UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	SACV 14-00341 JVS (ANx) consolidated with CV 15-02370 JVS	Date	February 13, 2018
Title	TCL Communications Technology Holdings, Ltd. v. Telefonaktienbolaget LM Ericsson, et al		

Present: The Honorable	James V. Selna

Karla J. Tunis	Not Present
Deputy Clerk	Court Reporter
Attorneys Present for Plaintiffs:	Attorneys Present for Defendants:
Not Present	Not Present

Proceedings: **(IN CHAMBERS)** Order DENYING IN PART and GRANTING IN PART Ericsson's Motion to Amend Findings of Fact

The Court, having been informed by the parties in this action that they submit on the Court's tentative ruling previously issued (with corrections), hereby DENIES IN PART and GRANTS IN PART the Defendants' Motion to Amend the Findings of Fact and rules in accordance with the tentative ruling as follows:

Telefonaktienbolaget LM Ericsson and Ericsson Inc. (collectively "Ericsson") timely move the Court pursuant to Rule 52(b) of the Federal Rules of Civil Procedure to amend certain findings in its November 7, 2017 Memorandum of Findings of Fact and Conclusions of Law.[1] (Docket Nos. 1786, 1787.) TCL Communication Technology Holdings, Ltd. and related entities ("TCL") have filed an opposition. (Docket Nos. 1835, 1836.) Ericsson filed a reply in support of its Motion. (Docket Nos. 1858, 1859.) The general background of this dispute is well known to the parties and the Court and can be found in the Court's Memorandum.

I. Legal Standard

Federal Rule of Civil Procedure 52(b) provides in part: "On a party's motion filed no later than 28 days after the entry of judgment, the court may amend its findings–or make additional findings–and may amend the judgment accordingly." (Fed.

[1]Docket No. 1778; corrected version at Docket No. 1798 ("Memorandum"). Page citations in this Order are to the corrected version.

R. Civ. P. 52(b).) Rule 52(b) motions "are appropriately granted in order to correct manifest errors of law or fact or to address newly discovered evidence or controlling case law." Ollier v. Sweetwater Union High Sch. Dist., 858 F. Supp. 2d 1093, 1117 (S.D. Cal. 2012). "[A] party seeking to amend a judgment under Rule 52(b) cannot raise arguments that could have been raised prior to the issuance of the judgment." Far Out Prods., Inc. v. Oskar, 247 F.3d 986, 998 (9th Cir. 2001) (construing Diocese of Winona v. Interstate Fire & Cas. Co., 89 F.3d 1386, 1397 (8th Cir.1996)). "A motion to amend a court's factual and legal findings is properly denied where the proposed additional facts would not affect the outcome of the case or are immaterial to the court's conclusions." Ollier, 858 F. Supp. 2d at 1117 (citing Weyerhaeuser Co. v. Atropos Island, 777 F.2d 1344, 1352 (9th Cir.1985)).

II. Discussion

Ericsson asks the Court to correct eight[2] errors in its Memorandum and make additional findings on: (1) the impact of TCL's pass-through rights derived from Qualcomm chipsets; (2) the Court's description that it unpacked the comparable license agreements "like Ericsson has"; (3) exclusion of the royalty rates unpacked from the Apple and Samsung licenses because they capture brand value; (4) a 2G royalty rate based on comparable licenses that includes an analysis based on Samsung, LG, and ZTE's 2G sales; (5) the evidentiary value of Ericsson's business case projections of Samsung's revenue based on the "mid" scenario; (6) the number of Standard Essential Patents ("SEPs") that Ericsson argued it owned; (7) the obligations imposed by the non-discrimination prong of the fair, reasonable, and non-discriminatory ("FRAND") licensing requirement; and (8) TCL's royalty rate for Ericsson's SEPs for the sale of external modems and personal computers. (Mot. at 1.) The Court will address each issue in turn.

A. The Court's Calculation of the Release Payment

After determining that Option A and Option B were not FRAND, the Court

[2] There was an additional error identified by Ericsson that was mooted by the Court's issuance of the Injunction.

was required to determine the FRAND release payment for TCL's unlicensed past sales. The Court determined that amount was $16,449,071. (Mem. at 107.) Ericsson challenges that amount and asks the Court to recalculate the release payment based on additional uncited evidence in the record. (Mot. at 2-3.)

Ericsson bore the burden of proof "regarding its entitlement to a release payment and the amount." (Docket No. 1278 at 20-21.) In order to calculate the release payment, the Court had to determine the number of unlicensed sales and the applicable FRAND rate for those sales. These calculations were complicated by TCL's multi-mode and single-mode devices which had pass-through rights. A multi-mode device is one which can use multiple standards, such 2G/3G, or 2G/3G/4G, while a single-mode device can only use a single standard. Due to a separate license agreement between Ericsson and Qualcomm, any TCL devices which used Qualcomm chipsets received pass-through rights to Ericsson's 3G SEPs. (Ex. 1520.) At trial Ericsson did not provide any evidence of how many of TCL's 3G devices unlicensed and seeks to do so now.

As background, Ericsson previously asked for partial summary judgment ruling that the "Pass-Through Rates" term of Option A and Option B did not violate its FRAND commitment. (Docket No. 1055 at 8.) This term required TCL to pay the full 2G or 4G rate on any TCL devices which had 3G pass-through rights because of Qualcomm chipsets. TCL opposed this, arguing that it would be "stacking" or "double-dipping" to require it to pay multiple times for the same device, and that it should not have to pay anything for 2G functionality on devices with 3G pass-through rights. (Id.) Faced with these arguments, the Court granted Ericsson partial summary judgment, reasoning that "[i]t cannot be unfair or unreasonable for Ericsson to include a term that provides for TCL to actually pay for a license for those 2G and 4G technologies that would otherwise be unlicensed on TCL's devices." (Id.) The Pass-Through Rates term became part of the Court's Injunction. (Injunction at 15-16, Docket No. 1813.) However, the Court's grant of summary judgment only applied to the prospective FRAND rate where TCL bore the burden of showing that the material terms offered by Ericsson were not FRAND. (E.g., Memo. P. & A. Supp. Ericsson's Mot. Partial Summ. J., Docket No. 858-2 at 7-8 ("TCL Has Presented No Evidence That The Pass-Through Rights Term Violates FRAND.").) The Court's summary judgment ruling did not apply to the release payment because that was a separately disputed term, and because Ericsson had the burden "regarding its entitlement to a release payment and the amount." (Docket No. 1278 at 20-21; Docket No. 428, Ex. D (listing terms potentially in dispute).)

After finding that Option A and Option B were not FRAND, the Court calculated the prospective FRAND rates. Turning to the release payment, the Court applied the prospective rates, but the Court had concerns about applying the full 2G or 4G rate to devices with 3G pass-through functionality. The Court agreed with Dr. Leonard that devices derive the most value from the most recent standard and only a small proportion of value from older technology. (Mem. at 106.) The Court also agreed with Dr. Leonard's conclusion that as a consequence TCL should only have to pay a proportion of the 2G rate for multi-mode 3G devices with pass-through rights. (Mem. 106; Leonard Decl. ¶ 150.) This follows naturally from the Federal Circuit's holding in <u>Ericsson, Inc. v. D-Link Systems, Inc.</u> 773 F.3d 1201, 1232 (Fed. Cir. 2014). There the Federal Circuit held that the value of SEPs must be apportioned according to the value they add to the device. (<u>Id.</u>) This principle requires that for 4G multi-mode devices with 3G pass-through rights TCL should have to pay most of the 4G FRAND rate because a 4G multi-mode device derives only a small proportion of its value from 3G functionality. Conversely, for a 3G multi-mode device with 3G pass-through rights TCL should only have to pay a small proportion of the 2G rate because the device derives most of its value from 3G functionality and only a small proportion from 2G functionality. Ericsson never presented a methodology that justified how much value TCL's multi-mode devices with 3G pass-through rights received from 2G or 4G functionality. Ericsson also never cited to any evidence showing the breakdown of how many devices had 3G pass-through rights, or how many devices with pass-through rights were single-mode or multi-mode. This made it impossible for the Court to determine, for example, how many of TCL's sales were single-mode 3G devices with 3G pass-through for which TCL would clearly not owe Ericsson anything for a release payment.

Ericsson never presented a total for what it believed it was owed for TCL's unlicensed sales in a witness statement, its trial brief, or its findings of fact and conclusions of law. Ericsson's only calculation of the release payment was based on figures deep in Kennedy's report at closing arguments. (Mem. at 105.) Kennedy's calculations in that report ignored TCL's pass-through rights entirely, even though Kennedy calculated the impact of the same Qualcomm pass-through rights when unpacking Ericsson's licenses with ZTE and LG. (Ex. 5316 at 1 (combining LG's 3G and 2G EDGE revenue into a blended 2G EDGE rate; Ex. 5316 at 18 (calculating the percentage of ZTE's 3G revenue from devices with Qualcomm chipsets).) Kennedy provided no explanation for why he treated TCL's pass-through rights differently than LG or ZTE's. Kennedy also did not explain why his calculation of the release payment ignored TCL's pass-through rights entirely even though TCL's pass-through rights were accounted for in the Pass-Through Rates term of the prospective license, as well as Option A and Option B. (Ex. 458 at 8; Ex. 459 at 8.) Thus, even if the Court had found that Option A and Option B were FRAND, it would not have been able to adopt Kennedy's calculation of the release payment.

Without any evidence regarding the breakdown of TCL's sales with pass-through rights or how much of the 2G or 4G rate should apply, the Court faced a problem with both inputs necessary to calculate a release payment. As an equitable solution, the Court chose to treat TCL's 3G sales as if they were 100% multi-mode devices 3G pass-through rights, its 4G sales as if 0% had 3G pass-through rights, and apply 100% of the 2G FRAND rate to devices with 3G pass-through rights. (Mem. at 106.) The Court calculated that the FRAND amount of the release payment for TCL's unlicensed sales from 2007-2015 was $16,449,071. (Id. at 107.)

Ericsson challenges only the Court's decision to treat 100% of TCL's sales as if they had 3G pass-through rights. Ericsson cites to IDC data that it argues shows the exact percentage of TCL's devices with pass-through rights, and asks the Court recalculate the release payment with TCL paying the full 2G FRAND rate for its 3G sales with pass-through rights, and the full 3G FRAND rate for the remainder of TCL's 3G sales. (Mot. at 2-3.) Ericsson's primary argument is that the Court's treatment of TCL's 3G revenue was a "manifest and highly material error" because there is evidence showing that not all of TCL's 3G sales have pass-through rights. (Id. at 2.) Ericsson also argues that TCL had the burden of proving how many of its sales were licensed. (Reply at 2 n.3.) The Court disagrees with Ericsson on both points.

Ericsson argues TCL had the burden to prove which 3G handsets had pass-through rights under Endo Pharms., Inc. v. Actavis, Inc. 746 F.3d 1371, 1374 (Fed. Cir. 2014). However, in Endo the Federal Circuit restated the unremarkable principle that the party asserting an implied license had the burden of proving its existence. (Id.) The license asserted by TCL is not implied and no one needs to prove its existence. Ericsson's license with Qualcomm is in the record, its scope is clear, and Ericsson was a party to it. (Ex. 1520.) Thus, nothing in Endo relieves Ericsson of its burden to exclude licensed products in calculating its entitlement to and the amount of the FRAND release payment or otherwise ask for payment for already-licensed products.

TCL argues that during trial Ericsson never presented the calculations, methodology, or facts that it now asks the Court to accept, and that Rule 52(b) does not allow Ericsson to present a new theory on how to calculate a release payment. (Opp'n at 3.) Ericsson does not address this point in its Reply. The Court agrees with TCL. The information Ericsson seeks to have the Court adopt was clearly available at trial, yet Ericsson provides no justification for why it did not cite to it. It is particularly problematic because this evidence contradicts Ericsson's approach at trial of ignoring TCL's pass-through rights entirely. Ericsson cannot use a Rule 52(b) motion to present an entirely new way to calculate a release payment or rely on evidence that was available at trial but not cited[3].

Even if the Court did make an error, the figures presented by Ericsson in its 52(b) motion cannot be adopted. Ericsson concedes in its Reply that because IDC did not track processor suppliers until 2010, the Court should treat 100% of TCL's in 2008 and 2009 as if they had pass-through rights. (Second Bailey Decl. ¶ 4, Docket No. 1858-2.) Ericsson also concedes that because IDC data cannot simultaneously be filtered by region and processor vendor, the Court should treat 100% of TCL's sales as occurring in the Rest of the World, the region where Ericsson has the weakest patent portfolio and therefore the lowest royalty rate. (Id. ¶ 10.) It is difficult to reconcile Ericsson's concessions here with its argument that similar treatment was error when done by the Court. (Mot. at 2.) IDC data also does not credibly show what processor TCL used in 2010 because it says "N/A" for 98.7% of TCL's sales, and is similarly questionable for

[3] Ericsson cites to the spreadsheet of IDC data Trial Exhibit 1000 for the figures it seeks to have the Court adopt. While Trial Exhibit 1000 was cited heavily by the parties and the Court, no expert used or mentioned the "Processor Vendor" filter that Ericsson seeks to use now. Because there was no way for the Court to find this information except *sua sponte*, Trial Exhibit 1000 was uncited for this purpose.

2011. (Bailey Decl. ¶ 2, Exh. A at 1, Docket No. 1786-4.) Most importantly, the sales data presented by Ericsson does not show how many of TCL's 3G sales were unlicensed because the data only shows how many of TCL's sales have pass-through rights; it does not show how many were multi-mode or single-mode. TCL's single-mode 3G devices with pass-through rights are fully licensed to Ericsson's SEPs, but Ericsson's approach in this Motion would still include those devices in the release payment. Ericsson's figures thus suffer from factual problems.

As explained above, because of the deficiencies in Ericsson's evidence justifying the release payment, the Court chose to treat 100% of TCL's 3G sales as if they had 3G pass-through rights, which favored TCL. The Court also treated 100% of TCL's sales as if they were multi-mode, that none of TCL's 4G devices had 3G pass-through rights, and that TCL was entitled to 100% of the 2G FRAND rate, each of which favored Ericsson. The Court is not convinced that Ericsson's calculation of the release payment is more accurate, and even if the Pass-Through Rates term fully applied to the release payment, it would not address Ericsson's failure to show how many units had pass-through rights and were multi-mode. By pulling on a single thread in this equitable solution, Ericsson would leave TCL holding the tangle of the other elements of the release payment that Ericsson failed to prove. The Court chose to treat all of TCL's 3G sales as if they had pass-through rights because Ericsson ignored TCL's pass-through rights entirely and failed to provide any way to otherwise calculate the release payment. The alternative would have been to find that Ericsson had not justified an appropriate rate or number of unlicensed units, and the Court would have had to exclude TCL's 3G sales entirely.

The Court declines to amend its findings regarding the calculations of the release payment. However, the Court will correct footnote 45 so that it correctly explains that the Pass-Through Rates term was decided on summary judgment and governed the terms of the prospective license.

B. Unpacking Comparable Licenses "Like Ericsson Has"

In explaining why it would not rely use floors or caps the Court stated that it "will unpack these licenses *as Ericsson has*, a percentage of the net selling price of the licensed devices without a cap or floor." (Mem. at 69 (emphasis added).) Ericsson objects to the emphasized language, arguing that some of its business cases rely on caps, and that the Court improperly relied on IDC data because IDC only reports retail sales data, while Ericsson's business cases relied on wholesale sales data. (Mot. at 3-6.)

In the referenced section, the Court was referring to how Ericsson has unpacked and presented these licenses in this case as presented by its expert Kennedy, not Ericsson's historical practices in creating its business cases after each license is signed. In its Reply, Ericsson states that it is not credible that the Court was referring to Ericsson's unpackings in this case as presented by Kennedy because the finding does not mention Kennedy, and because the Court rejected his approach of unpacking Ericsson's license rates to dollar per-unit and percent per-unit rates. (Reply at 4.) It was unnecessary to cite to Kennedy by name because Ericsson adopted his methodology and presented it as their own. (Ericsson COL ¶ 151; Kennedy Decl. ¶¶ 129-133.) Although Kennedy did present dollar per-unit rates, his approach was to first calculate and present the rates of similarly situated licensees as a percentage of the net selling price of the device, without regard to a cap or floor. (E.g., Ex. 5316 at Column N.) Although the Court rejected other part's of Kennedy analysis, such as finding that his apportionment ratios were not credible, the Court unpacked the comparable licenses using the same approach to calculate a percentage rate without floors or caps, just with somewhat different inputs.

Ericsson's second objection is that its business cases relied on wholesale sale price, while IDC only provides retail sale price. The Court addressed this issue in some detail in its Memorandum. (Mem. at 72 n.40.) The Court simply was not sure whether the revenue data in the business cases for Apple, Samsung, HTC, and LG were based off of wholesale or retail data because no Ericsson witness addressed the issue. In addition, the deals were lump sum deals. Despite whether the licenses nominally defined "net selling price," Ericsson had no obvious financial incentive to use one type of revenue over the other to model the license. The Court was also skeptical of some of the revenue figures in the business cases because the business cases often dramatically understated the licensees' number of units sold, and no Ericsson witness ever explained the sources used, their accuracy, or what figures Ericsson actually relied on in its negotiations. (Mem. at 72-73.) These are among the reasons why the Court used the revenue projections in the business cases as the lower limit of the licensee's revenue, and IDC data as the upper limit. (Id.) If Ericsson now believes it was inappropriate to use IDC data in the unpackings, Ericsson should have raised the issue at trial. TCL presented unpackings from Dr. Lynde based on both IDC and business case data, sometimes even on back to back slides, but during trial Ericsson never argued that IDC data was an inappropriate revenue source because it was retail sales data. (E.g., PDX 243, 244; TCL COF at 59,60.) Similarly, TCL's final non-discriminatory rate for 4G was based off of calculations using business case data, but it's 2G/3G non-discriminatory rate was based off of IDC data, and Ericsson never raised any issue. (TCL COL ¶ 72.) Ericsson cannot raise this issue for the first time in a Rule 52(b) motion.

The Court declines to amend its finding describing its unpackings as being done "like Ericsson has."

C. Excluding Brand Value for Apple and Samsung

Ericsson asks the Court to exclude percentage rates unpacked from the Apple and Samsung licenses because they include brand value. (Mot. at 6-8.) Ericsson argues that there is evidence that part of the price of Apple and Samsung devices is brand value, that such value is not attributable to Ericsson's SEPs, and the Court's unpackings based on those licenses includes brand value and are therefore erroneous. (Id.)

Ericsson first argues that the Court was required to apportion out brand value from its unpackings based on the Federal Circuit's decisions in Commonwealth Sci. & Indus. Research Organisation v. Cisco Sys., Inc., 809 F.3d 1295, 1301 (Fed. Cir. 2015), and Ericsson v. D-Link, 773 F.3d 1201. (Mot. at 7-8.) Those decisions stand for the proposition that a reasonable royalty must be apportioned to the value attributable to the infringing features. Ericsson v. D-Link, 773 F.3d at 1226. These decisions say nothing about how the Court should unpack third-party licenses that will be used as evidence in determining a FRAND rate. Unpackings of the Apple and Samsung licenses were clearly admissible and relevant, and Ericsson's arguments only go to the weight the Court should ascribe to the Apple and Samsung licenses.

Ericsson never presented a methodology or witness to "back out" brand value. Ericsson now argues that it was TCL's burden to do so, not Ericsson's. (Reply at 5.) However, Ericsson never raised this argument or cited to any objection it made during trial. In fact, Ericsson presented its own unpackings of the Apple and Samsung licenses which included brand value. Absent extraordinary circumstances, Ericsson cannot argue for the first time in a Rule 52(b) motion that even its own evidence was clearly erroneous.

There is also no evidence in the record that would permit the Court to make any findings on the amount of brand value associated with each similarly situated licensee. Ericsson only asks for the Apple and Samsung licenses to be discarded, presumably because those are the only licensees for which there is evidence in the record about the existence of brand value. However, that evidence only exists because the parties disagreed over whether Apple and Samsung were similarly situated to TCL. (Mem. at 58.) Because the parties agreed that Huawei, LG, HTC, and ZTE were similarly situated to TCL, neither party had any reason to submit evidence of the value of these brands. (Id.) However, these licensees all have some brand value. If the Court were to exclude the Apple and Samsung's unpackings because there was evidence of brand value, in fairness, it would also have to exclude the unpackings for any licensee where there was insufficient information in the record to determine whether the licensee had a similar amount of brand value to TCL. In essence, Ericsson's argument would require the Court to exclude all evidence of comparable licenses, even though the comparable license analysis was Ericsson's preferred approach.

The Court declines to amend its findings to exclude the unpackings of the Apple and Samsung licenses. Ericsson's objection here has even less force given that the Court only used the Apple rate as a benchmark to test the reasonableness of the licenses it used. (Mem. at 91.)

D. A 2G Comparable License Unpacking for LG and ZTE

Ericsson asks the Court to unpack the licenses for LG and ZTE for 2G because they also sell material amounts of 2G products. (Mot at. 8-11.) Ericsson does so based on a footnote in the Memorandum that states in part: "The only comparable licensee that sells 2G products is Samsung, so in unpacking the Samsung license the

Court chose to apportion out the 2G net balancing payment and calculate just 3G and 4G rates." (Mem. at 68 n.38.) The Court acknowledges that the footnote is misleading because LG and ZTE do sell 2G products. The Court will add the phrase "whose 2G net balancing payments could be determined" to the footnote so that it reads: "The only comparable licensee that sells 2G products **whose 2G net balancing payments could be determined** is Samsung, so in unpacking the Samsung license the Court chose to apportion out the 2G net balancing payment and calculate just 3G and 4G rates."

However, the Court declines Ericsson's request to conduct a 2G comparable license analysis for LG and ZTE. The Court found many reasons why Kennedy's 2G unpackings were generally not credible, including how Kennedy apportioned the net balancing payments — especially between the 2G standards, the PSRs he used which had no relation to 2G patents, and his results, which were either not consistent with each other, or with Ericsson's reference rates. (E.g., Mem. at 67-68, 88-89.) The Court also had specific problems with Kennedy's unpackings of LG and ZTE because of the issue with Qualcomm pass-through rights. As described above, licensees that use Qualcomm chipsets receive pass-through rights to Ericsson's 3G SEPs. In order to properly unpack a license where the licensee has pass-through rights the Court would need to know how many devices had pass-through rights, and what sort of discount to the 2G rate the licensee might have reasonably agreed to for its 3G devices. However, Ericsson never provided a justification for how Kennedy unpacked the LG and ZTE licenses. For ZTE, even if it's 3G Qualcomm revenue should be treated as 2G revenue at all, a point Ericsson never made during trial, that contradicts Kennedy's analysis which treated it as 3G revenue. (Mem. at 88.) For LG, Brismark testified that Ericsson treated all of LG's 3G devices as if they had pass-through rights. (Brismark Decl. ¶ 120.) Using IDC data now identified by Ericsson above, it is clear that a substantial portion of LG's 3G devices do not have Qualcomm pass-through rights. (Ex. 1000.) In addition, there was no evidence cited from the business case that Ericsson actually treated all of LG's 3G revenue as if it had pass-through rights. Ericsson does not attempt to address many of these issues that were raised in the Memorandum.

Footnote 38 will be amended to read: "The only comparable licensee that sells 2G products whose 2G net balancing payments could be determined is Samsung, so in unpacking the Samsung license the Court chose to apportion out the 2G net balancing payment and calculate just 3G and 4G rates." However, the Court declines to conduct additional 2G unpackings of the LG and ZTE licenses for the reasons described above.

E. The Evidentiary Value of Samsung's "Mid" Revenue Scenario

Ericsson asks the Court to include the unpacked rates from the Samsung mid revenue projection. (Mot. at 11-12.) In the alternative, Ericsson asks the Court for additional findings explaining why it omitted the mid revenue projection. During trial Ericsson repeatedly argued that mid projection for Samsung was more accurate than its high projection. (E.g., Kennedy Decl. ¶¶ 168-69.) The Court disagrees. Even in arguing this Motion, Ericsson compares Samsung's total revenue according to its scenarios against Strategy Analytics and IDC's estimates of Samsung's total revenue from 2011-2015. (Bailey Decl. ¶¶ 28-29.) However, estimates of Samsung's total revenue are irrelevant to the Court's unpackings because the unpacking formula uses the licensee's revenue by standard. The information from Strategy Analytics was both never cited during trial by Ericsson and fails to break down Samsung's revenue by standard. (Ex. 4852.) From 2011-2015, Ericsson estimated that Samsung would sell 410 million 4G units according to the high projection, and 384 million 4G units according to the mid projection. (Ex. 4936.) According to IDC data, during that period Samsung actually sold over 474 million 4G units. (Ex. 1000.) The mid projection thus dramatically underestimated the number of units Samsung would sell. These underestimates are among the reasons why the Court chose not to rely too heavily on Ericsson's business cases when other sources were available. (Mem. at 72-73.) To the degree that Ericsson is arguing that the mid revenue projection should be used because it is wholesale data as opposed to retail data, the Court has already addressed that point above.

For the foregoing reasons the Court declines to amend the Memorandum to include details related to the unpacked rates from the Samsung business case's mid revenue projection.

F. The Number of SEPs Ericsson Asserted at Trial

Ericsson asks the Court to amend its recitation of the number SEPs that Ericsson disputed at trial to include patents that were disputed in testimony that was excluded by the Court's *Daubert* ruling. (Mot. at 12-13; Docket No. 1460.) Except for "Part 1: Background," the Court's Memorandum presents its findings of fact and conclusions of law from the bench trial as required under Federal Rule of Civil Procedure 52(a). The Court's rejects Ericsson's view that the Memorandum serves as a summary of each of "Ericsson's contentions in this case." (Reply at 9.) Ericsson does not dispute that Delgado's testimony for these 13 patent families was excluded, nor has Ericsson has identified any other witness that testified that those 13 families were essential. Regardless of what the Court's finding may "suggest," (Reply at 8), the Memorandum accurately described the testimony presented during the bench trial, while Ericsson's proposed amendments do not. Moreover, such an amendment would also be immaterial to the Court's conclusions.

The Court declines to amend its Memorandum to include testimony that was excluded from the trial.

G. The Obligations under FRAND's Non-Discrimination Prong

Ericsson asks the Court to clarify its findings regarding the non-discrimination prong of FRAND because of how some may construe the Memorandum. (Mot. at 13-14.) The Court held that "the non-discrimination prong of FRAND does not incorporate an SEP-holder's projections; it applies to the actual terms and conditions." (Mem. at 73.) Ericsson is concerned with how this phrase "could be interpreted" and the requirements that might be construed. (Reply at 9-10.) It is unclear what sort of clarification Ericsson wants that is properly within the scope of a Rule 52(b) motion. Ericsson does not challenge the use of actual sales data, except to the degree that the Court should have used wholesale sales data instead of retail sales data, because Ericsson does not suggest that the Court's IDC unpackings for Samsung, LG and HTC should be amended or excluded. Even in the instant Motion, Ericsson has repeatedly asked the Court to rely on actual data for a variety of purposes. (E.g., Mot. at 2 (asking the Court to recalculate the release payment based on actual TCL sales data), 4 (arguing that the Court did not unpack the licenses "like Ericsson has" because Ericsson historically used wholesale sales data), 11 (asking the Court to use the mid Samsung revenue projection because it is "far more aligned to Samsung's actual wholesale revenues (as reported by Strategy Analytics) than the revenue information in Ericsson's 'High' business case scenario").) Ericsson also never challenged the use of actual data at trial, and Kennedy used IDC data in every unpacking to convert his percentage rates to dollar-per-unit rates. (Kennedy Decl. ¶ 105.)

Ericsson expresses a concern that the Court's holding is susceptible to an interpretation that would require Ericsson to renegotiate existing licenses if actual sales diverge from its projections. (Reply at 10.) However, the Court expressly found that "ETSI's members ultimately approved an ETSI IPR Policy that did not require such re-opening and re-negotiation of prior licenses." (Mem. at 14.) Ericsson expresses additional concerns for how "some may attempt to construe the Memorandum" and asks for additional findings clarifying that "constant monitoring and re-analysis of lump sum licenses is not what the FRAND commitment requires." (Mot. at 13-14.) The Court confesses that it is powerless to stop people from making their own interpretations of the Memorandum, whether right or wrong. In its Reply, Ericsson asks the Court to amend the Memorandum to clarify that "Ericsson is not obligated to continuously monitor the actual sales covered by its lump sum licenses, and renegotiate the license if there are any deviations, in order to comply with the nondiscrimination prong of FRAND." (Reply at 10.) However, this request is prospective in nature and does not relate to TCL or this case. Such a clarification would be essentially an advisory opinion on Ericsson's potential future liability against unknown parties.

For the foregoing reasons the Court declines to amend the Memorandum to opine on the non-discrimination prong of FRAND.

H. TCL's Royalty Rate for External Modems and Personal Computers

Ericsson asks the Court to amend its finding that external modems and personal computers were already accounted for in unpacking the rates for handsets. (Mem. at 67 n.37, 115.) Ericsson argues that this finding is manifestly erroneous because there is no evidence that any Ericsson licensee made sales that were accounted for in unpacking their handset rates. (Mot. at 14-15.) The Court found that Ericsson's licenses with Apple and LG include both external modems and personal computers at no additional charge, and that Ericsson's licenses with Samsung and HTC include personal computers at no additional charge. (Mem. at 67 n.37.) The Court made no express findings regarding external modems under Samsung or HTC's license. Unlike these companies, Huawei and ZTE both pay a running percentage royalty on external modems and personal computers.

Ericsson correctly notes that TCL had the burden of proving that the rates offered in Option A and Option B for external modems and personal computers were not FRAND. Ericsson argues that TCL failed to meet this burden because it provided no evidence that Apple, Samsung, LG or HTC actually sell external modems or personal computers with cellular connectivity, while there was evidence that Huawei and ZTE do, and they both pay a running percentage royalty. (Reply at 11.) TCL argues that there was enough evidence for the Court to reasonably infer that the licensees sold the external modems and personal computers, so the finding should be upheld. Revenue from external modems and personal computers is relevant because ignoring it would undermine the unpacking analyses of Kennedy and Dr. Lynde. However, prior sales are clearly not required before a prospective licensee can insist on a FRAND rate because even companies trying to break into a market are entitled to a FRAND rate.

The existence of a license to Ericsson's 3G SEPs for external modems and/or personal computers would also impact the net balancing payment term of the unpacking formula. If a licensee received such a license, then that value must be apportioned out of the net balancing payment, just like the value of the 2G and 3G handset license must be apportioned out of the net balancing payment before a 4G rate can be calculated. However, neither expert made any attempt to do so in analyzing Ericsson's licenses with Apple, Samsung, LG, or HTC. By not apportioning out that value and applying the full lump sum towards handsets, both experts necessarily treated the licenses to Ericsson's SEPs to sell external modems and personal computers as being free once the licensee paid for handsets. Had the experts subtracted the value of a license to Ericsson's SEPs for external modems and handsets, it would have reduced the rate that Apple, Samsung, LG, and HTC were paying Ericsson for handsets. The record before the Court was that four similarly situated licensees received a license from Ericsson to use SEPs in external modems for free, at least two (possibly up to four) licensees received a license for personal computers for free, and two paid running percentage royalties for their sales of both external modems and personal computers. The Court also found that Kennedy's unpacking of the ZTE licenses suffered from numerous flaws, all of which also apply to the rates for external modems and personal computers. (Mem. at 87-88.) Based on this data, the Court concluded that TCL should be treated like Apple, Samsung, LG, and HTC, and should also receive a license to Ericsson's SEPs to sell external modems and personal computers at no additional cost as part of its handset license. Therefore, the Court had more than sufficient evidence to conclude that by paying the full price for handsets TCL was entitled to a royalty-free license for external modems and personal computers.

In the Memorandum, the Court stated "With respect to the sale of External Modems and Personal Computers, so long as they are TCL Products (as defined in Option B at §§ 1.9, 1.20, 1.25), TCL shall receive a royalty-free license because the *revenues* for these devices have already been accounted for in the unpacking analysis for handsets." (Mem. at 115 (emphasis added).) This briefing shows that the inclusion of the word revenue undermined the Court's point, which was more clearly expressed in the apportionment discussion. (Id. at 67 n.37.) In the interests of clarity the word "revenues" will be replaced with "licenses." However, the Court declines to make any additional changes to this finding.

III. Conclusion

The Court will issue an Amended Memorandum making the following changes:

The Court will correct footnote 45 so that it correctly explains that the Pass-Through Rates term was decided on summary judgment and governed the terms of the prospective license.

Footnote 38 will be amended to read: "The only comparable licensee that sells 2G products whose 2G net balancing payments could be determined is Samsung, so in unpacking the Samsung license the Court chose to apportion out the 2G net balancing payment and calculate just 3G and 4G rates."

In the first full paragraph on page 115 the word revenues will be replaced with the word licenses.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	SACV 14-00341 JVS (ANx) consolidated with CV 15-02370 JVS	Date	February 13, 2018
Title	TCL Communications Technology Holdings, Ltd. v. Telefonaktienbolaget LM Ericsson, et al		

The Court will also make various clerical corrections.

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