

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF DELAWARE**

W.L. GORE & ASSOCIATES, INC.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action No. 11-515-LPS-CJB
	)	
C.R. BARD, INC. and BARD	)	
PERIPHERAL VASCULAR, INC.,	)	
	)	
Defendants.	)	

**MEMORANDUM ORDER**

In this action filed by Plaintiff W.L. Gore & Associates, Inc. (“Gore” or “Plaintiff”) against Defendants C.R. Bard, Inc. and Bard Peripheral Vascular, Inc. (collectively, “Bard” or “Defendants”), Gore alleged infringement of United States Patent Nos. 5,735,892 (the “892 patent”) and 5,700,285 (the “285 patent”) (the “asserted patents” or the “patents-in-suit”). Presently before the Court is Defendants’ *Daubert* motion (“Motion”) to exclude certain opinions and testimony of Plaintiff’s damages expert, Laura B. Stamm. (D.I. 256)<sup>1</sup> For the following reasons, the Court GRANTS the Motion, with leave for Gore’s infringement expert, Dr. Enrique Criado, to offer a limited, supplemental expert report in accordance with the guidance set out in this Memorandum Order.<sup>2</sup>

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<sup>1</sup> Recently, the District Court upheld the Court’s recommendation that Bard be granted summary judgment regarding Gore’s claims of infringement of the '285 patent, meaning that the '285 patent is no longer in the case. (D.I. 405 at 10-11) However, because Ms. Stamm originally offered the expert opinions at issue in this Memorandum Order as to both the '892 patent and the '285 patent, and because it would be cumbersome to do otherwise, the Court will simply refer herein to her opinions regarding the “asserted patents” or “patents-in-suit.” The Court’s decision as to the Motion would be unaffected were there one or two patents in the case.

<sup>2</sup> Under the circumstances here, the resolution of this *Daubert* Motion is properly treated as non-dispositive, and is resolved by the Court pursuant to 28 U.S.C. § 636(b)(1)(A) and D. Del. LR 72.1(a)(2). *See, e.g., Withrow v. Spears*, 967 F. Supp. 2d 982, 987 n.1 (D. Del. 2013)

## I. BACKGROUND

### A. Factual Background

In this case, Gore seeks reasonable royalty and lost profit damages for alleged infringement of the asserted patents by two of Bard's stent-graft products (the "accused products"). On February 28, 2014, and April 25, 2014, respectively, Gore's damages expert, Laura Stamm, provided an opening expert report ("Stamm Opening Report") and a reply expert report ("Stamm Reply Report") regarding damages. (D.I. 233, ex. A ("Stamm Opening Rep.") & ex. B ("Stamm Reply Rep.)) In her reports, Ms. Stamm, *inter alia*, opines that the asserted claims of the patents-in-suit "cover technologies that are fundamental to the manufacture, development, and sale of small diameter stent grafts with thin ePTFE [expanded polytetrafluoroethylene] coverings." (Stamm Opening Rep. at ¶ 18; *see also* Stamm Reply Rep. at ¶¶ 72, 77) She ultimately concludes that a proper reasonable royalty, assuming the patents-in-suit are valid and infringed, is 15% of revenue from net sales of the accused products. (Stamm Opening Rep. at ¶¶ 272, 297)

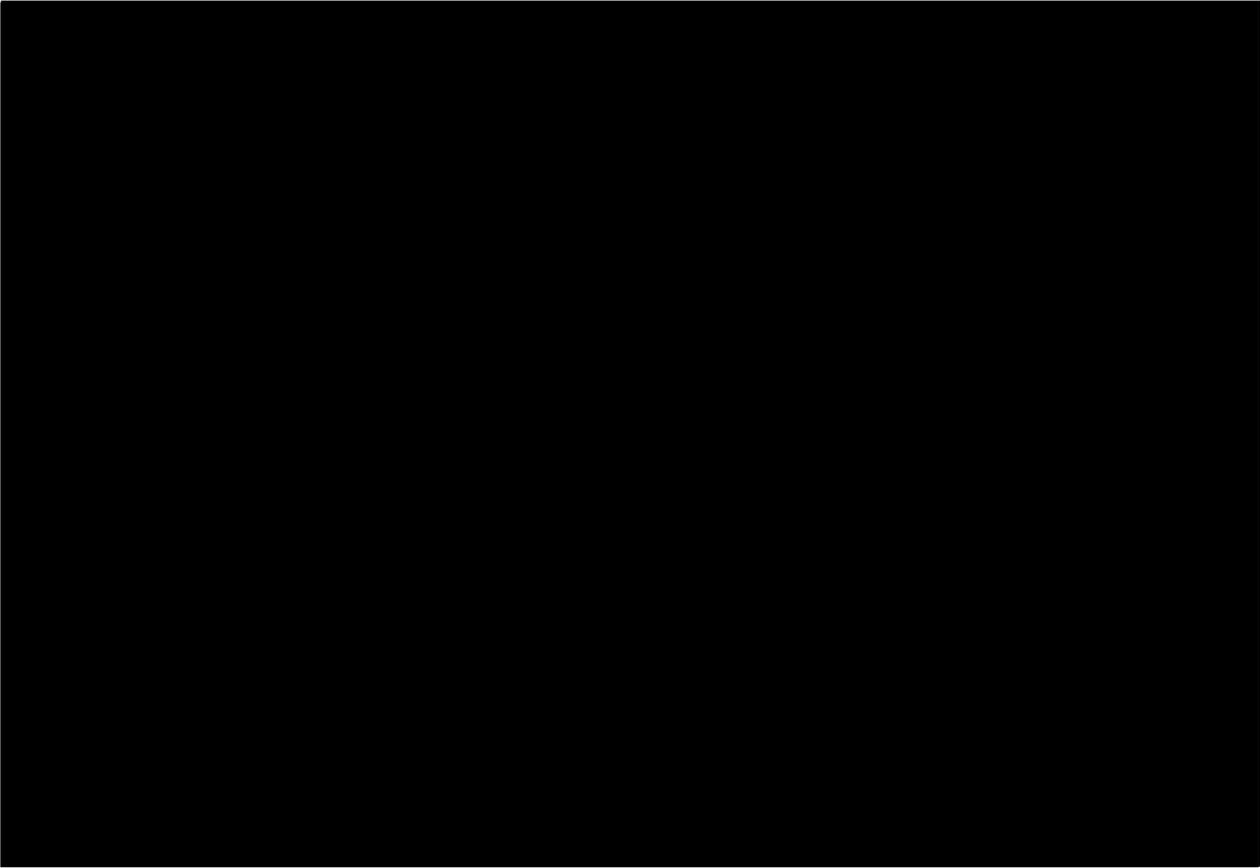
In arriving at this conclusion, Ms. Stamm relies heavily on three agreements in which Bard provided a license to its United States Patent No. 6,436,135 (the "Goldfarb patent"). (D.I. 308, ex. 48)<sup>3</sup> [REDACTED]

[REDACTED]

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(citing cases).

<sup>3</sup> The Goldfarb patent is entitled "Prosthetic Vascular Graft" and describes an invention "relat[ing] to prosthetic vascular structures, and, more particularly, to vascular prostheses fabricated from highly expanded polytetrafluoroethylene." (Goldfarb patent, col. 1:3-5)



Ms. Stamm testified that these license agreements were the “anchor” for her conclusion that a 15% royalty rate was appropriate in this case. (D.I. 258, ex. 1 (“Stamm Dep.”) at 213) In her expert reports, she explains that she utilized these agreements because they had a “high degree of comparability to the hypothetical license to the patents-in-suit negotiated between Gore and Bard.” (Stamm Opening Rep. at ¶¶ 228, 230, 233, 272) Ms. Stamm came to that conclusion based on a number of factors. Among those were that Bard (or its subsidiary) was a party to the licenses, that (certain of) the licenses did not come about as part of the settlement of litigation,

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and the parties to the licenses were all in the business of manufacturing and selling stent grafts. (Stamm Opening Rep. at ¶¶ 228, 230, 233) An additional factor that Ms. Stamm cited as to her “high degree of comparability” conclusion was her understanding that “the licensed technology is similar in importance to the patents-in-suit.” (*Id.* at ¶ 228 (concluding as to the ██████████ license); ¶ 230 (concluding the same as to the ██████████ license); *see also id.* at ¶ 233 (concluding, as to the ██████████ license, that the “Goldfarb Patent is similar in importance to the patents-in-suit while the ██████████ Patent with its narrower claims could be considered of lesser value”))

In her deposition, Ms. Stamm stated that the basis for her conclusion that the Goldfarb patent and the patents-in-suit are “similar in importance” was a conversation that she had with Dr. Criado, Gore’s technical expert on infringement. (Stamm Dep. at 220, 224) According to Ms. Stamm, Dr. Criado explained that the Goldfarb patent “covers the microstructure of ePTFE, [that] its use is not limited to stent grafts[,]” and that it was an “important” patent. (*Id.* at 220-21) Ms. Stamm also testified that Dr. Criado explained that the Goldfarb patent “is fundamental to the use of ePTFE and that is comparable to these [asserted] patents [in that the asserted patents are also] fundamental to the use of ePTFE in this particular product.” (*Id.* at 224) When he used the term “fundamental,” Ms. Stamm explained that Dr. Criado meant that one “couldn’t make a commercially successful stent graft absent the use of the patents-in-suit and the Goldfarb patent[.]” (*Id.* at 225)

For his part, Dr. Criado mentions the Goldfarb patent in only a few portions of his expert reports. That is, he references the Goldfarb patent by: (1) identifying it as one of a number of patents that cover Gore’s Viabahn® stent-graft product; and (2) citing to the patent in support of his opinion as to how the claim term “about” (found in the asserted patents) should be construed.

(D.I. 258, ex. 4 at 71 & ex. 5 at 203)

Dr. Nigel Buller, Bard's technical expert on infringement, also references the Goldfarb patent in his expert report. Dr. Buller notes that the Goldfarb patent was part of the "crowded field of stent graft prior art" but opines that its claims stood "in contrast" to those of the asserted patents, because the Goldfarb patent "is widely practiced, relates generally to requirements for expanded PTFE in vascular uses, and covers numerous products such as vascular grafts and stent grafts." (D.I. 259, Declaration of Dr. Nigel Buller ("Buller Decl."), ex. B at ¶ 41)<sup>5</sup>

## **B. Procedural History**

On June 10, 2011, Gore commenced this action. (D.I. 1) On November 29, 2011, this case was referred to the Court by Chief Judge Leonard P. Stark to hear and resolve all pretrial matters, up to and including the resolution of case dispositive motions. (D.I. 20) Briefing on the Motion (and various other *Daubert* and summary judgment motions) was completed on November 12, 2014. (D.I. 339) A 10-day trial is set to begin on December 7, 2015. (D.I. 362)

## **II. LEGAL STANDARDS**

### **A. *Daubert* Motions Generally**

Federal Rule of Evidence 702 governs the admissibility of qualified expert testimony, providing that an expert witness may testify if: "(a) the expert's scientific, technical, or other

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<sup>5</sup> Bard's damages expert, Dr. Gregory Leonard, also testified that the Goldfarb patent is a "fundamental" patent, in that for an entity designing a successful product in this field, the patent is "difficult to design around." (D.I. 308, ex. 55 at 321, 330; *see also* D.I. 262, ex. B at ¶ 137 (Dr. Leonard asserting in his rebuttal expert report that "the Goldfarb patent cover[s] fundamental technologies and therefore is not comparable to Gore's patents-in-suit" in that he was "unaware of any non-infringing alternatives to the Goldfarb patent" but that in a hypothetical negotiation regarding the patents-in-suit Bard "could have turned to non-infringing alternatives"))

specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue; (b) the testimony is based on sufficient facts or data; (c) the testimony is the product of reliable principles and methods; and (d) the expert has reliably applied the principles and methods to the facts of the case.” Fed. R. Evid. 702. Rule 702’s requirements have been examined in detail by the Supreme Court of the United States in *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993), and have been said to embody “three distinct substantive restrictions on the admission of expert testimony: qualifications, reliability, and fit.” *Elcock v. Kmart Corp.*, 233 F.3d 734, 741 (3d Cir. 2000); *see also B. Braun Melsungen AG v. Terumo Med. Corp.*, 749 F. Supp. 2d 210, 222 (D. Del. 2010).<sup>6</sup> As to this Motion, the parties appear to dispute only the reliability and “fit” of the expert testimony at issue. (*See* D.I. 339 at 2)

With regard to reliability, Rule 702 mandates that the relevant expert testimony “must be supported by appropriate validation—*i.e.*, ‘good grounds,’ based on what is known.” *Daubert*, 509 U.S. at 590; *see also Schneider ex rel. Estate of Schneider v. Fried*, 320 F.3d 396, 404 (3d Cir. 2003). The information provided by experts should be “ground[ed] in the methods and procedures of science” and be “more than subjective belief or unsupported speculation.” *Daubert*, 509 U.S. at 590; *see also Schneider*, 320 F.3d at 404.<sup>7</sup> In examining this requirement, a court’s focus must be on “principles and methodology” rather than on the conclusions generated by the expert. *Daubert*, 509 U.S. at 595; *see also Daddio v. Nemours Found.*, 399 F. App’x 711,

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<sup>6</sup> In applying Rule 702 to a patent action, the Court looks to the law of the regional circuit. *Info-Hold, Inc. v. Muzak LLC*, 783 F.3d 1365, 1371 (Fed. Cir. 2015).

<sup>7</sup> The Supreme Court later held in *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137 (1999), that the obligations imposed by *Daubert* extended to not only scientific expert testimony but rather to all expert testimony. *Kumho Tire Co.*, 526 U.S. at 147.

713 (3d Cir. 2010).

As to the “fit” requirement, it “goes primarily to relevance” as the testimony must “assist the trier of fact to understand the evidence or to determine a fact in issue” and have “a valid scientific connection to the pertinent inquiry as a precondition to admissibility.” *Daubert*, 509 U.S. at 591-92 (citations omitted); *see also Schneider*, 320 F.3d at 404. The standard for fit, however, is not a high one; it is met “when there is a clear ‘fit’ connecting the issue in the case with the expert’s opinion that will aid the jury in determining an issue in the case.” *Meadows v. Anchor Longwall & Rebuild, Inc.*, 306 F. App’x 781, 790 (3d Cir. 2009) (citations omitted).

Overall, “Rule 702 embodies a ‘liberal policy of admissibility.’” *B. Braun Melsungen AG*, 749 F. Supp. 2d at 222 (quoting *Pineda v. Ford Motor Co.*, 520 F.3d 237, 243 (3d Cir. 2008)). Nonetheless, the burden is placed on the party offering expert testimony to show that it meets each of the standards for admissibility. *Id.* (citing *Daubert*, 509 U.S. at 592 n.10).<sup>8</sup>

## **B. Expert Testimony Regarding a Reasonable Royalty Determination in a Patent Action**

### **1. Determination of a Reasonable Royalty**

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<sup>8</sup> Although Bard requested oral argument on its pending motions, (which the Court held), (D.I. 343), neither party sought an evidentiary hearing as to this *Daubert* Motion or suggested that the factual record was insufficiently developed such that a hearing of that type was required. The United States Court of Appeals for the Third Circuit has held that a trial court need not conduct an evidentiary hearing on a *Daubert* challenge if the record is sufficient to allow the Court to make a determination on the issues in dispute. *See, e.g., Oddi v. Ford Motor Co.*, 234 F.3d 136, 151-55 (3d Cir. 2000); *Maldonado v. Walmart Store No. 2141*, Civil Action No. 08-3458, 2011 WL 1790840, at \*13 n.10 (E.D. Pa. May 10, 2011). Here, Ms. Stamm’s two expert reports were provided to the Court, as was her deposition testimony regarding those reports. The parties also ably addressed issues relating to Ms. Stamm’s reports in their briefing. Under such circumstances, the Court has determined that the record before it is sufficient to allow for a decision on the admissibility of Ms. Stamm’s testimony under *Daubert*. *See, e.g., Furlan v. Schindler Elevator Corp.*, 516 F. App’x 201, 205-06 (3d Cir. 2013); *Oddi*, 234 F.3d at 151-55; *Maldonado*, 2011 WL 1790840, at \*13 n.10.

In a patent action, the burden of proving damages falls on the patentee. *Lucent Techs., Inc. v. Gateway, Inc.*, 580 F.3d 1301, 1324 (Fed. Cir. 2009). Damages may be awarded based on a “reasonable royalty” for use of the patented invention. *See* 35 U.S.C. § 284. A reasonable royalty “may be based upon . . . the supposed result of hypothetical negotiations between the plaintiff and defendant.” *Rite-Hite Corp. v. Kelley Co., Inc.*, 56 F.3d 1538, 1554 (Fed. Cir. 1995). A factfinder uses the hypothetical negotiation to “attempt to ascertain the royalty upon which the parties would have agreed had they successfully negotiated an agreement just before infringement began.” *Aqua Shield v. Inter Pool Cover Team*, 774 F.3d 766, 770 (Fed. Cir. 2014) (brackets and citation omitted).<sup>9</sup>

In determining a reasonable royalty, the finder of fact may consider the factors set out in *Georgia-Pacific Corp. v. U.S. Plywood Corp.*, 318 F. Supp. 1116 (S.D.N.Y. 1970) (“the *Georgia-Pacific* factors”). *See Lucent*, 580 F.3d at 1325; *see also ResQNet.com, Inc. v. Lansa, Inc.*, 594 F.3d 860, 869 (Fed. Cir. 2010) (describing the *Georgia-Pacific* factors as “comprehensive (but unprioritized and often overlapping)”).<sup>10</sup> “A key inquiry in the analysis is what it would have been worth to the defendant, as it saw things at the time, to obtain the authority to use the patented technology, considering the benefits it would expect to receive from

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<sup>9</sup> This mode of analysis “often involves approximation and uncertainty[,]” and can require certain assumptions, including that the parties are willing to negotiate, that the patents at issue are valid, and that those patents are infringed. *Aqua Shield*, 774 F.3d at 771 (internal quotation marks and citation omitted); *see also Lucent*, 580 F.3d at 1325.

<sup>10</sup> Particularly pertinent to the discussion below is *Georgia-Pacific* factor two (“The rates paid by the licensee for the use of other patents comparable to the patent in suit.”) and twelve (“The portion of the profit or of the selling price that may be customary in the particular business or in comparable businesses to allow for the use of the invention or analogous inventions.”). *Georgia-Pacific*, 318 F. Supp. at 1120; *see also* (D.I. 295 at 10-11).

using the technology and the alternatives it might have pursued.” *Carnegie Mellon Univ. v. Marvell Tech. Grp., Ltd.*, — F.3d —, No. 2014-1492, 2015 WL 4639309, at \*17 (Fed. Cir. Aug. 4, 2015). In other words, a reasonable royalty is measured by “the ‘value of what was taken[.]’” *Ericsson, Inc. v. D-Link Sys., Inc.*, 773 F.3d 1201, 1226 (Fed. Cir. 2014) (quoting *Dowagiac Mfg. Co. v. Minn. Moline Plow Co.*, 235 U.S. 641, 648 (1915)).

## **2. Comparable Licenses Must Be Used to Determine the Reasonable Royalty**

In determining the reasonable royalty, an expert witness may rely on “existing royalty agreements entered into at arms-length[.]” *Warsaw Orthopedic, Inc. v. NuVasive, Inc.*, 778 F.3d 1365, 1377 (Fed. Cir. 2015), as long as those agreements are “sufficiently comparable to the hypothetical license at issue in suit[.]” *Lucent*, 580 F.3d at 1325. For an existing agreement to be considered sufficiently comparable, the Federal Circuit does not require “identity of circumstances” between the agreement and the hypothetical license at issue; however, “district courts performing reasonable royalty calculations must exercise vigilance when considering past licenses to technologies *other* than the patent in suit[.]” *Virnetx, Inc. v. Cisco Sys., Inc.*, 767 F.3d 1308, 1330 (Fed. Cir. 2014) (brackets and citation omitted) (emphasis in original). In particular, an effort must be made to “link [the past] license[ agreements] to the infringed patent[.]” such that “the fact finder [can] adequately evaluate[] the probative value of the agreements.” *ResQNet*, 594 F.3d at 871 (brackets and citation omitted). This can involve efforts to “show that the[] agreements embody or use the claimed technology or otherwise show demand for the infringed technology[.]” *id.*, and to “account for differences in the technologies and economic circumstances of the contracting parties[.]” *Finjan, Inc. v. Secure Computing Corp.*, 626 F.3d 1197, 1211 (Fed. Cir. 2010).

Where damages experts have deviated from these principles, courts have excluded their testimony as unreliable under *Daubert*. See *LaserDynamics, Inc. v. Quanta Comput., Inc.*, 694 F.3d 51, 79-81 (Fed. Cir. 2012); *AVM Techs., LLC v. Intel Corp.*, 927 F. Supp. 2d 139, 142-45 (D. Del. 2013).

### III. DISCUSSION

Bard's primary argument in support of its Motion is a multi-step one. It goes as follows: (1) Ms. Stamm's "opinion that the patents-in-suit command a 15% reasonable royalty rate" is generated largely by "relying on [the above-referenced] Bard license agreements to the Goldfarb patent[,]"; (2) in doing so, Ms. Stamm "must necessarily opine that [these] licenses . . . concern comparable technology to the patents-in-suit"; (3) but Ms. Stamm "lacks the technical expertise to make that conclusion on her own" and so she relies on her conversation with Dr. Criado to support the conclusion; and yet (4) "Dr. Criado . . . provided no such opinions or proposed testimony in his expert reports or in deposition" and so "he cannot provide the necessary predicate testimony for Ms. Stamm's opinions based on Bard licenses to the allegedly 'comparable' Goldfarb patent." (D.I. 257 at 8) Asserting that "the expert rules [may not] be circumvented by allowing one expert [Ms. Stamm] to merely parrot the undisclosed opinions of another [Dr. Criado][,]" Bard argues that the Motion should be granted. (*Id.* at 9)<sup>11</sup>

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<sup>11</sup> Bard also makes a secondary argument—that even if there is an admissible basis for Ms. Stamm's opinion as to technological comparability, the evidence is clear that the Goldfarb patent could not, under any circumstances, be considered to be sufficiently comparable to the patents-in-suit. (D.I. 257 at 9-11) The Court declines to address that argument here. For one thing, the Court would be surprised if the dispute over the differences between the patents (e.g., the parties' divergent views regarding the importance of the respective patents in the field) would not go to the weight of the testimony, as opposed to being a reason to exclude the testimony entirely. See *Open Text S.A. v. Box, Inc.*, Case No. 13-cv-04910-JD, 2015 WL 393858, at \*5 (N.D. Cal. Jan. 29, 2015) (explaining that "[a]ny differences between the licensed

As an initial matter, there is no real dispute that in order for Ms. Stamm's use of the [REDACTED] licenses to pass muster under *Daubert*, there must be a showing that the technologies at issue in those licenses (particularly that relating to the Goldfarb patent) are sufficiently comparable to the technology at issue in the asserted patents. *Cf. LaserDynamics*, 694 F.3d at 79-81 (noting that to be sufficiently reliable under Rule 702, it "does not suffice" for a damages expert opining on a reasonable royalty to be "alleging a loose or vague comparability between different technologies or licenses"). In paragraphs 224-34 of her opening expert report, Ms. Stamm articulates why she believes there to be sufficient technological comparability (and why, for other reasons, the agreements are comparable to the hypothetical negotiation here). (Stamm Opening Rep. at ¶¶ 224-34; *see also* Stamm Reply Rep. at ¶ 78)

Although Gore attempts to paint a different picture, (*see* D.I. 295 at 14-15), it is clear that Ms. Stamm relied exclusively on her conversation with Dr. Criado in reaching a conclusion regarding technological comparability of the Goldfarb patent and the asserted patents, (*see, e.g.*, D.I. 339 at 3-4). During her deposition, for example, when asked if she was relying on her own reading of the Goldfarb patent for her conclusion as to technological comparability, Ms. Stamm replied that she was "[n]ot [relying on her] own reading" but instead solely on her "discuss[ion] with Dr. Criado." (Stamm Dep. at 220) Later in the deposition, when Ms. Stamm was again asked if her opinion in this regard was based "solely on information provided to [her] by Dr. Criado and not [her] own evaluation[.]" Ms. Stamm replied "[y]es, the technical part,

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patents and the patents-in-suit can be easily pointed out to the jury . . . through cross-examination . . . or . . . direct testimony [of experts]" and were not a basis for excluding the expert's testimony). And in any event, pending a clearer articulation of the basis for Ms. Stamm's testimony in this regard, *see infra*, it would be premature to decide the question.

yes.” (*Id.* at 224) As if to underscore this, when asked in her deposition whether she had read the Goldfarb patent herself, Ms. Stamm could not recall if she had ever seen that document. (*Id.* at 220)<sup>12</sup>

As a general matter, there is nothing wrong with such a practice in the instant context—in patent cases, damages experts routinely rely on facts and opinions provided by technical experts when rendering their damages analysis. *See, e.g., Apple Inc. v. Motorola, Inc.*, 757 F.3d 1286, 1321 (Fed. Cir. 2014) (citing cases), *rev’d on other grounds, Williamson v. Citrix Online, LLC*, 792 F.3d 1339 (Fed. Cir. 2015); *Wis. Alumni Research Found. v. Apple, Inc.*, — F. Supp. 3d —, No. 14-cv-062-wmc, 2015 WL 5704356, at \*18 (W.D. Wis. Sept. 29, 2015); *Fujifilm Corp. v. Motorola Mobility LLC*, Case No. 12-cv-03587-WHO, 2015 WL 1737951, at \*4 (N.D. Cal. Apr. 8, 2015) (citing cases); *Formax, Inc. v. Alkar-Rapidpak-MP Equip., Inc.*, No. 11-C-298, 2014 WL 3057116, at \*2 (E.D. Wis. July 7, 2014). In such circumstances, however, the damages expert’s reliance on the technical expert is not improper because the technical expert’s underlying opinion is typically of record in the case; that is, the technical expert’s opinion will be reviewable by the trier of fact and subject to cross-examination by the opposing party. *See, e.g., Wis. Alumni Research Found.*, 2015 WL 5704356, at \*22 (noting that “it is proper for an expert to rely on the opinions of other experts, so long as all of those opinions are reliable and non-

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<sup>12</sup> In her expert reports, Ms. Stamm does not cite to any underlying source of information that informed her opinion regarding the technological comparability of the Goldfarb patent and the asserted patents. (*See, e.g., Stamm Opening Rep.* at ¶¶ 225, 228, 230, 233; *Stamm Reply Rep.* at ¶ 78) Elsewhere in her report, however, she notes that she spoke with Dr. Criado and relied on information gleaned from those conversations in her damages analysis. (*Stamm Opening Rep.* at ¶ 8 & Appendix C at 8) Indeed, with respect to the technological comparability of the ██████████ Patent and the asserted patents, Ms. Stamm states explicitly that her conclusion is “[b]ased on [her] discussion with Dr. Criado[.]” (*Id.* at ¶ 232)

speculative, and subject to weighing by the trier of fact”); *Fujifilm Corp.*, 2015 WL 1737951, at \*4 (denying the defendant’s motion to exclude the opinion of the damages expert, who had relied on conversations with technical experts for information about the accused products, as the defendant “will have the opportunity to cross examine [the damages expert] on the factual basis and assumptions for his opinion, and [the] technical experts” on their underlying opinions); *Formax, Inc.*, 2014 WL 3057116, at \*2 (“It is perfectly reasonable for a finance and damages expert to adopt the conclusions of other experts. Whether those conclusions are sound can be explored at trial through cross-examination and other expert testimony.”).

Here, the problem is that Dr. Criado’s expert reports contain no opinions (nor really even any mention) as to whether the technology at issue in the Goldfarb patent is comparable in technological significance to that covered by the asserted patents. Nor do they contain mention of whether the Goldfarb patent and the asserted patents are similarly “fundamental” in their field. Indeed, Dr. Criado makes only the briefest of reference to the Goldfarb patent in his expert reports (e.g., listing it as one of 19 patents having at least one claim that covers Gore’s Viabahn product), (D.I. 258, ex. 4 at 71), no portion of which could be said to articulate a fully formed view on these questions. Therefore, the current state of play is that Dr. Criado will not be expected to testify on the Goldfarb patent’s comparability to the asserted patents, nor would he be subject to cross-examination on those topics. (D.I. 257 at 4) And in such a circumstance, Ms. Stamm could not simply testify at trial (as she did during her deposition) about what Dr. Criado previously *said to her* about the topics. (*See, e.g.*, Stamm Dep. at 224-25) In that scenario, Ms. Stamm would be simply repeating Dr. Criado’s views on technological comparability without applying her own experience or methodology to those views; this would amount to the

transmission of hearsay to the jury, which is not permissible. *See, e.g., Malletier v. Dooney & Bourke, Inc.*, 525 F. Supp. 2d 558, 651, 664-66 (S.D.N.Y. 2007) (explaining that if a damages expert attempted to simply relate the opinions of another expert in another field at trial, where the latter expert was not listed as an expert or made available for deposition on the issue, the damages expert's testimony would not be admissible under Federal Rule of Evidence 703 and would violate the hearsay rule); *see also McLeod v. Dollar Gen.*, Civil Action No. 13-3113, 2014 WL 4634962, at \*6 (E.D. Pa. Sept. 16, 2014) (citing cases).

In sum, Ms. Stamm heavily relies on the comparability of the three licenses at issue in coming to her ultimate conclusion as to an appropriate royalty rate in this case. But at present, her testimony regarding the technological comparability of the Goldfarb patent and the asserted patents is unreliable, and relatedly, cannot be said to “fit” the facts of the case, because it needs to be (but is currently not) drawn from admissible evidence. In light of all of this, Bard's motion is well-taken.

Yet to simply exclude Ms. Stamm's testimony—full stop—does not seem equitable under the particular circumstances here. Ms. Stamm's testimony is critical to Gore's damages case, and her assessment of the technological comparability of these three licenses is in turn critical to that testimony. Moreover, Dr. Criado, on whose opinion Ms. Stamm relies in this regard, is an expert who is well known to Bard, and through Ms. Stamm's deposition, Bard already has some sense as to what Dr. Criado would say on the topic. And in order to fill the gap that exists on this issue, Dr. Criado would need only to provide a short addendum to his expert report that establishes a “discernible link” between the licensed technology and claimed invention—something that could be accomplished before trial. *See LaserDynamics, Inc.*, 694

F.3d at 79; *see also, e.g., In re Maxim Integrated Prods., Inc.*, Master Docket Misc. No. 12-244, Civil No. 12-945, 2015 WL 5311264, at \*5 (W.D. Pa. Sept. 11, 2015) (“Once [an] expert shows some discernible link between the comparable license and the claimed technology, distinctions and oversights are matters for cross-examination.”) (internal quotation marks and citations omitted).<sup>13</sup> While Gore could be faulted for not having had Dr. Criado provide this opinion months ago in the first instance, in the end, the equities favor allowing such a supplemental report now. *Cf. Digital Reg of Tex., LLC v. Adobe Sys., Inc.*, No. C 12-1971 CW, 2014 WL 4090550, at \*1-4 (N.D. Cal. Aug. 19, 2014) (finding that damages expert’s opinions must be excluded under *Daubert*, but granting the expert one opportunity to supplement his report before trial); *ThinkOptics, Inc. v. Nintendo of Am., Inc.*, CASE NO. 6:11-CV-455, 2014 WL 2859578, at \*1-3 (E.D. Tex. June 21, 2014) (same); *Dynetix Design Solutions, Inc. v. Synopsys, Inc.*, Case No. C 11-05973, 2013 WL 4538210, at \*5 (N.D. Cal. Aug. 22, 2013) (same); *Access Int’l, Inc. v. Savi Techs., Inc.*, No. 3:10-cv-1033-F., 2013 WL 6839112, at \*7, \*9 (N.D. Tex. Jan. 25, 2013) (same).

For these reasons, the Court will permit Dr. Criado one opportunity to offer a brief supplemental expert report limited to the issue of the technological comparability of the Goldfarb patent and the asserted patents (i.e, to set out in writing the very opinion that Ms. Stamm has

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<sup>13</sup> The focused nature of such a supplemental report is underscored by Bard’s own technical expert’s report, which Bard characterizes as “properly contain[ing] a technological comparison of the Goldfarb patent to the patents-in-suit.” (D.I. 339 at 10 (citing Buller Decl., ex. B at ¶ 41)) The paragraph to which Bard cites in support contains exactly one sentence regarding the content of the Goldfarb patent: “Unlike the asserted patents, I understand that the Goldfarb patent is widely practiced, relates generally to requirements for expanded PTFE in vascular uses, and covers numerous products such as vascular grafts and stent grafts.” (Buller Decl., ex. B at ¶ 41)

been relying on all along). Gore shall furnish Bard with any such report on or before **November 2, 2015**. Bard may then depose Dr. Criado regarding his supplemental report by no later than **November 16, 2015**.

#### **IV. CONCLUSION**

For the reasons set out above, the Court hereby ORDERS that Bard's Motion be GRANTED, with leave for limited, supplemental expert discovery from Dr. Criado in accordance with the guidance set out above.

Because this Memorandum Order may contain confidential information, it has been released under seal, pending review by the parties to allow them to submit a single, jointly proposed, redacted version (if necessary) of the Memorandum Order. Any such redacted version shall be submitted no later than **October 30, 2015** for review by the Court, along with an explanation as to why disclosure of any proposed redacted material would "work a clearly defined and serious injury to the party seeking closure." *Pansy v. Borough of Stroudsburg*, 23 F.3d 772, 786 (3d Cir. 1994) (internal quotation marks and citation omitted). The Court will subsequently issue a publicly-available version of its Memorandum Order.

Dated: October 23, 2015

  
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Christopher J. Burke  
UNITED STATES MAGISTRATE JUDGE