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11 HTC CORPORATION and HTC AMERICA, INC.

12   UNITED STATES DISTRICT COURT

13   NORTHERN DISTRICT OF CALIFORNIA

14   SAN JOSE DIVISION

15

16 HTC CORPORATION and HTC   Case No. 5:08-cv-00882 PSG
    AMERICA, INC.,
17   [Related to Case No. 5:08-CV-00877 PSG]
                Plaintiffs,
18   **MOTION FOR JUDGMENT AS A**
        v.   **MATTER OF LAW OF NON-**
19   **INFRINGEMENT**
                                         [PER F.R.C.P. 50(A)]
20 TECHNOLOGY PROPERTIES
    LIMITED, PATRIOT SCIENTIFIC   Complaint Filed: February 8, 2008
21 CORPORATION and ALLIACENSE   Trial Date: September 23, 2013
    LIMITED,
22   Date: September 23, 2013
                Defendants.   Time: 9:00 a.m.
23   Place: Courtroom 5, 4th Floor
                                         Judge: Hon. Paul S. Grewal
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NOTICE OF MOTION AND MOTION

2   PLEASE TAKE NOTICE that Plaintiffs HTC Corporation and HTC America, Inc.

3   (collectively "HTC"), before this case is submitted to the jury, move pursuant to Federal Rule of

4   Civil Procedure 50(a) for judgment as a matter of law on the grounds that defendants Technology

5   Properties Limited, Patriot Scientific Corporation and Alliacense Limited (collectively "TPL")

6   have failed to present a legally sufficient evidentiary basis to find for TPL on any issue over

7   which it bears the burden of proof. More specifically, HTC seeks judgment as a matter of law on

8   the ground that: (1) HTC does not infringe any one of claims 6, 7, 9, 13, 14 or 15 of U.S. Patent

9   No. 5,809,336 ("'336 patent"); (2) TPL has not shown that any alleged infringement by HTC was

10   willful; and (3) TPL has not provided legally sufficient evidence to sustain a claim of damages for

11   any alleged infringement. This Motion is based on the Memorandum of Points and Authorities

12   set forth below, the evidence and proceedings at trial, and such other matters as may be presented

13   at the hearing on Plaintiffs' motion and allowed by the Court.

14

MEMORANDUM OF POINTS AND AUTHORITIES

15   TPL failed to present any evidence at trial as to at least two elements of each asserted

16   claim of the '336 patent. First, independent claims 6 and 13 require "*an entire oscillator* disposed

17   upon said integrated circuit substrate and connected to said central processing unit." The Court

18   has held that the term "entire oscillator" is "properly understood to exclude any external clock

19   used to generate the signal used to clock the CPU." (Dkt. No. 616, at 2:6-7.) Second, each

20   asserted claim includes the requirement of "varying the processing frequency of said first

21   plurality of electronic devices and the clock rate of said second plurality of electronic devices in

22   the same way as a function of parameter variation in one or more fabrication or operational

23   parameters associated with said integrated circuit substrate." Because TPL failed to present

24   sufficient evidence upon which a reasonable jury could find for TPL on either of these

25   limitations, judgment as a matter of law of no infringement should be entered. TPL also failed to

26   present any evidence that any alleged infringement by HTC was willful, and the evidence at trial

27   negates both the objective and subjective prongs of the willful infringement test. Finally, TPL

28

1   has failed to present legally sufficient evidence to support its claim of a reasonable royalty from

2   HTC.

3   **I.   LEGAL STANDARD**

4   "A motion for judgment as a matter of law may be made at any time before the case is

5   submitted to the jury. The motion must specify the judgment sought and the law and facts that

6   entitle the movant to the judgment." FED. R. CIV. P. 50(a)(2). A court may grant judgment as a

7   matter of law against an adverse party if "the court finds that a reasonable jury would not have a

8   legally sufficient evidentiary basis to find for the party on that issue." FED. R. CIV. P. 50(a)(1).

9   **II.   TPL HAS FAILED TO SHOW INFRINGEMENT BY HTC**

10 TPL has confirmed that its infringement claim against HTC is based entirely on *literal*

11 infringement. (09/27/2013 Trial Tr. at 1012:25-1013:3.) Literal infringement is established only

12 if TPL establishes that "every limitation recited in the claim appears in the accused device, *i.e.*,

13 when the properly construed claim reads on the accused device exactly." *DeMarini Sports, Inc. v.*

14 *Worth, Inc.*, 239 F.3d 1314, 1331 (Fed. Cir. 2001) (internal quotations and citation omitted). "If

15 any claim limitation is absent from the accused device, there is no literal infringement as a matter

16 of law." *Bayer AG v. Elan Pharm. Research Corp.*, 212 F.3d 1241, 1247 (Fed. Cir. 2000).

17 Judgment as a matter of law of no literal infringement should be entered because TPL's evidence

18 failed to establish at least two elements recited in each independent claim of the '336 patent.

19 The Federal Circuit has made clear that the question of literal infringement is properly

20 decided as a matter of law when, as here, there is no material dispute regarding the operation of

21 the accused products. *See, e.g.*, *MyMail, Ltd. v. Am. Online, Inc.*, 476 F.3d 1372, 1378 (Fed. Cir.

22 2007) ("Because there is no dispute regarding the operation of the accused systems, that issue [of

23 literal infringement] reduces to a question of claim interpretation and is amenable to summary

24 judgment."); *K-2 Corp. v. Salomon S.A.*, 191 F.3d 1356, 1362 (Fed. Cir. 1999) ("Because the

25 relevant aspects of the accused device's structure and operation are undisputed in this case, the

26 question of whether [the accused product] literally infringes the asserted claims of the [patent-in-

27 suit] turns on the interpretation of those claims."); *see also Reeves v. Sanderson Plumbing Prods.,*

28 *Inc.*, 530 U.S. 133, 150 (2000) ("And the standard for granting summary judgment 'mirrors' the

Case No. 5:08-cv-00882 PSG   3.   **MOTION FOR JUDGMENT AS A MATTER OF LAW OF NON-INFRINGEMENT**

1 standard for judgment as a matter of law, such that 'the inquiry under each is the same.'" (quoting

2 *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250-51 (1986))).

3 **A.   Defendants failed to show a clock or oscillator that generates a signal to clock a CPU without the use of an external clock**

4

5 The Court has held that the term "entire oscillator" is "properly understood to *exclude any*

6 *external clock used to generate the signal used to clock the CPU*." (Dkt. No. 616, at 2:6-7.) The

7 testimony of TPL's technical expert, Dr. Vojin Oklobdzija, confirmed that the accused HTC

8 products include precisely what the Court found to be excluded by the claims – an "external clock

9 used to generate the signal used to clock the CPU." Dr. Oklobdzija's testimony was also

10 consistent with the testimony of every other technical witness who testified at trial.

11 As Dr. Oklobdzija acknowledged, although each accused HTC product includes

12 Qualcomm, Texas Instruments (TI) or Samsung chips, for purposes of his infringement analysis,

13 "they generally work the same way." (09/26/2013 Tr. at 734:16-18.) In particular, each of these

14 chips includes a Phase Locked Loop (PLL) that receives an input from an external (off-chip)

15 reference signal which is based on a crystal. (*Id.* at 734:19-22, 735:6-19, 744:15-745:3.) This

16 external reference signal is, according to Dr. Oklobdzija, "essential" to the PLLs in all of the

17 accused HTC products. (*Id.* at 737:17-738:2.) The external reference produces a "stable" signal

18 that "is used to adjust the frequency generated by the ring oscillator, so it has some relationship

19 with it." (*Id.* at 738:9-17.) The purpose of the PLL, in fact, is to adjust the frequency of the on-

20 chip oscillator based on that reference. (*Id.* at 746:11-18.) The evidence at trial established that

21 the Qualcomm, TI and Samsung chips at issue in this case all use such a PLL with an external

22 reference signal. (*See, e.g.*, Trial Exs. Ex. 3084 at HTCTP0075742 (TXCO), Ex. 3107 at

23 QCHTCTPL0013601 (Fig. 12-1, TXCO), QCHTCTPL0013600, Ex. 3109 at

24 QCHTCTPL0017373, Ex. 3112 at QCHTCTPL0024020, Ex. 3091 at HTCTPI0002154

25 (CLK_REF), Ex. 3115 at TI-0001073 (CK_REF), Ex. 3100 at PIC00004245-46.)

26 Dr. Oklobdzija also acknowledged that the relationship between the frequency of the on-

27 chip oscillator and the external clock is defined by a formula contained "in every textbook" that

28 defines the relationship between the frequency of the reference signal and the output frequency of

1   the oscillator. (*Id.* at 739:12-24, 749:4-6.) The Qualcomm, TI and Samsung chips all use such a

2   formula to define the frequency of the external clock. The notation use to express the formula

3   may differ from chip-to-chip, but in each case, the formula expressly uses the external clock

4   frequency. (*See, e.g.*, Trial Exs. Ex. 3101 at QCHTCTPL0007812 (MSM7201), Ex. 3112 at

5   QCHTCTPL0024021, Ex. 3115 at TI-0001076, Ex. 3117 at TI-0007192.) One example of a

6   formula that was presented at trial in detail was the following formula that was used during Dr.

7   Oklobdzija's testimony:

5.1 Output Frequencies

The PLL output clock frequency is given by:

$$f_{CLK} = f_{TCXO} * L * 2$$

13   (Trial Ex. 3027.0030.)

14   The formula shown above states that the output frequency of the on-chip clock (f_{CLK})

15   equals the <u>frequency of the external crystal clock</u> (f_{TCXO}), multiplied by "L," multiplied by 2.

16   (09/26/2013 Tr. at 743:5-20.) The table below, from the same page of Exhibit 3027, shows the

17   output signal frequency generated based on the external reference frequency (19.2 MHz)

18   multiplied by "L" and 2. For example, for an "L" value of 10, the output of the on-chip clock will

19   equal 19.2 MHz * 2 * 10, which equals 384 MHz. (*Id.* at 743:21-744:17, 748:22-749:6.)

Table 5-1 PLL output clock frequencies with 19.2 MHz reference

Input frequency	L	PLL_L_VAL[5:0]	Output frequency (MHz)
19.2 MHz	10	001010	384.0
19.2 MHz	11	001011	422.4
19.2 MHz	12	001100	460.8
19.2 MHz	13	001101	499.2
19.2 MHz	14	001110	537.6

27   (Trial Ex. 3027.0030.) Dr. Oklobdzija admitted that a manufacturer can select the "L" value

28   depending on what it wanted to achieve in its product. (09/26/2013 Tr. at 746:8-18.)

1   As this example illustrates, the external clock in the accused HTC products is clearly used

2   to generate the signal that clocks the CPU.   This is because the external clock (represented for

3   example by the input frequency or TCXO above) exerts direct control on the frequency of the on-

4   chip oscillator (represented by the output frequency f_{clk}) in accordance with a fixed formula. The

5   fact that the external clock is "used to generate the signal that clocks the CPU" is apparent from

6   the fact that the output frequency of the on-chip clock is expressly calculated, in each instance,

7   based on the input frequency provided by the external clock. And there is no dispute that all of

8   the PLLs in all of the HTC accused products use a formula similar to the one above, and

9   therefore, generates the clock signal as a function of the frequency of the external clock. This

10 was confirmed through the trial testimony of Sina Dina, Baher Haroun and Thomas Gafford.

11 (*E.g.*, Trial Tr. at 350:7-17, 359:364:22-363:24, 365:17-366:1, 1046:9-14.) The evidence also

12 makes clear that neither the PLLs nor the HTC phones themselves can function properly without

13 the external crystal clock.

14 TPL's argument at trial appears to be based on a reading the Court's claim construction

15 order as excluding only an external clock that directly generates the signal that clocks the CPU.

16 The Court's actual holding was not so narrow. The Court found that the "entire oscillator"

17 excludes "any external clock ***used to*** generate the signal used ***to clock the CPU***." The Court's

18 construction makes clear that if an on-chip "entire oscillator" uses any external clock to generate

19 that signal, it does not meet the claim limitation. The external clock in the present case is

20 indisputably *used* to generate the signal used *to clock the CPU* because, among other reasons, it is

21 essential to generating that clocking signal.

B.   **TPL Failed to Show that the Processing Frequency of the CPU and the "Entire Oscillator" Vary In the Manner Required by the Claims**

22

23

24 TPL also failed to show the element of "varying the processing frequency of said first

25 plurality of electronic devices [for the CPU] and the clock rate of said second plurality of

26 electronic devices [for the "entire oscillator"] in the same way as a function of parameter

27 variation in one or more fabrication or operational parameters associated with said integrated

28 circuit substrate." The evidence at trial established that the accused HTC products use fixed

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1 speed clocks that do not vary based on fabrication or operational parameters. As Mr. Dina

2 testified, for example, "regarding PLL's, I can tell you that PLL's are designed to maintain the

3 target frequency across PVT variations." (Trial Tr. at 1062:2-3, 359:2-8 (Haroun).) Using a

4 fixed speed clock to clock the CPU was important to enable the HTC phones to operate

5 consistently across all conditions. (09/27/2013 Trial Tr. at 1031:9-1032:9.) The processing

6 frequency of the CPU and the on-chip clock varies as a function of the formulae discussed above,

7 which establish the output signal frequency based on the external reference signal and other

8 factors relating to the PLL circuitry. None of the formulae for any of the Qualcomm, TI or

9 Samsung chips recites process, temperature or voltage as playing any role in the determination of

10 the output frequency of the on-chip clock. The testimony from Mr. Gafford also showed through

11 empirical testing that the frequency of the on-chip clock moved up or down based on changes in

12 the frequency of the external crystal clock – not based on variation across operational parameters

13 such as temperature.

14 **III.   TPL HAS FAILED TO SHOW WILLFUL INFRINGEMENT BY HTC**

15 A showing of willful infringement requires TPL to establish by clear and convincing

16 evidence (1) that the accused infringer "acted despite an objectively high likelihood that its

17 actions constituted infringement of a valid patent," and (2) that this objectively defined risk "was

18 either known or so obvious that it should have been known to the accused infringer." *In re*

19 *Seagate Tech., LLC*, 497 F.3d 1360, 1371 (Fed. Cir. 2007) (en banc). TPL did not establish either

20 the objective or subjective prong at trial.

21 Under the objective prong of the willful infringement analysis, "a patentee must show by

22 clear and convincing evidence that the infringer acted despite an objectively high likelihood that

23 its actions constituted infringement of a valid patent." *Id*. "The state of mind of the accused

24 infringer is not relevant to this objective inquiry." *Id*. This objective determination entails an

25 assessment of the reasonableness of the accused infringer's defenses, such as its arguments about

26 non-infringement. *See Bard Peripheral Vascular, Inc. v. W.L. Gore & Assocs., Inc*., 682 F.3d

27 1003, 1006 (Fed. Cir. 2012). This objective prong presents a legal question for decision by the

28 judge. "When a defense or noninfringement theory asserted by an infringer is purely legal (e.g.,

1   claim construction), the objective recklessness of such a theory is a purely legal question to be

2   determined by the judge." *Id*. at 1007. Even when the objective prong turns on factual issues,

3   which is does not here, "the judge remains the final arbiter of whether the defense was

4   reasonable, even when the underlying fact question is sent to a jury." *Id*.

5   The evidence at trial established that HTC's non-infringement defenses are, at a

6   minimum, objectively reasonable. With respect to the "entire oscillator" limitations, it is

7   undisputed that all of the HTC products rely on a PLL that uses an external clock to generate the

8   signal used to clock the CPU. TPL has presented no evidence that HTC's defenses are not, at a

9   minimum, objectively reasonable. The objective reasonableness of HTC's position is further

10   confirmed by the fact that the named inventors of the '336 patent – Mr. Moore and Mr. Fish –

11   both shared HTC's view regarding the scope of the alleged invention as not covering fixed speed

12   clocks that rely on external PLLs. (*See, e.g.*, 09/24/2013 Trial Tr. at 312:7-17, 313:23:314:4,

13   315:12-17.) HTC has consistently relied on these reasonable non-infringement defenses. (*See,*

14   *e.g.*, Trial. Ex. 1118, at TPL853_02185142; Ex. 1282 at TPL853_02185820 ("However, without

15   the reference signal from the external crystal, the ring oscillator variable speed system clock

16   would not be generated by the ring oscillator.").) TPL therefore cannot establish willful

17   infringement as a matter of law.

18   **IV.   TPL HAS FAILED TO PRESENT LEGALLY SUFFICIENT EVIDENCE OF DAMAGES**

19   TPL claims that HTC is liable for $9,486,266.00 in damages for alleged infringement.

20   TPL's evidence and testimony offered at trial cannot support this claim.

21   TPL based its damages opinion on the entire revenue generated by the accused phones,

22   which are complete, multi-component mobile handsets. Federal Circuit law makes clear that the

23   entire market value rule is a "narrow exception" to the general rule that royalties cannot be based

24   on the revenue of the entire product, but on the "smallest salable patent-practicing unit."

25   *LaserDynamics, Inc. v. Quanta Comp., Inc.*, 694 F.3d 51, 67 (Fed. Cir. 2012). This "narrow

26   exception" applies only if the patentee can show that the patented feature drives the demand for

27   the entire accused product. *Id.* "To employ the entire market value rule," in other words,

28   "plaintiffs first must show that the infringing feature is the primary reason that consumers buy the

1   product; the necessity of the infringing feature to the product is insufficient." *Brocade*

2   *Communications Systems, Inc. v. A10 Networks, Inc.*, No. 10- cv-3428 PSG, 2013 WL 831528, at

3   *14 (N.D. Cal. Jan. 10, 2013) (Grewal, J.). TPL did not make any attempt to show that the entire

4   market value rule applies here. The jury heard no evidence to show that the allegedly infringing

5   features drive demand for the accused products. Dr. Prowse simply stated that he "determined"

6   that the royalty base of the hypothetical license is the sales of all accused HTC products after he

7   "looked at the data" in the case. (Trial Tr. 847:16-19.) TPL's request for a "lump-sum" royalty

8   payment does not provide an exception to the entire market value rule.

9   Dr. Prowse's testimony also failed to meet the Federal Circuit's requirement of using

10   licenses that are comparable to the hypothetical license at issue. *See Uniloc USA, Inc. v.*

11   *Microsoft Corp.*, 632 F.3d 1292, 1325 (Fed. Cir. 2011). Further, the comparability analysis

12   requires that the patentee "account for differences in the technologies and economic

13   circumstances of the contracting parties." *Finjan, Inc. v. Secure Computing Corp.*, 626 F.3d

14   1197, 1211 (Fed. Cir. 2011); *see also Trell v. Marlee Elecs. Corp.*, 912 F.2d 1443 (Fed. Cir.

15   1990) (reversing damages award where the district court permitted the patentee's expert to rely

16   solely on a prior license agreement that included a license to the patent in suit, but "conveyed

17   rights more broad in scope than those covered by Trell's patent."). Dr. Prowse's analysis fails

18   because the vast majority of licenses on which he relies are non-comparable.

19   Mr. Leckrone testified at trial that the most relevant licenses in calculating patent damages

20   were the ones in the same industry segment as HTC. (Trial Tr. 405:3-9.). Dr. Prowse, however,

21   despite relying on his interviews with Mr. Leckrone (9/26/13 Tr. at 858:16-22), chose to give the

22   most relevant licenses in HTC's industry segment – Mobile Communications – the *least* weight.

23   Even more egregious is the fact that he didn't give *any* weight to perhaps the most relevant

24   license – the Apple license. (*Id*. at 872:9-14 ("Apple is not here. I did not consider Apple…."))

25   Instead, Dr. Prowse relied on over 100 licenses that were non-comparable to the

26   hypothetical license at issue in this case. These licenses were non-comparable in that they: (1)

27   granted patent rights far broader in scope than the hypothetical license at issue in this case, and

28   (2) the licensees were not sufficiently similar to HTC.

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                                                       OF LAW OF NON-INFRINGEMENT

1   First, the vast majority of those licenses granted patent rights far broader in scope than the

2   rights to the '336 patent. These licenses were for the entire MMP portfolio, which includes at

3   least seven U.S. patents, and several foreign patents and applications. (Trial Tr. 1142:5-6.) Here,

4   however, the hypothetical license would grant HTC rights to only one patent within the portfolio.

5   Again, TPL presented no evidence of the value of the '336 patent in relation to the other assets in

6   the MMP portfolio.

7   Second, the licensees were not similar to HTC. Dr. Prowse grouped into "buckets"

8   several licenses based on one factor that the licensees had in common with HTC, in isolation. Yet

9   he did not account for any differences between HTC and the licensees. For example, in one

10   bucket, Dr. Prowse considered companies whose only similarity with HTC was that they agreed

11   to licenses purportedly around the time of the hypothetical negotiation date. (932:5-12.) Dr.

12   Prowse did not explain to the jury what time period constituted a "similar time." Indeed, he

13   included licenses dated over 16 months after the hypothetical negotiation date. (943:6-18.) He

14   could not explain to the jury why he chose not to include only licenses entered into within a year

15   of that date, when including only those licenses would have reduced the effective rates in that

16   bucket by half. (*Id.*)

17   Dr. Prowse also grouped a separate set of licenses with companies whose only similarity

18   with HTC was their revenue size. (881:2-7; 933:18-934:2; 943:19-25.) Dr. Prowse included in

19   this bucket companies that make trucks and auto parts, along with a photography equipment

20   company. (944:15-13-17.) When asked about these companies, Dr. Prowse agreed that "none of

21   them are companies that compete with HTC and none of them make smartphones." (944:22-24.)

22   Even within the mobile communications bucket, Dr. Prowse skewed the royalty rates upward by

23   including Sierra Wireless, a company that does not make smartphones. (945:23-947:9.)

24   Perhaps most tellingly, Dr. Prowse could not show the jury that he had even a mere

25   surface-level understanding of the licensees that he used to compare with HTC. (Trial Tr. at

26   939:10-940:7.) Dr. Prowse also conceded that he did not perform any independent analysis of the

27   industry "buckets." (*Id.* at 949:7-10.)

28

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                                                        OF LAW OF NON-INFRINGEMENT

1   TPL also offered no evidence to support its damages rate of 0.125% for HTC. This rate is

2   a dramatic increase over prior license rates that comparable parties actually paid. Dr. Prowse did

3   not use sound analytics to support this rate at trial, and admitted that "there wasn't a formula for

4   coming up with .125 percent." (Trial Tr. 936:7-8.)

5   The hypothetical negotiation applied in litigation assumes that the patent is valid and

6   infringed. *See Lucent Technologies, Inc. v. Gateway, Inc.*, 580 F.3d 1301, 1325 (Fed. Cir. 2009)

7   ("The hypothetical negotiation also assumes that the asserted patent claims are valid and

8   infringed."). Dr. Prowse used this legal fiction to inflate HTC's royalty rate to almost 40 or more

9   times higher than the rate HTC's direct competitors in the relevant mobile communications

10   segment paid. Dr. Prowse, however, presented no evidence that would support the specific

11   increase in a royalty rate that TPL now seeks from HTC.

12   Dr. Prowse instead relied on TPL's asking rates from parties – rates that ***nobody*** ever

13   accepted – to support a "multiplier" based on the assumption of validity and infringement. TPL

14   presented no evidence to the jury that HTC is the exception. First, Dr. Prowse assigned each of

15   TPL's prior licenses to one of six different licensing "tiers." (Trial Tr. 860:5-8, 863:24-864:10.).

16   Dr. Prowse stated that "it was TPL's policy to attempt to receive higher royalty rates for

17   companies that signed on in higher tiers, or later tiers." (Trial Tr. 860, 13-15.) The tiered

18   structure, according to Dr. Prowse, "indicated . . . that as more and more licensees signed on,

19   there was less risk for them," (Trial Tr. 862, 17-20), and "the patents became more valuable . . . ."

20   (9/26/13, 863, 3-8.) Yet, Dr. Prowse admitted that "they weren't the actual rates received from

21   the licensees . . . ." (9/26, 862, 13-16.) Further, the actual rates received for the relevant industry

22   segment licenses did not follow this structure. (*See generally*, 969:3-974:13.)

23   Next, each of these "tiers" was assigned its corresponding "tier multiplier." Tier 1, for

24   example, received the highest multiplier of 8.69. (9/26, 876:13-18 ("So what I did was I

25   multiplied that rate by the sought for tier multiplier that represented the difference between tier 1

26   sought for rates and tier 6 sought for rates, 8.69 . . . .")). This "tier multiplier," as Dr. Prowse

27   explained, was intended to adjust the royalty rate for each TPL license to the level it would have

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1   been had it been negotiated without uncertainty regarding validity and infringement. (*See*
2   *generally*, 876:13-23.)

3   Dr. Prowse then multiplied the royalty rate for each license by its corresponding
4   "multiplier" to derive an "effective rate." (935:16-19.)   It was this dramatically inflated
5   "calculated effective royalty rate," and not the actual royalty rate derived from the amount paid
6   by the licensee, that Dr. Prowse used as the basis for determining the reasonable royalty for HTC.
7   (*See generally*, 935:16-936:8.) But Dr. Prowse's "tier multiplier" methodology is unsupported by
8   substantial evidence.

9   To begin with, it was TPL – not Dr. Prowse – who made the decision as to which "tier"
10   would be assigned to each licensee. Further, there are numerous other flaws with Dr. Prowse's
11   tier multiplier calculation. For example, for Tier 1, Dr. Prowse obtained his "8.69" multiplier
12   through a ratio between (1) the average royalty rates that TPL sought from companies in Tier 1
13   and (2) the average royalty rates it sought from companies in Tier 6. (937:2-12) The problem with
14   this analysis, however, is that it is based on the royalty rates that TPL sought from licensees in
15   these tiers – in other words, the amount TPL was hoping it would obtain, but did not. (*See*
16   *generally*, 960:9-963:21.) Indeed, Dr. Prowse admitted that the only Tier 6 company, LG, did not
17   actually agree to a license, and that the value he used in calculating his tier multiplier was only a
18   "sought for rate." (960:9-22.) Considering that LG never actually took out a license, TPL's use
19   of this rate to dramatically increase HTC's damages amount was egregious.   Because TPL's
20   damages claim is based on these sought for rates, the fact that no licensees accepted these sought-
21   for rates cannot support TPL's damages opinion.

22   Dr. Prowse also claimed, without sufficient basis, that several prior licensees were given
23   "discounts" for various reasons. (9/26: 883:3-8 ("[W]e've also talked about a second difference
24   between the hypothetical negotiation and the actual licenses that TPL entered into, and that is a
25   lot of the licenses that TPL entered into, they gave discounts for a variety of reasons . . . .")) Yet,
26   Dr. Prowse admits that he has not quantified those discounts. (883:11-13.)   Moreover, Dr.
27   Prowse claimed that prior licensees received a discount for ease of negotiating. Yet, TPL's Dan
28   Leckrone admitted that TPL had been in communication for about a year before litigation was

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1   initiated.   On the contrary, the prior licensees that TPL said received discounts for being

2   cooperative ended up taking a license, in some cases, after more than two or three years of

3   negotiations.   Dr. Prowse's testimony established no rational nexus between the evidence

4   pertaining to the "tiers" and the dramatic increase in the royalty rate that resulted from them.

5   Consequently, because neither TPL nor Dr. Prowse presented legally sufficient evidence

6   to the jury that its royalty base and royalty rates were appropriate, granting HTC's motion for

7   judgment as a matter of law against TPL's damages claim is warranted.

8   **V.   CONCLUSION**

9   For the foregoing reasons, HTC respectfully requests that the Court grant judgment as a

10 matter of law under Rule 50(a) before this case is submitted to the jury.   In the event the Court

11 denies or declines to rule on this motion, and any issue is found in favor of TPL, HTC reserves its

12 right to bring a renewed motion for judgment as a matter of law in accordance with Federal Rule

13 of Civil Procedure 50(b).

14

15 Dated: September 30, 2013   Respectfully submitted,

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