION,

Defendant.

C.A. No. 17-83-LPS

3G LICENSING, S.A.,
KONINKLIJKE KPN N.V.,
ORANGE, S.A.,

Plaintiffs,

v.

LENOVO GROUP LTD.,
LENOVO HOLDING CO., INC,
LENOVO (UNITED STATES) INC., and
MOTOROLA MOBILITY LLC,

Defendants.

C.A. No. 17-84-LPS

ORDER

At Wilmington, this 29th day of September, 2020, for the reasons stated in the Memorandum Opinion issued this same date,

IT IS HEREBY ORDERED that:

1. Plaintiffs 3G Licensing, S.A. (“3G”), Koninklijke KPN N.V. (“KPN”), and Orange S.A.’s (“Orange”) (collectively, “Plaintiffs”) Motion for Partial Summary Judgment (C.A. No. 17-82 D.I. 267; C.A. No. 17-83 D.I. 347; C.A. No. 17-84 D.I. 331) is GRANTED IN PART and DENIED IN PART, as detailed in the Memorandum Opinion.
2. Defendants HTC Corporation (“HTC”), Lenovo Holding Co., Inc., Lenovo (United States) Inc. (collectively, “Lenovo”), Motorola Mobility LLC (“Motorola”), BlackBerry Limited and BlackBerry Corporation (collectively, “BlackBerry”) (collectively, “Defendants”) Motion for Summary Judgment (C.A. No. 17-82 D.I. 272; C.A. No. 17-83 D.I. 355; C.A. No. 17-84 D.I. 336) is GRANTED IN PART and DENIED IN PART, as detailed in the Memorandum Opinion.
3. Defendants’ Motion to Exclude Expert Testimony (C.A. No. 17-82 D.I. 270; C.A. No. 17-83 D.I. 350; C.A. No. 17-84 D.I. 334) is DENIED.
4. HTC’s Motion for Summary Judgment (C.A. No. 17-83 D.I. 352) is DENIED.
5. Because the Memorandum Opinion was filed under seal, the parties shall meet and confer and, no later than September 30, submit a proposed redacted version, along with a supporting memorandum identifying with specificity the reasons for any proposed redaction. Thereafter, the Court will issue a public version of the Memorandum Opinion.

6. The parties shall file a joint status report by October 5, stating their positions as to whether the Court's decision resolves the Section 101 issue or whether, instead, there is something left to this defense to be tried to the jury.



HONORABLE LEONARD P. STARK
UNITED STATES DISTRICT JUDGE