IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

DATACORE SOFTWARE CORPORATION, Plaintiff, v. SCALE COMPUTING, INC., Defendant.	Civil Action No. 22-535-GBW

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MEMORANDUM OPINION

July 10, 2024
Wilmington, Delaware

GREGORY B. WILLIAMS
U.S. DISTRICT JUDGE

Pending before the Court is Plaintiff DataCore Software Corporation's ("DataCore") Motion to Strike certain opinions and testimony of Brett L. Reed, D.I. 154, DataCore's Motion to Exclude certain opinions and testimony of Mr. Reed, D.I. 156, and Defendant Scale Computing Inc.'s ("Scale") Motion to Exclude certain opinions and testimony of Mr. Elmore. D.I. 162.

I. LEGAL STANDARD

A. Expert Witness Testimony

Federal Rule of Evidence 702 sets out the requirements for expert witness testimony and states:

> A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise 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. The Third Circuit has explained:

> [T]he district court acts as a gatekeeper, preventing opinion testimony that does not meet the requirements of qualification, reliability and fit from reaching the jury. *See Daubert* ("Faced with a proffer of expert scientific testimony, then, the trial judge must determine at the outset, pursuant to Rule 104(a) [of the Federal Rules of Evidence] whether the expert is proposing to testify to (1) scientific knowledge that (2) will assist the trier of fact to understand or determine a fact in issue.").

Schneider ex rel. Estate of Schneider v. Fried, 320 F.3d 396, 404–05 (3d Cir. 2003) (footnote and internal citations omitted). Qualification examines the expert's specialized knowledge, reliability examines the grounds for the expert's opinion, and fit examines whether the testimony is relevant and will "assist the trier of fact." *Id.* at 404.

II. DISCUSSION

DataCore seeks to exclude certain "use data" testimony by Scale's damages expert, Mr. Reed, in his rebuttal report on damages. D.I. 157 at 8. Among other things, Mr. Reed's rebuttal report addresses whether Scale's customers use the allegedly infringing features of Scale's products. In preparing his rebuttal report, Mr. Reed spoke to Scale employees, who used a feature of Scale's product called Fleet Manager to provide Mr. Reed with information about how Scale's customers have their products configured. *See, e.g., id.* at 1-2. DataCore argues that those opinions should be excluded because (1) the Fleet Manager data was untimely produced, and (2) Mr. Reed's testimony regarding that data does not meet the standards for expert witness testimony. *Id.*

A. DataCore's Motion to Strike Certain Opinions of Mr. Reed

DataCore argues that the Fleet Manager usage data was responsive to its discovery requests. D.I. 154. Thus, DataCore argues, the Court should strike Mr. Reed's opinions to the extent that they rely on such data because Scale failed to produce that data prior to the close of discovery. *Id.* Scale disagrees, and contends that (1) DataCore failed to request that information during discovery, and (2) the *Pennypack* factors do not support striking Mr. Reed's testimony.

The Court agrees with DataCore that it requested the Fleet Manager usage data during discovery. The Fleet Manager usage data is responsive to at least Interrogatory No. 24, which asked Scale to:

> Describe in detail how Scale, installers of the Accused Products, and/or End User(s) use, test, or direct another party to use or test the following features of the Accused Products:
>
> - Over-provisioning, including without limitation, the functionality described in SCALE-DE00002867 row 39, SCALE-DE00002549, and SCALE-DE00000174;
> - The "Provisioned" view, including without limitation, the functionality described in SCALE-DE00001136, SCALE-DE00001895, and SCALE-DE00002344.

D.I. 155, Ex. 2. Scale does not offer a persuasive argument to explain why the Fleet Manager usage data—which shows how user's systems are configured—would not "describe in detail how … End Users use … overprovisioning." *Id*; *see* D.I. 175. Notably, Scale explained in its briefing that the Fleet Manager usage data shows when a user's system is configured such that the amount of virtual capacity exceeds the amount of physical capacity. D.I. 175 at 1. ("Scale can use Fleet Manager as a dashboard to observe configuration data about deployed Scale systems that run Fleet Manager, including the amount of provisioned virtual storage, the amount of total physical storage, and the amount of used physical storage in a system; Scale customers who have Fleet Manager can observe this data about their own systems."). Accordingly, the Court finds that Scale's disclosure of the Fleet Manager usage data for the first time in Mr. Reed's report was untimely.

However, the Court finds that the *Pennypack* factors do not support exclusion of the Fleet Manager usage data. Excluding "critical evidence, such as an expert report," is an "extreme sanction, not normally to be imposed absent a showing of willful deception or flagrant disregard of a court order." *Abbott Labs. v. Lupin Ltd.*, 2011 WL 1897322, at *3 (D. Del. May 19, 2011). DataCore has been in possession of the Fleet Manager usage data since its receipt of Mr. Reed's rebuttal damages report on or about January 15, 2024—approximately seven (7) months prior to the parties' August 20, 2024 trial date. Also, DataCore was aware of the existence of the Fleet Manager usage data since, at the latest, November 15, 2023. *See*, *e.g.*, D.I. 176, Ex. 5 at 63:6-63-12 (deposition of Mr. Theriac, dated November 15, 2023) (Q. Okay. What is Fleet Manager? A. Fleet Manager is a cloud-based monitoring and orchestration tool. Q. Does Fleet Manager interact in any way with HyperCore? A. Fleet Manager primarily monitors HyperCore clusters.). Thus, even though the depositions of Mr. Theriac and Mr. Demlow occurred prior to Datacore's receipt of Mr. Reed's rebuttal report on damages, DataCore had the opportunity to ask those individuals

about Fleet Manager. *See* D. 176, Ex. 5 at 61:10-64:4; *id.*, Ex. 6 at 24:9-25:18; *id.*; Ex. 3 at 112:10-119:22. Mr. Elmore also responded to Mr. Reed's opinions on the Fleet Manager usage data in his reply report. *See* D.I. 177, n. 4.

As a result, the Court finds that DataCore was aware of the Fleet Manager usage data prior to the close of discovery, and could have raised a discovery dispute with respect to that data prior to its receipt of Mr. Reed's expert report. Therefore, the Court is not convinced that the "extreme sanction" of striking the objected-to portions of Mr. Reed's report is appropriate under the circumstances of this case. The Court does find, however, that Defendants should have the opportunity to question Mr. Theriac and Mr. Demlow about the specific Fleet Manager usage data that they provided to Mr. Reed, because Mr. Reed's report is based on certain opinions and information about Fleet Manager that Mr. Theriac and Mr. Demlow provided to Mr. Reed. DataCore was not aware of those individuals' opinions when it took their depositions. Accordingly, the Court orders Plaintiffs to produce Mr. Theriac and Mr. Demlow for a supplemental deposition, not to exceed a total of four (4) hours[1], regarding the Fleet Manager usage data addressed in Mr. Reed's report.

B. DataCore's Motion to Exclude Certain Opinions of Mr. Reed

DataCore also argues that Mr. Reed's opinions regarding the Fleet Manager usage data are unreliable because Mr. Reed relied on Scale employees to collect and analyze the data, without doing any further analysis of that data himself. D.I. 157 at 1-2. DataCore argues that Mr. Reed obtained the Fleet Manager usage data from Mr. Theriac and merely incorporated that data (and Mr. Theriac's analysis) into his report without more. *Id.* DataCore also argues that Mr. Reed

[1] The total deposition time shall not exceed four (4) hours. For example, DataCore may choose to depose one individual for four (4) hours, or both individuals for two (2) hours each.

similarly relied on Mr. Demlow's assertion that there were not any changes in use cases that would change the extent to which customers used primarily three-node clusters between 2016 (the start of the alleged period of infringement) and 2023 (when the Fleet Manager usage data was collected). *Id.* at 5.

Among other things, for the reasons explained below, DataCore objects to certain opinions that Mr. Reed formed based on conversations he had with Mr. Theriac and Mr. Demlow. Specifically, DataCore objects to: (1) Mr. Reed's reliance on the data collected and used by Mr. Theriac to calculate a figure for WCF (Wasted Capacity Factor), on average, based on Scale's customer configurations, *id.* at 10, (2) Mr. Reed's opinion that "while the Fleet Manager data includes units sold after March 2023, and units associated with OEMs, and likely only few units from 2016 and 2017," the Fleet Manager data reflected in Tab 18 "is a large sample," and "in large part the physical configuration would be similar to the machine as installed, for the large number on single node and 3 node clusters," *id.* at 13, and (3) Mr. Reed's opinion that customers did not use the accused products differently in 2016 than they did in 2023. *Id.*

DataCore argues that Mr. Reed's opinions are inadmissible because they "merely 'parrot what some lay person has told [Mr. Reed].'" *Id.* at 9 (citing *Goldberg v. 401 N. Wabash Venture LLC*, 755 F.3d 456, 461 (7th Cir. 2014). Further, DataCore argues that the Fleet Manager usage data is not representative of Scale's customers' use of the allegedly infringing features because "Theriac testified that Fleet Manager is only necessary for Scale's large customers," while "Scale's own documents state that its customer base is made up of predominately small and medium sized businesses." *Id.* Also, DataCore argues that there is no evidence in the record to support Mr. Reed's reliance on Mr. Theriac's opinion that the Fleet Manager data is representative of all single and three node clusters, or Mr. Demlow's opinion that Scale's consumers use the accused products

in 2023 the same way that they used those products in 2016. As a result, DataCore argues, Mr. Reed's opinions are unreliable for failure to show that the Fleet Manager data is representative of Scale's customers overall and should be excluded.[2]

The Court finds that Mr. Reed's opinions are sufficiently reliable under *Daubert*. Generally, DataCore challenges Mr. Reed's use of the Fleet Manager data (because he obtained it from Scale's employees), and Mr. Reed's assumption that the Fleet Manager usage data is representative of Scale's customers overall (because DataCore contends that the record shows that the data is not representative). However, the Court is not convinced by DataCore's argument that Mr. Reed was not entitled to rely on the information that Scale's employees provided to Mr. Reed about Fleet Manager, and whether that data was representative of customers' usage of Scale's products from 2016 to 2023. Mr. Reed is Scale's damages expert, and may reliably generate his opinions on the appropriate measure of damages based on certain assumptions provided to him about the technical operation of Scale's products. *C.f. W.L. Gore & Associates, Inc. v. C.R. Bard, Inc.*, 2015 WL 12731924, at *6 (D. Del. Nov. 4, 2015) ("[A] damages expert's reliance on [a] technical expert is not improper because the technical expert's underlying opinion is typically of record in the case; that is, the technical expert's opinion will be reviewable by the trier of fact and subject to cross-examination by the opposing party."). Thus, DataCore's challenges to the information that Mr. Theriac provided to Mr. Reed go to the weight of Mr. Reed's testimony rather

[2] Those opinions include Mr. Reed's opinions on (1) wasted capacity factor ("WCF") adjustments; (2) "Summary of Scale Product Cluster Configuration per Fleet Manager January 2024" in Tab 18; (3) that physical configurations of multi-node clusters for all Scale customers during the entire damages period would be similar to the systems in the Fleet Manager use data (showing use as of January 2024); (4) that the percentage of Scale customer clusters in Fleet Manager use data where total virtual volume capacity exceeds total physical capacity; (5) the amount and cost of additional disk storage space (HDD and SSD) based on Fleet Manager use data; (6) an alternative royalty base adjustment to DataCore's expert's "avoided cost of waste" as a percentage of Scale's revenues; (7) a royalty base apportionment based on Tab 18; and (8) an "Alternative 1"– Dr. Jeffay and Scale's Over-Provisioning Determination. *Id.* at 2.

than its admissibility, because Mr. Theriac's opinion is reviewable by the trier of fact and subject to cross-examination. *Id.* For the same reason, the parties' dispute about the representativeness of the Fleet Manager usage data goes to the weight of Mr. Reed's testimony rather than its admissibility. *Id.*

Also, the Court is not convinced that Mr. Reed's opinions merely parrot the opinions of another witness, like the opinions that were excluded by the court in *360Heros, Inc. v. GoPro, Inc.*, No. 1:17-cv-01302, D.I. 289 (D. Del. May 31,2022). In *360Heroes*, the court excluded a damages expert's opinion when the expert relied solely on an employee's "opinion regarding whether the proposed alternatives were non-infringing or commercially acceptable," and the employee failed to provide any reason why those proposed alternatives were non-infringing or not commercially acceptable. *Id.* at 17. In this action, however, Mr. Reed relied on Scale's employees' explanation of how Fleet Manager functions, and whether the usage data collected by Fleet Manager was representative of consumers' use of Scale products in the past, to support his analysis of what the appropriate royalty rate should be based on that data. The Court finds that Mr. Reed's opinions are more similar to the opinions that the court found admissible in *Intellectual Ventures I LLC v. Check Point Software Techs. Ltd.*, 215 F. Supp. 3d 314, 324 (D. Del. 2014). (finding expert opinions admissible that were based, in part, on statements by a company's Marketing Director of Consumer Products).

As a result, the Court finds that Mr. Reed's opinions are sufficiently reliable under *Daubert*, and denies DataCore's motion to strike Mr. Reed's opinions. The Court notes, however, that its ruling regarding the admissibility of Mr. Reed's opinions rests on the assumption that Mr. Theriac's and Mr. Demlow's opinions are reliable and non-speculative. *W.L. Gore*, 2015 WL 12731924 at *6. If Scale fails to show at trial that Mr. Theriac's and Mr. Demlow's opinions are

reliable and non-speculative,[3] then DataCore may re-raise its objection at that time. *Cf.*, *e.g.*, *Shire Viropharma Inc. v. CSL Behring LLC*, 2021 WL 1227097, at *10 (D. Del. Mar. 31, 2021) (finding Rule 703 does not require defendants' expert to verify *reliable* facts from a study that defendant's expert did not conduct himself, when those facts were the type typically relied upon by experts in the field).

C. Scale's Motion to Exclude Certain Opinions of Mr. Elmore

Scale asserts that certain opinions of DataCore's damages expert, Mr. Elmore, are unreliable for failure to properly apportion. D.I. 164 at 35. In his royalty base, Mr. Elmore included Scale's revenue from Scale's software, the hardware on which that software was installed, and support services. *Id.* Scale argues that the support services revenue should have been excluded from the royalty base, because (1) the support services "do not practice the asserted claims of the patent," *id.* at 40, (2) nothing in the license agreements that Mr. Elmore opined were comparable (the Crossroads Licenses) indicates that the royalty rates in those licenses applied to support revenue, *id.*, and (3) support revenues are not "convoyed sales" because Mr. Elmore presented no evidence that the allegedly infringing features of the accused products drive demand for the "accused products plus support services." *Id.* at 42.

The Court is not convinced by Scale's arguments that DataCore failed to show that the support services are convoyed sales. "A 'convoyed sale' refers to the relationship between the sale of a patented product and a functionally associated non-patented product." *Am. Seating Co. v. USSC Grp., Inc.*, 514 F.3d 1262, 1268 (Fed. Cir. 2008). A patent owner may recover damages

[3] For example, if Mr. Demlow does not "testify at trial as to the behavior of Scale's customers over time" or DataCore fails to otherwise support his assertion that Scale's customers' behavior has remained consistent from 2016 to 2023. *See* D.I. 196 at 15.

for convoyed sales only if "both the patented and unpatented products 'together were considered to be components of a single assembly or parts of a complete machine, or they together constituted a functional unit' and the patent-related feature drives demand for the functional unit as a whole." *Zimmer Surgical, Inc. v. Stryker Corp.*, 365 F. Supp. 3d 466, 491 (D. Del. 2019) (quoting *Am. Seating*, 514 F.3d at 1268 and *Rite-Hite Corp. v. Kelley Co.*, 56 F.3d 1538, 1550 (Fed. Cir. 1995)).

Mr. Elmore opined that "Scale bundles the sales of these support licenses with its HyperCore products" and that the "purchase and renewal of support licenses have been presented as nearly essential to proper system performance," because "software updates are only available to customers who have purchased a software support license." D.I. 197, Ex. 37 at ¶28. Mr. Elmore's opinion is supported by the testimony of Mr. Ripperger, Scale's Vice President of Finance, who testified that support revenues were tied to the accused products:

> Q. And is the support and maintenance required for -- let me rephrase that. Are customers required to purchase support and maintenance for the software? A. Under the perpetual license model, they were required to have at least one year of support on the software, and then they could opt to renew that support at the end of the year, or they could, upfront, purchase an extended support contract for the software. Under the term license model since 2022, the support is a feature of the overall software license. So if they have the license, they will have support on that license.

D.I. 198, Ex. 10. Mr. Elmore's opinion is also supported by the documentation for Scale's products. *See, e.g., id.* at Ex. 16 at SCALE-DE00001881 ("HyperCore software updates are an important part of regular system maintenance."). Thus, the Court finds that Mr. Elmore's opinion that the accused products plus support services were a single functional unit is reliable, because there is evidence in the record that suggests the support services contribute to the continued usability and performance of the accused products.

The Court is also not persuaded by Scale's argument that the support services are not a part of a functional unit with the accused products because the accused features do not drive demand for the accused products plus support services. D.I. 164 at 32. Mr. Elmore opined that "the patented technology, as a form of thin provisioning, has contributed significantly to a lower cost of ownership (TCO) for the Accused Products, which is a driver of demand," D.I. 197, Ex. 37 at ¶71 (although he admitted that the allegedly infringing features are not the "sole driver of demand," D.I. 164, Ex. 11 at 190:24-25). If Mr. Elmore is correct that the accused features drive demand of some portion of the accused products, and the support services contribute to the ongoing functionality of the accused products (which includes the accused features), then the support services are a part of the functional unit because those services contribute to the ongoing functionality of the accused product as a whole.

Similarly, the Court is not convinced that the accused products plus support services are not a single functional unit at the time of configuration (when Scale's products allegedly infringe DataCore's method claims) because the support services are not being employed at the time of the products' initial configuration. D.I. 164 at 42-43. Even if an accused product is not configured to infringe at the time it is initially configured, subsequent configurations of the accused product may infringe, and the availability of software updates or other support services may impact whether a user has the option to configure their system in an infringing manner. *See* D.I. 198, Ex. 44 at ¶107.

The Court also finds that DataCore has presented sufficient evidence that the Crossroads Licenses are comparable. Scale argues that Mr. Elmore did not opine in his expert report that those licenses incorporate support services, or rely on the information within those licenses that DataCore cites to show that the Crossroads Licenses include support services. D.I. 208 at 21-23. The Court agrees with Scale that Mr. Elmore opined that those licenses were comparable based on

the underlying technology, because Mr. Elmore did not discuss whether those licenses included support services. *Id.*; *see also* D.I. 198, Ex. 37 ("The nexus of the two licenses to the circumstances of the present matter is that the storage router of the '972 Patent family is analogous in many respects to a HyperCore appliance and the patented technology involves storage provisioning technology."). However, the Court is not convinced that Mr. Elmore's failure to show that the Crossroads Licenses required the payment of a royalty rate on support services makes those licenses non-comparable. The Federal Circuit has "held that apportionment can be addressed in a variety of ways, including 'by careful selection of the royalty base to reflect the value added by the patented feature [or] ... by adjustment of the royalty rate so as to discount the value of a product's non-patented features; or by a combination thereof.'" *Exmark Mfg. Co. Inc. v. Briggs & Stratton Power Products Grp., LLC*, 879 F.3d 1332 (Fed. Cir. 2018). Also, use of the sales of the accused product as a whole is appropriate when the asserted claim is directed to the accused product as a whole, because it is "consistent with the realities of a hypothetical negotiation and accurately reflects the real-world bargaining that occurs, particularly in licensing." *Id.* Accordingly, the Court finds that it was appropriate for Mr. Elmore to consider the value of the convoyed sales of the support services when determining the appropriate royalty base, including whether the Crossroad Licenses are comparable. *See Interactive Pictures Corp. v. Infinite Pictures, Inc.*, 274 F.3d 1371, 1385 (Fed. Cir. 2001) ("The jury was entitled to rely on evidence of bundling and convoyed sales in determining the proper scope of the royalty base.").

III. CONCLUSION

For the foregoing reasons, this 10th day of July, 2024, **IT IS HEREBY ORDERED** as follows:

1. DataCore's Motion to Strike certain opinions and testimony of Mr. Reed, D.I. 154, is **DENIED**.

2. DataCore's Motion to Exclude certain opinions and testimony of Mr. Reed, D.I. 156, is **DENIED**.

3. Scale's Motion to Exclude certain opinions and testimony of Mr. Elmore, D.I. 162, is **DENIED**.

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MEMORANDUM ORDER[1]

On August 15, 2024, Plaintiff DataCore Software Corporation ("DataCore" or "Plaintiff") filed a Renewed Motion to Strike Certain of Brett Reed's Opinions and to Exclude Brett Reed's Related Testimony ("Renewed Motion"). D.I. 264. Defendant Scale Computing, Inc. ("Scale" or "Defendant") opposed the Renewed Motion and maintained that DataCore's challenges go to the weight of Mr. Reed's testimony rather than its admissibility. D.I. 271 at 1. Scale added that testimony elicited during trial from two lay witnesses, Mr. Theriac and Mr. Demlow, would provide the basis of Mr. Reed's expert opinions. *Id.* On August 16, 2024, the Court issued an order reserving judgment on DataCore's Renewed Motion and ordered Scale to submit additional briefing providing its basis for the reliability of the Fleet Manager data. D.I. 278. Now having reviewed the additional submissions by Scale, D.I. 284, it is hereby ordered that DataCore's Renewed Motion is **GRANTED**, and the Court strikes the opinions of Mr. Reed which are based on the Fleet Manager data and precludes any testimony relying on Mr. Demlow and/or Mr.

[1] The Court writes for the benefit of the parties who are already familiar with the pertinent background facts.

Theriac's analysis of the Fleet Manager data gathered by or through the PowerShell script written by Mr. Demlow.

Rule 702 governs the admissibility of expert testimony and mandates that "there must be good grounds on which to find the data reliable." Fed. R. Evid. 702(b) and (c) (requiring that expert testimony is "based on sufficient facts and data"). The party seeking to introduce the expert testimony bears the burden of proving by a preponderance that the proffered expert testimony satisfies the Rule 702 test, including that the conclusions were based on sufficient facts or data. *In re TMI Litig.*, 193 F.3d 613, 705 (3d Cir. 1999), *amended*, 199 F.3d 158 (3d Cir. 2000). "If the data underlying the expert's opinion are so unreliable that no reasonable expert could base an opinion on them, the opinion resting on that data must be excluded." *Id.* at 697. "The key inquiry is reasonable reliance and that inquiry dictates that the 'trial judge must conduct an independent evaluation into reasonableness.'" *Id.* (internal citations omitted). Pursuant to this standard, courts have excluded expert opinions based on data "not reached by application of a scientific method or procedure" and lacking "a reliable basis on which to make a scientific opinion." *See CareDx, Inc. v. Natera, Inc.*, No. CV 19-662-CFC-CJB, 2021 WL 1840646, at *3 (D. Del. May 7, 2021). Similarly, an expert may run afoul of Rule 702 by adopting data without any understanding of "what the data represents, how it was compiled, or how it [was] evaluated or chosen." *Chemipal Ltd. v. Slim-Fast Nutritional Foods Int'l, Inc.*, 350 F. Supp. 2d 582, 589 (D. Del. 2004).

In this matter, Mr. Reed concedes that his opinions are based on "no hard supporting evidence" because he "did not obtain actual data on configuration of systems for Scale customers." Reed Rebuttal Report, at 60. Rather, to support his damages calculations, Mr. Reed relies wholly on the Fleet Manager data collected by Mr. Demlow and subsequently analyzed by Mr. Theriac. This data, however, covered a sample of only 287 Fleet Manager users and was collected over a

single day (January 5, 2024). D.I. 264 at 2. Mr. Reed extrapolated data from this sample to estimate that no more than 10% of Scale products infringed the patent-in-suit during the operative damages period from 2016 to 2024. B. Reed Op. Rpt., p. 89 (adopting and rounding up figure from Fleet Manager data finding that 6.1% of all customer clusters are in the state that virtual capacity exceeds physical capacity). Scale contends that the 6.1% figure from the Fleet Manager data reliably represents the configuration of clusters throughout the damages period because the behavior of Scale's customers remained consistent from 2016 to the present. D.I. 284 at 2. Yet, Scale's assumption that customer behavior was consistent during the eight year damages period is supported only by testimony from Mr. Demlow and Mr. Theriac that, "based on their knowledge of and experience with Scale's customer behavior[,] [] there have not been material changes in customer use cases or key benefits that would alter the extent to which customers used primarily multi-node clusters from 2016 to the present." D.I. 284 at 2. Scale does not claim that either Mr. Demlow or Mr. Theriac took steps to verify whether customer behavior remained consistent during the operative timeframe, and Mr. Reed does not allege that he conducted any assessments into customer behavior on his own.

While small sample sizes are commonly employed to draw reliable conclusions about a larger population, parties collecting such data must ensure that they use a sampling methodology that is reliable. *See, e.g.*, *In re Countrywide Fin. Corp. Mortg.-Backed Sec. Litig.*, 984 F. Supp. 2d 1021, 1033 (C.D. Cal. 2013) ("In order to draw reliable conclusions about a population based on a statistical sample, the sample size must be large enough to support those conclusions."); *see also Tyson Foods, Inc. v. Bouaphakeo*, 577 U.S. 442, 459, 136 S. Ct. 1036, 1048, 194 L. Ed. 2d 124 (2016) (finding that reliable inferences cannot be drawn from "[r]epresentative evidence that is statistically inadequate or based on implausible assumptions"). Here, a reliable sampling

methodology would be of particular importance given, as DataCore contends, that "over half of the appliances providing the Fleet Manager usage data were not introduced into the market until 2020." D.I. 264 at 2 (explaining that the appliances introduced after 2020 offered "fundamentally different performance and pricing characteristics than the earlier (2016-2020) Scale products"). Yet, it is indisputable that Mr. Reed adopted testimony from Mr. Demlow and Mr. Theriac without seeking any evidence to substantiate their claim that customer behavior remained unchanged from 2016 through 2024. B. Reed Aug. 6, 2024 Dep. Tr. 17:16-18:19 (noting that Mr. Demlow provided no documentation). Moreover, Mr. Demlow conceded during his deposition that he created a PowerShell script to collect the Fleet Manager data with no guidelines on identifying the data relevant to the damage calculations in this case, and without any goal of reflecting customer usage of Scale products over the damages period. D. Demlow Aug. 6, 2024 Dep. Tr. 63:5-16, 108:17-109:9. Given Mr. Demlow's failure to use a reliable sampling methodology in collecting the Fleet Manager data, Mr. Reed's reliance on such data to glean information about Scale customers over eight years cannot pass muster under Rule 702.

Several other methodological flaws undermine the reliability of the Fleet Manager data. For instance, Scale's personnel testified that they could have collected data from all of Scale's customers by remotely logging into those systems, but they did not do so. C. Theriac Aug. 6 Dep. Tr., 77:10-78:2. Additionally, Mr. Demlow's data collection produced no data for 64 customers who were connected to the Fleet Manager system on January 5, 2024. D.I. 264 at 1. Scale explained that data was not provided for these 64 customers because, according to Mr. Demlow, "those customers are those who have purchased clusters that have not yet been set-up," which is "especially common near the beginning of a fiscal quarter and when [Mr. Demlow] pulled this data, Q1 2024 had just begun." *See* D.I. 281, Ex. 1 at ¶ 15. Yet, here again, Mr. Demlow made

no attempt to test the veracity of his "belief," and Mr. Reed adopted this assumption without question. Additionally, while Scale contends that "Mr. Demlow will testify that he regularly writes, uses, and runs scripts as part of his job responsibilities at Scale," D.I. 284 at 1, during his deposition, Mr. Demlow could not explain how Fleet Manager compiled or processed the information that he extracted. D. Demlow Aug. 6, 2024 Dep. Tr. 65:1-22. Mr. Demlow similarly could not answer how the data was being reported to Fleet Manager, and he struggled to describe how he knew that the data collected by Fleet Manager was in fact coming from Scale's customers. D. Demlow Aug. 6, 2024 Dep. Tr. 67:5–68:8, 104:20-107:6. Finally, Mr. Demlow testified that he did not "review the patent for any guidance as to how to determine whether a cluster was overprovisioned as that term is defined in the script." D. Demlow Aug. 6, 2024 Dep. Tr. 109:10-21.

While Mr. Theriac ultimately analyzed the Fleet Manager data before it was provided to Mr. Reed, Mr. Theriac conceded that he did not "have any input on which customers' data to pull" and did not "give Mr. Demlow any guidance or specifications relevant to the script." C. Theriac Aug. 6, 2024 Dep. Tr. 76:13-15. Mr. Theriac added that he did nothing to review or test the Fleet Manager data. C. Theriac Aug. 6, 2024 Dep. Tr. 107:17-108:2. Similarly, Mr. Reed played no role in the development of the script, and he could not have taken any steps to test the data, as Mr. Theriac read the results of his analysis to Mr. Reed over the phone. C. Theriac Aug. 6, 2024 Dep. Tr. 104:10–105:22. As Mr. Theriac potently explained, Mr. Demlow's script "ran the calculations against the clusters within Fleet Manager, and that[] [was] it." C. Theriac Aug. 6, 2024 Dep. Tr. 107:17-108:2.

In response to DataCore's first motion seeking to exclude opinions stemming from the Fleet Manager data, the Court warned that "the admissibility of Mr. Reed's opinions rests on the

assumption that Mr. Theriac's and Mr. Demlow's opinions are reliable and non-speculative." D.I. 235 at 8. When viewed as a whole, however, the evidence now before the Court proves that the Fleet Manager data lacks scientific reliability and leaves "too great a gap" between the 6.1% figure deciphered from data collected on January 5, 2024 and Mr. Reed's opinion that 10% of all revenue for all of sales of the accused products over the last eight years infringe the patent-in-suit. Accordingly, DataCore's Renewed Motion is **GRANTED**.

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Date: August 21, 2024

GREGORY B. WILLIAMS
UNITED STATES DISTRICT JUDGE