IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
MARSHALL DIVISION

OPTIS WIRELESS TECHNOLOGY, LLC, OPTIS CELLULAR TECHNOLOGY, LLC, UNWIRED PLANET, LLC, UNWIRED PLANET INTERNATIONAL LIMITED, AND PANOPTIS PATENT MANAGEMENT, LLC, Plaintiffs, v. APPLE INC., Defendant.	Civil Action No. 2:19-cv-66-JRG JURY TRIAL FILED UNDER SEAL

PLAINTIFFS' MOTION FOR A NEW TRIAL

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I. INTRODUCTION

Plaintiffs ("Optis") request the Court grant a new trial for each of the independent reasons below.

II. ARGUMENT

a. Failure to Instruct the Jury the Asserted Patents Are Essential

A standard-essential patent (an "SEP") is a patent that must be practiced in order to comply with a standard. *See, e.g.*, *Telefonaktiebolaget LM Ericsson v. Lenovo, Inc.*, 120 F.4th 864, 867 (Fed. Cir. 2024) ("SEPs, by definition, *must* be practiced in order to comply with a given standard"); *Ericsson, Inc. v. D-Link Sys., Inc.*, 773 F.3d 1201, 1209 (Fed. Cir. 2014) ("Because the standard *requires* that devices utilize specific technology, compliant devices *necessarily* infringe certain claims in patents that cover technology incorporated into the standard. These patents are called 'standard essential patents' ('SEPs')."); *HTC Corp. v. Telefonaktiebolaget LM Ericsson*, 407 F. Supp. 3d 631, 634 (E.D. Tex. 2019), *aff'd*, 12 F.4th 476 (5th Cir. 2021) ("Patented technology that is 'essential' to implement a standard is called a standard essential patent ('SEP'). *See ETSI Rules of Procedure*, Annex 6, Clause 15. A patent is 'essential' if it is not technically possible to practice the standard without infringing the patent.").

In the first paragraph of its ruling on remand of this matter, the Federal Circuit decision stated: "[t]he asserted patents are standard-essential patents ('SEPs') that cover technology essential to the Long-Term Evolution ('LTE') standard":

> Optis Cellular Technology, LLC, Optis Wireless Technology, LLC, PanOptis Patent Management, LLC, Unwired Planet International, Ltd., and Unwired Planet, LLC (collectively, "Optis") sued Apple Inc. ("Apple") for patent infringement in the U.S. District Court for the Eastern District of Texas. Relevant here, Optis asserted U.S. Patent Nos. 9,001,774 ("the '774 patent"), 8,019,332 ("the '332 patent"), 8,385,284 ("the '284 patent"), 8,102,833 ("the '833 patent"), and 8,411,557 ("the '557 patent") (collectively, "the asserted patents"). ***The asserted patents are standard-essential patents ("SEPs") that cover technology essential to the Long-Term Evolution ("LTE") standard***. Optis contends various Apple iPhones, iPads, and Watches implementing the LTE standard infringe the asserted patents.

Optis Cellular Technology, LLC v. Apple Inc., 139 F.4th 1363, 1368 (Fed. Cir. 2025) (emphasis added).

The Federal Circuit further held that "[t]he asserted patents are ***undisputably FRAND-encumbered SEPs***, [citing Dkt. 585 at 9, this Court stating that the asserted patents 'are FRAND-encumbered SEPs'], so any royalty award had to be FRAND." *Id.* at 1376 n.8 (emphasis added).

The Federal Circuit was explicit that a FRAND obligation only exists when a patent is essential to the LTE standard under the governing ETSI policy:

> Standards often incorporate patented technology, also known as SEPs. ***When a standard incorporates SEPs, "compliant devices necessarily infringe" claims that "cover technology incorporated into the standard."*** *Ericsson, Inc. v. D-Link Sys., Inc.*, 773 F.3d 1201, 1209 (Fed. Cir. 2014) (emphasis in original). As a result, ***companies developing standard-compliant devices must obtain licenses from the owners of such SEPs***. ETSI has created an Intellectual Property Rights ("IPR") Policy designed to ensure that patentees are fairly compensated for their contributions while fostering the standard's widespread adoption. To facilitate this balance, ***under the IPR policy, SEP owners commit to licensing their SEPs on FRAND terms.***

Id. at 1369 (emphasis added).

After the first trial in this action, Apple filed a motion for a new trial on the basis that the jury was precluded from hearing that the Asserted Patents have a FRAND obligation, relying on the argument that "Plaintiffs are undisputedly obligated to license the patents-in-suit on FRAND terms." Dkt. 549 at 1; *see also id.* ("Apple moves for a new trial on all issues under Fed. R. Civ. P. 59 due to the improper preclusion of evidence of Plaintiffs' FRAND obligation with respect to the asserted patents. This error unfairly prejudiced Apple in presenting its damages defenses and resulted in an unfair trial.") The Court granted Apple's motion, holding that the Asserted Patents "are FRAND-encumbered SEPs," which in turn "require[d] a new trial on damages." Dkt. 585 at 9 ("Given that the patents found to be infringed are FRAND-encumbered SEPs, any royalty awarded must be FRAND."); *see also* Dkt. 633 at 1 (the Court stating that the purpose of the first retrial was for the jury to determine what "Apple and the original asserted patent owners would have agreed upon as a Fair, Reasonable, and Non-discriminatory [FRAND] royalty").

Apple did not appeal the Court's ruling that the patents "are FRAND-encumbered SEPs" and therefore waived its right to challenge essentiality on remand. *See* Dkt. 778, Ex. 5 [Apple Appellate Brief] at 63 ("in this SEP case, the reasonable royalty rate must reflect FRAND"); *see also United States v. Stanford*, 883 F.3d 500, 514 (5th Cir. 2018) ("[T]his circuit instructs district courts to faithfully apply the 'waiver' doctrine by discerning whether an issue raised after a remand is one that could have been, but was not, raised during the original appeal.").

Multiple additional doctrines precluded Apple from disputing that the patents-in-suit meet the ETSI definition of "ESSENTIAL," which was necessary to trigger the FRAND obligation. Apple wanted a new trial on damages. Apple calculated that its path forward to obtaining a new trial on damages was to argue the patents were ESSENTIAL and therefore triggered a FRAND obligation, and it successfully made this argument which led to it obtaining a retrial.[1]

First, "[t]he doctrine of judicial estoppel prevents a party from asserting a position in a legal proceeding that is contrary to a position previously taken in the same or some earlier proceeding. … The doctrine prevents internal inconsistency, precludes litigants from 'playing fast and loose' with the courts, and prohibits parties from deliberately changing positions based upon the exigencies of the moment." *Ergo Sci., Inc. v. Martin*, 73 F.3d 595, 598 (5th Cir. 1996) (citations omitted); *see also New Hampshire v. Maine*, 532 U.S. 742, 750, (2001) (noting that the pertinent inquiry is whether a party is attempting to take a position that is "clearly inconsistent" from a prior, successful position). Other prongs of the judicial estoppel are also met here: this Court accepted Apple's representation that the patents are SEPs and FRAND-encumbered when ordering a new trial and the Federal Circuit accepted

[1] It is possible for a patent to be both Essential and not-infringed to the extent the implementer does not implement the particular portion of the standard, and therefore Apple's gambit still allowed it to maintain non-infringement positions to the extent the record could support that Apple did not implement the relevant portion of the standard.

that representation in its opinion; and the change of position imposed unfair detriment to PanOptis and unfair advantage to Apple at least in the trial result.

Second, the law of the case doctrine likewise prohibits the parties from deviating from the clear holding of this Court. *See Suel v. Sec'y of Health & Hum. Servs.*, 192 F.3d 981, 984 (Fed. Cir. 1999) ("Law of the case is a judicially created doctrine, the purpose of which is to prevent relitigation of issues that have been decided. The doctrine operates to protect the settled expectations of the parties and promote orderly development of the case.") (citation omitted).

In front of the Federal Circuit, in order to support that it was entitled to a re-trial on damages, Apple once again argued the patents were Essential: "in this **SEP** case, the reasonable royalty rate must reflect FRAND, including that the rate be 'non-discriminatory.'" *See* Dkt. 778, Ex. 5 (Apple Appellate Brief) at 63 (citation omitted). Under ETSI policy which was expressly summarized by the Federal Circuit, this statement would only be true if the patents-in-suit were "**necessarily infringe[d]"** by devices that implemented the relevant portion of the standard. The Federal Circuit's opinion expressly adopted this admission and this Court's unappealed holding that the Asserted Patents are standard essential. *Optis*, 139 F.4th at 1377 ("The asserted patents are undisputably FRAND-encumbered SEPs, [citing Dkt. 585 at 9], so any royalty award had to be FRAND."); *see also, e.g.*, *AMS Sensors USA Inc. v. Renesas Elecs. Am. Inc.*, No. 4:08-CV-00451, 2021 WL 765227, at *4 (E.D. Tex. Feb. 26, 2021) ("This Court is bound by the Federal Circuit's opinion as it is the law of the case.") (citing *Terrell v. Household Goods Carriers' Bureau*, 494 F.2d 16, 19 (5th Cir. 1974)).

Nonetheless, the Court rejected Optis' request for an instruction that the asserted patents are Essential and instead instructed the jury (1) that the asserted patents were merely declared essential and (2) that Apple was permitted to challenge essentiality at trial. Tr. 143:8-11 (preliminary jury instructions) ("Standard essential patents, ladies and gentlemen, are patents that have been declared by the patent owner or its predecessor owner to be a part of a standard in a certain field."); Tr. 145:20-

21 ("Apple can dispute the patentee's assertion that its standard essential patents are essential to the standard."); Tr. 1194:7-14 (Court overruling Optis' objection to omitting instruction that the patents are standard essential).

The Court permitted Apple to argue that the asserted patents were not essential, which was one of Apple's primary arguments for non-infringement for each of the asserted patents. Tr. 716:25-717:1 [Apple opening] ("declared essential is not the same thing as actually essential"); Tr. 937:5-7 [Wells] ("Q. In your opinion, is either one of those two patents essential to the LTE standard? A. In my opinion, they are not."); Tr. 1017:4-9 [Lanning] ("Q. In your opinion, is either one of the patents you analyzed essential to LTE? A. No, they're not."); Tr. 1068:25-1069:4 [Fuja] ("Q. What did you conclude? A. It is not essential to the LTE standard."); Tr. 1077:18-19 [Fuja] ("Q. Is the patent actually essential to the LTE standard? A. No, it's not."). The Court prevented Optis from presenting the Federal Circuit's ruling finding the asserted patents essential to the jury. Tr. 1194:7-14 (Court overruling Optis' request for an instruction that the asserted patents are essential "consistent with Federal Circuit's ruling in this case on appeal that the patents are standard essential patents").

Failure to instruct the jury that the asserted patents are standard-essential patents ("SEPs") was prejudicial error that requires a new trial. *Aero Int'l, Inc. v. U.S. Fire Ins. Co.*, 713 F.2d 1106, 1113 (5th Cir. 1983) ("A new trial is the appropriate remedy for prejudicial errors in jury instructions."). The admission of evidence (including testimony by Apple witnesses) that the asserted patents were not standard essential was also error that warrants a new trial. *See, e.g.*, *Jordan v. Maxfield & Oberton Holdings, L.L.C.*, 977 F.3d 412, 417 (5th Cir. 2020) ("A court may grant a new trial when there is an erroneous evidentiary ruling at trial.").

b. Exclusion of Evidence and Jury Instructions Regarding the FRAND Obligation

The Court instructed the jury that "the Plaintiffs Optis are bound by the commitment to ETSI that it will license its standard essential patents to other parties, including Apple, on fair, reasonable,

and non-discriminatory terms, F-R-A-N-D, FRAND." Tr. 144:15-18. However, the Court refused to instruct the jury regarding ETSI's policy that FRAND obligations only apply when a patent is and remains essential. Tr. 1194:24-1195:3 (Optis counsel: "the jury should be informed of the specific ETSI instruction that the FRAND obligation only attaches to patents that are, become, and remain essential to the standard." THE COURT: "That is also overruled.").

Further, the Court excluded evidence that Apple has claimed that the asserted patents are bound by a FRAND obligation. *See, e.g.*, Dkt. 549 at 1 ("Plaintiffs are undisputedly obligated to license the patents-in-suit on FRAND terms."). Because a FRAND obligation **only** exists if the patent meets the definition of "ESSENTIAL," Apple's assertions that the patents in suit are FRAND encumbered is an admission that the asserted patents are actually essential (and not merely declared to ETSI). *See, e.g.*, Ex. 1 at § 6.1 (ETSI IPR Policy):

> **6 Availability of Licences**
>
> 6.1 When an ESSENTIAL IPR relating to a particular STANDARD or TECHNICAL SPECIFICATION is brought to the attention of ETSI, the Director-General of ETSI shall immediately request the owner to give within three months an irrevocable undertaking in writing that it is prepared to grant irrevocable licences on fair, reasonable and non-discriminatory ("FRAND") terms and conditions under such IPR to at least the following extent:

ETSI defines an "ESSENTIAL" patent as one for which it "is not possible on technical … grounds … to make, sell, … use or operate EQUIPMENT or METHODS which comply with a STANDARD without infringing that IPR." *Id.* at § 15.6:

> "**ESSENTIAL**" as applied to IPR means that it is not possible on technical (but not commercial) grounds, taking into account normal technical practice and the state of the art generally available at the time of standardization, to make, sell, lease, otherwise dispose of, repair, use or operate EQUIPMENT or METHODS which comply with a STANDARD without infringing that IPR. For the avoidance of doubt in exceptional cases where a STANDARD can only be implemented by technical solutions, all of which are infringements of IPRs, all such IPRs shall be considered ESSENTIAL.

That a patent is simply declared essential is not sufficient for a patent to be FRAND encumbered; a declarant must agree to license the patents on FRAND terms only "to the extent that the IPR(s) ***are or become, and remain ESSENTIAL***[.]" *Id.* at § A.1 (emphasis added):

RULES OF PROCEDURE, 29-30 November 2022

A.1 GENERAL IPR LICENSING DECLARATION

the Declarant hereby irrevocably declares that (1) it and its AFFILIATES are prepared to grant irrevocable licenses under its/their IPR(s) on terms and conditions which are in accordance with Clause 6.1 of the ETSI IPR Policy, in respect of the STANDARD(S), TECHNICAL SPECIFICATION(S), or the ETSI Project(s), as identified above, to the extent that the IPR(s) are or become, and remain ESSENTIAL to practice that/those STANDARD(S) or TECHNICAL SPECIFICATION(S) or, as applicable, any STANDARD or TECHNICAL SPECIFICATION resulting from proposals or Work Items within the current scope of the above identified ETSI Project(s), for the field of use of practice of such STANDARD or TECHNICAL SPECIFICATION; and (2) it will comply with Clause 6.1bis of the ETSI IPR Policy with respect to such ESSENTIAL IPR(s).

Accordingly, under the declarations for each of the asserted patents, the original patent owners committed to license on FRAND terms only if the patents ***are*** ESSENTIAL, as defined by ETSI. *See* Ex. 2, PX 1796 (declaration of the '774 Patent making FRAND commitment "[t]o the extent that the IPR(s) disclosed in the attached *IPR Information Statement Annex* are or become, and remain ESSENTIAL"); Ex. 3, PX 1791 (declaration of the '833 and '332 Patents); Ex. 4, PX 1009 (declaration of the '557 Patent); Ex. 5, PX 1525 (declaration of the '284 Patent).

Apple's admission that the asserted patents are FRAND encumbered (and therefore actually essential, as defined by ETSI) directly contradicts its positions taken at trial that none of the asserted patents are standard essential. Apple was estopped from arguing that the asserted patents were not FRAND encumbered (and therefore essential). *See* Dkt. 849 ("Judicial estoppel is a doctrine that 'prevents a party from asserting a position in a legal proceeding that is contrary to a position previously taken in the same or some earlier proceeding.'") (citing *Gabarick v. Laurin Mar. (Am.) Inc.*, 753 F.3d 550, 553 (5th Cir. 2014)). Refusal to allow Optis to present this contradiction unduly prejudiced Optis, requiring a new trial. *See, e.g.*, *Jordan*, 977 F.3d at 417 (5th Cir. 2020) ("A court may grant a new trial when there is an erroneous evidentiary ruling at trial.").

c. Admission of Settlement Offers Protected Under F.R.E. 408

Federal Rule of Evidence 408 prohibits use "by any party" of "evidence of …offering … a valuable consideration in compromising or attempting to compromise a claim" including to (1) "prove

or disprove the validity of amount of a disputed claim" or (2) "to impeach a prior inconsistent statement or a contradiction":

> **(a) Prohibited Uses.** Evidence of the following is not admissible — on behalf of any party — either to prove or disprove the validity or amount of a disputed claim or to impeach by a prior inconsistent statement or a contradiction:
>
> > **(1)** furnishing, promising, or offering — or accepting, promising to accept, or offering to accept — a valuable consideration in compromising or attempting to compromise the claim; and
> >
> > **(2)** conduct or a statement made during compromise negotiations about the claim — except when offered in a criminal case and when the negotiations related to a claim by a public office in the exercise of its regulatory, investigative, or enforcement authority.
>
> **(b) Exceptions.** The court may admit this evidence for another purpose, such as proving a witness's bias or prejudice, negating a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.

Federal Rule of Evidence 408.

As Apple has argued, the settlement offers and related negotiations in this case are protected under F.R.E. 408 and the parties' Confidentiality Agreement[2]:

[redacted]

Dkt. 192 (Apple motion *in limine*) at 3-4 (emphasis added); *see also* Dkt. 778, Ex. 5 (Apple Appellate Brief) at 64 ("Federal Rule of Evidence 408 barred them as 'statement[s] made during compromise negotiations about the claim.' Fed. R. Evid. 408[.]"); Appeal Hrg. at

[2] [redacted]

https://www.cafc.uscourts.gov/oral-arguments/22-1904_05092025.mp3 (Apple's counsel: "Rule 408 continues to apply regardless of whether there is FRAND in the case… the confidentiality agreement that the parties had rendered that [the settlement offers] inadmissible").

The Court correctly recognized that for either party "***to go into the substance of any of those offers or counteroffers or negotiations crosses that line [in violation of FRE 408]***." Dkt. 437 at 230:15-231:6 (emphasis added):

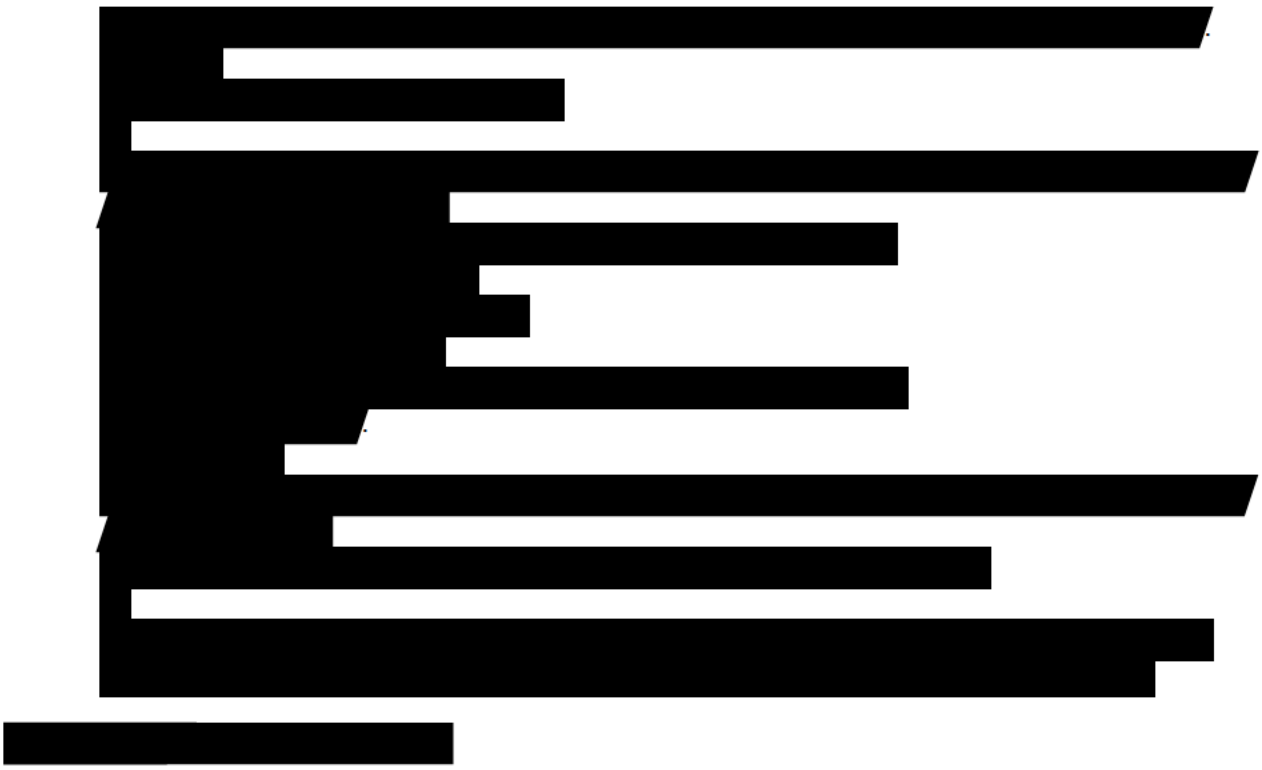
> ***[I]f there's attempt to elicit what actually was offered or counter-offered or exchanged or exchanged in response, that's clearly in my view within Rule 408***. However, the fact that the parties talked, the fact that the parties may have engaged in a discussion without any development of what the terms of the discussion were, whether they reached an agreement or didn't reach agreement, that to me is beyond 408. And the fact that the -- the parties knew about each other and talked to each other and the particulars of what they talked about were such that ***they felt it was appropriate to mutually agree not to disclose those in detail***, that's fair game. And I think I said that yesterday. ***But to go into the substance of any of those offers or counteroffers or negotiations crosses that line***.

During the cross examination of Plaintiffs' corporate representative Mr. Brian Blasius, Apple's counsel improperly elicited testimony and inserted factual assertions into its questions regarding each parties' settlement offers:

Plaintiffs promptly objected under FRE 408 and the party's agreement, but the Court overruled that objection. Tr. 211:19-24 (Plaintiffs' counsel: "This is a violation of Federal Rule of

Evidence 408. All of our discussions between Apple occurred under an FRE 408 agreement. The offers we made to Apple were all under FRE 408. There's no way he should be getting into what those [offers] are in this discussion.").

Apple's counsel proceeded to delve into protected details of the parties' negotiations, including inquiring repeatedly about the relative amount of Plaintiffs offers to settle the disputes:



There is no ambiguity about Apple's intention with the line of questioning at issue. It stated candidly: "The negotiations between the parties go to valuation in this case and whether fair value is what the parties have been representing to each other, including what Optis has represented to Apple." Tr. 212:8-11. Apple's stated purpose directly contradicted the provisions of F.R.E. 408, its own statements in arguing for exclusion of evidence in this matter, and the Court's prior rulings.

Optis requested a curative instruction from the Court. Dkt. 832. The Court denied Optis' request. Tr. 292:10-11. The Court appeared to credit Apple's contention that it was permitted to introduce evidence of settlement offers—which it does not deny are protected under F.R.E. 408—

because Plaintiffs allegedly "made allegations of delay and unresponsiveness in support of their willfulness claim" and opened the door. Dkt. 833 at 5. But Optis never made any such claim.

First, Apple pointed to the following questioning in *voir dire* (Dkt. 833 at 1):

> MS. TRUELOVE: Okay. And are you familiar – you know, what does Eastman do in regards to their patents? Do they just put them on a shelf or do they consider those to be important assets of the company?
> THE PANEL MEMBER: They consider them to be important.
> MS. TRUELOVE: If someone -- if they found out that someone was using their technology, would they raise their hand and speak up and reach out to that company --
> THE PANEL MEMBER: Definitely.
> MS. TRUELOVE: -- let them know, hey, we think you're using our patent? If that company or whomever it was that they think is using the patent was unresponsive, wouldn't -- wouldn't communicate, try to work something out, in your view would it be unreasonable for Eastman to bring a lawsuit?
> THE PANEL MEMBER: I don't think it would be unreasonable.

Tr. 50:1-18. The questioning says nothing of Apple or undue delay as evidence of willful infringement; it is hypothetical about the employer of the panel member (Eastman) inquiring whether the panel member has bias against a plaintiff for bringing a lawsuit. Exposing potential bias is the purpose of *voir dire. See, e.g.*, *McDonough Power Equip., Inc. v. Greenwood*, 464 U.S. 548, 554 (1984) ("One touchstone of a fair trial is an impartial trier of fact… *Voir dire* examination serves to protect that right by exposing possible biases, both known and unknown, on the part of potential jurors."). Plaintiffs' concerns were well-founded – multiple members of the panel responded on the questionnaire that there were "too many lawsuits." Tr. 57:1-7 ("THE PANEL MEMBER: It's a pretty litigious society we live in right about now."). Questioning panel members about potential bias against plaintiffs for bringing lawsuits does not open the door to the details of settlement offers protected under F.R.E. 408, and Apple cites no authority to support such a proposition. [redacted] F.R.E. 408 expressly prohibits using evidence of a settlement offer "to impeach by a prior inconsistent statement or a contradiction."

[redacted] Apple does not contend Plaintiffs' opening said anything about undue delay (it did not). Under Apple's reasoning, and party raising a claim for willfulness would waive F.R.E. 408. This is not the law.

[redacted] The purpose of introducing this evidence was to establish that Plaintiffs had worked to avoid filing a lawsuit to counter any animus jurors may have against Plaintiffs for filing suit. Mr. Blasius did not say or insinuate Apple delayed; he testified that the parties had meetings, and when they failed to reach agreement, Plaintiffs filed suit. His testimony was squarely within the Court's guidance on this issue: "the fact that the parties talked, the fact that the parties may have engaged in a discussion without any development of what the terms of the discussion were, whether they reached an agreement or didn't reach agreement, that to me is beyond 408." Dkt. 437 at 230:15-231:6.

Finally, Apple points to testimony of Mr. Blasius that occurred ***after*** Apple injected extensive questioning of settlement offers into this case. Plaintiffs could not have opened the door after Apple barged through it.

Apple's allegation that Plaintiffs accused Apple of undue delay was baseless. And but for this allegation, Apple did not dispute that it violated F.R.E. 408.

Following the Court's ruling, Apple's counsel repeatedly raised the protected settlement offers. Tr. 644:15-18 [Apple cross of Optis expert Kennedy] ("Q. And another way to put it is Optis kept asking for more and more and more. Right? A. Yes. I'm not sure if every correspondence increased it, but it did go up over time."); Tr. 722:1-14 [Apple opening] ("the demands kept going up and up

and up. … when the demands keep going up, up, up for the portfolio, and then demands are being made in this case, in this case, for more than the portfolio demands were, a demand is being made in this case for five patents. That is more, more than what was demanded for thousands of patents during those negotiations"); Tr. 1109:7-12 [Mewes direct] ("Q. Now, over time did Optis' demands, did they stay the same, go down, or go up? A. They went up. Q. And Ms. Mewes, have we also seen some of that continue in the courtroom this week? A. I did see that, yes."); Tr. 1305:21-25 [Apple closing] ("And rather than engage in a negotiation that led to a deal, the Optis companies kept making greater and greater demands in those negotiations years ago. And then you saw precisely the same thing in this courtroom over the last week."). The Court further allowed Apple to raise the issue of patent hold-up, over Optis' objection, despite no such claim existing in this case. Tr. 751:22-754:1 [Apple expert Perryman direct] ("Q. And, Doctor, you've just shared some benefits of industry standards. On the flip side, are there any risks from creating industry standards? … A. … if a party that owned a patent were to refuse to license it or to say they would only license it for a substantial sum of money that was out of the bounds of what would allow the standard to move forward effectively, you could deny all the benefits that come from having standards. And the common name for that when someone does that is called patent hold-up.").

The Court's admission of settlement offers protected under F.R.E. 408 including the relative amount of those offers over time and compared to the damages demand at trial, and the discussion of patent hold-up, was highly prejudicial to Optis, and requires granting of a new trial. *See, e.g.*, *McInnis v. A.M.F., Inc.*, 765 F.2d 240, 251 (1st Cir. 1985) (granting new trial including as to liability where the "district court erred in admitting evidence of the Poirier release" in violation of F.R.E. 408, noting that "we must grant the plaintiff a new trial ***unless the defendant can show the error was harmless***"); *Kennon v. Slipstreamer, Inc.*, 794 F.2d 1067, 1071 (5th Cir. 1986) (granting new trial including

as to liability and holding that "no party, or the court, should disclose to the jury the amount of a settlement with other defendants in the absence of compelling circumstances demanding disclosure").

d. Failure to Instruct the Jury Regarding Apple's Claim in Closing Arguments that Optis' Requested Damages Would "Put People Out of Business"

In closing arguments, Apple's counsel stated:

> "The first thing is if anyone ever paid the types of amounts that Optis is demanding in this case, ***they would put people out of business*** because the number of patents in this area is immense. There's tens of thousands of declared essential patents."

Tr. 1312:11-15 (emphasis added).

Apple asked the jurors to rule in Apple's favor not on the merits, but to protect Apple (and in turn, consumers of Apple products) from being materially harmed by a verdict in Optis' favor. Apple's plea to the jurors was highly improper and prejudicial to Optis. *See, e.g.*, *Pavemetrics Sys., Inc. v. Tetra Tech, Inc.*, 652 F. Supp. 3d 1098, 1103 (C.D. Cal. 2023) (granting new trial including as to infringement where defendant's counsel made "particularly problematic arguments during closing" and "improperly encouraged the jury [to] look outside the [trial] record and decide the case based on ***societal impacts***" by "insinuate[ing] this was a trial about corporate greed instead of sales allegedly constituting patent infringement" and arguing plaintiffs "want to increase prices.") (emphasis added); *Teva Pharms. Int'l GmbH v. Eli Lilly & Co.,* No. 18-CV-12029-ADB, 2022 WL 10489059, at *6 (D. Mass. Oct. 17, 2022) (excluding argument or evidence "that a jury verdict in [plaintiff's] favor would impact patients or consumers by, among other things, increasing costs or removing a product option from the market" because "this sort of market evidence has minimal, if any, relevance to the issues to be decided by the jury and that whatever relevance it has is substantially outweighed by the danger of unfair prejudice.").

Apple's argument also violated the Court's standing orders:

> Court's MIL No. 19. The parties shall be precluded from introducing evidence, testimony, or argument suggesting that a verdict in one party's favor would impact the cost of goods or services or would have other commercial impacts.

2025-12-23 Second Amended Standing Order on Motions in Limine.

When Optis' counsel requested an instruction from the Court following the improper argument by Apple's counsel, Apple's counsel denied having made the argument. Tr. 1331:23-24 ("I did not say 'go out of business,' not once."). The Court stated that it did not "have the ability to sit here and do a word search through the whole transcript" and did not "recall the words 'go out of business'," and denied Optis' request for an instruction to the jury. Tr. 1331:25-1333:7.

Apple's improper plea to the jurors followed Apple's counsel casting the original patentees as foreign corporations and Apple as an America corporation. *Compare,* Tr. 205:7-206:11 (Apple's counsel: "Samsung International Consumer Electronics Company, headquartered in Korea"; "Ericsson, headquartered in Stockholm, Sweden"; "Panasonic, headquartered in Tokyo, Japan"; "LG Electronics, headquartered in Seoul, Korea") *with* Tr. 708:13-15 ("Apple has focused on consumer products over its history. It's been around for about 50 years. Headquartered in California…"). Apple's plea to the jurors improperly requested protection of an American corporation from foreign corporations. Such "pleas intended to evoke a sense of community loyalty, duty and expectation" "serve no proper purpose" and warrant a new trial. *Westbrook v. Gen. Tire & Rubber Co.,* 754 F.2d 1233, 1238 (5th Cir. 1985) ("Our condemnation of a 'community conscience' argument … extends to all impassioned and prejudicial pleas intended to evoke a sense of community loyalty, duty and expectation. Such appeals serve no proper purpose and carry the potential of substantial injustice when invoked against outsiders."); *see also Loose v. Offshore Nav., Inc.*, 670 F.2d 493, 496 (5th Cir. 1982) (granting new trial including as to liability where statements "ask[ed] jurors to put themselves in the plaintiff's position").

III. CONCLUSION

Optis' motion for a new trial should be granted.

Dated: April 1, 2026

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing document was served via electronic mail on all counsel of record on April 1, 2026.

/s/ Andrew Strabone
Andrew Strabone

CERTIFICATE OF AUTHORIZATION TO FILE UNDER SEAL

This is to certify that this document should be filed under seal because the document, and any exhibits, contain material covered by the Stipulated Protective Order approved and entered in this case on August 7, 2019 (Dkt. 57).

/s/ Andrew Strabone
Andrew Strabone