IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

ATTENTIVE MOBILE INC.,	)	
	)	
Plaintiff / Counterclaim-Defendant,	)	
	)	
v.	)	Civil Action No. 23-87-CJB
	)	
STODGE, INC., d/b/a POSTSCRIPT,	)	
	)	
Defendant / Counterclaim-Plaintiff.	)	

MEMORANDUM ORDER

1. The Court has reviewed Plaintiff/Counterclaim-Defendant (hereafter, for ease of reference, "Plaintiff") Attentive Mobile Inc.'s *Daubert* motion to exclude the opinions of Defendant/Counterclaim-Plaintiff (hereafter, "Defendant") Stodge, Inc. d/b/a Postscript's damages expert Douglas Kidder ("Motion"). (D.I. 519) With the Motion, Plaintiff argues that Mr. Kidder failed to properly apportion damages to account for Plaintiff's customers' limited use of the allegedly infringing Campaign Composer ("CC") functionality. (D.I. 520 at 1) The Court also reviewed the briefing related to the Motion, (D.I. 520; D.I. 564; D.I. 611), held oral argument on the Motion on June 5, 2025, (D.I. 666 (hereinafter, "Tr.")), and considered the relevant legal standards, *see 360 Heros, Inc. v. GoPro, Inc*., 569 F. Supp. 3d 198, 201 (D. Del. 2021). Having done all of that, the Court ORDERS that the Motion is DENIED for the reasons that follow.

2. Plaintiff first argues that the *royalty base* that Mr. Kidder used is problematic because it included a small amount of revenues relating to non-accused products (i.e., products unrelated to CC). (D.I. 520 at 7) But in his report, Mr. Kidder *did* attempt to apportion out these revenues. He simply did so in his calculation of the applicable *royalty rate* (i.e., not via

adjustments made to the royalty base). (D.I. 565, ex. C at ¶¶ 93-94, 102) The United States Court of Appeals for the Federal Circuit has held that "apportionment can be addressed in a variety of ways"—including in circumstances where the royalty base contains revenues unrelated to the patented feature, but the expert then adjusts "the royalty rate so as to discount the value of a product's non-patented features[.]" *Exmark Mfg. Co. Inc. v. Briggs & Stratton Power Prods Grp.*, 879 F.3d 1332, 1348 (Fed. Cir. 2018). Now, it is probably not ideal (for various reasons) for a damages expert to be working with a royalty base that includes revenues from non-accused products. But if an expert can properly apportion out revenues relating to *non-accused features of an accused product* when calculating the appropriate royalty rate, the Court does not see why it is impossible for him to also appropriately apportion out revenues relating to *non-accused products* (as Mr. Kidder did here) when making adjustments to that rate. (D.I. 564 at 7-8); *Niazi Licensing Corp. v. St. Jude Med. S.C., Inc.*, 30 F.4th 1339, 1357-58 (Fed. Cir. 2022) (while noting that "where the only asserted claim is a method claim, the damages base should be limited to products that were actually used to perform the claimed method[,]" subsequently explaining that if an expert included unaccused products in his calculation of the royalty base, it could be possible for him to sufficiently adjust for this by accounting for apportionment in the relevant royalty rate); *Freeny v. Murphy Oil Corp.*, Case No. 2:13-CV-791-RSP, 2015 WL 11089599, at *3 (E.D. Tex. June 4, 2015) (denying the defendant's motion to exclude, which was premised in part on the ground that the plaintiff's damages expert's opinion regarding the appropriate royalty base had accounted for sales of products that were outside the scope of plaintiff's infringement claims, where the plaintiff had adequately showed that the expert factored the delineation between accused versus non-accused features into his royalty rate analysis). So this is not a basis to grant the Motion.

3. Next, Plaintiff argues that Mr. Kidder failed to apportion out revenues from two CC-related multi-message/retargeting campaigns (i.e., "did-not-click" and "did-not-open," collectively the "other MM campaigns"); it asserts that this amounts to the use of an unsound methodology, since these two other MM campaigns were not accused of infringement in the opening report of Defendant's infringement expert, Barbara Frederiksen. (D.I. 520 at 3, 7) To be sure, Ms. Frederiksen's report could have been clearer in stating that Defendant was accusing these other MM campaigns of infringement. But the Court will not grant the Motion on this ground, because there is enough in the record to support the conclusion that Defendant *is* accusing these campaigns—and that it gave Plaintiff sufficient notice in that regard. That is in part because Ms. Frederiksen's report references these other MM campaigns a few times, (*see* D.I. 565, ex. A at ¶¶ 22, 117)—including at least once in a manner suggesting that the campaigns are actually being accused of infringement, (*id*. at ¶ 117). And it is also because in its infringement contentions (and at other points in Ms. Frederiksen's report), Defendant indicated that it was accusing multi-message campaigns other than the "click-but-didn't-buy" campaign (i.e., the one campaign that everyone agrees is being accused in this case). (*Id*. at ¶¶ 38, 100; *id*., ex. B at 7; *see also* D.I. 564 at 3)

4. Plaintiff's final argument is that: (a) it is undisputed that single-message campaigns are not covered by the asserted claims; and so (b) Mr. Kidder used unsound methodology when he failed to apportion out revenues associated with those campaigns from his royalty base and royalty rate-related calculations. (D.I. 520 at 7-8) In response, Defendant acknowledges that Mr. Kidder does include revenues from single-message campaigns in his damages calculation. But it argues that this is not problematic. Here, Defendant explains that in setting out his damages theory, Mr. Kidder considered the results of a 2023 "A/B test" that

Plaintiff conducted. According to Mr. Kidder, that test compared Plaintiff's customers' use of legacy functionality with their use of the accused CC functionality—and it showed that the ability to use the claimed technology (which, admittedly, is focused on retargeting campaigns) in turn spurred on Plaintiff's customers to send more messages and generate more revenues—not only as to revenues associated with retargeting campaigns, but *also as to revenues associated with single-message campaigns*. (D.I. 564 at 9-10 (citing D.I. 565, ex. C at ¶¶ 81-94, 146-47, 149)) So in this way, Defendant asserts, the claimed technology/accused functionality *is* responsible for increased revenues related to single-message campaigns (even though single-message campaigns are not the focus of the asserted claims). (*Id*.)

5. This last issue was a close call. In part, that was because Mr. Kidder's report (and Defendant's briefing) could have been clearer and more fulsome in explaining Defendant's position. That said, the Court has to keep in mind that the standard for reliability is "not that high[,]" and that Rule 702 embodies a "liberal policy of admissibility." *360 Heros, Inc.*, 569 F. Supp. 3d at 201-02 (internal quotation marks and citations omitted). In light of this—and because Mr. Kidder's report does at least contain *some* evidentiary basis in support of his theory—the Court declines to grant the Motion on this ground. *Cf. Pardalis Tech. Licensing, LLC v. Int'l Bus. Machines Corp.*, Case No. 2:22-cv-0452-JRG-RSP, 2024 WL 4123787, at *3 (E.D. Tex. Sept. 9, 2024) ("[T]he Court is not convinced that [the plaintiff's damages expert's] inclusion of unaccused products and alleged use of the entire market value rule is improper" where the expert "contends that IBM benefits through various additional sales based on the use of the claimed invention being a prerequisite for IBM's entire line of blockchain products" and "[w]hether Pardalis can prove that is for the parties to explore on cross-examination.").

6. To that end, Mr. Kidder's report: (a) notes that the A/B test compared Plaintiff's legacy functionality (which allegedly did not make use of the accused CC functionality regarding retargeting campaigns) with the accused CC functionality;[1] (b) cites to Ms. Frederiksen's input and to Attentive documents to support the notion that CC's ability to allow merchants to communicate multi-message/retargeting campaigns (i.e., the functionality aligned with the key features of the asserted claims) could have been responsible for the *entirety* of the increase in profits generated by CC, as compared to the legacy product—including profits associated with single-message campaigns that never turned into multi-message campaigns; (c) explains that he has seen no evidence that some other aspect of CC (like its altered user interface) could account for a portion of that increase in revenues; and (d) nevertheless, accounts for the possibility that some of the increase in messages/revenues captured by the A/B test could have been due to product changes "other than incorporation of the patented technology" by allowing for a slight decrease to the applicable royalty rate. (D.I. 565, ex. C at ¶¶ 86, 146-47, 149-51) Plaintiff's disagreement with these conclusions can be taken up in cross-examination, if necessary.

7. 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

[1] In its reply brief, (and contrary to Mr. Kidder's report) Plaintiff asserts that its legacy product *did* include the allegedly infringing retargeting functionality. (D.I. 611 at 4; Tr. at 16-17) Therefore, it argues, Defendant falsely asserts that the increase in total messages captured by the A/B test was solely a result of the patented technology. (D.I. 611 at 4) The issue is not well-briefed, since Plaintiff first raised it in reply. However, Mr. Kidder cites to evidence to support the notion that "[t]he benefits conferred by the implementation of Campaign Composer map to the patented technology precisely." (D.I. 565, ex. C at ¶ 147; *see also* Tr. at 39-40) To the extent the parties have a disagreement about whether or not the legacy product included usable retargeting functionality, that seems to be a disputed fact issue—not a reason to declare Mr. Kidder's analysis to be the product of an unreliable methodology.

shall be submitted no later than **June 17, 2025** for review by the Court. It should be accompanied by a motion for redaction that shows that the presumption of public access to judicial records has been rebutted with respect to the proposed redacted material, by including a factually-detailed explanation as to how that material is the "kind of information that courts will protect and that disclosure will work a clearly defined and serious injury to the party seeking closure." *In re Avandia Mktg., Sales Pracs. & Prods. Liab. Litig.*, 924 F.3d 662, 672 (3d Cir. 2019) (internal quotation marks and citation omitted). The Court will subsequently issue a publicly-available version of its Memorandum Order.

Dated: June 12, 2025

Christopher J. Burke
Christopher J. Burke
UNITED STATES MAGISTRATE JUDGE