

No. 19-2039

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

CONVERSANT WIRELESS LICENSING S.A.R.L.,

Plaintiff-Appellant,

v.

APPLE INC.,

Defendant-Appellee.

On Appeal from the United States District Court for the Northern District of California, Case No. 5:15-cv-05008, Judge Nathanael M. Cousins.

**REPLY BRIEF FOR PLAINTIFF-APPELLANT
CONVERSANT WIRELESS LICENSING S.A.R.L.**

DATED: January 2, 2020

Marc A. Fenster
mfenster@raklaw.com
Reza Mirzaie
rmirzaie@raklaw.com
Adam S. Hoffman
ahoffman@raklaw.com
RUSS AUGUST & KABAT
12424 Wilshire Boulevard, 12FL
Los Angeles, California 90025
Tel: (310) 826-7474
Fax: (310) 826-6991

*Attorneys for Plaintiff-Appellant
Conversant Wireless Licensing
S.A.R.L.*

TABLE OF CONTENTS

INTRODUCTION 1

ARGUMENT: APPLE’S RESPONSE CONFIRMS THAT THE DISTRICT COURT’S “UNJUST BENEFITS” RULING RESTS ON REVERSIBLE ERRORS..... 3

I. APPLE’S BRIEF DOES NOT ADDRESS THE DISTRICT COURT’S FAILURE TO APPLY THE CORRECT STANDARD OF PROOF ON THE REMAND QUESTION—AND, IN FACT, ESTABLISHES THERE IS NO EVIDENCE THAT COULD SATISFY *ANY STANDARD* 3

 A. The District Court Legally Erred By Holding The Patent Unenforceable Where the Evidence Merely “*Suggests [a] Reasonable Possibility*” that a Benefit Resulted From Nokia’s Late Disclosure, Which Does Not Meet the Required *Clear and Convincing Evidence* Standard..... 3

 B. Apple Did Not And Could Not Provide Any Response To This Dispositive Point—and That Alone Confirms The Reversible Error of Substituting a “Suggest[ion of a] Reasonable Possibility” For Clear and Convincing Evidence 4

 C. Beyond Apple’s Failure to Respond to This Dispositive Point, Apple’s Other Responses Conclusively Establish There Was No Such “Reasonable Possibility” Because They Do Not Dispute the Conditions on Which that Reasonable Possibility Could Exist Were Not Met..... 5

II. APPLE’S BRIEF LIKEWISE CONFIRMS THAT ITS THEORIES AND THE DISTRICT COURT’S CONCLUSIONS REST ON THE PREMISE THAT THIS COURT’S “MATERIALITY” TEST DOES NOT REQUIRE *ANY* CAUSAL LINK TO THE LATE DISCLOSURE—AND THIS ESTABLISHES ANOTHER ERROR OF LAW 8

 A. The “Materiality” Test In This Court’s Remand Order Required Finding that Nokia’s Late Disclosure Was the But-For Cause of

Unjust Benefit—and Apple’s Strawmen and Misapplication of *Other* Cases Do Not Suggest Otherwise 8

B. Apple’s “No Causation Required” Premise Exposes An Even Clearer Legal Error In Light of this Court’s Remand Order, Which at the Least Required a Showing an Unjust Benefit Was “A Result Of” the Late Disclosure *Unless* there is a Showing of “Egregious Misconduct” 14

III. EVEN IGNORING ALL EVIDENCE AND ASSUMING ETSI ADDED THE NON-ADOPTED ’151 OPTION “AS A RESULT OF” NOKIA’S LATE DISCLOSURE, THERE IS *NO EVIDENCE* THAT THIS *OPTION* RESULTED IN APPLE’S ALLEGED STANDARD-*ESSENTIAL* BENEFITS—CONFIRMING A THIRD REVERSIBLE ERROR..... 18

IV. APPLE’S FINAL ARGUMENT—THAT ERRORS IN THE “UNJUST BENEFITS” RULING ARE HARMLESS DUE TO CLEAR FACTUAL ERRORS IN FINDING NOKIA’S CONDUCT “NOT AFFIRMATIVELY EGREGIOUS”—IS WRONG ON THE FACTS AND LAW 24

A. What Apple Calls “Clear Factual Error” Involve Well-Supported Facts For Which Apple Prefers A Different Finding—That Does Not Show Any Abuse Of Discretion..... 25

B. Apple’s Arguments Also Fail Because They Ignore Dr. Walker’s Contradictory Admissions, Which Make Clear Apple Can Never Prove Egregious Misconduct in this Case..... 26

V. WITH NO SUPPORT FROM THE FACTUAL RECORD, APPLE AGAIN ARGUES FOR A FAR LOWER EVIDENTIARY THRESHOLD THAN EXISTING LAW ALLOWS 28

TABLE OF AUTHORITIES

CASES

Burrage v. U.S.,

571 U.S. 204 (2014)..... 10

Core Wireless Licensing S.A.R.L. v. Apple Inc.,

899 F.3d 1356 (Fed. Cir. 2018) passim

Qualcomm Incorporated v. Broadcom Corp.,

548 F.3d 1004 (Fed. Cir. 2008) 11, 12

Therasense, Inc. v. Becton, Dickinson and Co.,

649 F.3d 1276 at 1287 (Fed. Cir. 2011) passim

United States v. Microsoft,

253 F.3d 34 (D.D.C. 2001) 15, 16, 31

INTRODUCTION

This Court remanded this case to the district court to determine whether Nokia’s nondisclosure of the ‘151 patent to ETSI during the GPRS standard setting was a material cause of any unjust benefit. *Core Wireless Licensing S.A.R.L. v. Apple Inc.*, 899 F.3d 1356, 1368-9 (Fed. Cir. 2018) (“Remand Order”). Such a determination must meet a “clear and convincing” evidentiary standard. *See* Appx2537; *Therasense, Inc. v. Becton, Dickinson and Co.*, 649 F.3d 1276 at 1287 (Fed. Cir. 2011); *Core Wireless*, 899 F.3d at 1368. Apple’s Brief fails entirely to explain how the district court’s finding that the evidence, at best, merely “*suggests that*, had Nokia disclosed its IPR, there was a *reasonable possibility* that the ‘151 patent would not have been incorporated into the GPRS standard” meets the requisite legal thresholds on remand. Appx043.

Apple was required to demonstrate Nokia’s nondisclosure “*resulted in*” an alleged unjust benefit. *Id.* at 1368-9. Both the district court and Apple rely on the contention that the rejected Nokia proposal for a single timing value option was essential to the standard or otherwise required of handset makers such as Apple. But all evidence in the case, as well as the prior holding of this Court, is to the contrary. So instead Apple argues that it need not meet any causation threshold at all, let alone the “but-for” causation of *Therasense*. However, this Court’s clear directive on remand was that the only exception to the requirement of materiality is if Apple can

prove “egregious misconduct.” *Id.* The district court held that Apple cannot prove egregious misconduct, and Apple has not shown that this finding was an abuse of the district court’s discretion or an error of fact or law.

ARGUMENT: APPLE’S RESPONSE CONFIRMS THAT THE DISTRICT COURT’S “UNJUST BENEFITS” RULING RESTS ON REVERSIBLE ERRORS

I. APPLE’S BRIEF DOES NOT ADDRESS THE DISTRICT COURT’S FAILURE TO APPLY THE CORRECT STANDARD OF PROOF ON THE REMAND QUESTION—AND, IN FACT, ESTABLISHES THERE IS NO EVIDENCE THAT COULD SATISFY *ANY STANDARD*

This Court remanded this case to the district court to determine whether Nokia’s nondisclosure of the ‘151 patent to ETSI during the GPRS standard setting was a material cause of any unjust benefit. *Core Wireless*, 899 F.3d at 1368-9. Such a determination must meet a “clear and convincing” evidentiary standard. *See* Appx2537; *Therasense, Inc.*, 649 F.3d at 1287 (Fed. Cir. 2011); *Core Wireless*, 899 F.3d at 1368. Apple’s Brief fails entirely to explain how the district court’s finding that the evidence, at best, merely “*suggests that*, had Nokia disclosed its IPR, there was a *reasonable possibility* that the ‘151 patent would not have been incorporated into the GPRS standard” meets the requisite legal thresholds on remand. Appx043.

A. The District Court Legally Erred By Holding The Patent Unenforceable Where the Evidence Merely “*Suggests [a] Reasonable Possibility*” that a Benefit Resulted From Nokia’s Late Disclosure, Which Does Not Meet the Required *Clear and Convincing Evidence Standard*

The parties have long agreed that the “clear and convincing” burden of proof applies to Apple’s implied waiver defense. *See, e.g.*, Appx2537 (Apple expressly acknowledging it bears the burden of proving unenforceability by “clear and convincing evidence”). As Conversant argued and demonstrated in its opening brief,

the district court failed to apply that legal standard to the question of whether any alleged unfair benefit was “a result of” Nokia’s late disclosure. *See, e.g.*, Conversant Br. at Sections III (A), III (B), and III (C). Instead, the district court expressly found that, at best, the relevant evidence relied on by Apple merely showed that “ETSI members are incentivized to choose technical solutions that are free of licensing costs . . . [which] *suggests that*, had Nokia disclosed its IPR, there was a *reasonable possibility* that the ‘151 patent would not have been incorporated into the GPRS standard.” Appx42 (emphasis added).

B. Apple Did Not And Could Not Provide Any Response To This Dispositive Point—and That Alone Confirms The Reversible Error of Substituting a “Suggest[ion of a] Reasonable Possibility” For Clear and Convincing Evidence

Despite Conversant prominently establishing this blatant legal error in three sections of its opening brief, Apple fails to write one word in direct response to it.

Nor could it. Evidence that merely “*suggests . . . a reasonable possibility*,” by definition, does not even reach the level of a reasonable *probability* or *likelihood*. Thus, it obviously does not and cannot satisfy the applicable *clear and convincing evidence* standard. Apple has not provided—and cannot provide—any legal authority otherwise.

Apple’s silence in addressing the district court’s failure to apply the clear and convincing standard speaks volumes. The district court’s contrary analysis and conclusion in favor of Apple rests on legal error that should be reversed.

C. Beyond Apple’s Failure to Respond to This Dispositive Point, Apple’s Other Responses Conclusively Establish There Was No Such “Reasonable Possibility” Because They Do Not Dispute the Conditions on Which that Reasonable Possibility Could Exist Were Not Met

Apple’s inability to provide any response to defend the legal error of not requiring clear and convincing evidence confirms this Court should reverse the district court. In addition, Apple’s other *affirmative* responses conclusively *establish* that Nokia’s breach did not and could not make any difference to ETSI’s decision incorporate the non-adopted ’151 option into GPRS.

The sole evidence on which the district court relies for its “reasonable possibility” finding—Dr. Walker’s testimony on the impact of IPRs on ETSI’s decision to include one proposal or another—cannot provide a basis for any finding that even a “reasonable possibility” existed in this case. A more complete version of Dr. Walker’s testimony than that quoted by Apple and the district court reveals that the possibility he describes is conditional:

Well, you may, for instance, see that there are a couple of proposals on the table, one of which IPR is essential for, and another may be totally IPR-free. Now, you wouldn't choose something just because it was IPR-free. Your requirement is to say, oh, choose the best technical solution. But if those two solutions were technically the best, then you're more likely to choose the one for which there was no cost ultimately to your company than the one that ultimately, no matter how small, there would be some cost.

Appx970 at 1420:2-14 (emphasis added).

Dr. Walker’s complete testimony shows that the IPR is only potentially relevant to ETSI choosing one technical proposal over another if and only if: (a) the

proposals are both technically the best; and (b) one proposal is lower cost than another because it is not subject to IPR. However, despite a record that includes so many fact and expert witnesses and detailed ETSI meeting minutes, there is no evidence of either condition being met in this case. There is no evidence, for example, that the two-TAV option recommended by the Ericsson Proposal was IPR-free, let alone of equal technical value but lower cost. And Apple's response brief did not provide *any evidence on, or even a response to*, either (a) or (b). Thus Dr. Walker's testimony cannot possibly provide a basis for a finding that Nokia's breach *resulted in*—or had any impact whatsoever on—the non-adopted '151 single-TAV option being incorporated into GPRS.

While this wholesale lack of evidence is more than enough to confirm reversible error, affirmative statements in Apple's brief further establish reversible error beyond any debate. Specifically, Apple's brief affirmatively establishes that at least necessary condition (a) cannot be met in this case because all proposals in question were not all “technically the best” solution. Apple now concedes that “ETSI was considering *several other* options at the time...” and ultimately adopted the “better performance” option, which was the Ericsson Proposal. Apple Br. at 34 (emphasis added)¹.

¹ Elsewhere, Apple's response brief argues that “ETSI was considering multiple options in 1997 with respect to the accused functionality...” Apple Br. at 49. As explained above, the mere fact that there were other proposals does not show

This admission now proves there can never be sufficient evidence of necessary condition (a) in this case because Apple concedes the adopted proposal was the best available solution technically – there was no technically equal proposal not encumbered by IPR for ETSI to choose. And because Dr. Walker’s conditional circumstance was the best and only basis for the district court’s finding that the evidence “suggest[s] ... a reasonable possibility” that Nokia’s breach resulted in even the non-adopted ’151 option being incorporated into GPRS, the district court’s finding rested on clear legal and factual error.

The other evidence in the record further proves a timely Nokia disclosure in this case would not have affected whether the non-adopted ’151 approach was included in the standard as an option. Dr. Walker himself could not identify a single instance of a member disclosing IPRs at a meeting discussing such proposals. Appx3161 at 87:7-12 (“Q: But in ... *50 meetings* that you were involved in over the years, *you can't recall a single person ever making an IPR declaration; is that right?* A: In the meetings I was involved with, *that is absolutely correct.*”). Consistent with the testimony, ETSI documents describing the purpose of its IPR disclosure policies confirm that the existence (or lack) of Nokia IPR would not be considered to be a factor in choosing among technical solutions, unless that IPR represented a potential

materiality. By Dr. Walker’s own admission, any such alternative must be of the same technical merit as the chosen proposal to be considered by ETSI as an actual alternative. Apple has failed to even allege this.

“hold up” to implementation because it was “unavailable” for licensing. Appx3331. But it is undisputed that a license to the ’151 Patent *always has been available for licensing* to Apple—on FRAND terms no less.

In sum, the district court’s conclusion is wrong as a matter of law, because there is no evidence showing a “reasonable possibility”—let alone clear and convincing evidence—that Nokia’s nondisclosure “resulted in” an unjust benefit. And this reality will not and cannot change with yet another trial on the issue, so that conclusion should be reversed.

II. APPLE’S BRIEF LIKEWISE CONFIRMS THAT ITS THEORIES AND THE DISTRICT COURT’S CONCLUSIONS REST ON THE PREMISE THAT THIS COURT’S “MATERIALITY” TEST DOES NOT REQUIRE ANY CAUSAL LINK TO THE LATE DISCLOSURE—AND THIS ESTABLISHES ANOTHER ERROR OF LAW

A. The “Materiality” Test In This Court’s Remand Order Required Finding that Nokia’s Late Disclosure Was the But-For Cause of Unjust Benefit—and Apple’s Strawmen and Misapplication of *Other* Cases Do Not Suggest Otherwise

Apple’s brief crystallizes a second purely legal question, which, if resolved in Conversant’s favor, requires reversal of the district court’s conclusion. As Conversant argued in its opening brief, and the parties do not dispute, the district court expressly held that “*but-for proof, however, is not required*” when applying this Court’s tests for implied waiver in its Remand Order. Appx43 (emphasis added). Conversant contends that was legal error. Apple argues the extreme opposite position that implied waiver does not require any evidence of causation, and admits

it has no evidence of causation. Thus, resolution of this purely legal question in Conversant's favor should also lead to a reversal.

Conversant's position is the correct one—and Apple's flawed legal arguments and irrelevant distractions make this point even clearer. The Court's Remand Order in this case expressly held that, unless there is a showing under the "egregious misconduct" test, Apple must prove its burden under the "*the materiality*" requirement of the unjust benefits test. Under that aptly named requirement, Apple must show that any alleged unjust benefit was obtained "*as a result of*" Nokia's late disclosure. *Core Wireless*, 899 F.3d at 1369 (Fed. Cir. 2018); *see also id* (remanding the issue of unenforceability to the District Court to determine whether "inequitable consequence *flowed from* Nokia's failure to disclose its patent application.") (emphasis added). In other parts of this Court's Remand Order, this Court restated the test and added the confirmatory explanation that implied waiver "should only be applied in instances where the patentee's misconduct *resulted in* an unfair benefit." 899 F.3d at 1368 (emphasis added). That is because "like the doctrine of inequitable conduct discussed in *Therasense*, [implied waiver also] may render an entire patent unenforceable." *Id.*

As a matter of pure logic, requiring that unjust benefit "X" happen "*as a result of*" late disclosure "Y" presents the very definition of "but for" causation. As a matter of hornbook tort law, Y does not have to be the only "but for" cause of X—

it merely has to be one “but for” cause of X. And Y also does not have to be the proximate cause of X. But it must be a cause of X. Indeed, the Supreme Court has repeatedly held that “results from” and equivalent phrases mean “but for” causation. *Burrage v. U.S.*, 571 U.S. 204, 214 (2014) (collecting cases).

This Court made clear this rule also makes sense as a matter of patent policy. And as Conversant showed in its opening brief, in repeatedly citing and analogizing to *Therasense*, this Court’s Remand Order shows that “resulted in an unfair benefit” in this context means the unfair benefit would not have occurred “but-for” the patentee’s misconduct. 649 F.3d at 1292.

Apple responds to all this by entirely ignoring and avoiding these parts of the Court’s Remand Order and the necessary logic and conclusions that must flow from it. In fact, other than merely citing the district court’s conclusion—the only sentence in that order that acknowledges the “*as a result of*” test—Apple itself also never acknowledges the “as a result of,” “*resulted in*,” or “*flowed from*” requirements stated in this Court’s Remand Order. As we already have established, there is no way for Apple to meet these requirements, even under Dr. Walker’s most favorable testimony or any other evidence.

Instead of directly dealing with this language from the Remand Order, Apple offers two irrelevant and otherwise flawed distractions. First, Apple argues that Conversant cannot be right about the causation requirement because the tests for

inequitable conduct and implied waiver are not “coextensive.” Apple Br. at 46. Besides citing no supporting authority for this argument, it is also a strawman: Conversant never said the two tests have to be perfectly coextensive and, indeed, they do not. Regardless, Apple’s argument does nothing to help them altogether ignore *any* materiality or causation, as they contend this Court should.

On the other, larger distraction, Apple suggests this Court should ignore the language from its Remand Order in this case and instead rely on Apple’s application of an entirely different (and pre-*Therasense*) case, *Qualcomm v. Broadcom*. Specifically, Apple contends that the Court applied the implied waiver doctrine in that case “for a patent *found not essential* to the standard—which itself confirms there is no requirement that nondisclosure be shown as the ‘but-for’ cause of a patent becoming essential to the standard.” Apple Br. at 42. In this argument Apple follows the district court’s misapplication of *Qualcomm*. As Conversant made clear in its opening brief, the district court confirmed its rejection of a requirement for any causation by misapplying the very same *Qualcomm* egregious-misconduct quotes Apple does now. Indeed, it did not identify evidence of any causation but nevertheless concluded that was not a problem for Apple because “Nokia and Conversant cannot now ‘rely on the effects of its misconduct to shield it from the application of the equitable defense of implied waiver.’” Appx43, quoting *Qualcomm Incorporated v. Broadcom Corp.*, 548 F.3d 1004, 1021 (Fed. Cir. 2008).

And the district court then held that Apple need not even “connect [Nokia’s] nondisclosure with the inequitable benefit.” Appx43.

As an initial matter, Apple’s key premise distorts that case to obscure the fact that the *Qualcomm* patentee had issued patent claims that it contended *were essential*, all the way *through trial*. *Qualcomm*, 548 F.3d at 1021-24. *This* was the salient point in analyzing the merits of Broadcom’s implied waiver defense, *not* whether Qualcomm’s strategy was effective in convincing the jury to enter a verdict vindicating its claim of essentiality. *Id.* at 1025.

Moreover, as discussed at Section II.B of the Opening Brief, both Apple and the district court stretch *Qualcomm*’s finding that an accused infringer need not show that it would have acted differently if not for the patent-holder’s failure to disclose, to mean that neither proof of but-for causation, nor indeed proof on any specific standard of causation, is required. This stretches the narrow issue addressed by *Qualcomm* (reliance by a defendant implementing the standard) far beyond its original application,

In any case, the *Qualcomm* holding was not even about the unjust benefits test. To the contrary, this Court was merely deciding whether Qualcomm’s “intentional nondisclosure” of IPR, “organized *[] plan* to shield [the] patents from [JVT] consideration,” and attempts to suppress and “*conceal*” trial evidence satisfied the “*egregious misconduct*” test for implied waiver. *Id.* at 1021-24. That test is the

sole alternative to the “unjust benefits” test and the *sole exception* to the materiality requirement in it. *Core Wireless*, 899 F.3d at 1368; *Therasense*, 649 F.3d at 1292 (“Although but-for materiality generally must be proved to satisfy the materiality prong of inequitable conduct, this court recognizes an exception in cases of affirmative egregious misconduct.”) And there is no dispute that the test at issue here is the unjust benefits test, given that the district court ruled in Conversant’s favor on egregious misconduct (a holding Apple separately appeals in its opposition brief).

Thus, contrary to Apple’s accusation, it is not Conversant who seeks to present a “valid reason for the Court to change its law.” Apple Br. at 43. It is Apple who is seeking and *needs* a change in law, a dramatic change that that would effectively eviscerate the “materiality” test of *Therasense* and this Court’s Remand Order. Apple proposes eliminating the “materiality” requirement because Apple has no evidence that comes close to satisfying any causation standard. *See supra*, at I (B); I (C) and II (A). Apple thus needs a brand-new “no causation required” rule to prevent this Court from holding there is a second independent reversible error in the district court’s Order.

But more to the dispositive point on this issue, Apple’s argument confirms that this Court need not decide the specific “but for” debate in Conversant’s favor to still find a second reversible error. Though the correct standard is the “but for” standard, this Court really need only decide the purely legal question of whether

there should be any causation or materiality requirement at all. If the district court's holding that there is no such requirement is wrong (and it is wrong), that is reversible legal error.

B. Apple's "No Causation Required" Premise Exposes An Even Clearer Legal Error In Light of this Court's Remand Order, Which at the Least Required a Showing an Unjust Benefit Was "A Result Of" the Late Disclosure *Unless* there is a Showing of "Egregious Misconduct"

Apple's argument for no causation is fatally flawed for at least three independent reasons. First, Apple's argument has no support in this Court's law and, indeed, *directly contradicts* that law. As discussed above, as that law makes clear, under the "materiality" requirement of the unjust benefits test, the district court should have required some proof that the alleged unjust benefit was "*a result of*" Nokia's late disclosure of the foreign '151 counterpart application. That, by definition, necessarily requires some causation. Indeed, as this Court put it in the Remand Order itself, the doctrine of implied waiver "should only be applied in instances where the patentee's misconduct resulting in [an] unfair benefit," because "enforcement of an otherwise valid patent *does not* injure the public merely because of misconduct, lurking somewhere in the past, that was *immaterial* to the patent's enforcement." *Core Wireless*, 899 F.3d at 1368-9. (emphasis added).

Another portion of the Remand Order, which Apple does not even address, proves beyond debate that there must be some causation under the unjust benefits test. In that portion, this Court made clear law is clear that the *only* "exception to the

materiality requirement” is under an application of the “egregious misconduct test.” That different test requires a showing of “egregious misconduct sufficient to justify the sanction of unenforceability of the patent at issue.” *Id.* at 1368 (Fed. Cir. 2018).

Significantly, Apple never proposes any alternative causation standard to satisfy the “as a result of” materiality requirement in this Court’s Remand Order. Instead, without any real factual support, Apple just characterizes the causation requirement as “plac[ing] a nearly impossible and highly unfair burden on those affected most by breach of nondisclosure rules.” Apple Br. at 43-44. Despite this clear language right from the Remand Order itself, Apple now seeks to have this Court also provide a second, brand-new exception to this requirement. That is, to allow Apple to meet its burden in this case ***without showing egregious misconduct or materiality***. Apple Br. at 43-46. But Apple does not cite any legal authority from this Court regarding the “unfair benefits” test for this significant departure from existing Federal Circuit requirements.

Unable to find support in any implied waiver decision from this Court for its “no causation required” rule, Apple resorts to an antitrust case from the DC Circuit, *United States v. Microsoft*, 253 F.3d 34, 79 (D.D.C. 2001). But Apple’s reliance on *Microsoft* is misplaced. The case has nothing at all to do with implied waiver or patents at all, but instead concerned Section 2 antitrust liability and Microsoft’s alleged market monopoly. And in that context, the court rejected Microsoft’s

proposed rule that the plaintiff must re-create “a hypothetical marketplace” and “present direct proof that a defendant’s continued monopoly power *is precisely attributable* to its anticompetitive conduct.” *Id.* at 79. That is objectively very different from—and much tougher than—a mere “but for” causation or “as a result of” causation requirement. And regardless, even in this context, the D.C. Circuit nevertheless required plaintiff to prove that Microsoft was “capable of making *a significant contribution to ... maintaining monopoly power.*” *Id.* Tellingly, Apple never proposed that it should even be held to this standard. And as we have established, Apple could not meet it anyway.

Moreover, immediately after the passage in *Microsoft* cited by Apple, the D.C. Circuit makes clear that such burden lightening or shifting ***does not apply where extensive, equitable relief is sought.*** In such cases, much tougher proofs of causation cannot be disregarded: “[M]ore extensive equitable relief, particularly remedies such as divestiture designed to eliminate the monopoly altogether, raise more serious questions and require a clearer indication of a significant casual connection between the conduct and creation or maintenance of the market power.” *Id.*

Second, Apple’s alarm-sounding and flawed analogies to the policy concerns over the difficulties of recreating a “hypothetical marketplace” to show “monopoly power precisely attributable to its anticompetitive conduct” have no relevance to this

case, where there was in fact extensive evidence relevant to the question here: whether ETSI would have added Nokia's non-adopted '151 option to GPRS if Nokia had disclosed its IPR. On that discrete and simple question, the direct evidence in *this case* was plentiful and included: (a) several ETSI fact and expert witnesses; (b) ETSI policy documents; ***and even (c) detailed ETSI meeting minutes concerning that very question.*** At trial, Apple went into the minutes in excruciating detail, with numerous technical witnesses, in an improper effort to suggest non-infringement because Nokia's proposal *was not adopted or essential*. See, e.g., Appx325-7; 658-9; 670-71. Apple's sudden about-face on the extreme lack of ETSI decision-making evidence is a mere boogeyman that is unsupported by our record and consistently contradicted by it. It should not deter this Court from applying the principled and well-supported materiality requirement in its Remand Order. Apple's inability to meet its burden is not the result of mythical "lost" evidence or an "nearly impossible and highly unfair burden" of proving any causation, but rather that the extensive evidence does not support its case and thus it is unable to meet the entirely reasonable burden of proving causation in this case.

Third, Apple argues that it should not have to satisfy the materiality test merely because Nokia's IPR disclosure was late by a few years. Apple Br. at 43-44. But Apple's sole reasoning for this unsupported "years-delay" exception proves Apple wrong. Under that reasoning, it would be "nearly impossible" for Apple to be

required to present any evidence of materiality because “ensuring that [SSO] participants have the opportunity to consider all options ... *before* freezing the standard is the precise purpose of the disclosure requirement that Nokia breached”—and “[l]osing that opportunity is the precise prejudice that renders the undisclosed patent unenforceable.” Apple Br. at 44 (emphasis added). Thus, under Apple’s logic, there is no difference between a disclosure that is late by one day or several years, as long as it is after “freezing” the standard. And again, Apple points to no actual evidence that was lost or destroyed due to passage of time. Thus, Apple’s argument and the district court’s order improperly renders the “unfair benefits” test met *in every case* where there is a mere ETSI IPR-Policy breach.

III. EVEN IGNORING ALL EVIDENCE AND ASSUMING ETSI ADDED THE NON-ADOPTED ’151 OPTION “AS A RESULT OF” NOKIA’S LATE DISCLOSURE, THERE IS *NO EVIDENCE* THAT THIS *OPTION* RESULTED IN APPLE’S ALLEGED STANDARD-*ESSENTIAL* BENEFITS—CONFIRMING A THIRD REVERSIBLE ERROR

A. To Link Its Alleged “Standard-Essential” Benefits to Nokia’s Late Disclosure of its Non-Adopted ’151 Option, Apple Now Wants Us All To Just Assume Essentiality—But That Brand New Position is Flawed and Directly Contradicted by the Undisputed Trial Record

Though we have already reached a point where the district court’s order must be reversed, it is noteworthy that the “unfair benefits” test in this Court’s Remand Order did not just require a showing that Nokia’s late disclosure resulted in ETSI adding the rejected ’151 option to GPRS. The full requirement includes showing that

Nokia's late disclosure ultimately *resulted in the ultimate alleged "unfair benefits"* Apple proposes.

Here, every articulation by Apple of such proposed "unfair benefits" rests on a premise that the '151 patent was standard-essential or "mandatory" for phones that are standards-compliant. *See*, Apple Br. at Section II. (A) (Nokia ...Unjustly Benefitted From Conversion of the '151 Patent ... Into An Essential Requirement For Every GPRS-Compliant Handset"); II (B) ("Nokia ...Received Unjust Benefits By Leveraging the Standard-Essential Status of the '151 Patent..."); and II (C) ("Conversant Received Unjust Benefits By Using the Standard-Essential Status of the '151 Patent"). Thus, on remand, Apple really had no choice but to do an about-face and create a counterfactual world where the '151 patent was essential to the GPRS standard.

The district court's ruling that Nokia and Conversant received an unjust benefit similarly and expressly relies on a finding that the '151 patent is "standards-essential" or "all but essential" to the standard." The district court, for example, held that "[t]he '151 patent became standards-essential when ETSI incorporated the method into the GPRS standard, allowing Conversant to extract licenses from industry participants." Appx41. *See also* Appx42 ("This undeserved competitive advantage is further bolstered by the fact that the '151 patent is essential").

But the district court’s “essentiality” finding is contradicted by every relevant fact at trial. Apple’s post-remand turnaround aside, *all technical experts* at trial (Conversant Wireless’s expert Dr. Wesel, and Apple’s experts Drs. Walker and Meyer) agreed that the ‘151 Patent is not essential. Apple’s technical expert testified at trial that the standard gives a choice to the base station which option to choose, and the base station then gives an option to the handset. Appx777 at 1022:22-1023:19 (“The Ericsson proposal left an option on the base station side for timing advance indexes, and because there's an option on the base station side, *there's also an option on the mobile side.*”). And Conversant’s expert, Dr. Wesel, agreed that “*the standard gives the mobile station the choice* whether to use the '151 invention or whether to use two timing advance values.” Appx361 at 378:19-379:8.

Dr. Walker summed this up when he *confirmed* that no expert witness opined the standard required Apple to practice the ‘151 Patent. Appx973. And as he put it, because it was not standard-essential,² “*then you don’t have to infringe the patent [because] there’s always a workaround.*” Appx3156-3157 at 64:14-16, 65:1-3.

² Apple’s Brief makes the nonsensical argument that “optional” somehow actually means “essential” according to ETSI because the ETSI IPR policy describes that a “STANDARD” can include options. Apple Br. at fn 10. But Apple misses that the very same IPR policy page it cites defines “ESSENTIAL” and confirms it means “not possible on technical ... grounds ... [to] comply with a STANDARD without infringing that IPR.” Appx5413.

All this proves a clear error of fact, because the *undisputed trial record* proves there can be no question that the use of Nokia’s rejected ’151 single-TAV was “optional.” This Court already—and correctly—held the same. *See, e.g., Core Wireless*, 899 F.3d at 1368 (holding that the Ericsson standard “that was adopted . . . made Nokia’s proposal ‘optional.’”) And to be sure, it is undisputed that Apple did not sell its first such phone until *more than 5 years after* Nokia’s 2002 public disclosure of the standard-optional ’151 Patent.

This error is not harmless in light of one key admission Apple never addresses. Conversant directly asked Dr. Walker whether there was any evidence that Apple or any company would have chosen the other, non-infringing GPRS-compatible option when it began selling GPRS phones in 2007 had Nokia timely disclosed its IPR before the freezing date—*i.e.*, whether there was any evidence that Nokia’s breach resulted in the very type of “unfair benefits” on which all of Apple’s theories are now premised. Rather than suggest that was a “near impossible” question to answer, Dr. Walker pointed to *no such evidence* and admitted he hadn’t analyzed the proposals enough. Appx975 at 1437:5-9.

Apple’s response that “Conversant’s argument fails as a matter of law” because “implied waiver applies with respect to breached disclosure obligations—[] for patents not essential to a standard” does not help them avoid the clear reversible error of fact. Apple Br. 55-56. As explained above, that contention is erroneous

because it is based on a distortion of *Qualcomm* case to obscure the fact that Qualcomm intentionally built its patenting and entire trial presentation around a contention that the patent was essential.

But in any event, Apple's response is also strawman—and one that entirely misses the point here. The point is not whether non-essential patents could ever be subject to an implied waiver theory—and *Conversant* has never suggested they cannot be. The point is that Apple's implied waiver theories in *this case* are all premised on the wholly unsupported fact that the '151 *is essential*. The district court's conclusions based on that same wholly unsupported and clearly erroneous finding should be reversed.

B. While Apple's Pre-Trial References and Conflation Between the *Three "Modes" of Operation* and the *Two Timing-Advance "Options" in the Continuous Mode of Operation* Mised the District Court to Error, Apple's Brief Confirms That Will No Longer Work Before This Court

In a final effort to undo the undisputed facts and this Court's finding that the '151 patent is standards "optional," Apple suggests that *Conversant* cannot back away from the district court's finding of essentiality. This contention is based on fatally flawed statements.

First, Apple cites to Nokia's and *Conversant*'s declarations to ETSI. But these declarations only stated the '151 patent "*may* be considered essential." Apple Br. at 56; Appx5414; Appx6027. The second bullet point is merely a list of out-of-context references to the essentiality of the '151, which, in each case, are about statements

made *long before* the relevant jury trial concerning Apple's infringing phones and even *long before* the scope of claims of the '151 patent were ever construed by the district court. The third bullet point, by Apple's own admission, at most is relevant to whether the '151 patent was "incorporated (via Ericsson's proposal)" into the standard. Apple Br. at 57. As explained above, the Court in its Remand Order has already found the '151 patent was incorporated as an option.

Apple's remaining purported evidence of essentiality on pages 56 to 58 of Apple's brief involve the technically complex, but nevertheless obvious conflation that Apple used for the first time on remand and repeats here. As Conversant demonstrated in its opening brief, Apple repurposed this Court's holding that it does not avoid infringing with its accused and mandatory continuous *mode* by pointing to the two other un-accused "initial" and "on-demand" *modes*. Conversant Br. at 9-12, 47-57. Apple took the testimony that those three *modes* were "mandatory" or "necessary" and misled the district court into thinking that the single- and the two-timing advance options adopted in Ericsson proposal (both used within the accused continuous mode) are themselves both necessary. This led the district court to confuse the three timing advance "modes" or procedures with the two very different "options" for phone makers to choose from within the accused continuous mode or procedure. *Id.*

But the undisputed trial record proves this is untrue and just a conflation, as Conversant established in its opening brief. Apple’s response just repeats the same conflation, but even a superficial review of exemplary quotes from Apple’s brief exposes the conflation. The testimony has Apple cited about something being “necessary” or “mandatory” or “absolutely mandatory” is plainly about the three timing advance procedures or *modes*, not *Nokia’s single-TAV optional approach within the continuous mode* or Ericsson’s two-TAV approach. See Conversant Br. at 9-12, 47-57.

Apple’s only response is one paragraph claiming that Conversant is wrong because Dr. Wesel “testified the exact opposite at trial.” Apple Br. at 58. But the testimony Apple cites in support of this false contention plainly disproves their point: it again is only about the three modes or procedures, not the two options within the continuous mode. *Id.* (citing only testimony from Dr. Wesel concerning the “*continuous* timing advance value *procedure*” or “*continuous* timing *mode*”). And contrary to Apple’s misleading arguments, Apple’s technical expert confirmed the two-TAV approach proposed by Ericsson and actually adopted was not mandatory or necessary or even used, as he opined it was *a non-infringing alternative available to Apple*. Appx3194-3195 at ¶ 132.

IV. APPLE’S FINAL ARGUMENT—THAT ERRORS IN THE “UNJUST BENEFITS” RULING ARE HARMLESS DUE TO CLEAR FACTUAL

ERRORS IN FINDING NOKIA’S CONDUCT “NOT AFFIRMATIVELY EGREGIOUS”—IS WRONG ON THE FACTS AND LAW

A. What Apple Calls “Clear Factual Error” Involve Well-Supported Facts For Which Apple Prefers A Different Finding—That Does Not Show Any Abuse Of Discretion

In the final 4 pages of Apple’s brief, it contends that this Court should excuse any otherwise reversible errors because they are harmless in light of Nokia’s affirmative egregious misconduct. To support this contention, Apple must show clear error of the district court’s factual findings on that separate test.

But what Apple calls clear factual errors are just points of factual disagreement, which cannot prove an abuse of discretion. For example, Apple points to the invention disclosure report signed by the ’151 inventor’s manager, but fails to point out that report also advised against filing a patent application on the idea. Appx5444. The form was not evidence of a plot to circumvent ETSI and hold up its members or take any similar actions that *Therasense* held exemplifies “egregious misconduct.” And as the district court found, Nokia just disagreed with the manager’s initial assessment when it later decided to file a patent. Appx38.

Moreover, as the district court also found when analyzing Apple’s familiar resort to the same “duty/breach” timeline, Apple did not show that Nokia’s later decision to file a patent while simultaneously having another Nokia group make the ETSI proposal was “suspicious” or “nefarious” but instead was “merely convenient.” Appx39. And notably, Apple does not acknowledge the inconvenient

truth that ETSI rejected and replaced that proposal around the same time anyway. *Id.* And the Nokia bonus payment does not change this one bit or otherwise provide evidence some sort of impropriety. Apple Br. at 11. The payment was made after Nokia disclosed the ‘151 IPR, in 2005, and was the result of an established Nokia program, required by Finnish law, to compensate inventors for a company’s use of their inventions. Appx321 at 218:2-8; Appx325 at 236:18-21; Appx3135 at 19:3-10.

Left with no facts that actually support its burden on remand, Apple also attempts to piggyback on the same facts that show mere untimeliness through a “four year” delay. But the district court already addressed this as well, noting that by law delay alone cannot establish egregious misconduct. Appx39, *citing Therasense* at 1292.

B. Apple’s Arguments Also Fail Because They Ignore Dr. Walker’s Contradictory Admissions, Which Make Clear Apple Can Never Prove Egregious Misconduct in this Case

Even assuming Apple’s preferred version of the facts, there is no way for Apple to show “affirmative egregious misconduct” in light of *Apple* witness *admissions* it wholly ignores.

Based on the clear record in this case, Apple clearly and convincingly demonstrate egregious misconduct. Apple’s expert Dr. Walker effectively conceded that Apple cannot clearly and convincingly demonstrate egregious misconduct. He

testified that he could not imply that any delay by Nokia in disclosing the '151 IPR was intentional:

Q. You haven't opined that Nokia intentionally delayed in this case, correct?

A. That is correct.

Appx3160 at 86:1-3 (emphasis added). Moreover, after opining that the entire “aim” of the ESTI IPR Policy itself is to prevent patent “hold up” by nondisclosure of IPR, Dr. Walker admitted that there is no evidence in this case that Nokia ever had a plan to “ambush” or “hold up” anyone.

Q. And [] you're aware of no evidence in this case that Nokia has tried to hold up Apple; correct?

A. No, I am not suggesting that.

Appx974 at 1434:11-1435:12 (emphasis added). Dr. Walker also conceded that the same is true for Conversant Wireless. Appx3168-9 at 95:16-19, 96:4-10 (Q. And so [Conversant] isn't attempting to hold up Apple, right? A. ***As far as I'm aware, they're not.***).

Relatedly, Dr. Walker admitted the “underlying philosophy of the policy is that participants should be able to [] select suitable technical solutions with knowledge ... that all licenses that might be needed for standardized technology will be available on FRAND terms[.]” Appx3182 at ¶ 19. Firmly corroborating this admission, ETSI's guidelines tell us that even a total “[n]on-disclosure of essential

IPR in a specific technical solution *is not a problem* for the Technical Body, *unless [] licenses are not available under FRAND conditions.*” Appx3112 (emphasis added). It is undisputed that before any of the technical meetings at issue—and well before the Freeze Date—all ETSI members had already understood that Nokia had committed to licensing any Nokia IPR (including the ’151 patent) *on FRAND terms*. And for completeness, Dr. Walker also admitted that he is not aware of a single instance in which Nokia or Core Wireless ever breached that commitment. Appx3163 at 89:5-13 (“Q. Are you aware of any breach of a FRAND commitment by Nokia? A. *Not that I’m aware of*; Q. [] Are you aware of any breach of a FRAND commitment by Core Wireless? A. *I don’t believe so[.]*”) (emphasis added).

V. WITH NO SUPPORT FROM THE FACTUAL RECORD, APPLE AGAIN ARGUES FOR A FAR LOWER EVIDENTIARY THRESHOLD THAN EXISTING LAW ALLOWS

Left with an entirely contradictory factual record, Apple suggests that it “would be error” to assume that “affirmative egregious misconduct” cannot be shown through mere “nondisclosure.” Apple Br. at 62-63. But as the *Core Wireless* panel made clear, the meaning of “affirmative egregious misconduct” is provided by the *en banc* Court decision in *Therasense*, which squarely rejected Apple’s argument. *Therasense*, 649 F.3d at 1293 (“*neither mere nondisclosure ... nor failure to mention ... constitutes affirmative egregious misconduct.*”) (emphasis added).

CONCLUSION

For the above reasons and those in Conversant’s opening brief, the district court’s conclusions and Order on “unjust benefits” should be reversed.

Respectfully submitted,

Dated: January 2, 2020

/s/ Marc A. Fenster

Marc A. Fenster

RUSS AUGUST & KABAT
12424 Wilshire Boulevard, 12th Floor
Los Angeles, California 90025
(310) 826-7474

*Counsel for Plaintiff-Appellant
Conversant Wireless Licensing, S.a.r.l.*

CERTIFICATE OF SERVICE

I certify that on January 2, 2020, the foregoing **REPLY BRIEF FOR PLAINTIFF-APPELLANT CONVERSANT WIRELESS LICENSING S.A.R.L.** was filed with the Clerk of the United States Court of Appeal for the Federal Circuit using the appellate CM/ECF system and served electronically on all counsel of record.

Dated: January 2, 2020

/s/ Marc A. Fenster

Marc A. Fenster

RUSS AUGUST & KABAT
12424 Wilshire Boulevard, 12th Floor
Los Angeles, California 90025
(310) 826-7474

*Counsel for Plaintiff-Appellant
Conversant Wireless Licensing, S.a.r.l.*

CERTIFICATE OF COMPLIANCE

This document complies with the word limit of Fed. R. App. P. 27(d)(2)(A) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f), this document contains 6,803 words.

This document 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 document has been prepared in Microsoft Word for Mac Version 15.40 Build 171108 using Times New Roman, a proportionally spaced typeface, and a 14-point type size.

Dated: January 2, 2020

/s/ Marc A. Fenster

Marc A. Fenster

RUSS AUGUST & KABAT
12424 Wilshire Boulevard, 12th Floor
Los Angeles, California 90025
(310) 826-7474

*Counsel for Plaintiff-Appellant
Conversant Wireless Licensing, S.a.r.l.*