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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

SAN DIEGO DIVISION

BLAST MOTION, INC., a California corporation, Plaintiff, v. ZEPP LABS, INC., a Delaware corporation, Defendant.	Case No. 15-cv-0700-JLS-NLS **ZEPP LABS, INC.'S REPLY IN SUPPORT OF ITS MOTION TO EXCLUDE THE TESTIMONY OF C. PAUL WAZZAN, PH.D.** Date: November 30, 2017 Time: 1:30 p.m. Courtroom: 4D Hon. Judge Janis L. Sammartino

[REDACTED VERSION] OF ZEPP LABS, INC.'S REPLY IN SUPPORT OF ITS MOTION TO EXCLUDE THE TESTIMONY OF C. PAUL WAZZAN, PH.D. PORTIONS OF WHICH HAVE BEEN CONDITIONALLY FILED UNDER SEAL

INTRODUCTION

Rather than identify the missing evidence or analysis by Dr. Wazzan, Plaintiff Blast Motion, Inc. ("Blast Motion") relies instead on hand-waving, non-responsive citations to the record, and an attack on Zepp's damages expert (whose testimony is not at issue here). Ultimately, Blast Motion fails to establish that Dr. Wazzan's opinions are reliable, and therefore they should be excluded.

I. DR. WAZZAN APPLIES IMPROPER MARKET SHARE ASSUMPTIONS

Blast Motion attempts to justify Dr. Wazzan's opinions regarding market share by arguing that he carefully considered the evidence available to him. But no level of consideration can make up for the lack of evidence necessary to provide reliable opinions regarding market share.

Both parties acknowledge a lack of third party market share data. This makes Blast Motion's effort to establish a market share for a lost profits analysis all the more challenging. Dr. Wazzan begins by identifying all competitors in the marketplace for golf and baseball sports sensors during the time of alleged infringement. Dr. Wazzan also examines testimony by Blast Motion and Zepp employees and concludes that Blast Motion and Zepp each considered the other its primary competitor. But even if true, the fact that the parties are significant competitors does not provide sufficient evidence from which to determine the market share held by each party in the industry. Rather than examine the sales of third party competitors to determine each company's footprint in the market, Dr.Wazzan relies on unsubstantiated assumptions.

In support of Dr. Wazzan's speculative estimate of market share, Blast Motion cites his testimony stating that while he believes, based on the "totality of the evidence," more sales should be allocated to Blast Motion than Zepp, he instead "defaulted to an equal share." Opp. at 5. This "carefully considered" evidence does not support his "default" assumption that all entrants in the market would have

had an equal share—a clear example of speculation. *Grain Processing Corp. v. Am. Maize-Prods. Co.*, 185 F.3d 1341, 1350 (Fed. Cir. 1999) ("To prevent the hypothetical from lapsing into pure speculation, this court requires sound economic proof of the nature of the market and likely outcomes with infringement factored out of the economic picture."). Therefore, Dr. Wazzan's faulty market share analysis should be excluded.

A. Dr. Wazzan Fails to Provide Sufficient Analysis of the Causal Connection Between the Alleged Infringement and Lost Profits

Blast Motion attempts to paper over Dr. Wazzan's failure to provide a causal connection between the infringement and Blast Motion's claimed lost profits by first by (helpfully) citing to Dr. Wazzan's entire 90-page report (Opp. at 9, fn. 5) and second by citing to twelve paragraphs in the 90-page report. Opp. at 10. Those twelve paragraphs—190 to 202—are in a section entitled "Economic Discussion of Apportionment." The section first discusses the purported value of the patented features of the allegedly infringing products and concludes with the statement: "I have therefore concluded that a reasonable apportionment factor for those Claims lies in the range of 60% to 75%." But Dr. Wazzan never explains the methodology underlying this conclusion. Indeed, there is no way to know whether he reached this conclusion using scientific/mathematical analysis, or how, and even if, he applied certain weights to different features. Such opinions are neither reliable nor helpful to a jury. *Power Integrations, Inc. v. Fairchild Semiconductor Int'l, Inc.*, 711 F.3d 1348, 1373 (Fed. Cir. 2013) (district court abused its discretion in admitting damages expert's testimony that was unreliable and based on unverifiable assumptions).

Dr. Wazzan later considers his "apportionment factor" in his *Georgia-Pacific* analysis and his discussion of a reasonable royalty. However, Dr. Wazzan provides no analysis in this section regarding how the "apportionment factor" relates to his lost profits analysis and makes no effort to connect his "range of 60% to 75%" to

his lost profits analysis. Despite Blast Motion's attempt to point to some portion of his report to support a causal nexus, Dr. Wazzan's flawed testimony does not aid the jury in determining "damages adequate to compensate [Blast Motion] for the infringement," and therefore his testimony should be excluded. *Power Integrations*, 711 F.3d at 1371.

B. Additional Factual Errors or Omissions

Prior to April 19, 2017, Blast Motion did not offer a separate softball sensor product, nor did it record separate sales for baseball and softball sensors. Zepp did because Zepp offered a specific softball sensor product. Blast Motion attempts to explain away Dr. Wazzan's improper inclusion of Zepp's softball sensor sales by arguing that Blast Motion's baseball product could also be used for softball. However, Blast Motion offers no evidence that any customers used its Baseball 360 product for softball before it introduced its Softball 360 product on April 19, 2017. Therefore, counting Zepp's softball sensor sales is improper.

Second, Dr. Wazzan makes no attempt to account for sales in Canada, but simply includes them. Even his "default to equal shares" strategy fails him here. Because Dr. Wazzan failed to remove any sales outside of the United States, his figures are not accurate and should not be the basis for any calculation. Further, Blast Motion fails to explain how its theory that some shipments of products may pass through the United States applies to method claims. Even assuming *arguendo* that Blast Motion would be entitled to damages for certain sales based on apparatus claims, Blast Motion's failure to exclude those foreign sales for method claims results in an over-inclusive damages base.

Third, Blast Motion again fails to provide any evidence that Blast Motion was manufacturing their products at [redacted] as early as December 2014. Blast Motion instead attempts to shift the burden to Zepp, arguing that Zepp failed to uncover the necessary evidence to prove Blast Motion's manufacturing location and capabilities in 2014. But the burden lies with Blast Motion to establish

those facts. *Welker Bearing Co. v. PHD, Inc.*, 550 F.3d 1090, 1095 (Fed. Cir. 2008) ("[T]he burden remains with the patentee to prove infringement, not on the defendant to disprove it."). Under Federal Rule of Civil Procedure 26(a)(2)(b)(i), Dr. Wazzan's report must include the factual basis his opinions. And his report lacks any evidence that Blast Motion was using that facility in 2014, as is required to support Dr. Wazzan's opinion that it could have ramped up manufacturing at that time. Blast Motion cannot justify Dr. Wazzan's unsubstantiated opinions by arguing that it possibly may provide support at trial. Such an approach falls far short of providing sufficient notice of his expert opinions and the bases thereof. Indeed, under such an approach, any party could avoid a *Daubert* motion by asserting that the factual foundation for the opinions will be provided at trial.

Because Dr. Wazzan's lost profits analysis is based on incorrect assumptions and is not supported by a sufficient factual foundation, his testimony should be excluded.

II. DR. WAZZAN'S REASONABLE ROYALTY ANALYSIS IS UNRELIABLE

A. Swing "accuracy" versus "false positive detection"

Blast Motion attempts to generate confusion regarding the distinction between "accuracy" versus "false positive detection." Dr. Wazzan asserts that both parties and their customers place a high value on the accuracy of the swing data, citing evidence of studies by third parties examining accuracy of the sensor's swing statistics. But the claim language refers to "false positive detection," which is directed to determining whether a swing occurred—the benefits of false positive detection are reducing the amount of memory required to store data in the sensor and reducing the amount of data transmitted to the user's mobile device. '855 patent at 5:24-28. If a motion does not qualify as a swing, the data is not stored or transferred. The "accuracy" of the data comes into play only after it is determined a given motion is a valid swing, as opposed to someone simply picking up a bat or

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