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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA, SAN JOSE DIVISION

BLADEROOM GROUP LIMITED, et al.,

Plaintiffs,

vs.

FACEBOOK, INC., et al.,

Defendants.

Case No. 5:15-cv-01370-EJD

REDACTED
PLAINTIFFS' OPPOSITION TO FACEBOOK'S MOTION TO EXCLUDE CERTAIN TESTIMONY OF MICHAEL WAGNER, MIKE ANDREA, JOHN QUALE, AND GERRY BRANNIGAN, AND PLAINTIFFS' EXPERT REPLY REPORTS; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF

Judge: Hon. Edward J. Davila
Date: March 22, 2018
Time: 1:30 pm
Crtrm.: 4 (5th Floor)

REDACTED VERSION OF DOCUMENT FILED UNDER SEAL

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I. INTRODUCTION

Defendants' motions to exclude testimony from Plaintiffs' technical and damages expert should be denied in their entirety, as at best, the arguments Defendants raise go to the weight and credibility of the opinions offered, not to their admissibility.

Defendants' motions to exclude the opinions of Michael Wagner, who serves as Plaintiffs' financial expert, do not contest Mr. Wagner's qualifications to offer expert testimony about Plaintiffs' damages and Defendants' unjust enrichment in this case. Rather, Defendants' *Daubert* motions attempt to exclude Mr. Wagner's opinions by arguing about assumptions Mr. Wagner did or did not make in formulating his opinions, or evidence he did or did not consider. None of Defendants' criticisms of Mr. Wagner's opinions have merit, but even if they did, they fail to justify excluding Mr. Wagner's opinions because "[t]hey all go to the weight of the testimony and its credibility, not its admissibility." *Alaska Rent-A-Car, Inc. v. Avis Budget Grp., Inc.*, 738 F.3d 960, 970 (9th Cir. 2013) (affirming trial court's decision to allow plaintiffs' damages expert to testify regarding past and future lost profits); *GSI Tech., Inc. v. Cypress Semiconductor Corp.*, No. 5:11-CV-03613-EJD, 2015 WL 364796, at *4 (N.D. Cal. Jan. 27, 2015) (quoting *Hangarter v. Provident Life & Acc. Ins. Co.*, 373 F.3d 998, 1017 n.14 (9th Cir. 2004) ("[Q]uestions regarding the nature of [an expert witness'] evidence [go] more to the 'weight' of his testimony—an issue properly explored during direct and cross-examination.")).

Defendants' extensive reliance on Judge Alsup's decision excluding Mr. Wagner's opinion in the *Waymo v. Uber* litigation also fails to lend support to their requests to exclude Mr. Wagner's expert testimony in this case. *Waymo* was fundamentally different from this case, with different parties, different facts and evidence, a completely different and non-established market, and involving different theories of unjust enrichment. The question here, however, is not what another court has decided about a different opinion of Mr. Wagner's offered on different facts in a different case. It is the merits of Mr. Wagner's opinions in *this* case. *City of Pomona v. SQM North America Corp.*, 750 F.3d 1036, 1045 & n.3 (9th Cir. 2014) (expert's previous exclusion by another court in another matter that was only "tangentially related to" expert's analysis "has little or no bearing on the analysis here"); *Asahi Kasei Pharma Corp. v. Actelion Ltd.*, 222 Cal. App.

4th 945, 975-76 (2014) (affirming award of $359 million of future lost profits; there was nothing in economic expert's testimony requiring jury to reject his conclusions despite losing party's "reference to instances in which a federal trial court has found his testimony flawed or unpersuasive"). Mr. Wagner's testimony is admissible under Federal Rules of Evidence 702 & 403 and *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). It is relevant to central facts in this case: the proper amount of Plaintiffs' lost profits and Defendants' unjust enrichment. It is helpful for the jury in understanding the large volume of financial data and the complex calculations that go into determining, for example, the present value of future lost profits and the valuations of companies that are the subject of corporate acquisitions. Although Defendants may disagree with Mr. Wagner's opinions, they are based on more than sufficient evidence, which Mr. Wagner has reliably applied in reaching his conclusions. And while Mr. Wagner's opinions are highly probative of the proper amounts of lost profits and unjust enrichment, there is no danger of unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence. His opinions are admissible.

Facebook also seeks to exclude the testimony of all of Plaintiffs' other experts as well, including that of Plaintiffs' data center industry expert, Mike Andrea; construction expert, John Quale; and cooling expert, Gerry Brannigan. As more fully explained in Plaintiffs' Opposition to Emerson's Motion to Exclude Expert Testimony, which also seeks to exclude the testimony of these experts on many of the same grounds, Defendants' motions should be denied and the experts allowed to testify to the full extent of their reports.[1]

Finally, Facebook and Emerson also both seek to "exclude" Plaintiffs' experts' reply reports. But the reply reports were not "new" expert reports as Defendants now attempt to characterize them – they were very short comments prepared by the same experts who issued Plaintiffs' opening reports to respond solely to opinions raised for the first time in Defendants' rebuttal reports (including issues for which Defendants bear the burden of proof). Nothing in these reply reports went beyond the scope of what these experts were fairly allowed to opine on

[1] Plaintiffs hereby incorporate by reference herein their Opposition to Emerson's Motion to Exclude Expert Testimony.

orally in their depositions; condensing their comments into written form was meant to allow for more efficient questioning, not create disputes. Defendants have identified no harm or prejudice they will suffer if the experts are allowed to testify regarding the points set forth in their reply reports. For all these reasons, Defendants' motions to exclude the reply reports should be denied.

II. ARGUMENT

A. Facebook's Motion to Exclude Mr. Wagner's Testimony Should Be Denied.

Mr. Wagner is a highly-qualified financial expert, with over 40 years of experience in computing commercial damages in both litigation and non-litigation contexts. Mr. Wagner has been qualified and testified at trial as an expert on financial matters, principally commercial damages, 140 times. Ex. 1, Wagner Report ¶¶ 4-5.[2] His opinions, including those in trade secrets cases, have been upheld on appeal multiple times. *See, e.g., i4i Ltd. P'ship v. Microsoft Corp.,* 598 F.3d 831, 856 (Fed. Cir. 2010); *Wellogix, Inc. v. Accenture, L.L.P.*, 716 F.3d 867, 879 (5th Cir. 2013); *CardiAQ Valve Techs., Inc. v. Neovasc Inc.*, 708 F. App'x 654, 667 (Fed. Cir. 2017). He has 33 professional publications, most of which deal with the computation of commercial damages. Ex. 1, Wagner Report ¶ 6. This includes Mr. Wagner's service as a founding editor of the Litigation Services Handbook, which has been recognized by the Federal Judicial Center as authoritative. *Id.*

Mr. Wagner's opinions in this case are the product of sound and accepted methodologies, reliably applied using his expertise and experience. The criticisms Defendants raise go, at best, to weight and credibility, not to admissibility.

1. Mr. Wagner Did Not "Fail" To Apportion Damages Based on Plaintiffs' Asserted Trade Secrets or Confidential Information.

Contrary to Facebook's argument (Motion at 7) Mr. Wagner did not "fail" to apportion damages; quite the opposite. Mr. Wagner expressly identified which Trade Secrets were entitled to which damages he has calculated. As Plaintiffs have maintained from the outset of this action, Plaintiffs invented a new system and method for constructing hyperscale data centers, and their

[2] All "Ex." cites are to the Combined Declaration of Erik C. Olson In Support of Plaintiffs' Oppositions to Defendants' Motions to Exclude Certain Testimony of Plaintiffs' Experts.

individual Trade Secrets are used in combination to achieve that new system and method. Dkt. 106-6 (Plaintiffs' CCP § 2019.210 Identification of Trade Secrets) at 5 ("Plaintiffs contend that each of the numbered paragraphs below is a trade secret or a trade secret consisting of a combination of elements. In addition, Plaintiffs contend that each of the numbered paragraphs can be combined with each other and still be considered a trade secret."); Dkt. 493 (Order on Facebook's MSJ) at 7 ("Nor can [Facebook] reasonably dispute that BladeRoom's individual trade secrets each claim certain construction aspects which can be combined using a distinct methodology to form a modular data center."). [redacted] Dkt. 379, Ex. 6 (MSJ Fisher Decl.) at 73, 103, 116, 128-29. Mr. Wagner relies on the opinions of Plaintiffs' technical experts, John Quale and Gerry Brannigan, that without Defendants' use of any of multiple individual Trade Secrets (Trade Secrets 1, 2, 4 and 6) and Combination Trade Secrets (combination of individual Trade Secrets 1 (part "(3)"), 5, 6.2 and 6.4), Emerson could not have met Facebook's technical requirements for the Lulea 2 data center and thus been awarded the contract for it.[3] Ex. 1, Wagner Report ¶¶ 132-135, 507. The technical experts have thus opined that each of these individual and combination Trade Secrets was a technical "lock on the door" to Emerson being awarded the Lulea 2 contract. Just as there can be multiple locks on a door, any one of which prevents the door from opening, there are multiple BladeRoom Trade Secrets or Combination Trade Secrets, any one (or more) of which would have prevented Emerson from entering into the Lulea 2 business with Facebook absent misappropriation. Because with only the exception he notes (i.e., damages relating to the Sub-Zero project) the damages Mr. Wagner calculates flow from the award of the Lulea 2 project to

[3] "Experts routinely rely upon other experts hired by the party they represent for expertise outside of their field." *Apple Inc. v. Motorola, Inc.*, 757 F.3d 1286, 1321 (Fed. Cir. 2014), *overruled on other grounds by Williamson v. Citrix Online, LLC*, 792 F.3d 1339 (Fed. Cir. 2015). "A rule that would exclude Apple's damages evidence simply because it relies upon information from an Apple technical expert is unreasonable and contrary to Rules 702 and 703 and controlling precedent." *Id.* at 1322. *See also GSI Tech.*, 2015 WL 364796, at *3 ("[Economic expert's] consideration of [technical expert's] testimony is proper because economic experts are entitled to consider the opinions of technical experts.").

Emerson instead of to BladeRoom (Ex. 1, Wagner Report ¶¶ 148-149, 156, 169, 203, 216, 258-259, 275, 330, 331-332, 363, 388, 389), misappropriation of any one or more of these "locks on the door" Trade Secrets by Defendants entitles BladeRoom to the full amount of damages flowing from that award of business to Emerson instead of to BladeRoom.[4] Although Defendants may disagree with this conclusion, the objections they raise go to the weight and credibility of the expert testimony, not to admissibility.

Last year, the Federal Circuit affirmed a $90 million trade secret damages award based upon Mr. Wagner's opinion in which he used the exact same methodology he uses here: that misappropriation of any one of multiple trade secrets entitled the plaintiffs to the same total sum of damages he had calculated. In *CardiAQ v. Neovasc*, "the jury awarded one sum of damages for both Trade Secrets 4 and 6, which, given Mr. Wagner's testimony, we take as awarded for each of those trade secrets, but awarded just once to avoid duplication." 708 F. App'x at 666. In his damages testimony,

> Mr. Wagner clearly explained that the total damages figure was $90 million, that the jury could award that figure by finding misappropriation of Trade Secrets 1 and 2 together, or 3, 4, or 6 separately, but that if the jury found misappropriation of multiple trade secrets, it should not add damages for each theory of liability.

Id. at 667 n.7. As the appellate court explained, "[a]t least because the various trade secrets are overlapping, there is no identified inherent inconsistency in testimony that Trade Secret 3 is different from Trade Secrets 4 and 6, but each would solve 50% of the De Backer challenges and is worth the same amount." *Id.* at 667. If the defendant thought Mr. Wagner's opinions in this regard were deficient, the appropriate course of action was cross-examination or submission of countervailing evidence; the defendant "was free to put on evidence that particular trade secrets, such as Trade Secrets 4 and 6 would be worth less than Trade Secret 3 and that Mr. Wagner did not fairly account for that difference." *Id.* Other courts have similarly held that the misappropriation of any one or more of multiple trade secrets could result in the same total

[4] Facebook's misrepresentation of Mr. Wagner's opinions is highlighted by its argument (Motion at 9) that according to Mr. Wagner the same amount of damages results from misappropriation of only Trade Secret 11 as of all the trade secrets. Mr. Wagner does not offer any opinion in his report on damages attributable to Trade Secret 11. *See* Ex. 1, Wagner Report ¶¶ 63-64, 507.

amount of damages. *See, e.g., Iofina, Inc. v. Igor Khalev*, No. CIV-14-1328-M, 2016 WL 6242930, at *3 (W.D. Okla. Oct. 25, 2016) (denying defendants' motion to exclude testimony of plaintiff's damages expert that "the damages are the same if one trade secret is misappropriated or if all trade secrets are misappropriated"; proper course of action was cross-examination of the expert); *W.L. Gore & Assocs., Inc. v. GI Dynamics, Inc.*, 872 F. Supp. 2d 883, 892 (D. Ariz. 2012) (distinguishing *O2* and holding that jury could decide damages or unjust enrichment even though plaintiff's damages expert "report does not break out the particular value of the secrets on a secret-by-secret basis"); *Ice Corp. v. Hamilton Sundstrand Corp.*, 615 F. Supp. 2d 1256, 1264 (D. Kan. 2009) (distinguishing *O2* and holding "Plaintiff's lost profits are an appropriate measure of damages for the misappropriation in this case whether one, two, or all three of the trade secrets were misappropriated."); *see also ATS Prod. Inc. v. Ghiorso*, No. C10-4880 BZ, 2012 WL 253315, at *1 (N.D. Cal. Jan. 26, 2012) (denying motion for judgment as matter of law where jury found most, though not all trade secrets misappropriated, despite defendants' argument that "the damages award is speculative because there was no testimony regarding how to apportion damages on a trade secret-by-trade secret basis.").

Facebook's reliance on *O2* is misplaced because *O2* involved a damages opinion that is the complete opposite of the opinion Mr. Wagner offers here. In that case, the damages expert *assumed* that *all* of the plaintiffs' trade secrets had been misappropriated and calculated *one* unjust enrichment figure based on that assumption. *O2 Micro Int'l Ltd. v. Monolithic Power Sys.*, 399 F. Supp. 2d 1064, 1076 (N.D. Cal. 2005). Since the jury found fewer than *all* of the trade secrets misappropriated, the opinion became moot. *Id.* at 1077.[5]

In contrast, in this case, Mr. Wagner opines:

> In terms of which damages should be awarded for each trade secret, as I describe in Section V.B.2, the lost profits damages calculated relating to the Prineville Sub-Zero project would be awarded for Trade Secret No. 25.2 and/or Facebook's Breach of the NDA related to the Sub-Zero project. Based on the opinions provided by Plaintiffs' technical experts, all the other damages that I've calculated

[5] Notably, *O2* was not an opinion issued on a *Daubert* motion, but instead involved a post-trial motion where plaintiff went forward with its damages theory despite the fact that the court warned the plaintiff against doing so. Accordingly, the court in *O2* clearly considered the expert's testimony *admissible*, despite its pre-trial misgivings about it. 399 F. Supp. 2d at 1076.

> (excluding the lost profits relating to Prineville Sub-Zero project) would be awarded for Trade Secret No. 1 and / or any of the combination trade secrets.

Ex. 1, Wagner Report ¶ 507; *see also id.* ¶¶ 63-64 (identifying Plaintiffs' asserted individual and Combination Trade Secrets). In other words, with respect to the Sub-Zero project, Mr. Wagner's opinion is based only on Trade Secret 25.2 and/or Facebook's Breach of the NDA related to the Sub-Zero project.[6] With respect to all other damages he calculated -- including damages based on the Lulea 2 project -- Mr. Wagner's opinion is that if the jury finds *any one* of Trade Secret 1 or *any* of the Combination Trade Secrets misappropriated (or the subject of a breach of the Defendants' nondisclosure agreements with BladeRoom), Plaintiffs are entitled to *all* of those damages. The damages are not additive, i.e., if the jury finds that *both* Trade Secret 1 and one of the combination trade secrets is misappropriated, the amount of damages is not doubled. Rather, Trade Secret 1 and each combination trade secret is *alone* a sufficient basis for an award of the entire amount of damages. This is the complete opposite of the opinion offered by the damages expert in *O2*.[7]

Ironically, it is Facebook's damages expert, [redacted]

[6] Facebook appears to acknowledge in Footnote 3 of its Motion that its "failure to apportion" argument does not apply to Mr. Wagner's calculated damages for the Sub-Zero project.

[7] The other cases Facebook relies on are also inapposite. Neither deals with a damages expert opining that misappropriation of any one of multiple trade secrets resulted in the same amount of damages. *Mattel, Inc. v. MGA Entm't, Inc.*, 782 F. Supp. 2d 911, 1046 (C.D. Cal. 2011); *Mgmt. & Eng'g Techs. Int'l, Inc. v. Info. Sys. Support, Inc.*, 490 F. App'x 30, 34 (9th Cir. 2012).

Ex. 3, Ludington at 116:13-118:4; Dkt. 529-15 (Ludington Report) ¶ 223. Unlike Facebook's expert, [redacted] Mr. Wagner followed the approach to allocation that has been tested and affirmed on appeal by the Federal Circuit in *CardiAQ* and approved in many other cases. Nothing further is required.

2. It is *Defendants'* Burden -- Not Plaintiffs' -- To Account for the Value of Any Non-Trade Secret Material or Contributions Facebook or Emerson Made to Lulea 2.

Facebook argues that the Court should exclude Mr. Wagner's opinion in its entirety because he allegedly "failed to account for the value of Facebook's existing data center technology, and any non-secret or non-confidential information included in Plaintiffs' offerings to Facebook." Motion at 9. Facebook is wrong for multiple reasons.

First*,** Facebook argues that in calculating ***Plaintiffs' lost profits, Mr. Wagner must deduct from the total revenues Plaintiffs would have received for Lulea 2 the revenue attributable to any non-trade secret material that would have been included in the project; i.e., Mr. Wagner must "apportion" for non-trade secret material. Motion at 9. Facebook cites no authority in support of this proposition, and it does not make sense as a matter of logic. If but-for a defendant's misappropriation a plaintiff would have made a sale of its product, then the plaintiff would have reaped the entire revenue (and thus profit) for that product, not just a specific portion embodying its trade secrets. The plaintiff is entitled to its entire lost profit on that product regardless of what portion of it is non-trade secret material. *See Ice Corp.*, 615 F. Supp. 2d at 1264 ("Plaintiff's lost profits are an appropriate measure of damages for the misappropriation in this case whether one, two, or all three of the trade secrets were misappropriated.").

Second*,** Facebook argues that in calculating ***Defendants' unjust enrichment, Mr. Wagner must also apportion for non-trade secret material. Motion at 9-10. But it is not *Plaintiffs'* burden to account for the value of non-trade secret material or other contributions Facebook or Emerson made to the modular technology used to construct Lulea 2 in calculating *Defendants' unjust enrichment* -- it is ***Defendants' burden*** to do that. Restatement (Third) of Unfair Competition § 45 comment f (1995) ("The plaintiff has the burden of establishing the defendant's sales; the defendant has the burden of establishing *any portion of the sales not attributable to the trade*

secret and any expenses to be deducted in determining net profits." (emphasis added)); *see also Micro Lithography Inc. v. Inko Indus. Inc.*, 20 U.S.P.Q.2d 1347, 1352 (Cal. App. 6th Dist. 1991) ("Instruction no. 37 also correctly identified Inko's burden of showing that part of its profits were attributable to features other than those misappropriated from MLI's trade secret."); *Cartel Asset Mgmt. v. Ocwen Fin. Corp.*, 249 F. App'x 63, 79 (10th Cir. 2007) (unpublished); *Injection Research Specialists, Inc. v. Polaris Indus., L.P.*, 168 F.3d 1320, *12 (Fed. Cir. 1998) (unpublished); *USM Corp. v. Marson Fastener Corp.*, 392 Mass. 334, 338, (1984); *Petters v. Williamson & Assocs., Inc.*, 151 Wash. App. 154, 164–65 (2009); *Eagle Harbor Holdings, LLC v. Ford Motor Co.*, No. C11-5503 BHS, 2015 WL 574911, at *3 (W.D. Wash. Feb. 11, 2015); *Lockheed Martin Corp. v. L-3 Commc'ns Integrated Sys., L.P.*, No. 1:05-CV-902-CAP, 2009 WL 8435667, at *3 (N.D. Ga. Apr. 9, 2009). Facebook has failed to carry its burden. There is no analysis identifying non-trade secret contributions or expenses in its damages expert's report *at all*. Dkt. 529-15 (Ludington Report).

Facebook cannot cure its own failure by attempting to improperly shift its burden to Plaintiffs and Mr. Wagner when Facebook is in the best position to explain what portion (if any) of its cost and time savings at Lulea 2 is attributable to anything other than Plaintiffs' Trade Secrets and confidential information. Facebook relies, without merit, on *MSC Software Corp. v. Altair Eng'g, Inc.*, No. CV 07-12807, 2015 WL 13273227, at *20 (E.D. Mich. Nov. 9, 2015); *Alcatel USA, Inc. v. Cisco Sys.*, Inc., 239 F. Supp. 2d 660, 671 (E.D. Tex. 2002); and *KW Plastics v. U.S. Can Co.*, 131 F. Supp. 2d 1289, 1295 (M.D. Ala. 2001), none of which support the burden shifting it attempts here. Notably, *MSC* and *KW* both involved circumstances where there was no "but for" evidence supporting the damages expert's opinion. *KW* actually supports Mr. Wagner's opinions, as it faulted the damages expert in that case for failing to opine "whether KW Plastics' use of U.S. Can trade secrets caused KW Plastics to gain the Behr account," from which the defendant's unjust enrichment allegedly flowed. 131 F. Supp. 2d at 1295. *MSC* concerned software products and the special master concluded, relying on patent damages law and the entire market value rule, that the expert should have determined whether the trade secrets drove demand for the products. 2015 WL 13273227, at *18-20. Here, in contrast to both *KW* and *MSC*,

Plaintiffs' technical experts *expressly opined* that the asserted Trade Secrets were technical locks on the door to Emerson being awarded the Lulea 2 business, and Mr. Wagner relied on those opinions in arriving at his conclusions on the amount of unjust enrichment. *Alcatel* is also unavailing because it concerned a reasonable royalty based on essentially the entire purchase price of a company that had misappropriated the trade secrets. None of Mr. Wagner's opinion is based on such a theory.

Finally, even if it was Plaintiffs' burden to account for non-trade secret material in determining *Defendants' unjust enrichment*, that would not render Mr. Wagner's opinion inadmissible, since it is for the jury to determine whether the full amount of the Defendants' unjust enrichment is attributable to the Trade Secrets. *Quintel Tech. Ltd. v. Huawei Techs. USA, Inc.*, No. 4:15-CV-307, 2018 WL 626355, at *7 (E.D. Tex. Jan. 30, 2018) ("The Court finds that [plaintiff's damages expert] failure to apportion is not fatal to his opinion since such a determination is for the jury.").

3. Mr. Wagner's Opinions In This Case Should Not Be Excluded Based On The Court's Decision in *Waymo v. Uber*.

Both Facebook and Emerson rely heavily on the court's decision to exclude Mr. Wagner's opinions in *Waymo v. Uber*. *Waymo* presented fundamentally different and more challenging factual and evidentiary circumstances than those involved here because it involved two companies seeking to *create a new market* for autonomous-driving cars. Although the plaintiff and defendant in *Waymo* were huge companies, the market for the autonomous-driving cars at issue was *unestablished*. Unsurprisingly, in *Waymo* lost profits were not at issue, only unjust enrichment based on Uber's expected gains from the misappropriation of the yet-untested technology.

In sharp contrast, there is no dispute in this case that as of the 2011 timeframe when Plaintiffs began their separate discussions with Facebook and Emerson, and through the present, there was not only an *existing*, but a *very large market* for constructing data centers. Moreover, unlike in *Waymo,* BladeRoom already had *real* products that it had sold to *real* customers for *real* money. And critically for the unjust enrichment analysis, unlike in *Waymo*, BladeRoom's Trade Secrets were stolen and used in connection with a specific and real project – Lulea 2 - a project

announced, designed and for which construction had begun by Facebook prior to the time of this litigation. Finally, there is also no dispute that BladeRoom has continued to sell its products to the present, including [redacted] Ex. 2, Godden 30(b)(6) Dep. at 353:23-354:10.

4. Mr. Wagner's Opinion Concerning Facebook's Unjust Enrichment Due to Cost Savings Is Admissible.

a. Mr. Wagner Properly Relies On [redacted] Cost Savings.

Facebook argues that Mr. Wagner improperly relies on evidence [redacted] to determine the best estimate of Facebook's cost savings. Motion at 11. Putting aside the merit of Facebook's arguments to minimize the reliability of [redacted], at best, Facebook's argument to exclude Mr. Wagner's opinion on cost savings raises questions solely about the weight of Mr. Wagner's opinions and fails to raise any questions about its admissibility. Even the court in *Waymo*, the opinion Facebook itself relies so heavily on, concludes that a trade secret defendant's internal projections of future profits or cost savings may be used to prove unjust enrichment. *Waymo LLC v. Uber Techs., Inc.*, No. C 17-00939 WHA, 2017 WL 5148390, at *2, *5-*6 (N.D. Cal. Nov. 6, 2017) (allowing Uber's projections of future profits and saved development costs to come into evidence to prove Uber's unjust enrichment).

Nothing in Mr. Wagner's deposition testimony Facebook cites at pages 11-12 of its Motion reveals anything other than what Mr. Wagner stated in his report: "[redacted]" Ex. 1, Wagner Report ¶ 329. In other words, the only way to determine with absolute certainty whether Facebook ultimately saved money using modular construction techniques at Lulea 2 would have been for Facebook to build both a stick built data center and a modular data center with all the

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same capabilities at Lulea 2 at the same time and compare the costs.[8] But contrary to Facebook's suggestion, the law does not require absolute certainty; jurors are allowed to decide based on the evidence available. "There is no standard formula to measure [unjust enrichment]. … Recovery [of unjust enrichment] is not prohibited just because the benefit cannot be precisely measured." *Ajaxo Inc. v. E*Trade Fin. Corp.*, 187 Cal. App. 4th 1295, 1305 (2010) (internal citations omitted). Because Facebook did not build both a stick-built and modular data center at Lulea 2, Mr. Wagner looked at other reliable ways to *estimate* what the cost savings were, including [redacted] Although Facebook now seeks to distance itself from [redacted] about cost savings, just because there is no document that Facebook admits shows its actual cost savings at Lulea 2 does not render Mr. Wagner's opinion that the *best estimate* of those actual costs savings is [redacted] In fact, Mr. Wagner notes that "[redacted]" Ex. 1 Wagner Report ¶ 329 (emphasis added). In other words, the fact that [redacted]

Facebook appears to argue both that Mr. Wagner cannot rely on [redacted] as a matter of law and that Mr. Wagner did not consider Facebook's actual costs of construction of Lulea 2. Motion at 11-12. Neither argument is correct. First, there is no rule against relying on [redacted] costs savings since "the wrongdoer should not benefit from hindsight perspective that its gamble of misappropriating the trade secret turned

[8] Mr. Wagner also points out that many Facebook witnesses (echoed by Facebook in its brief) seem to think that the proper cost comparison to determine whether Facebook saved money at Lulea 2 is [redacted] Ex. 1, Wagner Report ¶¶ 324, 328. But Mr. Wagner explains the reasons why that is not the proper comparison, including, for example, that there is [redacted]" *Id.* ¶ 324.

out not to be so profitable." *GlobeRanger Corp. v. Software AG United States of Am., Inc.*, 836 F.3d 477, 500 (5th Cir. 2016) (affirming award of unjust enrichment based on misappropriator's cost savings); *S. Jon Kreedman & Co. v. Meyers Bros. Parking-W. Corp.*, 58 Cal. App. 3d 173, 185, (1976) ("We are aware of no case…involving the determination of damages in a civil case in which the use of projections has been held to be impermissible. Indeed, the use of such projections is…routine in calculating…the present value of future damages."); *Allied Erecting & Dismantling Co. v. Genesis Equip. & Mfg., Inc.*, 511 F. App'x 398, 401–02 (6th Cir. 2013) (applying Ohio law) (affirming award of trade secret unjust enrichment based on defendant's profit margin projection for product that used trade secrets).[9]

As for Facebook's contention that Mr. Wagner did not consider Facebook's reported actual costs at Lulea 2, this is simply false. Ex. 1, Wagner Report ¶ 329 and n.726 ("[redacted]").

The fact that Mr. Wagner did not have the data to perform a calculation as to whether Facebook would have saved money using *BladeRoom's* proposal for Lulea 2 has no relevance to whether Facebook achieved costs savings at Lulea 2 by stealing BladeRoom's technology and using another vendor to build an imitation of BladeRoom's Armature data center. At most it is a subject for cross-examination, not a basis for excluding Mr. Wagner's opinion. *Alaska Rent-A-Car*, 738 F.3d at 970 (defendant's complaint that plaintiff's damages expert used the wrong "comparator" went "to the weight of the testimony and its credibility, not its admissibility.").

[redacted] Ex. 1, Wagner Report ¶ 325; Ex. 5

[9] Facebook's citation of *Litton Sys., Inc. v. Ssangyong Cement Indus. Co.*, 107 F.3d 30 (Fed. Cir. 1997) (unpublished) and *Ajaxo Inc. v. E*Trade Grp., Inc.*, 135 Cal. App. 4th 21 (2005) are inapposite to the case at hand. The damages award at issue in *Litton* was based on the misappropriator's expected future "profit stream," not, as here, its cost savings, and, as with *Ajaxo*, it says nothing about what evidence may be used to determine a defendant's cost savings. 107 F.3d 30 at *7.

(FB00195935); Dkt. 529-14 (FB00065046). There could hardly be a more relevant and reliable document to the cost savings analysis. At best, Facebook's argument attempting to undermine the value [redacted] goes to the weight of the evidence, not admissibility. *Alaska Rent-A-Car*, 738 F.3d at 969; *GSI Tech*, 2015 WL 364796 at *4).

b. Mr. Wagner's Testimony Will Help the Jury to Understand the Evidence of Facebook's Cost Savings.

Facebook's remaining criticism of Mr. Wagner's opinion regarding cost savings is based on the incorrect assertion that Mr. Wagner's opinion on Facebook's unjust enrichment due to cost savings "consist[s] entirely of a value taken from [redacted]" and that his testimony on this issue should be excluded because it does not involve expertise or specialized knowledge.[10] Motion at 10 (emphasis in original).[11] Facebook's characterization of the cost savings analysis performed by Mr. Wagner is inaccurate. Mr. Wagner considers and analyzes a broad range of evidence relating to the cost savings Facebook achieved due to its use of the accused RDDC technology at Lulea 2 before concluding that [redacted] is the best estimate of those savings. Ex. 1, Wagner Report ¶¶ 324-330. He considers a number of different documents and performs multiple calculations as part of that analysis. *Id.* As just one example, Mr. Wagner considers "[redacted]" *Id.* ¶ 326 n.718. To translate that percentage into dollars, Mr.

[10] Facebook concedes (Motion at 10:15-18) that the *theory* that it benefitted by [redacted] in cost savings unjust enrichment may be proven to the jury with [redacted]. It just doesn't want Mr. Wagner to be able to testify about the expert analysis he performed to reach his opinion that the [redacted] figure is the best measure of Facebook's cost savings.

[11] Facebook cites Judge Posner's decision in *Apple, Inc. v. Motorola, Inc.*, No. 1:11-CV-08540, 2012 WL 1959560, at *3 (N.D. Ill. May 22, 2012), in support of its argument that "Wagner's proposed testimony…is not expert testimony but fact testimony…." What Facebook fails to mention is that although Motorola chose not to appeal Judge Posner's ruling regarding its expert's (Mr. Wagner's) opinion in that case, Apple *did* appeal the exclusion of its own expert (Brian Napper, Emerson's damages expert in this case) that Judge Posner had based on the same rationale as his exclusion of Mr. Wagner. 2012 WL 1959560 at *9 ("The disabling objection [for Napper] is similar to the objection to Wagner's damages estimate for the '002: in both cases the party's damages expert obtained the essential information . . . from an agent of the party rather than from a disinterested source."). The Federal Circuit *reversed* Judge Posner's ruling based on this rationale: "The district court's exclusion of Napper's proposed testimony was erroneous." *Apple Inc. v. Motorola, Inc.*, 757 F.3d at 1321.

Wagner analyzes another document (Ex. 4, FB00058383) to determine that [redacted]" Ex. 1, Wagner Report ¶ 326 n.719.

There can be no question that Mr. Wagner performs a comparative analysis of cost savings evidence that uses his expertise and provides helpful guidance to a jury. Although Facebook may complain that Mr. Wagner's actual calculations regarding cost savings are simple arithmetic, courts have repeatedly recognized that there is no threshold level of mathematical complexity that must be met at a *Daubert* proceeding by an expert witness' opinions. *Microsoft Corp. v. Motorola, Inc.*, No. C10-1823 JLR, 2013 WL 4008822, at *6 (W.D. Wash. Aug. 5, 2013) (recognizing there is no "implicit requirement in Federal Rule of Evidence 702 that the proffered expert make complicated mathematical calculations" and admitting accounting expert's testimony where expert's basic role was to "compile the costs and do the math" using general accounting principles); *PixArt Imaging, Inc. v. Avago Tech. Gen. IP (Singapore) Pte. Ltd.*, No. C 10-00544 JW, 2011 WL 5417090, at *5 (N.D. Cal. Oct. 27, 2011) (admitting expert testimony on calculation of damages as helpful to the trier of fact despite party's objection that the testimony offered only "basic mathematical calculations"). Given the sheer volume of financial information at issue in this case, having the assistance of an expert to explain the accounting will be extremely helpful. Moreover, because the evidence Mr. Wagner considers is financial in nature, a lay jury will benefit from Mr. Wagner's experience and expertise in analyzing the available evidence on cost savings and translating that evidence into terms that they will understand in order to allow them to determine what the best measure of Facebook's unjust enrichment due to cost savings is. His analysis, which "will help the trier of fact to understand the evidence [and] determine a fact in issue": the appropriate amount of Facebook's unjust cost savings, should be allowed. Fed. R. Evid. 702(a).

5. Mr. Wagner's Opinion Concerning Facebook's Unjust Enrichment Due to Time Savings Is Also Admissible.

Facebook next contends that Mr. Wagner's opinion concerning Facebook's unjust

enrichment due to time savings achieved by using RDDC at Lulea 2 should be excluded. Motion at 13-14. Facebook does not challenge that time savings would be a correct measure of its unjust enrichment, but rather claims it is incorrect to use [redacted] during the time saved in the construction of Lulea 2 as the estimate.

Facebook reprises its complaints about Mr. Wagner's reliance on [redacted] time savings, and those complaints should be rejected for the same reasons set forth above. Further, Mr. Wagner does not rely only on [redacted] time savings, but also on documents showing, and testimony given by Emerson's 30(b)(6) witness about [redacted]. Ex. 1, Wagner Report ¶ 334 ("[redacted]").[12] It also relies on testimony given by Facebook's own 30(b)(6) witness. *Id.* ¶ 341 ("[redacted].").

Facebook next argues that Mr. Wagner's opinion regarding the value of time savings achieved by Facebook using RDDC at Lulea 2 is based on an "unsupported assumption" that but-for the time savings, Facebook [redacted]. Motion at 13. But Facebook's argument is belied by the substantial evidence Mr. Wagner cites in his report in support of this assumption, including the testimony of Facebook's own 30(b)(6) witness that [redacted]. Ex. 1, Wagner Report ¶ 344 ("[redacted]")[13] Facebook's citation of what it contends is countervailing evidence (its own damages expert's report, which is not evidence) that [redacted]

[12] The presentation Mr. Wilcox discusses appears in Figure 23 page 135 of Mr. Wagner's report.
[13] Mr. Wagner's report also cites evidence showing that [redacted] *See* Ex. 1, Wagner Report ¶ 348 and Fig. 27, p. 140.

[redacted][14] simply highlights that it disputes *causation* of this time savings unjust enrichment. But causation is a jury question, not an issue for the Court to decide on a *Daubert* motion. *Raven H. v. Gamette*, 157 Cal. App. 4th 1017, 1029 (2007); *Asahi* , 222 Cal. App. 4th at 972.

6. Mr. Wagner's Future Lost Profits Opinion Is Admissible.

Facebook contends that Mr. Wagner's future lost profits opinion should be excluded as speculative because it is allegedly based on "unreliable methodology" (which it never identifies) applied to three purportedly "flawed assumptions." Motion at 14. Mr. Wagner's assumptions are not flawed, and the law does not support Facebook's arguments.

Mr. Wagner's future lost profits opinion is based on detailed analysis of the evidence in this case. Mr. Wagner starts his calculation of BladeRoom's future lost profits opinion with BladeRoom's *actual* growth rate of [redacted] over the 2011-2015 period. Ex. 1, Wagner Report ¶ 285. Including the incremental (i.e., additional) revenues BladeRoom would have received in the but-for world for the Lulea 2 data center in 2015 (which is only *half* of the total revenues BladeRoom would have received for the project, since the other half would have been received in 2014) had Defendants not misappropriated its Trade Secrets, brings *that* growth rate up to [redacted]. *Id.* ¶ 285, Schedule 2.7. That is, the *increase* to BladeRoom's *actual* growth rate if half of the Lulea 2 revenues were received in 2015 is [redacted]; he is not going from [redacted]. Mr. Wagner then tests that [redacted] growth rate against numerous actual and projected growth rates for the data center market and sales of not only BladeRoom, but also Facebook, Emerson, Platinum and third party industry publications. *Id.* ¶ 288 (BladeRoom benchmarks, ranging from [redacted]); ¶¶ 289-290 (Emerson benchmarks, ranging from [redacted]); ¶ 291 (Facebook [redacted]); ¶¶ 292-293 (industry publication benchmarks, ranging from 28-30.1%); ¶¶ 294-298 (Platinum benchmarks, ranging from [redacted]). Emerson's damages expert (Mr. Napper) credits the growth rates of the same industry publication (451 Research) as Mr. Wagner relies on, but thinks that the lower growth

[14] Facebook's citation to [redacted].

rates (ranging from 15.7%-22.4%) from reports published in later years are more reliable. Dkt. 523-14 (Napper Report) at 61-63. Mr. Napper also credits another of the other third party industry publications Mr. Wagner relies on, Beige. *Id.* at 16. Mr. Wagner applies the [redacted] growth rate to the years 2016-2020 to determine BladeRoom's incremental revenues for those years. *Id.* ¶ 285, p. 117, Fig. 17. Mr. Wagner then divides the future sales by region and deducts BladeRoom's cost of sales, incremental operating expenses, and royalties to arrive at his calculation of BladeRoom's lost profits for those years, which he discounts back to the date of trial. Ex. 1, Wagner Report ¶¶ 300-320. Facebook's atacks on Mr. Wagner's analysis are misplaced.

First, citing out-of-context snippets of Mr. Wagner's deposition, Facebook argues that Mr. Wagner does not quantify the effect of having sold to a marquee customer like Facebook, that he admits that there is no evidence that [redacted], and -- citing no authority in support of this proposition -- that this somehow translates into a "speculative benefit" being incorporated into his future lost profits damages calculation. Motion at 14-15. Contrary to Facebook's arguments, Mr. Wagner testified that he *did* quantify the marquee client enhancement "in my future damages" and that the enhancement was reflected in his [redacted] growth rate for BladeRoom in that calculation. Ex. 6, Wagner Dep. at 193:13-194:4; *see also id.* at 186:14-188:3. He also explained why it did not matter if Emerson had received [redacted] " *Id.* at 168:2-169:4. Mr. Wagner's testimony about the "marquee customer" effect details the host of evidence -- document after document, witness after witness from the Defendants -- admitting that having delivered Lulea 2 to Facebook opened more opportunities to Emerson and [redacted]. Ex. 1, Wagner Report ¶¶ 203-216, 410-428. Had BladeRoom been awarded the Lulea 2 contract, there would not have been this litigation casting a shadow over its technology, it could have performed better than Emerson did at Lulea 2, and as a consequence gotten more work from Facebook and close more

deals from other customers. The fact that [redacted] is at most a point Facebook might bring out on cross-examination of Mr. Wagner, but it does not render his opinion inadmissible.

Second, Facebook argues that a plaintiff or its damages expert must identify specific missed business opportunities in order to be entitled to future lost profits. Motion at 15-16. Facebook cites no legal authority in support of this proposition,[15] and the law in this Circuit and in California does not require such a showing, but rather allows lost profits to be based on projected growth rates. *Tri-Tron Int'l v. Velto*, 525 F.2d 432, 437 (9th Cir. 1975) (affirming award of lost profits to trade secret plaintiff: "Although net profits are not shown, opinion evidence was offered and received on the sales and the cost of sales by appellee with a projection of an assumed increase in gross profits over a period of five years."); *Clark v. Bunker*, 453 F.2d 1006, 1011 (9th Cir. 1972) ("Absent some ground for arriving at a different result, it was reasonable for the court to conclude, as it did, that if appellants had not appropriated appellee's plan, appellee would have made all of the 'prepaid' plan sales in the area."); *S. Jon Kreedman*, 58 Cal. App. 3d at 185 ("We are aware of no case…involving the determination of damages in a civil case in which the use of projections has been held to be impermissible. Indeed, the use of such projections is…routine in calculating, for example, the present value of future damages."); *Asahi*, 222 Cal. App. 4th at 969 (affirming award of lost profits based on future events that had not yet occurred -- FDA approval of the drug in question -- and projections of the price and market share of that product); *Brandon & Tibbs v. George Kevorkian Accountancy Corp.*, 226 Cal. App. 3d 442, 459 (1990) (affirming award of lost profits based on expert testimony projecting 5 years of income and expenses); *see*

[15] Facebook's cited law is inapposite. *Sargon Enters., Inc. v. Univ. of S. Cal.*, 55 Cal. 4th 747 (2012), concerned a lost profits expert opinion based on a market share approach, which Mr. Wagner does not apply here. *Mattel,* 782 F. Supp. 2d at 1021-22, concerns the "concrete loss" needed to prove a RICO claim under a federal statute, not lost profits for trade secret misappropriation. *PSM Holding Corp. v. Nat'l Farm Fin. Corp.*, No. CV 05-08891 MMM, 2013 WL 12080306, at * 26-27 (C.D. Cal. Oct. 8, 2013), is about the proper amount of *restitution* to be returned to a defendant after its business was transferred to the plaintiff as a result of its loss in a breach of contract action and related bankruptcy proceedings when the Ninth Circuit reversed the trial court judgment. *Oracle Am., Inc. v. Google Inc.*, No. C 10-03561 WHA, 2016 WL 2342365, at *7-8 (N.D. Cal. May 3, 2016), actually finds that lost profits *can* be based on forecasts. In that copyright case, Judge Alsup only disallowed the expert from testifying about revenue growth beyond the years listed on the forecast at issue.

also Brighton Collectible, LLC v. Believe Prod., Inc., No. 2:15-cv-00579-CAS (Asx), 2017 WL 440255, at **10-11 (C.D. Cal. Jan. 30, 2017) ("Generally, an estimate of lost profits must be 'reasonably certain' . . . To demonstrate that the amount of lost profits is 'reasonably certain,' a plaintiff need only provide, 'reasonable basis for computation.'" (citation omitted)) (denying summary judgment of no lost profits even though Plaintiff did not present any evidence that it lost "any particular sale due to defendant's alleged [copyright] infringement"); *see also Lundell Mfg. Co., Inc. v. Am. Broad. Cos., Inc.*, 98 F.3d 351, 365 (8th Cir. 1996) (applying Iowa law; holding that a plaintiff need not identify specific lost sales to recover lost profits); *Ice Corp.*, 615 F. Supp. 2d at 1261 (relying on trade secret damages expert testimony of lost profits based on projections); *Quintel*, 2018 WL 626355 at *6 (denying motion to exclude testimony of damages expert who had based trade secret lost profits calculation on plaintiffs' sales projections); Restatement (Third) of Unfair Competition § 45 Comment e (1995) ("The plaintiff may also prove lost profits through proof of a general decline in sales or a *disruption of business growth* following the commencement of use by the defendant…." (emphasis added).).

Further, Mr. Wagner *did* identify a number of specific lost opportunities for BladeRoom, both in his report and during his deposition. Ex. 1, Wagner Report ¶ 204 (identifying specific lost opportunities of [redacted]), ¶ 215 (Emerson admissions that [redacted]). Ex. 7, Wilcox 30(b)(6) Dep. at 224:12-225:14.

Third, Facebook argues that Mr. Wagner mistakenly assumes that Plaintiffs' lost profits are not limited to "[redacted]" data centers. Motion at 16. Facebook is implicitly making here the same arguments the Court has already rejected: namely (1) that Defendants' liability for misappropriation of Plaintiffs' Trade Secrets and violation of their NDAs (and thus Plaintiffs' lost profits) are predicated on a patent-style all-elements infringement analysis when they are not (*see* Dkt. 493 at 21-24), and (2) that Plaintiffs' confidential information under their NDAs with Plaintiffs are co-extensive with their Trade Secrets, when they are not (Dkt. 512 at 1-3). The

Court should reject them again as irrelevant to the question of whether Mr. Wagner's future lost profits opinion is admissible. Finally, it is odd that Facebook complains about Mr. Wagner's division of Plaintiffs' lost sales between BladeRoom USA ("BRUSA") and Plaintiff BladeRoom Group Limited ("BRG"), as this only serves to *lower* Plaintiffs' lost profits, [redacted]. That is, [redacted]. Ex. 1, Wagner Report at p. 128, Fig. 20.

7. Mr. Wagner's Margin Improvement Opinions Are Admissible.

Facebook faults Mr. Wagner for relying on [redacted] cost savings and time savings, but then reverses course and argues that Wagner *should only* rely on BladeRoom's cost projections in his margin improvement opinions. Motion at 17. That inconsistency highlights that the points made here at most go to the weight of Mr. Wagner's opinion about BladeRoom's margin improvement, not its admissibility, since they deal with the evidence he is relying on. *Hangarter,* 373 F.3d at 1017 n.14; *GSI Tech*, 2015 WL 364796 at *4. Mr. Wagner explicitly considered Facebook's argument that a larger data center may lead to a different margin improvement, and found that [redacted]. Ex. 1, Wagner Report ¶ 256. Nevertheless, Mr. Wagner applied the lower average margin improvement of [redacted] across all projects in his lost profits calculations.

B. <u>Facebook's Motion to Exclude Mike Andrea's Testimony Should Be Denied.</u>

Facebook makes a number of arguments seeking exclusion of the testimony of Plaintiffs' data center industry expert, Mike Andrea. Motion at 17-23. These arguments are addressed in Section IV.D. of Plaintiffs' contemporaneously filed Opposition to Emerson's Motion to Exclude Expert Testimony, which also seeks exclusion of Mr. Andrea's testimony on similar grounds. Plaintiffs' incorporate by reference herein their arguments set forth therein.

C. <u>Facebook's Motion to Exclude John Quale's and Gerry Brannigan's Testimony Should Be Denied.</u>

Facebook argues that the testimony of Plaintiffs' construction expert, John Quale, and cooling expert, Gerry Brannigan, should also be excluded. Motion at 23-24. These arguments are

addressed in Sections IV.A-C. of Plaintiffs' contemporaneously filed Opposition to Emerson's Motion to Exclude Expert Testimony, which also seeks exclusion of Messrs. Quale's and Brannigan's testimony on similar grounds. Plaintiffs' incorporate by reference herein their arguments set forth therein.

D. Plaintiffs' Experts' Reply Reports Are Appropriate and the Experts Should Be Allowed to Testify About Their Contents.

Defendants ask the Court to "exclude"[16] Plaintiffs' reply reports. Facebook Motion at 24-25; Emerson Motion at 18-20. Emerson goes further – apparently seeking to preclude Plaintiffs' experts from testifying regarding the opinions set forth in their reply reports. Emerson Motion at 18:10-11. Plaintiffs' experts should be allowed to testify on the topics raised in these reports because (a) they do not introduce new opening argument, but rather respond to issues raised for the first time in Defendants' expert's rebuttal reports, to which they had no prior opportunity to respond, (b) they remain within the scope of the experts' opening and rebuttal reports, and (c) Defendants will suffer no harm or prejudice.

Notably, Defendants do not address the content of Plaintiffs' short reply reports. Specifically:

- **Mike Andrea**'s report included 11 pages of text and images replying to mischaracterizations Defendants' data center experts (Phil Isaak and Chris Goodier) made in their rebuttal reports concerning two data center references which Andrea had addressed in prior reports: HP Butterfly and Colt. *See* Ex. 10, Andrea Reply Report at 4-10. Mr. Andrea also responded to Mr. Isaak's mischaracterization in his rebuttal report of the usage of certain terms (i.e., "chassis") in the data center industry. *Id*. at 11.
- **Gerry Brannigan**'s four page report addressed Defendants' air handling experts' (William Acorn and Alfonso Ortega) dismissal of the significant differences between BladeRoom's Volumetric and Armature products and attempt to treat them as nearly the same in their rebuttal reports. Mr. Brannigan responded to arguments in Acorn's and Ortega's rebuttal reports to clarify the technical similarities in Defendants' attempts to copy Plaintiffs' trade secrets. *See* Ex. 11, Brannigan Reply Report.
- **John Quale**'s four and a half page report addressed and corrected Facebook's expert Goodier's mistaken suggestion that BladeRoom's Volumetric and Armature products are the same. Mr. Quale's reply also addressed Mr. Goodier's factually incorrect and unsupportable claim in his rebuttal report that [redacted]

[16] To be clear, Plaintiffs do not seek to submit the reply reports as evidence to the jury since expert reports are hearsay and should not be admitted into evidence submitted to the jury.

[redacted] Further, Mr. Quale addressed Mr. Goodier and Emerson's expert Makarand Hastak ignoring in their rebuttal reports how the designs and concepts leading up to Lulea 2's construction show that what Defendants created was substantially derived from Plaintiffs' technology. *See* Ex. 12, Quale Reply Report.

- **Mike Wagner**'s report consisted of six pages, all of which are schedules adjusting for errors in Emerson damages expert Brian Napper's unjust enrichment apportionment analysis in his rebuttal report, to which Mr. Wagner expressly reserved his right to respond in his opening report since it is Defendants' burden to prove any deductible expenses or apportionment in calculating their unjust enrichment. Ex. 13, Wagner Reply Report; Ex. 1 Wagner Report ¶ 166; *see also* Section A.2, above.

The limited material provided in the reply reports directly responded to arguments made by Defendants' experts *for the first time* in their rebuttal reports to which Plaintiffs' experts could not have responded to in their opening reports. This is exactly the type of rebuttal Federal Rule of Civil Procedure 26(a)(2)(D)(ii) contemplates (requiring disclosure "within 30 days after the other party's disclosure" "if the evidence is intended solely to contradict or rebut evidence on the same subject matter identified by another party under Rule 26(a)(2)(B) or (C)").

The cases Defendants cite in their motions support that reply reports are allowable under the circumstances here and only strike replies and supplemental reports when provided by *new experts*, or when providing *entirely new analysis*. That is not the case here. Facebook's reliance on *Oracle Am., Inc. v. Google Inc.*, No. C 10-03561 WHA, 2011 WL 5572835, at *1 (N.D. Cal. Nov. 15, 2011), is illustrative. In that case, the court allowed certain reply reports, and only excluded reply reports submitted by a *new* expert who had not previously opined in the case. In contrast, Plaintiffs' experts each submitted opening reports, and their reply reports were simply responding to discrete matters they could not have addressed before.

Emerson argues that the reply reports are "unauthorized and inadmissible" because the Court's scheduling orders did not expressly contemplate or authorize their submission, and because Rule 26 "does not typically permit parties to submit reports 'in reply' to rebuttal reports."[17] All three cases Emerson cites in support of this point present factual scenarios wildly

[17] As set forth in the August 17, 2017 Joint Case Management Statement (Dkt. 339), precisely to avoid Defendants' attempts to claim that Plaintiffs' experts should be precluded from responding to issues raised for the first time in Defendants' rebuttal reports, Plaintiffs wrote, "There is

different from the instant case that fail to support and indeed contradict Emerson's position. *See Cadence Pharm., Inc. v. Fresenius Kabi USA, LLC*, No. 13-CV-00139-DMS (MDD), 2014 WL 12139076, at *2 (S.D. Cal. June 3, 2014) (as in *Oracle*, striking a reply report submitted from *an entirely new expert* who had issued no prior report in the case); *see also Shinsedai Co. v. Nintendo Co., Ltd.*, No. 11-CV-2799-CAB (MDD), 2014 WL 11955595, at *2 (S.D. Cal. June 10, 2014) (striking one section from a "supplemental expert report" when even the expert agreed he was "replacing" his prior analysis, and ruling that providing "completely new analysis, with different source code references" prejudiced the defendants); see also *Oracle*, 2011 WL 5572835, discussed above.

The reply reports are also proper because Defendants had the opportunity to ask each expert about his reply report. For each expert, "[i]t is enough that [he] revealed his opinions at his deposition and that the [defendant's] attorney had the opportunity to question him on them." *May v. San Mateo Cty.*, No. 16-CV-00252-LB, 2017 WL 2305160, at *5 (N.D. Cal. May 26, 2017) (citations omitted) (also noting these additional opinions were permissible because the party seeking their exclusion "did not seek to compel [the expert] to supplement his Rule 26 disclosures" nor "seek a further deposition on the allegedly new matters"). That Defendants' counsel chose to ignore these short reports (which take only minutes to read) is not a reason to exclude the opinions.

Finally, even if these reports were deemed untimely, the Court should allow them because any such late service was both substantially justified and harmless *Yeti by Molly, Ltd. v. Deckers Outdoor Corp.*, 259 F.3d 1101, 1106 (9th Cir. 2001); *accord Philadelphia Indem. Ins. Co. v.*

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currently no date set for Reply Expert Reports, and despite Plaintiffs' repeated requests, Defendants have refused to agree to a Reply Report date. Accordingly, to avoid any argument by Defendants of surprise and to seek 'preclusion' of Plaintiffs' expert opinions responsive to rebuttal reports at trial, Plaintiffs' experts will be prepared and available to respond to questions regarding any of their opinions in response to Defendants' Rebuttal Reports during expert depositions." *Id.* at 8. Prior to, or early in each deposition, Plaintiffs gave Defendants' notice of the responses Plaintiffs' experts had to the Defendants' experts' rebuttal reports that raised issues for the first time, some of which Defendants bear the burden on. *See* Section II.A.2 above. Plaintiffs discussed with the Court the circumstances of why it was done this way given the limited time between when rebuttal reports were due and when the experts' depositions were taken at the September 28, 2017 Case Management Conference, and the Court reserved judgment "to see what will happen" with these reports. Dkt. 361 at 11:18-17:15.

Broan-Nutone, L.L.C., No. 12-CV-01811-SC, 2015 WL 866055, at *5 (N.D. Cal. Feb. 27, 2015) (refusing to exclude a supplemental report which "contains no new opinions; it only provides additional testing data" because "an untimely supplemental report need not be excluded if its late production is harmless"); *see also Finjan, Inc. v. Sophos, Inc.*, No. 14-CV-01197-WHO, 2016 WL 4560071, at *12 (N.D. Cal. Aug. 22, 2016).[18] While Facebook does not even try to claim harm or prejudice, Emerson claims, without offering any support, that allowing these replies would "gravely prejudice Defendants' right to put on a defense in this matter." Neither Defendant has articulated any harm or prejudice caused because there is none. Plaintiffs' experts should accordingly be allowed to testify on the subjects in their reply reports. *Woodson v. Rodriguez,* No. C 07-04925 CW, 2011 WL 1654663, at *3 (N.D. Cal. April 28, 2011) (denying motion to strike reply report not provided for in case management order where production of report was harmless). Even if the Court decides to strike the reply expert reports, Plaintiffs request that its experts be permitted to respond during rebuttal to any arguments offered by Defendants' experts during trial to which they could not have responded in their Opening or Rebuttal Reports.

III. CONCLUSION

For the foregoing reasons, and the reasons set forth in Plaintiffs' Opposition to Emerson's Motion to Exclude Expert Testimony, the Court should deny Facebook's motion.

Dated: February 15, 2018

FARELLA BRAUN + MARTEL LLP

By: */s/ Jeffrey M. Fisher*
Jeffrey M. Fisher

Attorneys for Plaintiffs BLADEROOM GROUP LIMITED and BRIPCO (UK) LIMITED

[18] There, the damages expert (Mr. Napper, Emerson's damages expert in this case) produced a supplemental report after documents he relied upon in his initial report were excluded—the supplemental report relied on non-excluded documents to re-calculate damages. In the supplemental report, Napper also included analysis of a license that he could have included in his opening report but did not, and this after being questioned at deposition about why he excluded analysis of the license in his original report. The court nonetheless found that there was no prejudice to Finjan and denied the motion to exclude opinions offered in the supplemental report.