Nos. 18-1363, 18-1380, 18-1382, 18-1732

IN THE

United States Court of Appeals

FOR THE FEDERAL CIRCUIT

TCL COMMUNICATION TECHNOLOGY HOLDINGS LIMITED, TCT MOBILE LIMITED, TCT MOBILE (US) INC.,

Plaintiffs-Appellees,

v.

TELEFONAKTIEBOLAGET LM ERICSSON, ERICSSON INC.,

Defendants-Appellants.

On Appeal from the United States District Court for the Central District of California in No. 8:14-cv-00341-JVS-DFM

ERICSSON, INC., TELEFONAKTIEBOLAGET LM ERICSSON,

Plaintiffs-Appellants,

v.

TCL COMMUNICATION TECHNOLOGY HOLDINGS LIMITED, TCT MOBILE LIMITED, TCT MOBILE (US) INC.,

Defendants-Appellees.

On Appeal from the United States District Court for the Central District of California in No. 2:15-cv-02370-JVS-DFM

CORRECTED NON-CONFIDENTIAL REPLY BRIEF FOR APPELLANTS ERICSSON INC. AND TELEFONAKTIEBOLAGET LM ERICSSON

(Counsel Listed on Inside Cover)

Theodore Stevenson, III
Nicholas Mathews
MCKOOL SMITH P.C.
300 Crescent Court, Suite 1500
Dallas, TX 75201
(214) 978-4000 (telephone)
(214) 978-4044 (fax)
tstevenson@mckoolsmith.com

John M. Whealan
4613 Merivale Road
Chevy Chase, MD 20815
(301) 588-1079 (telephone)

Jeffrey A. Lamken
Counsel of Record
Michael G. Pattillo, Jr.
Rayiner I. Hashem
Emily K. Damrau
MOLOLAMKEN LLP
The Watergate, Suite 660
600 New Hampshire Avenue, N.W.
Washington, D.C. 20037
(202) 556-2000 (telephone)
(202) 556-2001 (fax)
jlamken@mololamken.com

Sara E. Margolis
MOLOLAMKEN LLP
430 Park Avenue
New York, NY 10022
(212) 607-8160 (telephone)
(212) 607-8161 (fax)

Counsel for Appellants Ericsson Inc.
and Telefonaktiebolaget LM Ericsson

FORM 9. Certificate of Interest

Form 9
Rev. 10/17

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

TCL Communication Technology Holdings Ltd. v. Telefonaktiebolaget LM Ericsson, Ericsson Inc.

Case No. 18-1363, -1380, -1382, -1732

CERTIFICATE OF INTEREST

Counsel for the:
☐ (petitioner) ▣ (appellant) ☐ (respondent) ☐ (appellee) ☐ (amicus) ☐ (name of party)

Telefonaktiebolaget LM Ericsson, Ericsson Inc.

certifies the following (use "None" if applicable; use extra sheets if necessary):

1. Full Name of Party Represented by me	2. Name of Real Party in interest (Please only include any real party in interest NOT identified in Question 3) represented by me is:	3. Parent corporations and publicly held companies that own 10% or more of stock in the party
Telefonaktiebolaget LM Ericsson	Telefonaktiebolaget LM Ericsson	None
Ericsson Inc.	Ericsson Inc.	Ericsson Holding II Inc., Telefonaktiebolaget LM Ericsson

4. The names of all law firms and the partners or associates that appeared for the party or amicus now represented by me in the trial court or agency or are expected to appear in this court **(and who have not or will not enter an appearance in this case)** are:

McKool Smith PC: Theodore Stevenson, III; Douglas A. Cawley; Laurie L. Fitzgerald; Ashley N. Moore; Nicholas M. Mathews; Blake H. Bailey; Christine M. Woodin; David Sochia; Dustin M. Howell; Jennifer A. Van Dusen; Travis E. DeArman

Crowell & Moring LLP: John S. Gibson; Samrah R. Mahmoud; Christie L. Stahlke; Daniel M. Glassman; Margaret B. Tappan; Mark A. Klapow; Robert B. McNary

MoloLamken LLP: Jeffrey A. Lamken, Michael G. Pattillo Jr., Rayiner I. Hashem, Sara E. Margolis, Emily K. Damrau, William J. Cooper

John M. Whealan

FORM 9. Certificate of Interest **Form 9 Rev. 10/17**

5. The title and number of any case known to counsel to be pending in this or any other court or agency that will directly affect or be directly affected by this court's decision in the pending appeal. *See* Fed. Cir. R. 47. 4(a)(5) and 47.5(b). (The parties should attach continuation pages as necessary).

None

2/22/2019

Date

/s/ Jeffrey A. Lamken

Signature of counsel

Jeffrey A. Lamken

Printed name of counsel

Please Note: All questions must be answered

cc: all counsel via ECF

Reset Fields

TABLE OF CONTENTS

Page

CONFIDENTIAL MATERIAL OMITTED

Material has been redacted in the Non-Confidential Reply Brief for Appellants Ericsson Inc. and Telefonaktiebolaget LM Ericsson. This material is confidential commercial information pursuant to the Confidentiality Order entered by the district court on December 8, 2014. Appx1431. Redacted material on pages 23, 27, 29, 31, and 33 contains confidential information regarding commercial patent-license royalties.

TABLE OF AUTHORITIES

Page(s)

CASES

CONSTITUTIONAL PROVISIONS

INTRODUCTION

TCL agrees that, if its declaratory-judgment action anticipated a damages action for patent infringement, Ericsson had a right to a jury trial. That should dispose of this case. To establish federal jurisdiction and obtain anti-suit injunctions, TCL repeatedly told the district court that its declaratory-judgment action anticipated an Ericsson infringement suit for damages. TCL now changes its tune. Its declaratory-judgment claim, TCL insists, was effectively a contract action for specific performance. But TCL cannot take one position below and another on appeal. It was right below. It is mistaken now. And if TCL's new theory were correct, subject-matter jurisdiction was lacking. Either way, the decision below cannot stand.

TCL's merits defense fares no better. The district court announced a novel methodology for determining FRAND royalties—a "simple patent counting system" under which "every patent" essential to the standard is deemed to "possess[] identical value." That defies the principle that reasonable royalties must reflect the incremental value the patented invention adds. While TCL urges that the court had wide "discretion" to implement a FRAND royalty, Br. 44, discretion does not encompass disregarding precedent. The district court never found, and no evidence supports, the theory that Ericsson's patents have the same "average" value as the thousands of patents in the court's "simple patent counting system." Even on its own terms, the court's putatively "detailed" methodology was too rife with error (*e.g.*, ignoring the impact of brand value unrelated to patents, mismatching retail and wholesale rates) to be sustained. Those errors cannot be brushed aside in footnotes, ignored, or disregarded on non-existent waivers.

ARGUMENT

I. THE DISTRICT COURT DENIED ERICSSON ITS SEVENTH-AMENDMENT JURY-TRIAL RIGHT

TCL does not dispute the three basic Seventh-Amendment principles that control this case. *First*, if Ericsson had filed this action as a patent-infringement suit for damages—and TCL had asserted FRAND obligations as a defense—Ericsson would have been entitled to a jury trial. *See Markman v. Westview Instruments, Inc.*, 517 U.S. 370, 377 (1996) ("infringement cases . . . must be tried to a jury"); *cf. Ericsson, Inc. v. D-Link Sys., Inc.*, 773 F.3d 1201 (Fed. Cir. 2014) (FRAND defense in jury trial); *Commonwealth Sci. & Indus. Research Org. v. Cisco Sys., Inc.*, 809 F.3d 1295 (Fed. Cir. 2015) ("*CSIRO*") (same). Ericsson filed that very infringement action in Texas, which was transferred and consolidated with this action.

Second, TCL does not dispute that Ericsson retained that Seventh-Amendment jury-trial right, even though *TCL* initiated the litigation as a declaratory-judgment action, insofar as TCL's declaratory-judgment suit anticipated an Ericsson damages action. *Third*, *Dairy Queen, Inc. v. Wood*, 369 U.S.

469 (1962), requires overlapping issues between legal and equitable claims to be tried to a jury.

TCL disputes only *how* those principles apply here. TCL denies that its declaratory-judgment action anticipated an Ericsson damages suit for infringement. But TCL argued the opposite below, and the record defies TCL's new position. TCL's theory here—that its declaratory-judgment action is really a state-law contract specific-performance action—would require reversal for lack of federal jurisdiction. TCL ignores *Dairy Queen* entirely. And the cash payment the district court required—compensation for *past* infringement—proves the error. The court had no authority to determine the amount owed without a jury.

A. Ericsson's Jury-Trial Right Cannot Be Defeated Through an Anticipatory Declaratory-Judgment Action

Declaratory-judgment suits are subject to Seventh-Amendment constraints. Declaratory-judgment actions permit parties to "reverse[]" the dispute's posture, allowing would-be defendants to "establish a defense against a cause of action which [would-be plaintiffs might] assert." *Pub. Serv. Comm'n of Utah v. Wycoff Co.*, 344 U.S. 237, 248 (1952). But that procedural device "preserves the right to jury trial." *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 504 (1959). One cannot be "deprived" of Seventh-Amendment rights merely because his opponent "took advantage of the availability of declaratory relief to sue . . . first." *Id.*

TCL concedes (Br. 21) that an Ericsson infringement suit for damages would have required a jury trial. It agrees that, when a declaratory-judgment action operates as an "inverted law suit"—anticipating an action in which the defendant had "a right to a jury"—the jury-trial right persists. Br. 22 (quoting *Owens-Illinois, Inc. v. Lake Shore Land Co.*, 610 F.2d 1185, 1189 (3d Cir. 1979)). But TCL now denies that *its* declaratory-judgment action anticipated an infringement action. That fails, for myriad reasons.

1. *TCL Has Correctly Conceded That Its Declaratory-Judgment Claim Anticipated an Infringement Damages Action*

TCL insists that, absent its declaratory-judgment action, this dispute would not "have come to [the] court" as an infringement suit, but instead as a "breach of contract" action, for "specific performance and injunctive relief" to require compliance with FRAND obligations, that could be tried without a jury. Br. 22. But TCL repeatedly—and correctly—took the opposite position below. Ericsson Br. 31.

When TCL needed to establish that its suit presented a *federal question*, it denied that its declaratory-judgment claim merely echoed the breach-of-contract claim in Count I. Appx468 (¶¶93-95). Instead, TCL urged that its declaratory-judgment claim supported *federal-question* jurisdiction because it anticipated Ericsson's *federal* "action for patent infringement." Appx711; Appx713 (TCL "pled" its declaratory-judgment claim "as a defense" to a "patent infringement action"). The "original complaint," TCL declared, asserted a defense that "limits the damages that Ericsson can seek in any patent infringement action." Appx713.

Asked why its complaint gets it "into federal court," TCL urged its declaratory-judgment claim was "in anticipation of the patent claim." Appx788-789. "The anticipated claim is the patent infringement claim." *Id.*; *see id.* ("defense to patent infringement"); Appx796 ("damages would be limited based upon [FRAND] obligation"). The declaratory-judgment action, TCL insisted, was the "other side of [the] coin" to an infringement action. Appx796. The district court found federal jurisdiction *only* because it accepted TCL's characterization of its complaint. The "alleged facts," it held, show that "TCL's claims go beyond a royalty dispute," Appx743, raising a "defense to a hypothetical" suit for "patent infringement," Appx742. It found no "substantial ground for difference of opinion on this issue." Appx1313.

Seeking to transfer Ericsson's Texas case—an infringement suit for damages—to California, TCL again equated its declaratory-judgment action with an inverted damages infringement suit. The "California action and the Texas action are essentially identical," it urged, "except the roles are reversed." Appx60857; *see* Appx60861 ("Texas action, as originally filed, was essentially a mirror image of the California action, as originally filed."). The California "FRAND claims" are "a defense to an anticipated, coercive patent infringement claim by Ericsson." Appx60863; *see* Appx61184 (FRAND "defense"). The Texas court agreed: It transferred the Texas action because the "FRAND allegations currently before" the California court "encompass the claims [Ericsson] asserted" in Texas—*infringement* claims *for damages*. Appx62198.

Seeking to enjoin Ericsson's earlier-filed foreign infringement actions, TCL again insisted its suit is an inverted infringement action raising the "same issues" as infringement suits: "[A]ny payment allegedly owed for past unlicensed sales (*i.e.*, damages), will be addressed in this case," TCL urged, eliminating any "basis for continuing to litigate the foreign cases." Appx6581. The district court agreed. Appx6645. TCL cannot take one view in the district court—to avoid dismissal for lack of jurisdiction, enjoin foreign actions, and deny Ericsson its damages action in Texas—but take the opposite position on appeal. *Pegram v. Herdrich*, 530 U.S. 211, 227 n.8 (2000); *MK Hillside Partners v. Comm'r*, 826 F.3d 1200, 1206 (9th Cir. 2016).

Objectively viewed in light of "all the circumstances," *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 127 (2007), TCL's declaratory-judgment action anticipated an Ericsson infringement suit. Ericsson Br. 31-32. TCL's complaint alleged that Ericsson had filed infringement suits against TCL around the world, Appx445, where Ericsson sought damages, Appx6640-6643. TCL suffered no harm from Ericsson's alleged breach of FRAND obligations, Appx38797, and thus lacked standing to sue, but-for threatened infringement suits; TCL was using Ericsson's technology for free. *MedImmune*, 549 U.S. at 128. TCL filed suit because it anticipated infringement actions. Appx711. Its declaratory-judgment claim asserted FRAND obligations as a "defense" to "limit[] the damages" in those actions. Appx713.

TCL's action thus "resembles nothing so much as a suit for patent infringement in which the . . . defense" of a FRAND obligation "has been pled." *In re Lockwood*, 50 F.3d 966, 974 (Fed. Cir. 1995). Ericsson would have had a jury-trial right had it sued TCL for patent infringement first. *Markman*, 517 U.S. at 377. Ericsson did not lose that right simply because TCL filed a declaratory-judgment action preemptively. *Lockwood*, 50 F.3d at 974; *In re Tech. Licensing Corp.*, 423 F.3d 1286, 1289 (Fed. Cir. 2005); *Owens-Illinois*, 610 F.2d at 1189.

2. *TCL's Contrary Theory Would Destroy Jurisdiction*

TCL's theory that its declaratory-judgment claim is really a contract suit for specific performance, Br. 22, has another defect: If TCL's suit did *not* anticipate a federal infringement action, subject-matter jurisdiction is absent. Ericsson Br. 9, 33. TCL initially asserted federal diversity jurisdiction, but diversity was lacking. *Id.* TCL avoided dismissal only by convincing the court that its declaratory-judgment count establishes federal-question jurisdiction because it anticipated a *federal* patent-infringement suit. *Id.* at 33-34. If TCL is correct that the declaratory-judgment action really is a "contract" action for specific performance of a FRAND obligation, this Court must dismiss for lack of jurisdiction. State-law contract claims do not support federal-question jurisdiction. Appx1312-1313; *Opera Plaza Residential Parcel Homeowners Ass'n v. Hoang*, 376 F.3d 831, 840 (9th Cir. 2004).

Later events could not cure that defect—as the district court concluded. Appx736; Appx741; Ericsson Br. 34 n.1. A complaint's failure to establish subject-matter jurisdiction deprives the court of power to do anything (even grant leave to amend). Appx734 (citing *Morongo Band of Mission Indians v. Cal. State Bd. of Equalization*, 858 F.2d 1376, 1380-81 (9th Cir. 1988)). Thus, TCL's assertion that jurisdiction "became moot when the Texas Action was later transferred and consolidated with the California Action," Br. 12, is mistaken. The court could not do *anything* with the California case, even order its consolidation, without jurisdiction; any ensuing order is a "nullit[y]." *Elliot v. Peirsol's Lessee*, 26 U.S. (1 Pet.) 328, 340 (1828). Even after proper consolidation, jurisdiction for each case "must be considered separately." *Butler v. Dexter*, 425 U.S. 262, 267 n.12 (1976) (per curiam).[1]

[1] Without explanation, TCL asserts (Br. 23) that "early" jurisdictional rulings are not "dispositive of the nature of the claims ultimately pursued." But the declaratory-judgment claim used to establish federal jurisdiction is *the same claim* decided at trial. TCL identifies nothing that eliminated federal patent issues. Br. 10-19.

"The fact TCL's declaratory judgment claim anticipated an infringement action by Ericsson," TCL continues, "is *neutral* with respect to whether the claim was premised on legal or equitable relief," because patentees asserting infringement "can seek either damages (legal relief) or an injunction (equitable relief)." Br. 23. But TCL *conceded* that its declaratory-judgment claim anticipated an infringement action for *damages*. Pp. 4-6, *supra*. When Ericsson filed an actual damages infringement suit, TCL urged that it and the California action were "mirror images." P. 5, *supra*. Damages, moreover, are the ordinary remedy; injunctions are an extraordinary remedy available only where "monetary damages[] are inadequate." *eBay Inc. v. MercExchange, LLC*, 547 U.S. 388, 391 (2006). TCL never suggests this is such an extraordinary case. And Ericsson sought, and received, a retroactive "reasonable royalty" award—an "undisputedly legal remedy." *Tex. Advanced Optoelectronic Sols., Inc. v. Renesas Elecs. Am., Inc.*, 895 F.3d 1304, 1320 (Fed. Cir. 2018).

3. *TCL Cannot Avoid the Consequences of Its Declaratory-Judgment Action*

TCL argues that, while its declaratory-judgment action anticipated an infringement action "for purposes of subject-matter jurisdiction," the action does not

---

Nor does TCL explain how the court could continue exercising jurisdiction if the anticipated federal infringement action somehow disappeared, leaving only a contract action. *Already, LLC v. Nike, Inc.*, 568 U.S. 85, 91 (2013) (federal jurisdiction must exist at " 'all stages' of the litigation").

anticipate an infringement action "under the Seventh Amendment." Br. 21-22. Essentially, TCL urges it can obtain federal jurisdiction by filing a declaratory-judgment claim that anticipates a federal infringement suit for which Ericsson has a jury-trial right, but avoid the jury trial by characterizing the same claim as a contract action. *Id.*

That defies precedent. One cannot be "deprived" of Seventh-Amendment rights merely because his opponent "took advantage of the availability of declaratory relief to sue . . . first." *Beacon Theatres,* 359 U.S. at 504. Had Ericsson filed its infringement action against TCL first, Ericsson's jury-trial right would have been unquestioned. *See Markman*, 517 U.S. at 377; pp. 2-3, *supra*. That does not change merely because TCL filed first. *Lockwood*, 50 F.3d at 974. Where the declaratory action functions as an "inverted" infringement suit, the nature of the anticipated suit governs for *both* jurisdictional and Seventh-Amendment purposes. *See Medtronic, Inc. v. Mirowski Family Ventures, LLC*, 571 U.S. 191, 196-197 (2014) (federal jurisdiction determined by suit defendant-patentee would bring); *ABB Inc. v. Cooper Indus., LLC*, 635 F.3d 1345, 1349-50 (Fed. Cir. 2011) (same); *Lockwood*, 50 F.3d at 974 (jury-trial right determined by suit defendant-patentee would bring); *Tech. Licensing*, 423 F.3d at 1288 (same).

TCL's lead case, *Owens-Illinois*, agrees: "If the declaratory judgment action . . . is essentially an inverted law suit—an action brought by one who would have been a defendant . . . —then the parties have a right to a jury trial." Br. 22 (quoting 610 F.2d at 1189). *Some* declaratory-judgment actions are not inverted suits because they "fit into" an "equitable pattern[ ]" for which there is no Seventh-Amendment jury-trial right. *Id.* But TCL properly conceded that its declaratory-judgment claim anticipated an infringement action by Ericsson. *See* pp. 4-6, *supra*. If it did not, federal-question jurisdiction and standing would be lacking. Pp. 7-8, *supra.* TCL cannot get into federal court by asserting a federal claim that affords a jury-trial right but disavow the jury-trial right that goes with it.

Owens-Illinois thus offers TCL no support. The plaintiff there sought specific performance of its contract, under state law, together with a declaratory judgment. But federal jurisdiction rested on diversity (missing here). *See* 610 F.2d at 1186. The *Owens-Illinois* action did not, and did not need to, anticipate *any* suit by the defendant (federal or otherwise). The defendant claimed no "affirmative relief"; the only issue was the plaintiff's demand for equitable relief. *Id.* at 1190. The action was "not an inverted lawsuit" in any respect. *Id.* at 1189. By contrast, TCL insisted it had brought an inverted infringement action. And the district court here had no jurisdiction *unless* TCL's declaratory-judgment action is "an inverted lawsuit" anticipating Ericsson's federal infringement action—a suit for which Ericsson had a jury-trial right. The court cannot exercise the jurisdiction that inverted suit brings while shedding the jury-trial right that goes with it.

TCL never argues that Ericsson waived, forfeited, or surrendered its jury-trial right. *Tokatly v. Ashcroft*, 371 F.3d 613, 618 (9th Cir. 2004). Ericsson insisted on that right throughout. Ericsson Br. 10-11. The pretrial order specifically declared that the court had "overruled Ericsson's request for a jury trial of all issues, Dkt. 1086, which request Ericsson hereby preserves." Appx48694.[2]

TCL's invocation of the agreed-upon case-management proposal—under which Ericsson's Texas action was stayed while TCL's California action proceeded—is thus puzzling. Br. 23-24. Because TCL's declaratory-judgment action anticipated Ericsson's infringement action for damages, Ericsson had a jury-trial right for *TCL's declaratory-judgment action*. *See* p. 7, *supra*. TCL never explains how staying the Texas action, where Ericsson had a jury-trial right, in favor of another action for which Ericsson *also* had a jury-trial right, eliminates Ericsson's jury-trial right for both.

In *Technology Licensing* (Br. 24), the patentee "voluntarily abandoned its claim for damages." 423 F.3d at 1289. Ericsson never did that: It consistently asserted its right to compensation for past infringement. This case remained a

[2] At trial's outset, Ericsson reiterated its non-waiver. Appx51642. The Court agreed, as "reflected in the pretrial conference order." *Id.* Because "the right of jury trial is fundamental," moreover, "courts indulge every reasonable presumption against waiver." *Aetna Ins. Co. v. Kennedy*, 301 U.S. 389, 393 (1937).

declaratory-judgment action that anticipated—and eventually extinguished—Ericsson's infringement claim for damages.[3]

B. The District Court Violated Ericsson's Seventh-Amendment Rights Under *Dairy Queen*

The district court violated the Seventh Amendment for an independent reason: Under *Dairy Queen*, Ericsson was entitled to jury resolution of all issues common to legal and equitable claims. Ericsson Br. 34-35. TCL does not contend otherwise. Nor does TCL deny that the district court decided common issues—from expert credibility, to assessing data, to deciding which prior licenses were most comparable. *Id.* TCL conceded below that its claims raised common legal issues, including which patents "have true value," a question "that go[es] directly to patent law." Appx795-796; *see* Appx4709 (parties would "litigate the same issue" in both suits because "damages in favor of Ericsson will require the setting of a royalty rate").

TCL does not address *Dairy Queen* in argument. Under "Facts and Procedural History," TCL suggests that dismissal of *its* damages claim "eliminat[ed] the last legal claim for relief in the case." Br. 14 n.1, 16. But Ericsson's *infringement* claims remained. Appx6654. The amount owed to Ericsson for past infringement

[3] *Paice LLC v. Toyota Motor Corp.*, 504 F.3d 1293 (Fed. Cir. 2007), is also inapposite. In *Paice*, the *jury* decided damages for infringement (and thus all common issues); *Paice* addressed only whether a jury must also decide the "ongoing royalty rate." *Id.* at 1314.

remained. That is why the court dismissed Ericsson's damages claims *after* trial, finding that, in ordering a payment for past unlicensed sales, the court had rendered those claims "moot." Appx23; Ericsson Br. 36-37. The court thus did not merely decide common *issues*. It conclusively resolved a central *legal claim*—damages for past violations—itself.

Ericsson demanded a "jury determination of *all legal issues*" from the outset. Appx9882 (emphasis added). Ericsson demanded that the *jury* decide common issues "prior to the Court's determination of any overlapping equitable issues." Appx10087-10088. "[T]he jury would determine whether Ericsson's proposal was FRAND," Br. 14, resolving common issues such as license comparability and patent value, Ericsson Br. 34-35.[4] Only afterward would the court review any license terms the jury found not-FRAND and reform them. But a jury trial would occur first "because Ericsson has a Seventh Amendment right to a jury trial on all factual issues underlying the parties' legal claims and counterclaims"; the jury's decision would "inform any later equitable ruling." Appx1892-1893.

[4] TCL claims the jury was to make the FRAND determination "because it was intermixed with *TCL's* damages claim." Br. 14 (emphasis added). But the court below never said that; the quoted language is TCL's.

C. The District Court's Award of Monetary Compensation for Past Infringement Confirms the Seventh-Amendment Violation

At the case's conclusion, the district court imposed a "release payment" to "compensate" Ericsson for TCL's "unlicensed past sales." Ericsson Br. 35-37. That judgment, requiring one party to "pay a sum of money to" another, is a "classic form of *legal* relief" that requires a jury trial. *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 210 (2002). The court's ruling that the payment "fulfills," or "moots," Ericsson's damages claims, Appx33; Appx56038, confirms the *Dairy Queen* violation: It demonstrates that the issues the court resolved and damages owed were one and the same.

TCL argues (Br. 25-27) that the release payment is "equitable relief." But it told the district court that "release payment is simply another word for 'damages for past infringement.'" Appx6283. TCL invokes cases concerning restitution (reimbursement) or prospective relief (future payment obligations). *See, e.g.*, *Bowen v. Massachusetts*, 487 U.S. 879, 882 (1988) (demand that agency reimburse State for Medicaid expenditures); *Paice*, 504 F.3d at 1315 ("ongoing royalty rate" for ongoing, not past, infringement); *Klein v. Shell Oil Co.*, 386 F.2d 659 (8th Cir. 1967) (requiring defendant to secure permit required under a land-sale contract; no "money judgment" awarded). None of those cases holds that ordering the payment of money, as compensation for past legal harms, is "equitable" just because a court calls it such.

TCL invokes *Great-West Life*'s statement that "an order which effectively 'restore[s] to the plaintiff *the particular funds or property in the defendant's possession*' is equitable." Br. 26-27 (quoting 534 U.S. at 214) (emphasis added). As the quoted language makes clear, such relief is equitable *only* if it requires surrender of "*particular* funds or property." TCL insists the district court directed TCL to hand over money TCL was "in effect" holding for Ericsson in "constructive trust." *Id.* at 27. TCL never identifies the "particular funds" at issue. It never claims the requirements for "constructive trust" (tracing, etc., *see Cunningham v. Brown*, 265 U.S. 1, 10 (1924)), were met. That effort to rebrand "personal liability on the defendant" as "equitable" relief is precisely what *Great-West Life* forecloses. 534 U.S. at 214. "[C]ompensation for loss resulting from . . . breach of legal duty [is] the 'classic form of legal relief.'" *Id.* at 210.

Nor does it matter (Br. 25) whether the district court found infringement. Monetary "compensation" is classic legal relief. *Feltner v. Columbia Pictures Television, Inc.*, 523 U.S. 340, 352 (1998). Besides, infringement was undisputed. TCL alleged that its phones practiced the standards, Appx444 (¶3), and "conceded" that Ericsson patent families were "essential" to those standards, Appx63. Standard-compliant devices "*necessarily* infringe" the SEPs covering that standard. *Ericsson*, 773 F.3d at 1209. If TCL did not practice the standard and Ericsson's inventions, it needed no licenses and owed nothing at all.

II. THE DISTRICT COURT'S "SIMPLE PATENT COUNTING" METHODOLOGY IS FATALLY FLAWED

Having displaced the jury, the district court applied a novel methodology to determine FRAND royalties. The parties agree that FRAND royalties, like other reasonable royalties, "must be based on the incremental value" added by the patented technology. *Ericsson*, 773 F.3d at 1226; *see* TCL Br. 31-33; Ericsson Br. 39-41. The decision below defies that rule: It adopted a "simple patent counting" method that treats "every [standard-essential] patent" as "possessing identical value." Appx42-43.

TCL claims "the top-down approach was not invented by the court; *it came from Ericsson*." Br. 30. Not so. Ericsson recognizes the utility of *properly conducted* top-down methods, particularly where (unlike here) no comparable licenses exist. But the district court's top-down framework was not properly conducted and did not "come from Ericsson." Ericsson never endorsed "simple patent counting" that disregards patents' relative value.[5] And the court's method for deciding which patents to count—the numerator and denominator in top-down analysis—rendered its approach unreliable.

[5] TCL frames the district court's methodological choices as evidentiary decisions. Br. 29-30 & n.4. But the FRAND methodology is a legal issue reviewed *de novo*. HTC Br. 10 n.1; Ericsson Br. 39-40.

A. "Simple Patent Counting" Defies Reasonable-Royalty Principles

The parties both presented FRAND calculations that attempted to account for the *value* of Ericsson's SEPs. Ericsson Br. 41. But the court rejected them and devised its own—"simple patent counting" that "treats every patent as possessing identical value." Appx42-43. The court first selected a *total* royalty for all SEPs. It then calculated Ericsson's share based *solely on the number* of Ericsson SEPs in each standard, expressed as a fraction of the total:

$$\textit{Proportional Share} = \frac{\textit{Number of unexpired SEPs owned by Licensor}}{\textit{Total Number of SEPs in the Standard}}$$

Appx43. But the "number of patents infringed" does not equal the value added. *Crystal Semiconductor Corp. v. TriTech Microelecs. Int'l, Inc.*, 246 F.3d 1336, 1357 (Fed. Cir. 2001). A portfolio with numerous patents covering minor features does not merit larger royalties than one with few patents covering critical inventions. Ericsson Br. 42-43. Yet that is the result the district court's method imposes.

1. TCL posits (Br. 34) that simple patent counting is permissible if one "assign[s] Ericsson's SEPs average value." But the court never found that Ericsson's SEP portfolios have "average value." The court's assertion that Ericsson's SEPs are "not as strong or essential as it has claimed," Appx69 (cited Br. 34), is not a finding they have "average value." This Court "may not guess at findings left

unmade." *Atl. Thermoplastics Co. v. Faytex Corp.*, 5 F.3d 1477, 1479 (Fed. Cir. 1993).

TCL invokes (Br. 34) its own "importance and contribution" analysis. But the district court *rejected* that as "unreliable." Appx67. Moreover, TCL "never applied [its] analysis to the rest of the SEPs in the standard." *Id.* TCL cannot claim Ericsson's SEPs have average value compared to others in the standard without estimating the value of those other patents. *Id.*

TCL urges (Br. 32-33) that "an assessment of the incremental value of the SEPs is baked in[ ]," because the "aggregate" value for all patents in each standard was based on Ericsson press releases. But the question is not *total* value; it is the value of *Ericsson's* contributions. The court *rejected* the press releases' estimates of *Ericsson's* "relative" contribution (25% for 4G). Appx48. TCL claims it is "not unreasonable" simply "to *assign* Ericsson's SEPs average value . . . given the complexity of the undertaking." Br. 34 (emphasis added). This Court has rejected efforts to use such "rule[s] of thumb" in place of a reasonable-royalty analysis "tie[d] . . . to the facts of the case." *Uniloc USA, Inc. v. Microsoft Corp.*, 632 F.3d 1292, 1315 (Fed. Cir. 2011).

2. The district-court cases TCL cites (Br. 35) underscore the error. *Microsoft Corp. v. Motorola, Inc.* rejected "patent-counting" because it "does not consider the importance of a particular SEP" or the "incremental value" the

invention adds. No. C10-1823-JLR, 2013 WL 2111217, at *80, *82 (W.D. Wash. Apr. 25, 2013). The court used rates from a patent pool addressed to the standard, where patentees *agreed* to divide royalty revenue "pro rata" based on the number of SEPs, as a *comparable-license* "benchmark." *Id.* at *87-89. TCL cites no comparable agreement here. Moreover, patent pools vet putative SEPs, investing 100 times what Concur IP did for each patent. Appx56. That renders any comparison implausible.

In re Innovatio IP Ventures LLC Patent Litigation (Br. 32) similarly rejected pure patent counting: "[It] is not appropriate to determine the value of the non-asserted [SEPs] based merely on numbers. If a patent holder owns ten out of a hundred patents . . . it does not automatically mean that it contributes 10% of the value of the standard." No. 11-c-9308, 2013 WL 5593609, at *10 (N.D. Ill. Oct. 3, 2013). The court ensured its method "account[ed] for" the patents' relative "importance." *Id.* at *39. The district court here refused to do that.

B. The "Proportional Share" Calculation Was Unreliable

The district court calculated Ericsson's "proportional share" for each standard as follows:

50-80 hours of claim-chart analysis per patent family by the engineers, lawyers, and technicians involved in developing the standards

$$\textit{Proportional Share} = \frac{\textit{Number of unexpired SEPs owned by Licensor}}{\textit{Total Number of SEPs in the Standard}}$$

20 minutes of review per patent family by persons without engineering experience in the field

Appx43 (annotations added). But the methods for determining the denominator (total SEPs) and numerator (Ericsson's SEPs) were so divergent as to preclude reliance on the result.

1. For the denominator, reviewers screened thousands of patent families for an average of 20 minutes each. Ericsson Br. 46-48. 20 minutes is not enough time to *read* most patents, much less make a reliable essentiality determination. In real negotiations, determining a patent's essentiality can take days. *Id.* at 47. TCL defends (Br. 39) Concur IP's 20-minute review because "Concur was already familiar with the patents" from prior studies. But that imports more error. In the prior study, Concur IP *presumed* patents standard-essential unless a 30-minute review found "apparent reason to exclude" them. *Unwired Planet Int'l Ltd. v. Huawei Techs. Co.*, [2017] EWHC (Pat) 711 [346]. The *Unwired Planet* court found that Concur IP's method "err[ed] on the side" of inclusion, *id.* [354], "significant[ly] overstat[ing]" the SEPs in the denominator, *id.* [377]. It therefore slashed Concur IP's counts—for 4G, from 1,812 to 800 (*half* the figure the district

court used here). Ericsson Br. 48. Even then, it used those figures only as a cross-check. *Id.* at 48 n.6.

TCL dismisses that as the "arbitrary finding" of a "foreign" court. Br. 40. But that case involved a near-identical study by the same reviewers and one of the same experts (Dr. Kakaes) as here. The U.K. Justice, moreover, compared the Concur IP study to one that spent 5-6 hours per patent family, and yielded far lower figures. *Unwired Planet*, [2017] EWHC (Pat) 711 [333], [377]. Dr. Kakaes admitted "he was not surprised that [the] more detailed studies had found that a number of patents deemed essential in the [Concur IP study] were not in fact essential." *Id.* [352].

2. The district court then mis-matched that denominator with a numerator calculated using a *different* method—a review that counted only Ericsson patent families found essential following 50-80 hours of claim-chart analysis. Ericsson Br. 49. By using Concur IP's count for the "denominator in a fraction in which the numerator is a number derived by considering the patents in more detail, the result" systematically "understate[d] the significance" of Ericsson's patents. *Unwired Planet*, [2017] EWHC (Pat) 711 [361].

TCL does not respond. It blames Ericsson (Br. 38) for not submitting its own estimate for the denominator. But it was TCL's burden to show Ericsson's offers were *not* FRAND. Appx120. Ericsson was not required to fix TCL's unreliable method.

3. The Concur IP study proved its own unreliability. TCL's experts tried to use Concur IP data to compare the strength of Ericsson's patent portfolio to that of its licensees to "unpack" Ericsson's licenses. Ericsson Br. 20-21, 50. That yielded results that were upside-down: It indicated Ericsson would pay LG; but LG paid Ericsson [redacted]. *Id.* *TCL's* expert rejected Concur IP's result as "implausible." Appx109. And he could not assure anyone that the underlying error did not infect every result using Concur IP data. Appx52584.

TCL now argues (Br. 41 n.9) that Concur IP's data is correct, and that LG erred in paying Ericsson [redacted]. But TCL's own expert dismissed the Concur IP results as not "sensible." Appx52579. TCL cannot reject its own expert to urge that 20-minute review yields more accurate results than real-world negotiations. *See* Ericsson Br. 47; Appx100.

C. The District Court's Justifications Fall Short

1. The district court invoked "simple patent counting" based on concern about "*the risk* of hold-up and royalty stacking." Appx51 (emphasis added). But this Court has held that, because royalty calculations are case-specific, courts should not alter general royalty principles absent evidence that hold-up or stacking

has occurred. *Ericsson*, 773 F.3d at 1234.[6] The district court cited no such evidence. TCL adduced no evidence it had paid even *a single other royalty* under the standards. Ericsson Br. 44. While it seeks to fill that gap now, its posited evidence is entirely theoretical. Br. 35. TCL dismisses the issue as a "strawman" because "the court did not announce any principles of law, or instruct a jury" on royalty-stacking. *Id.* But the court adopted a *new* FRAND reasonable-royalty methodology, premised on hypothetical concerns divorced from this case—precisely what *Ericsson* forbids.

2. TCL urges that Ericsson previously espoused "top-down" methods. Br. 30-31, 36. But the measure of royalties is provided by law, not press releases. Besides, the materials invoked by TCL urge that royalties should be "based on the value added by the technology." Appx75486; *see* Appx76093 (rates based on "relative patent strength"); Appx63835 (rates "reflect the value that the licensed patented technology confers").

TCL cites statements (Br. 30-31) from before Ericsson had a "substantial licensing history" for 4G patents. Appx63558-63560. In that context, Ericsson proposed allocating any aggregate royalty based on "approved technical contributions" to the standard. Appx63836-63837; *see* Appx53711-53712 ("proportional

[6] Several *amici* urge that a top-down method is justified given *theoretical* stacking concerns. Toyota Br. 26 & n.55; HTIA Br. 21-23 & n.22. That defies *Ericsson*.

share" based on "approved technical contributions"); Appx63558-63560 (same); Appx75923-75924 (royalties for SEP holders should reflect "their respective technology contributions"). Counting such contributions is not "pure" patent counting, Br. 34 n.5, as the district court recognized, Appx101. It assesses value by looking to *technical contributions* to the standard, not patent counts. That method does not endorse patent-counting wholly divorced from any assessment of the patented technologies' contribution to value.

3. TCL's *amici* defend top-down in the abstract. Toyota Br. 24; HTIA Br. 21-23. But Ericsson's challenges are limited to the flaws in the district court's novel approach. Top-down approaches may be appropriate as a mutually-agreed-upon allocation method for patent pools, *see* pp. 19-20, *supra*, or where comparable-license data is absent and the court accounts for patent value, *see* p. 20, *supra*. But that is not this case here.

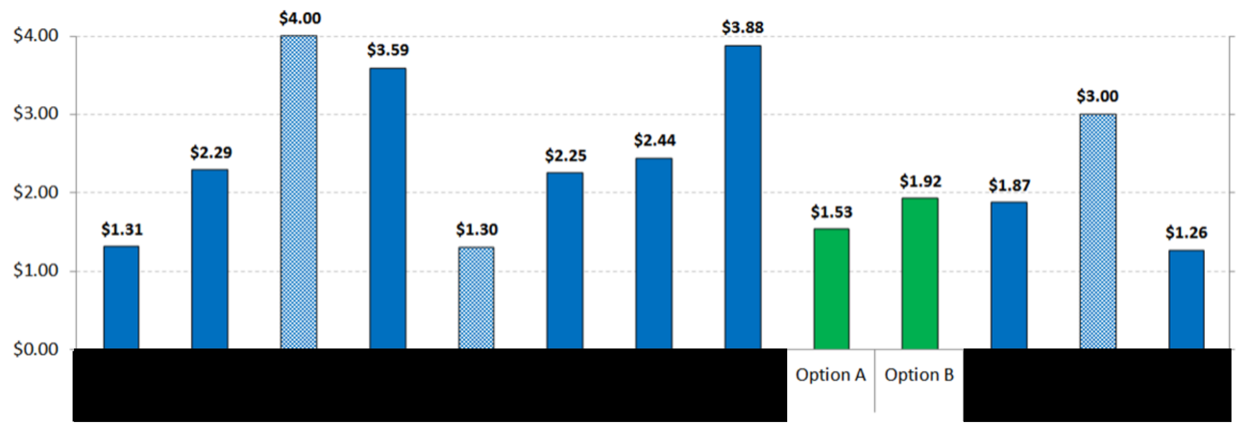
III. THE DISTRICT COURT'S COMPARABLE-LICENSE ANALYSIS CANNOT WITHSTAND SCRUTINY

The district court looked to Ericsson's prior licenses to evaluate nondiscrimination, Appx80, and to confirm patent-counting results, Appx125-129. The court purported to recognize—correctly—that there is no "single rate that is necessarily FRAND, and different rates offered to different licensees may well be FRAND given the economics of the specific license." Appx135. But it imposed the opposite approach. It held that FRAND required a license expressed in raw percentage of phone price, Appx94, without floors or caps, Appx95. But *none* of the *negotiated* Ericsson licenses the court invoked as comparable involved a naked percentage rate; many used floors and caps. Ericsson Br. 56-57. TCL urges that "the court acted well within its discretion in using unbounded percentage running royalty rates." Br. 44. But the FRAND obligation does not give a court "discretion" to displace a patentee's offer structures with a mandatory system of its own devising. And the court's comparable-license analysis was replete with clear error.

A. The District Court's Insistence on Raw Percentage-of-Price Rates Contravenes Basic Royalty Principles

1. Although Ericsson's negotiated licenses are almost never a raw percentage-of-phone-price, the district court mandated that for TCL. Requiring companies with premium smartphones and a company that sells low-cost phones to pay the same percentage-of-phone-price across-the-board can produce stunning disparities: Premium phone makers pay several dollars per phone, while others pay mere cents, for the same Ericsson technology, even if they use it in the same way. That violates the principle that royalties should be based on the value added by the patented feature, not just the value of the device incorporating it. *See* Ericsson Br. 52-55; *Ericsson*, 773 F.3d at 1226, 1232; *VirnetX, Inc. v. Cisco Sys., Inc.*, 767 F.3d 1308, 1329 (Fed. Cir. 2014).

This case proves the point. TCL complains that "Apple, Samsung, LG, HTC, and Huawei are *all* paying effective percentage rates substantially lower than what Ericsson was demanding TCL pay." Br. 59. In dollars-per-unit terms, Ericsson's offer to TCL was well within the range those companies pay. Ericsson Br. 59-61.



Appx50871 (4G rates). TCL cannot explain why FRAND entitles it to pay *less* for Ericsson's technology than its competitors in dollar terms merely because it wants to sell cheaper phones.

2. TCL urges that the district court acted "within its discretion," because Ericsson allegedly stated "that FRAND royalties should be expressed as a percentage of the selling price of the handset." Br. 44-45. But that is a jury argument, not a legal principle. Nothing entitled TCL to a structure—a pure (and low) percentage-of-phone-price rate—nowhere found in Ericsson's other negotiated licenses. The court conceded that "different rates offered to different licensees may well be FRAND given the economics of the specific license." Appx135. It identified

nothing in Ericsson's FRAND commitment requiring it to structure its offer to TCL as a pure-percentage-of-price royalty.[7]

TCL points to "public announcements," "internal communications plan[s]," "internal 'reference prices,'" litigation "argu[ments]," "business cases," and "interrogatory responses" where Ericsson supposedly utilized percentage rates. Br. 45-48. But TCL ignores the *actual Ericsson licenses* the court invoked to justify pure-percentage rates. Ericsson Br. 56-57. The court cited Samsung, LG, HTC, Coolpad, Karbonn, Doro, Sharp, Huawei, and ZTE. Appx94. Only *one* of those was a negotiated pure-percentage royalty; several had no percentage-of-price element at all. Ericsson Br. 58-60. TCL ignores that. TCL cannot explain why "internal communications" control over *actual licenses* in determining reasonable and non-discriminatory rates. TCL cannot explain why FRAND required Ericsson to offer TCL a pure-percentage-of-price rate structure that almost none of TCL's competitors received—much less using a rate that yields a per-phone payment well below any other licensee's. Ericsson Br. 57, 64-66. The decision below does not bar discrimination; it imposes it.

[7] TCL invokes the court's "equitable discretion." Br. 44, 56. But before using its "equitable" powers to "set the FRAND royalty rate," the court had to first find that Ericsson's offers were not FRAND. Appx139. And courts in equity are not exempt from the "clear-error" standard or burdens of proof. *See United States v. Noland*, 517 U.S. 535, 543 (1996).

3. TCL tries to defend the district court's rejection of dollars-per-unit royalties (and floors and caps) as "discriminatory." Appx139. The "record was devoid of any evidence," TCL urges, "that there is a fixed dollar value attributable to" Ericsson's SEPs. Br. 51. That inverts the burden: If proving Ericsson's dollars-per-unit rates (or floors) unreasonable or discriminatory depends on whether Ericsson's SEPs have a minimum value, it was TCL's burden to show they do not. Ericsson Br. 55.

There was ample proof. Where parties have "negotiated over the value of the asserted patent[s]," the resulting licenses reflect "the market's actual valuation." *CSIRO*, 809 F.3d at 1303. Companies like Apple and Samsung paid [redacted] of [redacted] of dollars in lump-sum payments—evidence of a minimum value the district court simply ignored. Ericsson Br. 56-57. Numerous Ericsson licenses include a floor (also ignored). *Id.*

TCL insists (Br. 51) that Apple's and Samsung's lump-sum payments yield rates that are "entirely variable" (depending on the number of units sold). But the payments represent a value/payment floor, even if Apple and Samsung sold few phones. And licenses are based on *sales projections*. Those projections produced a range of dollars-per-unit valuations. Appx97-98. Coolpad, Sharp, and Doro agreed to pay dollars-per-unit rates or percentages with floors and caps; Apple and Samsung had dollars-per-unit options. Ericsson Br. 57-58. Like the district court, TCL ignores the market. Even if "Ericsson's licensing business is thriving," Br. 56, that reflects the value of Ericsson's technology. It does not support TCL being allowed to pay less for that technology than TCL's competitors.

B. Other Methodological Errors Require Reversal

1. *Inclusion of Brand Value*

In calculating the percentage rates Apple and Samsung paid, the district court utilized the full price of their premium phones, as if Ericsson were receiving a royalty on brand value wholly unrelated to Ericsson's contributions. That is legal error. Ericsson Br. 61-64; *see VirnetX*, 767 F.3d at 1329. TCL does not contend otherwise. Br. 56.

TCL asserts waiver. But Ericsson raised the issue repeatedly, in cross-examining TCL's expert, Appx52430-52432; through its own expert, Appx54107; and in argument, Appx54603. It would be "incorrect," Ericsson warned, to not "strip out . . . brand recognition" value "that has nothing to do with . . . Ericsson's patents." *Id.*; *see* Appx54124-54126 (similar). Like the district court, TCL faults Ericsson (Br. 57-58) for not offering data to "back out" brand value. But Ericsson had no obligation to *fix* flaws in *TCL's* FRAND case. Ericsson proposed calculating royalties in dollars-per-unit to avoid calculating royalties based on Apple and Samsung brand value. Ericsson Br. 53-54. Besides, TCL's witnesses provided any necessary evidence, estimating brand value at $300-400 per phone. Ericsson

Br. 53. TCL and the district court simply chose not to exclude that brand value—violating reasonable-royalty principles in the process.

2. *Ignoring the Most Comparable Licenses*

The district court ignored inexpensive phone-makers most comparable to TCL. Ericsson Br. 64-67. Despite the parties' agreement that ZTE is comparable, Appx83, the court ignored it. ZTE's license revealed rates—[redacted] 4G and [redacted] 3G in North America, Europe, Japan, and Australia—[redacted] Ericsson's Option B, which specified a 1.5% 4G rate and 1.2% 3G rate in the U.S. and Europe. Appx34. The court's theory that it could not "unpack" ZTE's *additional* lump-sum payments is no basis for ignoring rates that, even without those payments, are [redacted] *to* [redacted] the court's selected rates for 4G (0.45%) and 3G (0.30%). Ericsson Br. 64-65. The court also disregarded Coolpad and Karbonn—which pay [redacted] *to* [redacted] the 3G and 4G rates the court gave TCL, Ericsson Br. 65-66—based on the idea that they sell primarily in one market, Appx84. But they have global licenses. Appx44547; Appx44550.

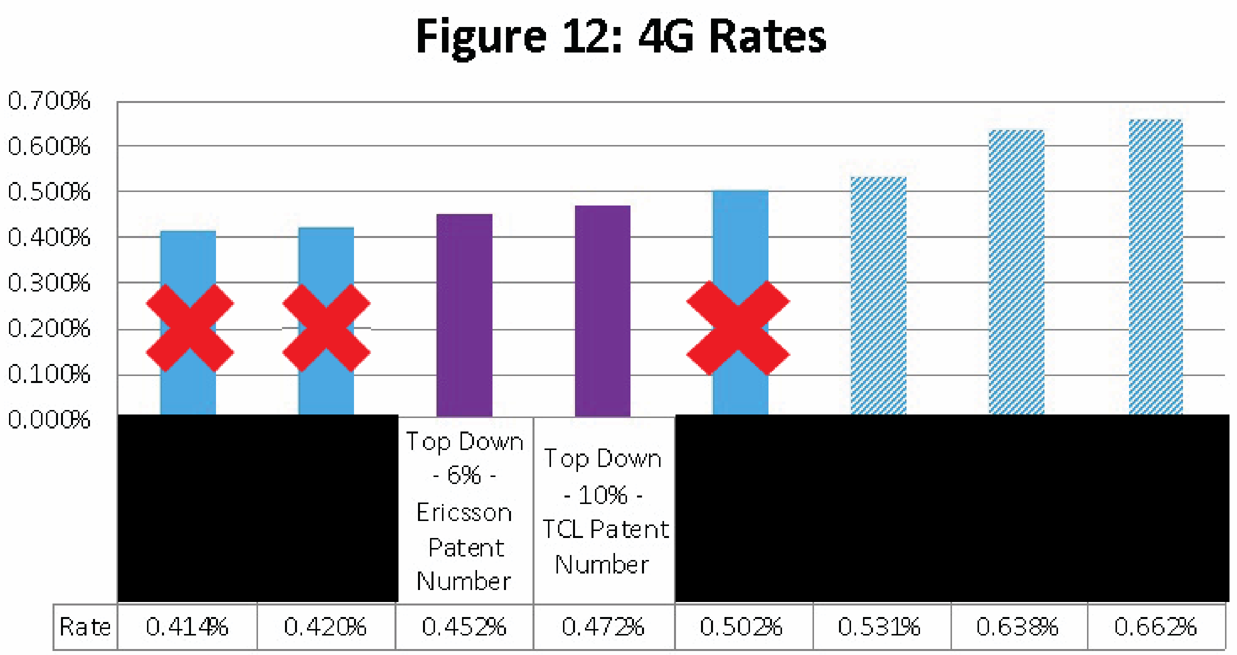
TCL does not defend the district court's erroneous rationales (mentioning ZTE only in a non-responsive footnote, Br. 60 n.14). TCL argues that, if *other licensees* "were paying effective percentage rates [that were] lower," ZTE, Coolpad, and Karbonn are "irrelevant." Br. 59-60. But FRAND does not require each subsequent licensee to be offered the "lowest rate" of all prior licensees. Appx135.

The district court cannot, based on patently erroneous rationales, ignore licenses showing that Ericsson offered TCL rates in the middle of a reasonable range. Indeed, TCL does not deny that it refused to accept even *Apple*'s deal, scaled to TCL's lower volume. Ericsson Br. 61. TCL does not want the same deal as competitors; it demands a better one.

3. *Conflating Percentages Based on Wholesale and Retail Prices*

The district court compared its "top-down" percentage rates to percentage rates based on allegedly comparable licenses, claiming they "confirmed" its calculations. *But see* Ericsson Br. 67-70. But the comparison was a mismatch between percentage-of-retail rates and percentage-of-wholesale rates. Ericsson Br. 69.

TCL does not deny the mismatch. It notes that the court considered some non-mismatched data, looking to both percentage-of-retail and percentage-of-wholesale license data. Br. 62. That was the problem: Comparing "apples to apples" (percentage-of-wholesale top-down to percentage-of-wholesale prior licenses), the court's top-down rates are far lower than *any* prior-license rate. Ericsson Br. 69. Including "apples to oranges" (percentage-of-wholesale to percentage-of-retail) comparisons simply obscured the disparity.



Appx125 (red annotations added).

There was no waiver. Br. 62. Ericsson made clear that its business cases used *wholesale* data, Appx50919, which TCL did not contest, Appx56306-56307. Ericsson could not anticipate the court would erroneously mix wholesale and retail rates. It filed a timely motion once the error surfaced. Appx55624. Acting at the first "opportunity to object" is sufficient. *Burlington N. R.R. Co. v. Dep't of Revenue of the State of Washington*, 934 F.2d 1064, 1070 (9th Cir. 1991).

4. *The Court's Other Uncorrected Errors*

TCL does not defend the district court's use of actual sales to calculate percentage-of-price royalties, despite this Court's guidance that "expectations" rather than "actual results" should shape the analysis. Ericsson Br. 67 (quoting *Aqua Shield v. Inter Pool Cover Team*, 774 F.3d 766, 772 (Fed. Cir. 2014)); *see*

Appx97. Nor does TCL defend myriad other errors. Ericsson Br. 67-68 & n.10. TCL again invokes waiver. But unlike in the cases TCL cites (Br. 61-62), Ericsson's arguments are sufficiently developed through record citations and explanation to show the district court's errors. TCL just chooses not to respond.

CONCLUSION

The judgment of the district court should be reversed.

February 22, 2019

Respectfully submitted,

/s/ Jeffrey A. Lamken

Jeffrey A. Lamken
Counsel of Record
Michael G. Pattillo, Jr.
Rayiner I. Hashem
Emily K. Damrau
MOLOLAMKEN LLP
The Watergate, Suite 660
600 New Hampshire Avenue, N.W.
Washington, D.C. 20037
(202) 556-2000 (telephone)
(202) 556-2001 (fax)
jlamken@mololamken.com

Sara E. Margolis
MOLOLAMKEN LLP
430 Park Avenue
New York, NY 10022
(212) 607-8160 (telephone)
(212) 607-8161 (fax)

Theodore Stevenson, III
Nicholas Mathews
MCKOOL SMITH P.C.
300 Crescent Court, Suite 1500
Dallas, TX 75201
(214) 978-4000 (telephone)
(214) 978-4044 (fax)
tstevenson@mckoolsmith.com

John M. Whealan
4613 Merivale Road
Chevy Chase, MD 20815
(301) 588-1079 (telephone)

Counsel for Appellants Ericsson Inc.
and Telefonaktiebolaget LM Ericsson

CERTIFICATE OF SERVICE

I certify that today, February 22, 2019, I electronically filed the foregoing document with the Clerk of the Court for the U.S. Court of Appeals for the Federal Circuit using the appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

February 22, 2019 /s/ Jeffrey A. Lamken

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

CERTIFICATE OF COMPLIANCE MOTIONS OR BRIEFS CONTAINING MATERIAL SUBJECT TO A PROTECTIVE ORDER

Motion / Response / Reply Containing Material Subject to a Protective Order

☐ This motion, response, reply complies with the limitations set forth in Fed. Cir. R. 27(m) and contains [*state the number of*] __________ words (including numbers) marked as confidential, or

☐ This motion, response, reply does not comply with the word count limitations set forth in Fed. Cir. R. 27(m) and a motion requesting permission to exceed the maximum word count limitation is being filed contemporaneously with the filing of this motion, response, or reply.

Briefs Containing Material Subject to a Protective Order

☐ This brief complies with the limitations set forth in Fed. Cir. R. 28(d) and contains [*state the number of*] __________ words (including numbers) marked as confidential, or

☑ This brief does not comply with the word count limitations set forth in Fed. Cir. R. 28(d) and a motion is requesting permission to exceed the maximum word count limitation is being filed contemporaneously with the filing of this brief.

/s/ Jeffrey A. Lamken
(Signature of Attorney)

Jeffrey A. Lamken
(Name of Attorney)

Appellant
(State whether representing appellant, appellee, etc.)

February 22, 2019
(Date)

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) and Fed. Cir. R. 32(a) because this brief contains 7,000 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii) and Fed. Cir. R. 32(b).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in Times New Roman 14-point font.

February 22, 2019 /s/ Jeffrey A. Lamken