No. 2026-1902

United States Court of Appeals for the Federal Circuit

G+ COMMUNICATIONS, LLC,
Plaintiff-Appellee,

v.

SAMSUNG ELECTRONICS CO., LTD.,
SAMSUNG ELECTRONICS AMERICA, INC.,
Defendants-Appellants.

Appeal from the United States District Court for the Eastern District of Texas,
Case No. 2:22-cv-00078-JRG, Hon. J. Rodney Gilstrap

BRIEF OF *AMICUS CURIAE* FAIR STANDARDS ALLIANCE A.S.B.L. IN SUPPORT OF DEFENDANTS-APPELLANTS SAMSUNG ELECTRONICS CO., LTD. AND SAMSUNG ELECTRONICS AMERICA, INC.

Shawnna Yashar
Brooke M. Wilner
O'MELVENY & MYERS LLP
1625 EYE STREET, NW
WASHINGTON, DC 20006
(202) 383-5300

Counsel for Amicus Curiae
Fair Standards Alliance A.S.B.L.

October 9, 2026

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

CERTIFICATE OF INTEREST

Case Number 2026-1902

Short Case Caption G+ Communications, LLC v. Samsung Electronics Co., Ltd.

Filing Party/Entity Fair Standards Alliance A.S.B.L.

Instructions:

1. Complete each section of the form and select none or N/A if appropriate.
2. Please enter only one item per box; attach additional pages as needed, and check the box to indicate such pages are attached.
3. In answering Sections 2 and 3, be specific as to which represented entities the answers apply; lack of specificity may result in non-compliance.
4. Please do not duplicate entries within Section 5.
5. Counsel must file an amended Certificate of Interest within seven days after any information on this form changes. Fed. Cir. R. 47.4(c).

I certify the following information and any attached sheets are accurate and complete to the best of my knowledge.

Date: 10/09/2026

Signature: /s/ Shawnna Yashar

Name: Shawnna Yashar

1. Represented Entities. Fed. Cir. R. 47.4(a)(1).	**2. Real Party in Interest.** Fed. Cir. R. 47.4(a)(2).	**3. Parent Corporations and Stockholders.** Fed. Cir. R. 47.4(a)(3).
Provide the full names of all entities represented by undersigned counsel in this case.	Provide the full names of all real parties in interest for the entities. Do not list the real parties if they are the same as the entities. ☑ None/Not Applicable	Provide the full names of all parent corporations for the entities and all publicly held companies that own 10% or more stock in the entities. ☑ None/Not Applicable
Fair Standards Alliance A.S.B.L.		

☐ Additional pages attached

4. Legal Representatives. List all law firms, partners, and associates that (a) appeared for the entities in the originating court or agency or (b) are expected to appear in this court for the entities. Do not include those who have already entered an appearance in this court. Fed. Cir. R. 47.4(a)(4).

☐ None/Not Applicable ☐ Additional pages attached

Shawnna M. Yashar	Brooke M. Wilner	

5. Related Cases. Other than the originating case(s) for this case, are there related or prior cases that meet the criteria under Fed. Cir. R. 47.5(a)?

☐ Yes (file separate notice; see below) ☑ No ☐ N/A (amicus/movant)

If yes, concurrently file a separate Notice of Related Case Information that complies with Fed. Cir. R. 47.5(b). **Please do not duplicate information.** This separate Notice must only be filed with the first Certificate of Interest or, subsequently, if information changes during the pendency of the appeal. Fed. Cir. R. 47.5(b).

6. Organizational Victims and Bankruptcy Cases. Provide any information required under Fed. R. App. P. 26.1(b) (organizational victims in criminal cases) and 26.1(c) (bankruptcy case debtors and trustees). Fed. Cir. R. 47.4(a)(6).

☑ None/Not Applicable ☐ Additional pages attached

TABLE OF CONTENTS

Page

INTEREST OF *AMICUS CURIAE* 1

INTRODUCTION 3

BACKGROUND 5

ARGUMENT 7

I. DISTRICT COURTS MUST SCREEN OUT UNRELIABLE AND UNAPPORTIONED DAMAGES MODELS BEFORE THEY REACH THE JURY 7

A. Under *Garretson*, Rule 702, and *EcoFactor*, apportionment is a threshold admissibility question, not a matter of weight. 7

B. For SEPs, *EcoFactor* requires specific threshold showings before an incremental-profits model may reach the jury. 10

C. Gatekeeping matters most for FRAND-committed SEPs, as judicial FRAND determinations confirm. 12

II. APPORTIONMENT IS ESSENTIAL FOR SINGLE FEATURES IN COMPLEX, MULTI-FEATURE PRODUCTS 13

A. Damages must reflect the value of the patented feature, not the product or its performance. 13

B. A FRAND royalty rate must reflect the value of the claimed technology. 15

III. RELIABLE APPORTIONMENT MUST BE GROUNDED IN AVAILABLE MARKET EVIDENCE OF FRAND RATES 17

A. Comparable licenses provide reliable market evidence of FRAND rates. 17

B. A fair and reasonable aggregate royalty can serve as a valuable cross-check to any valuation methodology. 19

1. Courts regularly consider implied aggregate royalty rates when setting FRAND terms. 20

TABLE OF CONTENTS
(continued)

Page

2. Aggregate royalty analysis exposes the excessive cumulative rates produced by pricing each SEP in isolation. 21

C. Apportionment analyses that consider willingness to pay are not grounded in reliable market evidence. 23

IV. INFLATED SINGLE-FEATURE AWARDS HARM INNOVATION AND CONSUMERS 23

CONCLUSION 25

TABLE OF AUTHORITIES

Page(s)

Cases

Apple Inc. v. Wi-LAN Inc.,
25 F.4th 960 (Fed. Cir. 2022) 9

Apple Japan Godo Kaisha v. Samsung Elecs. Co.,
IP High Ct. of Japan, 2013 (Ne) 10043 (May 16, 2014) 21

Bonito Boats, Inc. v. Thunder Craft Boats, Inc.,
489 U.S. 141 (1989).....23

Broadcom Corp. v. Qualcomm Inc.,
501 F.3d 297 (3d Cir. 2007) 6, 16

Commonwealth Sci. & Indus. Rsch. Org. v. Cisco Sys., Inc.,
809 F.3d 1295 (Fed. Cir. 2015) 11, 15, 23

Daubert v. Merrell Dow Pharms., Inc.,
509 U.S. 579 (1993).....8

EcoFactor, Inc. v. Google LLC,
104 F.4th 243 (Fed. Cir. 2024), *reh'g en banc granted, opinion vacated*, 115 F.4th 1380 (Fed. Cir. 2024), *and on reh'g en banc*, 137 F.4th 1333 (Fed. Cir. 2025), *cert. denied*, 146 S. Ct. 333 (2025).....9

EcoFactor, Inc. v. Google LLC,
137 F.4th 1333 (Fed. Cir. 2025) 3, 4, 9, 15

Ericsson, Inc. v. D-Link Sys., Inc.,
773 F.3d 1201 (Fed. Cir. 2014) 6, 7, 10, 13, 15, 17, 18, 23

Exmark Mfg. Co. Inc. v. Briggs & Stratton Power Prods. Grp., LLC,
879 F.3d 1332 (Fed. Cir. 2018) 8, 12

Garretson v. Clark,
111 U.S. 120 (1884)..... 3, 7, 13

Gen. Elec. Co. v. Joiner,
522 U.S. 136 (1997).....8

In re Innovatio IP Ventures, LLC Patent Litigation,
No. 11 C 9308, 2013 U.S. Dist. LEXIS 144061 (N.D. Ill. Sept. 27, 2013) 13, 16, 19, 20, 22

TABLE OF AUTHORITIES
(continued)

Page(s)

InterDigital Tech. Corp. v. Lenovo Grp. Ltd.,
[2023] EWHC 539 (Pat) (Eng.) 18

LaserDynamics, Inc. v. Quanta Comput., Inc.,
694 F.3d 51 (Fed. Cir. 2012) 8, 11, 13, 14, 17, 18

Lucent Techs., Inc. v. Gateway, Inc.,
580 F.3d 1301 (Fed. Cir. 2009) 14, 18

Microsoft Corp. v. Motorola, Inc.,
864 F. Supp. 2d 1023 (W.D. Wash. 2012) 16

Microsoft Corp. v. Motorola, Inc.,
No. C10-1823JLR, 2013 WL 2111217 (W.D. Wash. Apr. 25, 2013) 11, 12, 16, 18, 20, 21, 22

Monsanto Co. v. McFarling,
488 F.3d 973 (Fed. Cir. 2007) 18

Optis Cellular Tech. LLC v. Apple Retail UK Ltd.,
[2023] EWHC 1095 (Ch) (Eng.) 18

Seymour v. McCormick,
57 U.S. 480 (1853) 7, 22, 24

TCL Commc'n Tech. Holdings, Ltd. v. Ericsson,
No. SACV 14-341 JVS, 2018 U.S. Dist. LEXIS 234535 (C.D. Cal. Mar. 9, 2018) 12, 21

Uniloc USA, Inc. v. Microsoft Corp.,
632 F.3d 1292 (Fed. Cir. 2011) 12

Unwired Planet Int'l Ltd. v. Huawei Techs. Co.,
[2017] EWHC 711 (Pat) (Eng.) 18, 19, 21

VirnetX, Inc. v. Cisco Sys., Inc.,
767 F.3d 1308 (Fed. Cir. 2014) 14

Visteon Global Techs., Inc. v. Garmin Int'l, Inc.,
No. 10-CV-10578, 2016 WL 5956325 (E.D. Mich. Oct. 14, 2016) 15

Whitserve, LLC v. Comput. Packages, Inc.,
694 F.3d 10 (Fed. Cir. 2012) 9

TABLE OF AUTHORITIES (continued)

Page(s)

Statutes

35 U.S.C. § 284 7

Other Authorities

Fair Standards Alliance, *The Importance of a Fair and Reasonable Aggregate Royalty in SEP Licensing* (Apr. 6, 2026) 5, 6, 7, 24

Fed. Trade Comm'n, *The Evolving IP Marketplace: Aligning Patent Notice and Remedies with Competition* 148 (2011) 24, 25

Jorge L. Contreras & Richard J. Gilbert, *A Unified Framework for RAND and Other Reasonable Royalties*, 30 BERKELEY TECH. L.J. 1451 (2015) 16

Jorge L. Contreras, *Aggregated Royalties* for *Top-Down FRAND Determinations: Revisiting "Joint Negotiation,"* 62 ANTITRUST BULL. 690 (2017) 20, 22

LexisNexis, *The Rise of Standard Essential Patents* (Oct. 6, 2021) 5

Mark A. Lemley & Carl Shapiro, *Patent Holdup and Royalty Stacking*, 85 TEX. L. REV. 1991 (2007) 22

Stout, *Standard Essential Patent Privateer Report* (Jan. 30, 2023) 6

William F. Lee & Mark A. Lemley, *The Broken Balance: How "Built-In Apportionment" and the Failure to Apply Daubert Have Distorted Patent Infringement Damages*, 37 HARV. J.L. & TECH. 255 (2024) 15, 24, 25

Rules

Fed. R. Evid. 702 ..... 3, 4, 8

Fed. R. Evid. 702(b) 9

Fed. R. Evid. 702(d) 9

INTEREST OF *AMICUS CURIAE*[1]

The Fair Standards Alliance A.S.B.L. ("FSA") is a non-profit association of more than 40 companies drawn from many industries, including telecommunications, consumer electronics, computing, automotive, and the Internet of Things. FSA is dedicated to promoting a transparent, efficient, and sustainable framework for licensing standard-essential patents ("SEPs") on fair, reasonable, and non-discriminatory ("FRAND") terms.

FSA's members participate actively in standard-setting organizations, contribute technology to standards, and collectively hold hundreds of thousands of patents, including many thousands of SEPs. FSA's members are both licensors and licensees of SEPs in vast numbers. FSA therefore speaks from both sides of the licensing table, and its interest is in royalties that reflect the actual value of patented technology, no more and no less. FSA has a strong interest in ensuring that damages for infringement of a single FRAND-committed SEP are reliably apportioned consistent with FRAND principles, and that district courts diligently screen the expert opinions underlying such damages before they reach a jury.

---

[1] No counsel for any party authored this brief in whole or in part, and no person or entity other than *amicus*, its members, and its counsel made a monetary contribution intended to fund the preparation or submission of this brief.

INTRODUCTION

For years, apportionment of reasonable-royalty damages for a single feature in a complex, multi-feature product has been one of the most persistent problems in patent law. The governing principle is old and settled: the patentee must in every case separate the value of the patented feature from the value of everything else, with evidence that is reliable and tangible rather than conjectural or speculative. *Garretson v. Clark*, 111 U.S. 120, 121 (1884). Yet district courts have not enforced that principle consistently. Too often, a facially defective damages model is admitted on the theory that its flaws go to "weight," and the jury is left to sort out, through cross-examination and dueling experts, questions of reliability that Rule 702 commits to the court. Fed. R. Evid. 702.

This Court's en banc decision in *EcoFactor, Inc. v. Google LLC*, 137 F.4th 1333 (Fed. Cir. 2025) (*en banc*), was meant to end that practice. The sufficiency of an expert's basis is an admissibility question for the court, and a district court abuses its discretion when it sends an inadequately supported damages opinion to the jury on the theory that cross-examination will cure its deficiencies. *Id.* at 1340–41.

This appeal shows why *EcoFactor*'s lesson is particularly important in cases involving FRAND-committed SEPs. The jury awarded $61 million for a single 5G SEP, one among nearly 70,000 patent families declared essential to 5G, based on an "incremental profits" model that priced the patent against a hypothetical alternative

without considering the standard as a whole. Samsung's brief addresses the specific defects in that model. FSA addresses the broader framework that should govern SEP damages, a framework that the district court's approach, if left uncorrected, would undermine in every SEP case.

FSA makes four points.

First, apportionment is not a question for the jury to sort out at trial. Under *EcoFactor* and Rule 702, it is a threshold reliability requirement. For SEPs, that requirement has specific content: an incremental-profits model is admissible only if the proponent first establishes a qualifying alternative and ties the claimed profit to the patented contribution rather than to the standard. As judicial FRAND determinations confirm, gatekeeping is especially critical because juries are poorly positioned to police FRAND.

Second, damages for a single feature of a complex, multi-feature product must reflect the value of that feature alone. A model that starts from consumer willingness to pay for an unclaimed performance metric, and then applies apportionment factors untethered to the claimed contribution, does not apportion at all.

Third, for a FRAND-committed SEP, a reliable apportionment must be grounded in available market evidence of FRAND value: comparable FRAND licenses where they exist, and, where reliable aggregate data is available, a review of the fair and reasonable aggregate royalty for all SEPs essential to the standard are

often used as market evidence. A model that prices one SEP in isolation risks capturing value outside the patent's claims and producing an unsustainable royalty stack.

Fourth, inflated single-patent awards harm innovation and consumers by making the cost of implementing standards unpredictable, deterring investment and market entry, and rewarding hold-up over contribution.

The Court should reverse and confirm that district courts must screen out unapportioned and non-FRAND damages models before trial.

BACKGROUND

Modern electronic devices are assemblies of many standardized and non-standardized components. A smartphone implements cellular standards (2G through 5G), Wi-Fi, Bluetooth, video and audio codecs, USB, and many others, alongside proprietary hardware, software, and design. Individual patents usually claim small improvements to minor features of one of those standards. At the same time, the number of declared SEPs has grown dramatically, from roughly 82,000 in 2010 to roughly 305,000 in 2021. LexisNexis, *The Rise of Standard Essential Patents* at 2 (Oct. 6, 2021); *see also* Fair Standards Alliance, *The Importance of a Fair and Reasonable Aggregate Royalty in SEP Licensing* (Apr. 6, 2026) ("FSA Paper"). For 5G alone, nearly 70,000 patent families have been declared essential. Appx32615; *see* Appellants' Opening Brief, Dkt. 18 ("Samsung Br.") at 8.

Standardization yields great benefits, but it also creates risks. Once a standard is adopted and implementers invest heavily in compliant products, they are effectively locked in, and switching to an alternative technology becomes prohibitively costly. *See Broadcom Corp. v. Qualcomm Inc.*, 501 F.3d 297, 310 (3d Cir. 2007) ("In this unique position of bargaining power, the patent holder may be able to extract supercompetitive royalties from the industry participants."). That lock-in gives SEP holders leverage to demand royalties that reflect the cost of switching away from the standard rather than the value of the patented invention—so-called "hold-up." FRAND commitments exist to prevent that result. *See Ericsson, Inc. v. D-Link Sys., Inc.*, 773 F.3d 1201, 1232 (Fed. Cir. 2014).

Because a single product may practice thousands of SEPs owned by many different holders, royalties negotiated or awarded patent by patent can accumulate to an unsustainable total, a problem known as "royalty stacking." One study cited in the FSA Paper found that royalty demands from "patent privateers" (entities that acquire patents solely to monetize them) would, if applied in the aggregate across the standard, total 164% *of a* smartphone's price. FSA Paper at 1, 3–4 (citing Stout, *Standard Essential Patent Privateer Report* at 10 (Jan. 30, 2023)).

Component and product manufacturers fund the overwhelming majority of the innovation embodied in standardized products. By one estimate, component and product makers account for approximately 95% of smartphone research and

development, while SEP holders account for approximately 5%. FSA Paper at 4. The non-patented and non-standardized features of a modern device (including those in its processor, display, camera, battery, software, design, and brand) therefore carry especially large value, and any damages model that fails to separate that value from the patented feature will dramatically overcompensate the patentee.

ARGUMENT

I. DISTRICT COURTS MUST SCREEN OUT UNRELIABLE AND UNAPPORTIONED DAMAGES MODELS BEFORE THEY REACH THE JURY

A. Under *Garretson*, Rule 702, and *EcoFactor*, apportionment is a threshold admissibility question, not a matter of weight.

Section 284 limits a reasonable royalty to compensation "for the use made of the invention by the infringer." 35 U.S.C. § 284. That focus on "the invention" is the source of the apportionment requirement. Without it, the Supreme Court warned, "actual damages" for an improvement could be "converted into an unlimited series of penalties on the defendant." *Seymour v. McCormick*, 57 U.S. 480, 491 (1853). The patentee therefore "must in every case give evidence tending to separate or apportion the defendant's profits and the patentee's damages between the patented feature and the unpatented features," and that evidence must be "reliable and tangible, and not conjectural or speculative." *Garretson*, 111 U.S. at 121. This Court has applied the rule consistently: the royalty base and rate together must reflect the value attributable to the infringing features, and no more. *Ericsson*, 773 F.3d at 1226;

Exmark Mfg. Co. Inc. v. Briggs & Stratton Power Prods. Grp., LLC, 879 F.3d 1332, 1348 (Fed. Cir. 2018) ("[A] reasonable royalty award 'must be based on the incremental value that the patented invention adds to the end product.'"); *LaserDynamics, Inc. v. Quanta Comput., Inc.*, 694 F.3d 51, 67 (Fed. Cir. 2012) ("Where small elements of multi-component products are accused of infringement, calculating a royalty on the entire product carries a considerable risk that the patentee will be improperly compensated for non-infringing components of that product.").

Garretson's requirement for "reliable and tangible" evidence maps directly onto Rule 702. The trial judge is the gatekeeper, *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 589 (1993), and need not admit an opinion connected to the data only by the expert's say-so, *see Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 146 (1997). The Federal Rules of Evidence's 2023 amendments confirm that the proponent must show the court that it is "more likely than not" that the testimony rests on sufficient facts or data and reflects a reliable application of reliable methods. Fed. R. Evid. 702. The Advisory Committee specifically rejected decisions treating "the sufficiency of an expert's basis, and the application of the expert's methodology," as "questions of weight and not admissibility," calling them "an incorrect application of Rules 702 and 104(a)." Fed. R. Evid. 702 advisory committee's note to 2023 amendment.

EcoFactor applied these principles to patent damages and settled the question. The patentee's expert opined that three lump-sum licenses reflected a particular per-

unit rate, relying principally on license recitals stating the patentee's own view of the rate. A divided panel affirmed, reasoning that the licenses had "built-in apportionment" and that the criticisms went to weight. *EcoFactor, Inc. v. Google LLC*, 104 F.4th 243 (Fed. Cir. 2024), *reh'g en banc granted, opinion vacated*, 115 F.4th 1380 (Fed. Cir. 2024), *and on reh'g en banc*, 137 F.4th 1333 (Fed. Cir. 2025), *cert. denied*, 146 S. Ct. 333 (2025). The *en banc* Court disagreed, holding that the testimony lacked sufficient facts or data and that its admission was an abuse of discretion warranting a new damages trial. *EcoFactor*, 137 F.4th at 1338–41. In doing so, the Court drew a firm line: "[w]hile the credibility of an expert's damages calculation is properly left to a jury, a determination of reliability under Rule 702 is an essential prerequisite." *Id.* at 1340. Sufficiency of basis and reliable application must be resolved by the court by a preponderance, not left to cross-examination, and an expert cannot bridge a missing factual premise by assertion. *Id.* at 1340–41; *see also, e.g.*, *Apple Inc. v. Wi-LAN Inc.*, 25 F.4th 960, 971–74 (Fed. Cir. 2022); *Whitserve, LLC v. Comput. Packages, Inc.*, 694 F.3d 10, 31 (Fed. Cir. 2012).

Apportionment is part of the reliability inquiry itself. A damages opinion that does not reliably separate the value of the patented feature from everything else is neither "based on sufficient facts or data" nor "a reliable application" of any method. Fed. R. Evid. 702(b), (d). It must be excluded, not handed to the jury with an obligation to discern reliability from a brief cross-examination.

B. For SEPs, *EcoFactor* requires specific threshold showings before an incremental-profits model may reach the jury.

FSA urges the Court to articulate what *EcoFactor* requires of incremental-profits models in SEP cases generally, so that district courts can apply consistent threshold standards rather than leaving these questions to juries case by case. An incremental-profits model estimates the added profit from a product improvement, usually by measuring willingness to pay, i.e., what consumers would pay for a device with the improvement, or what a manufacturer would pay to include it. Here, G+'s expert converted a conjoint survey of consumer willingness to pay for faster download speeds into Samsung's claimed incremental profit. Appx210–11. When willingness to pay is measured for standardized technology, such as the speed or connectivity 5G delivers, the resulting "incremental profit" captures the value of the standard and the many technologies behind it, not the claimed invention. The following threshold requirements must therefore be met before an incremental profits analysis may be used in SEP cases.

A qualifying alternative. An incremental-profits model measures value by comparing the accused product to an alternative. That comparison isolates the patent's contribution only if the alternative differs from the accused product solely in the absence of the patented feature. For an SEP, the alternative must be one that could have been written into the standard; otherwise the comparison measures the value of standardization, not the invention. *See Ericsson*, 773 F.3d at 1232;

Commonwealth Sci. & Indus. Rsch. Org. v. Cisco Sys., Inc., 809 F.3d 1295, 1305 (Fed. Cir. 2015) ("*CSIRO*"). In complex, multi-function devices, identifying such an alternative is often infeasible. Where the proponent cannot make that showing, an incremental-profits model is not based on sufficient facts or data and should be excluded.

A claimed contribution, **not a performance metric**. Consumers value performance characteristics, such as speed, battery life, and reliability, that result from the combined operation of the standard, thousands of other patented and unpatented technologies, and the implementer's own engineering. A valuation of a performance metric is therefore not a valuation of a claimed method unless the proponent reliably ties the metric to the claims and separates the patent's contribution from everything else that affects the metric. *See LaserDynamics*, 694 F.3d at 67–69. Absent that showing, a survey or other estimate of the value of a performance metric cannot serve as the starting point for an SEP royalty.

Reconciliation with market evidence. Comparable licenses and, where available, reliable aggregate royalty data can each reflect "the economic value of the patented technology in the marketplace," *LaserDynamics*, 694 F.3d at 79, and help ensure that implementation of the standard is not "prohibitively expensive," *Microsoft Corp. v. Motorola, Inc.*, No. C10-1823JLR, 2013 WL 2111217, at *86 (W.D. Wash. Apr. 25, 2013). A result significantly greater than those benchmarks

may signal that the methodology has captured value beyond the invention, and consistent with *EcoFactor* and Rule 702, the proponent should be prepared to explain the divergence with facts, not assertion. *See Exmark*, 879 F.3d at 1349–51; *Uniloc USA, Inc. v. Microsoft Corp.*, 632 F.3d 1292, 1315–18 (Fed. Cir. 2011).

These requirements are not new law; they follow from *Garretson*, *Ericsson*, and *EcoFactor*. But articulating them plainly would give district courts clear guidance—and prevent SEP holders from using incremental-profits models to bypass the apportionment and FRAND principles this Court has long required.

C. Gatekeeping matters most for FRAND-committed SEPs, as judicial FRAND determinations confirm.

When courts set FRAND rates themselves, they frequently find that the SEP holder's initial demands far exceeded the actual FRAND rate:

- In *TCL Commc'n Tech. Holdings, Ltd. v. Ericsson*, No. SACV 14-341 JVS, 2018 U.S. Dist. LEXIS 234535 (C.D. Cal. Mar. 9, 2018), the FRAND rate set by the court was less than one-sixth of that demanded by the SEP holder. *Id.* at *185–86.
- In *Microsoft Corp. v. Motorola, Inc.*, No. C10-1823JLR, 2013 WL 2111217 (W.D. Wash. Apr. 25, 2013), the FRAND rate set by the court was approximately ***214 times*** lower than the SEP holder's initial demand. *Id.* at *101.

- In *In re Innovatio IP Ventures, LLC Patent Litigation*, No. 11 C 9308, 2013 U.S. Dist. LEXIS 144061 (N.D. Ill. Sept. 27, 2013), the FRAND rate set by the court was approximately ***386 times*** lower than the SEP holder's initial demand. *Id.* at *186–87.

Rule 702, as construed in *EcoFactor*, demands comparable rigor before a single-SEP damages model reaches a jury: the proponent should show by a preponderance that the model isolates the patent's value from both the product's unpatented features and the value of standardization itself.

II. APPORTIONMENT IS ESSENTIAL FOR SINGLE FEATURES IN COMPLEX, MULTI-FEATURE PRODUCTS

A. Damages must reflect the value of the patented feature, not the product or its performance.

A reasonable royalty must reflect the value of the patented feature, not the value of the whole product or of some broader performance characteristic to which the feature contributes. *Garretson*, 111 U.S. at 121; *Ericsson*, 773 F.3d at 1226; *LaserDynamics*, 694 F.3d at 67–69. That rule matters most for products—such as computers, smartphones, and cars that many of FSA's members manufacture—whose value is driven overwhelmingly by thousands of other technologies and by the manufacturer's own research and development, design, and brand.

This Court has repeatedly prohibited damages theories that capture the total value of a multi-component product. In *Lucent*, for example, the patentee sought 8%

of total Outlook revenue for a calendar "date-picker" feature; this Court vacated the $357 million award for failure to apportion. *Lucent Techs., Inc. v. Gateway, Inc.*, 580 F.3d 1301, 1332–38 (Fed. Cir. 2009). In *LaserDynamics*, this Court affirmed the rejection of a $52 million award, calculated as 2% of $2.53 billion in laptop revenue, for a patent covering only optical disc discrimination between CDs and DVDs. 694 F.3d at 67–68. This Court explained that "the requirement to prove that the patented feature drives demand for the entire product may not be avoided by the use of a very small royalty rate." *Id.* And in *VirnetX*, this Court vacated a $368 million damages award, which was based on the entire price of iPhones and iPads, because the patents covered only VPN and FaceTime features. *VirnetX, Inc. v. Cisco Sys., Inc.*, 767 F.3d 1308, 1326–29 (Fed. Cir. 2014). In doing so, this Court explained that the apportionment rules ensure a royalty "does not overreach and encompass components not covered by the patent." *Id.* (quoting *LaserDynamics*, 694 F.3d at 70).

The same discipline applies to models that substitute consumer surveys or econometric constructs for apportionment. Courts have excluded conjoint surveys that fail to value the patented features relative to the many unpatented features of the accused product, because such a survey makes it "impossible for a jury to determine" the profit actually attributable to the patented features. *Visteon Global Techs., Inc. v. Garmin Int'l, Inc.*, No. 10-CV-10578, 2016 WL 5956325, at *6, *17 (E.D. Mich.

Oct. 14, 2016). A survey or model that measures willingness to pay for a broad performance attribute, rather than for the claimed improvement, suffers from the same defect. This problem stems from inconsistent gatekeeping: patentees have used such surveys "as a stand-in for apportionment," and some courts have let them reach the jury without rigorous Rule 702 review. William F. Lee & Mark A. Lemley, *The Broken Balance: How "Built-In Apportionment" and the Failure to Apply Daubert Have Distorted Patent Infringement Damages*, 37 HARV. J.L. & TECH. 255, 316–19 (2024). But *EcoFactor* resolves that inconsistency—whether an expert's model reliably isolates the value of the patented feature is a threshold question for the court, not a matter of weight for the jury. 137 F.4th at 1340.

B. A FRAND royalty rate must reflect the value of the claimed technology.

For a FRAND-committed SEP, the royalty must reflect the patent's incremental value over the next-best alternative that could have been written into the standard. As this Court has held, an SEP royalty "must be based on the incremental value of the invention, not the value of the standard as a whole or any increased value the patented feature gains from its inclusion in the standard." *Ericsson*, 773 F.3d at 1232, 1235. "[T]he value of the patented invention . . . is distinct from any value that artificially accrues to the patent due to the standard's adoption," and a patentee may not capture "all of the benefit created by standardization." *CSIRO*, 809 F.3d at 1304–05.

Courts setting FRAND rates have applied the same principle by fixing the comparison before lock-in. In *Microsoft v. Motorola*, Judge Robart held that "a proper methodology used to determine a RAND royalty should therefore recognize and seek to mitigate the risk of patent hold-up that RAND commitments are intended to avoid," and that the hypothetical negotiation must "consider alternatives that could have been written into the standard instead of the patented technology," focusing "on the period before the standard was adopted and implemented (*i.e.*, ex ante)." *Microsoft Corp.*, 2013 WL 2111217, at *13. The *Innovatio* court likewise framed its inquiry as the rate "the parties to a hypothetical ex ante negotiation most likely would have agreed upon." *In re Innovatio*, 2013 U.S. Dist. LEXIS 144061, at *163. Once a standard is entrenched, switching becomes prohibitively costly, *see Broadcom*, 501 F.3d at 310, and any value measured after that point reflects the manufacturer's sunk, standard-specific investment rather than the invention. *See generally* Jorge L. Contreras & Richard J. Gilbert, *A Unified Framework for RAND and Other Reasonable Royalties*, 30 BERKELEY TECH. L.J. 1451, 1455, 1496 (2015).

FRAND commitments exist to protect implementers from hold-up; they "are clearly designed to benefit potential licensees . . . by ensuring that such patents are readily accessible to everybody at reasonable rates." *Microsoft Corp. v. Motorola, Inc.*, 864 F. Supp. 2d 1023, 1033 (W.D. Wash. 2012). Companies' reliance on those commitments is precisely what gives the SEP holder leverage afterward, and a

damages model that converts reliance-induced value into a royalty turns the FRAND commitment on its head.

Where a patent claims only a small part of a multi-component product, "courts must insist on a more realistic starting point for the royalty calculations by juries—often, the smallest salable unit and, at times, even less." *Ericsson*, 773 F.3d at 1227; *see LaserDynamics*, 694 F.3d at 67–69. A model that starts from consumers' willingness to pay for standard-enabled performance inverts that instruction.

III. RELIABLE APPORTIONMENT MUST BE GROUNDED IN AVAILABLE MARKET EVIDENCE OF FRAND RATES

Comparable licenses and top-down aggregate analyses each offer a possible market-based benchmark for evaluating a valuation methodology. Where reliable comparable licenses exist, they are a natural anchor; and a fair and reasonable aggregate royalty, where reliable aggregate data is available, can supply a helpful cross-check. A method that ignores these types of market evidence, such as an incremental-profits or willingness-to-pay model, risks overvaluing an individual SEP.

A. Comparable licenses provide reliable market evidence of FRAND rates.

Where reliable comparable licenses exist, courts should not ignore them, because such licenses reflect "the economic value of the patented technology in the marketplace." *LaserDynamics*, 694 F.3d at 79. "[A]n established royalty is usually

the best measure of a 'reasonable' royalty," and real-world licenses are "relevant and reliable" where testimony about them accounts for *Garretson*'s apportionment principles. *Ericsson*, 773 F.3d at 1227–28 (quoting *Monsanto Co. v. McFarling*, 488 F.3d 973, 978 (Fed. Cir. 2007)).

Judge Robart's RAND determination, for example, rested heavily on comparisons with patent pools and commercial licenses for the standards at issue. *Microsoft*, 2013 WL 2111217, at *98–101. The *Unwired Planet* court relied principally on comparable licenses and used a top-down calculation as a cross-check. *Unwired Planet Int'l Ltd. v. Huawei Techs. Co.*, [2017] EWHC 711 (Pat) (Eng.), ¶¶ 180, 476, 807. English courts continue to rely on comparable licenses when determining FRAND terms. *See InterDigital Tech. Corp. v. Lenovo Grp. Ltd.*, [2023] EWHC 539 (Pat) (Eng.); *Optis Cellular Tech. LLC v. Apple Retail UK Ltd*., [2023] EWHC 1095 (Ch) (Eng.). By contrast, the *TCL* court made a top-down aggregate analysis central to its rate-setting, and the *Innovatio* court built its rate from the aggregate, but both courts did so only after declining to treat the proffered licenses as comparable.

As the *TCL* and *Innovatio* courts recognized, comparability must be shown, not assumed. Licenses must be sufficiently comparable to the hypothetical negotiation, *LaserDynamics*, 694 F.3d at 79; *Lucent*, 580 F.3d at 1325–32, and courts have discounted licenses that may reflect hold-up value rather than FRAND

value, *see Microsoft*, 2013 WL 2111217, at *79–82; *Innovatio*, 2013 U.S. Dist. LEXIS 144061, at *64–65. Where comparable licenses exist, however, FRAND's non-discrimination component makes them highly probative.

B. A fair and reasonable aggregate royalty can serve as a valuable cross-check to any valuation methodology.

Whether or not comparable licenses exist, a "top-down" analysis supplies a helpful market check, and where they do not exist it can supply the market foundation. A top-down royalty multiplies the total aggregate royalty burden of a standard by the SEP holder's share of the relevant SEPs. *Unwired Planet*, [2017] EWHC 711 (Pat), ¶ 178. Moreover, "the determination of a [F]RAND royalty must address the risk of royalty stacking by considering the aggregate royalties that would apply if other [SEP] holders made royalty demands of the implementer." *Innovatio*, 2013 U.S. Dist. LEXIS 144061, at *62 (internal quotation marks omitted).

Taking a top-down approach—that is, checking a royalty against the implied aggregate rate—builds apportionment discipline into the analysis, tests whether the royalty for one patent is consistent with the royalties for all others, and guards against both hold-up and stacking. It also supplies objective facts or data (the size of the essential patent population, the patentee's share, and a market-tested aggregate) against which an expert's chained assumptions can be tested under *EcoFactor*. A fixed aggregate royalty also neutralizes a tactic increasingly common in SEP enforcement: dispersing a portfolio among assertion entities. When the aggregate is

fixed, the number of entities asserting individual SEPs is immaterial; only under piecemeal, bottom-up adjudication can serial suits yield total royalties far exceeding a portfolio's value. *See* Jorge L. Contreras, *Aggregated Royalties* for *Top-Down FRAND Determinations: Revisiting "Joint Negotiation,"* 62 ANTITRUST BULL. 690, 693–94 (2017).

Put simply, whatever method an expert uses, the result is not FRAND if the rates applied across the standard could "be stacked in such a way that makes implementation of the standard prohibitively expensive." *Microsoft*, 2013 WL 2111217, at *86.

1. Courts regularly consider implied aggregate royalty rates when setting FRAND terms.

Courts determining FRAND rates frequently anchor their analysis on the aggregate royalty:

- In *Innovatio*, the court derived an aggregate per-chip royalty for all Wi-Fi SEPs of $1.80 and then apportioned a fraction of that total to the patentee. The court noted that chip makers facing royalty demands "far outstripping their expected profit margin would not agree to take a license on the patents, but would instead exit the chip-making business." 2013 U.S. Dist. LEXIS 144061, at *83, *161, *174, *180.
- Japan's Intellectual Property High Court held that the aggregate royalty for the 3G UMTS standard should not exceed 5% and allocated Samsung a

share based on the number of patent families likely essential to the standard. *Apple Japan Godo Kaisha v. Samsung Elecs. Co.*, IP High Ct. of Japan, 2013 (Ne) 10043, at 132, 136–38 (May 16, 2014).

- In *TCL v. Ericsson*, the district court similarly considered a reasonable aggregate royalty for the standard, the total number of SEPs, and the number and relative importance of Ericsson's SEPs. 2018 U.S. Dist. LEXIS 234535 at *185–86.

Even where courts have not used aggregate royalties as the primary basis for setting FRAND rates, those considerations have provided an important check on their analysis. In *Unwired Planet*, the High Court of England and Wales computed the aggregate burden from SEP holders' public rate statements and calculated the patentee's share using filters for likely essentiality as a cross-check on its comparable-license analysis. [2017] EWHC 711 (Pat) ¶¶ 178, 264–72, 325, 476. Similarly, in *Microsoft v. Motorola*, the district court rejected the licensor's rates for the 802.11 Wi-Fi standard and the H.264 codec after concluding that the aggregate royalty burden if those terms were applied across either standard would impede their "widespread adoption." *Microsoft*, 2013 WL 2111217, at *73–74.

2. Aggregate royalty analysis exposes the excessive cumulative rates produced by pricing each SEP in isolation.

Methodologies that price each SEP in isolation, such as an incremental-profits model, are unreliable because nothing ensures that their results, applied across the

standard, will not produce excessive cumulative rates. Because "the royalty rate negotiated by one patent holder is affected by the rates the downstream firm pays to other patent holders, . . . a proper analysis must account for the joint determination of all the royalty rates." Mark A. Lemley & Carl Shapiro, *Patent Holdup and Royalty Stacking*, 85 TEX. L. REV. 1991, 2011 (2007). The Wi-Fi litigation history shows what happens otherwise. In 2013 and 2014, five district courts set royalties for thirty-five Wi-Fi SEPs totaling roughly 4.5% of the price of a typical $50 router. Yet roughly 3,000 patents cover the standard, so uncoordinated bottom-up determinations for all of them could exceed the product's price by an order of magnitude. Contreras, *Aggregated Royalties*, *supra*, at 692–93; *see Innovatio*, 2013 U.S. Dist. LEXIS 144061, at *179.

Courts have recognized the same point. In *Microsoft*, Judge Robart found that Motorola's request "raises significant stacking concerns" because there were "at least 92 entities that own 802.11 SEPs," and if each sought similar royalties, "the aggregate royalty to implement the 802.11 Standard, which is only one feature of the Xbox product, would exceed the total product price." 2013 WL 2111217, at *73. Such a rate "cannot be a RAND royalty rate because [it] does not stand up to the central principle of the RAND commitment—widespread adoption of the standard." *Id.* That is the "unlimited series of penalties" condemned in *Seymour*, 57 U.S. at 491, and it is why evidence of cumulative royalty burden is essential to any reliable SEP

damages analysis—and why juries should be permitted to hear it and be instructed on it. *See* Samsung Br. at 61–64.

C. Apportionment analyses that consider willingness to pay are not grounded in reliable market evidence.

A model that ignores both comparable licenses and aggregate analysis, and instead prices a single SEP by willingwiness to pay for standard-enabled performance, lacks grounding in market evidence. Willingness to pay for connectivity, speed, or reliability measures the value of the standard as a whole, ***not*** the incremental contribution of one patent among thousands. *See Ericsson*, 773 F.3d at 1232, 1235; *CSIRO*, 809 F.3d at 1305. Because every SEP holder could claim the same consumer valuation, the approach applied across a standard would produce the very hold-up and stacking that FRAND exists to prevent. An expert who cannot reconcile such a model with reliable benchmarks has not reliably applied any method to the facts, and the testimony should be excluded.

IV. INFLATED SINGLE-FEATURE AWARDS HARM INNOVATION AND CONSUMERS

Inflated awards for single features have consequences well beyond the parties. The patent system is "a carefully crafted bargain for encouraging the creation and disclosure of new, useful, and nonobvious advances in technology and design," *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 150–51 (1989), and that bargain depends on damages that reflect the value of the invention and no more.

As the Supreme Court recognized in *Seymour*, if the inventor of a small improvement could recover the value of the whole machine, "the unfortunate mechanic may be compelled to pay treble his whole profits to each of a dozen or more several inventors of some small improvement in the engine he has built." 57 U.S. at 490–91.

Excessive awards act as a tax on products that implement patented technology, raise the costs and risks of product development, and are passed on to consumers. *See* Lee & Lemley, *supra*, at 270–71; Fed. Trade Comm'n, *The Evolving IP Marketplace: Aligning Patent Notice and Remedies with Competition* 148 (2011) ("Overcompensation raises costs to other innovators through multiple mechanisms and can deter innovation."). Uncertainty about the total royalty cost of implementing a standard discourages investment and market entry, especially by smaller companies that cannot absorb the risk of an outsized verdict on one of tens of thousands of declared patents. FSA Paper at 4. The effects are already visible: some manufacturers have disabled HEVC video decoding in their products because of licensing costs, and some video streaming services have switched to alternative standards in response to high licensing demands. *Id.* When standards lose implementers, consumers lose interoperability and SEP holders who genuinely contributed to the standard lose licensing revenue.

Inflated awards also distort incentives within the patent system. When oversized damages are available, rational actors may treat patents as "lottery tickets" and devote resources to assertion rather than invention. Lee & Lemley, *supra*, at 271–72. A recurring tactic is to buy a patent from an operating company for a small sum and then urge that the low price be disregarded because the hypothetical negotiation predated the sale. *Id.* at 287. When the assignee of a portfolio of roughly 70 patents paid $600,000 up front and can then obtain a $61 million verdict on a single patent, the system rewards acquisition and assertion rather than contribution. SEP holders that genuinely contribute to standards are entitled to full FRAND compensation; the concern is awards untethered from that contribution. And because court-awarded damages establish "the legal shadow in which negotiations occur," unpredictable awards ripple into every licensing negotiation. Fed. Trade Comm'n, *supra*, at 138, 144. Reliable apportionment—anchored in comparable licenses, cross-checked against a fair and reasonable aggregate royalty, and policed at the threshold under *EcoFactor*—restores the proper incentives.

CONCLUSION

The Court should reverse and confirm that, under *EcoFactor* and Rule 702, district courts must exclude SEP damages models that are not reliably apportioned to the value of the patented technology, reconciled with comparable licenses where they exist, and, where reliable aggregate royalty evidence is available, tested against

a fair and reasonable aggregate royalty for the standard. A model that rests instead on consumers' willingness to pay for standardized technology, or the incremental profits a company has allegedly achieved from using the standard, untethered to reliable benchmarks, should not reach the jury.

Respectfully submitted,

/s/ Shawnna Yashar

Shawnna Yashar
Brooke Wilner
O'MELVENY & MYERS LLP
1625 EYE STREET, NW
WASHINGTON, DC 20006
(202) 383-5300

Attorneys for Amicus Curiae
Fair Standards Alliance A.S.B.L.

October 9, 2026

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitation of Federal Circuit Rule 32(b)(1). This brief contains 5,599 words, excluding the portions of the brief exempted by Fed. R. App. P. 32(f). I further certify that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the typestyle requirements of Fed. R. App. P. 32(a)(6). This brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman.

October 9, 2026

Respectfully submitted,

/s/ Shawnna Yashar

Attorney for Amicus Curiae