

KONINKLIJKE KPN N.V.,

Plaintiff,

v.

SAMSUNG ELECTRONICS CO., LTD,

Defendant.

§ 2021 JUN 11 AM 8:03
§ IN THE DISTRICT COURT OF
§ SHERY GRIFFIS
§ BY *Sherry Griffith*
§ HARRISON COUNTY, TEXAS
§
§
§
§ 71st JUDICIAL DISTRICT

**SAMSUNG'S MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT
AND, IN THE ALTERNATIVE, NEW TRIAL OR REMITTITUR**

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For the following reasons, Defendant Samsung Electronics Co., Ltd. (“Samsung”) respectfully moves for judgment notwithstanding the verdict (“JNOV”) in favor of Samsung on all claims or, in the alternative, on the amount of the damages award that exceeds \$72,447,610.99 plus pre-judgment interest. In the further alternative, the Court should at minimum order a new trial or suggest a remittitur of the judgment down to \$72,447,610.99 plus pre-judgment interest, and grant a new trial in the interests of justice and fairness if that suggestion is not accepted.

INTRODUCTION

The jury verdict in favor of Plaintiff Koninklijke KPN N.V. (“KPN”) rests on a breach-of-contract theory that misconstrues the 2016 settlement agreement between the parties. Entering judgment based on that verdict would thus constitute legal error that is reversible on *de novo* review. For that reason alone, this Court should grant judgment to Samsung. But even if the jury had correctly construed that agreement, KPN’s own evidence refutes any basis for judgment in KPN’s favor. Apart from those fundamental defects on liability, the damages model the jury adopted, which relied on patent-infringement principles to reach back to 2010 even though the alleged breach occurred in 2021, violates foundational principles of New York contract law. The Court should at minimum reduce the damages award or suggest a substantial remittitur and grant new trial if that is not accepted.

In 2016, KPN and Samsung entered into a Settlement, License and Non-Assertion Agreement (the “Agreement”) to resolve KPN’s patent-infringement lawsuit. As part of the Agreement, KPN not only granted Samsung a license to the patents at issue in the suit, but also agreed that it would not sue Samsung for infringement of its other patents (the “KPN Non-Asserted Patents”) before 2025 and that no damages would accrue during the life of the Agreement. The parties, however, included an “exception” to those provisions that lies at the heart of this dispute. That exception, contained in Article 2.3.1, states that “[i]n the event that Samsung takes a license

from a Patent Pool, KPN shall have the right . . . to receive the KPN share of any Patent Pool Payment made by Samsung to that Patent Pool during the Term of the Agreement.”

Under well-accepted principles governing patent pools, the purpose and function of that exception are straightforward. Many patent pools are all-or-nothing affairs; a license must include every patent in the pool. Standing alone, that requirement would force licensees that already hold separate licenses to some of the patents in the pool to pay twice for the same patents. So pool administrators often offer licensees a so-called “pre-netting” discount that offsets the royalties for independently licensed patents. The Agreement’s Article 2.3.1 exception, however, forbids Samsung from obtaining a pre-netting discount for the KPN Non-Asserted Patents if Samsung takes a pool license that includes one or more of those patents. Although the Agreement’s covenant not to sue and damages waiver might ordinarily be deemed a preexisting license to the Non-Asserted Patents for pre-netting purposes, the exception ensures that they will not have that legal effect. If Samsung takes a pool license that includes Non-Asserted Patents, therefore, it must pay for them. That was part of KPN’s bargained-for consideration.

Five years after entering into the Agreement, Samsung settled separate patent-infringement litigation with a company called Sisvel International S.A. (“Sisvel”). As part of that settlement, Samsung agreed to pay Sisvel \$35 million. The settlement also granted Samsung licenses to certain patents owned by Sisvel and its affiliates, as well as patents held by another company, Wilus, Inc.

KPN then filed this lawsuit against Samsung for breach of the Agreement and unjust enrichment, claiming that Samsung’s \$35 million settlement with Sisvel required it to pay KPN nearly \$300 million—and possibly over half a *billion* dollars. KPN’s extraordinary theory is that because Sisvel, in addition to owning its own patent portfolio, also serves as the administrator of

a patent pool called the Mobile Communication Program (“MCP”) pool, and because the MCP pool includes some Wilus patents, Samsung must have taken a license from the MCP pool in the 2021 settlement, despite the fact the settlement agreement with Sisvel says nothing of the sort and members of the MCP patent pool are free to license their own patents outside the pool. The jury verdict rests on KPN’s theory that, because Samsung supposedly took that MCP pool license, Article 2.3.1 of the Agreement affirmatively required Samsung to also pay for a license to the KPN patents in the pool—a theory that erroneously misconstrues Article 2.3.1 as sweeping far beyond merely foreclosing pre-netting discounts.

No reasonable jury could have adopted KPN’s theory of breach based on the MCP pool. That is because the undisputed evidence shows that the MCP pool employs an *a la carte* approach that allows licensees to choose which patents to license. Accordingly, the MCP pool does not require Samsung to include KPN patents in any pool license.

And as KPN’s own corporate representative admitted, Article 2.3.1’s critical phrase “the KPN share” refers to KPN’s rights to pool payments under its own agreements with pool administrators. Under those separate agreements, KPN has no right to payments for pool licenses that do not include its patents. Its “share,” in other words, is zero as a matter of law.

That should end this case and require JNOV for Samsung. Article 2.3.1’s exception does not impose the sort of expansive financial liability on Samsung that the jury found. Rather, the only possible function of the exception is important but far more limited: When Samsung does take a pool license that includes KPN Non-Asserted Patents—such as when it takes a license to an all-or-nothing pool that (unlike the MCP pool) requires licenses to include KPN patents—Samsung may not avoid paying royalties to KPN on pre-netting grounds by claiming that the Agreement is a preexisting license. That is the deal that the parties struck, and this Court should not enter a

judgment that erroneously reads a licensing obligation into Article 2.3.1 that just isn't there. For much the same reason, the covenant of good faith and fair dealing provides no basis to add an implied requirement to license KPN Non-Asserted Patents. No such requirement is necessary to give effect to the provision's bar on pre-netting discounts, and it would distort the nature of the contractual bargain.

But even if the jury had not erroneously misconstrued the Agreement, KPN's own evidence refutes its claim that Samsung took a license from a "Patent Pool" as defined by the Agreement when it entered into the settlement with Sisvel. The evidence at trial that Samsung implicitly took a license from a "Patent Pool" consisted of brochures listing all of the patents in the MCP pool. But for two reasons, those brochures refute any finding for KPN. First, the brochures indicate that many of the MCP pool's patent families have not been declared standard-essential—meaning that the MCP pool does not qualify as a "Patent Pool" under the Agreement's definitional provision. Second, the brochures do not show that the Wilus patents included in the 2021 settlement with Sisvel are part of the MCP pool. There is accordingly no evidentiary basis to conclude that Sisvel was acting as a pool administrator when it entered into that settlement. For this additional reason, the Court should enter JNOV for Samsung.

Nor could a reasonable jury have awarded KPN \$287 million in damages, an amount that KPN told the jury equals what KPN would have received from Sisvel in 2021 had Samsung obtained a license to the KPN patents contained in the MCP pool. KPN presented zero evidence that Sisvel and Samsung would have entered into a settlement agreement for upwards of \$300 million—nearly ten times the actual settlement amount—even though that is the fundamental premise of KPN's damages request. KPN's expert, moreover, drew his royalty rate from a KPN-Sisvel contract that describes the rate as "fictional." And most strikingly, KPN's damages model

rests on the view that Samsung would have paid royalties on its products going back to 2010, despite the fact that the alleged breach occurred in 2021. That damages theory is irreconcilable with the required expectation-damages measure for breach of contract and instead amounts to legally improper patent-infringement damages.

For all those reasons, Samsung is entitled to JNOV—a complete judgment on liability or at the very least a judgment reducing the damages award substantially. Should this Court conclude otherwise, however, a number of other errors require a new trial in the interests of justice and fairness or at least a substantial remittitur. Most notably, with no legal basis, KPN presented to the jury a patent-infringement claim masquerading as an unjust-enrichment claim, and KPN improperly leveraged a ludicrous \$600 million request for unjust-enrichment damages for the admitted purpose of trying to make \$300 million in contract damages appear reasonable.

The Judiciary plays an essential gatekeeping role in ensuring that jury verdicts are grounded in the law and have a reasonable connection to the evidence presented at trial. The verdict here satisfies neither requirement.

BACKGROUND

1. *Patent Pools.* This case centers on contractual arrangements known as patent pools. Patent pools allow licensees to acquire a single license to a collection of patents owned by multiple patent holders and related to a single technology area.¹ They are run by “pool administrators,” which act as intermediaries between the patent holders and licensees and enter into separate

¹ When the technology area is defined by technical standards, the patent pool typically encompasses patents that are necessary to practice the standard in question, *i.e.*, standard-essential patents. A standard is an agreement on what sort of technology an entire industry will use to ensure continuity in the consumer experience—for instance, to ensure text messages can be exchanged between iPhones and Android phones. *See* Trial Tr. (Day 1) 177:11-24.

contracts with both. Under the contracts between the pool administrator and licensees, licensees pay the pool administrator for a single license that covers patents in the pool. The pool administrator then allocates the payments received from licensees to the various patent holders under the terms of their contracts. *See* Trial Tr. (Day 1) 195:9-25–196:1-7; 221:21-25–222:1-9; *see also id.* (Day 2) 126:7-25–128:1-14.

Two features of patent pools are relevant here. *First*, a patent pool can either use an all-or-nothing approach, in which a licensee must take a license to all of the patents in the pool and all of the pool members receive a share of the license fee, or an *a la carte* approach, in which a licensee can select which patents to license from among those in the pool and the license fee is divided among the pool members whose patents were licensed. *Compare, e.g., Zenith Elecs., LLC v. Sceptre, Inc.*, 2016 WL 7177530, at *1 (C.D. Cal. Feb. 5, 2016) (“MPEG LA is authorized to license this pool of patents as a whole, but is not authorized to do so as to the individual patents.”), *with* Trial Tr. (Day 1) 215:18-22 (explaining that pool licenses in this case could include “fewer than all of the pool members”). This brief refers to the former as “indivisible” pools and the latter as “divisible” pools. *See* Trial Tr. (Day 1) 215:18-22; *id.* (Day 2) 51:1-7; *id.* (Day 3) 97:21-25–98:1.

Second, patent pools often offer “pre-netting” discounts to licensees that already have separate licenses for some of the patents in the pool. Trial Tr. (Day 1) 237:13-19; *see generally* Jonathan M. Barnett, *From Patent Thickets to Patent Networks: The Legal Infrastructure of the Digital Economy*, 55 *Jurimetrics J.* 1, 53 n.112 (2014). That discount prevents licensees from paying twice to license the same patents. A licensee that receives a pre-netting discount either does not have to pay royalties for the relevant patents or can recover the duplicative royalties from the patent holder after the fact. Trial Tr. (Day 1) 237:13-19.

2. *The Samsung-KPN Agreement and Article 2.3.1.* In 2016, Samsung and KPN settled a patent dispute, memorializing the terms in the Agreement, which is governed by New York law. Agreement art. 13.1. Under the Agreement, Samsung paid KPN \$11.5 million. Agreement art. 3.1. In exchange, KPN made two principal commitments to Samsung. *First*, KPN granted Samsung a license to the KPN patents at issue in the dispute. Agreement art. 2.1. *Second*, KPN promised not to sue Samsung for potential infringement of the KPN Non-Asserted Patents until 2025, *id.* art. 2.3, and to waive all liability and damages that might accrue for such infringement during the Agreement’s term, *id.* art. 2.3.1. In practical effect, then, KPN granted Samsung a license to the Non-Asserted Patents for the duration of the Agreement. *See Molon Motor & Coil Corp. v. Nidec Motor Corp.*, 946 F.3d 1354, 1360 (Fed. Cir. 2020) (“A covenant not to sue is equivalent to a nonexclusive or ‘bare’ license.”).

The provisions governing the Non-Asserted Patents, however, contain an exception that is central to this dispute. The second sentence of Article 2.3.1 provides:

In the event that Samsung takes a license from a Patent Pool, KPN shall have the right, as an exception to the foregoing, to receive the KPN share of any Patent Pool Payment made by Samsung to that Patent Pool during the Term of the Agreement.

Agreement art. 2.3.1. The Agreement in turn defines the term “Patent Pool” as:

a patent pool or a joint licensing program for a standard, and wherein at least one KPN Non-Asserted Patents is evaluated and found to be essential by an independent evaluator, and which joint license program or patent pool is offered by several patent owners, and managed jointly by the patent owners or by a joint licensing agent, and is consisting of their patents declared or, evaluated and found, to be essential for a standard.

Agreement art. 1. Finally, a “Patent Pool Payment” is defined as “any payment by Samsung . . . to a Patent Pool during the Term of the Agreement.” *Id.*

This exception from the otherwise blanket bar on liability for infringing the Non-Asserted Patents ensures that if Samsung takes a license to Non-Asserted Patents through a pool license, it

cannot obtain a pre-netting discount on the ground that the Agreement constitutes a preexisting license to those patents. That enables KPN to receive a share of Samsung's pool payment from the pool administrator.

3. ***The Samsung-Sisvel Agreement.*** In 2021, five years after it settled with KPN, Samsung settled a separate patent dispute with Sisvel. DX 144 ("Sisvel Settlement Agreement"). Under the Sisvel Settlement Agreement, Samsung paid Sisvel \$35 million. DX 144, § 4.01. Samsung also took licenses to a set of patents owned by Sisvel and its affiliates, as well as patents owned by Wilus. *Id.* § 2.01. Although the Sisvel Settlement Agreement represents that Sisvel has authority to sublicense Wilus's patents, *id.* § 3.01, KPN did not introduce any evidence at trial indicating the source of that authority, such as a licensing agreement between Sisvel and Wilus. The Sisvel Settlement Agreement does not include a license to KPN patents. *Id.* § 1.13. Nor do any of its substantive provisions mention the MCP pool or any other patent pool.

4. ***The Trial Proceedings.*** KPN filed this action against Samsung, alleging that Samsung breached the Agreement by licensing the Sisvel and Wilus patents without paying KPN to license its patents as well. KPN's basic theory is that because Sisvel, in addition to holding its own portfolio of patents, also serves as the administrator for the MCP pool, which includes KPN patents, Samsung's \$35 million payment to Sisvel was a "Patent Pool Payment" within the meaning of Article 2.3.1 of the Agreement. Trial Tr. (Day 4) 52:8-22. According to KPN, that means that Samsung must pay KPN's "share" of that payment—which, in KPN's view, is what Samsung would have paid had it also licensed the KPN patents contained in the MCP pool. Trial Tr. (Day 4) 53:6-18. In essence, KPN's theory is that "Samsung promised it wouldn't cut us out of its joint license with Sisvel." Trial Tr. (Day 4) 54:16-17.

KPN's damages expert opined that the amount of damages was \$287 million—over eight times what Samsung had paid to Sisvel to settle their litigation. Although Samsung allegedly breached in 2021 with the signing of the Sisvel Settlement Agreement, the expert calculated the damages figure in part by determining what KPN would have received had it prevailed in a 2016 infringement action, with damages for that action accruing from 2010 given the Patent Act's six-year outer limit for recovering past damages. Trial Tr. (Day 2) 150:12-22. Over Samsung's objections, the Court permitted the expert's testimony. Trial Tr. (Day 2) 108:16-21.

KPN alternatively argued that, even if the Agreement did not require Samsung to pay KPN, Samsung had unjustly enriched itself by "using" KPN's patents since 2010, *see* Trial Tr. (Day 2) 218:14-15—in other words, without even attempting to satisfy the legal requirements for patent infringement, KPN presented a theory that Samsung had infringed its patents and must pay royalties as a result. *Id.* at 223:6-25, 224:1-12; *see also id.* (Day 4) 36:5-12. KPN's damages expert claimed that unjust-enrichment damages would amount to \$609 million. Trial Tr. (Day 2) 165:15-19. In a revealing moment at trial, he admitted that he was proposing that figure primarily as a "reference point" to demonstrate that the \$287 million request for breach-of-contract damages was reasonable because "the value of what Samsung received is over twice" that amount. Trial Tr. (Day 2) 166:8-16. Samsung objected to sending the unjust-enrichment claim to the jury, but the Court overruled the objection. Trial Tr. (Day 4) 6:9-25–15:20. The Court instructed the jury, however, that it should not reach the unjust-enrichment claim if it found Samsung liable for breach of contract. *Id.* at 27:5-10.

Samsung argued for a directed verdict and judgment on its behalf because, *inter alia*, nothing in the Agreement required Samsung to include KPN's patents in a pool license, Mot. for Directed Verdict (Feb. 24, 2023), at 10-11; and Samsung did not take a license from a Patent Pool

through the Sisvel Settlement Agreement, *id.* at 6-8. Alternatively, Samsung argued that KPN had failed to present legally competent evidence to support damages, *id.* at 11-12; KPN's unjust-enrichment claim is legally barred because the Agreement governs the relevant subject matter and KPN presented no evidence that Samsung obtained a benefit through fraud, duress, or undue advantage, *id.* at 3-5; and KPN is improperly seeking patent-infringement damages for its unjust-enrichment claim, *id.* at 13-14. The Court denied the motion.

After a four-day trial, the jury returned a verdict that Samsung had breached the Agreement, awarding \$287 million in damages as KPN had requested. Following the Court's instructions, the jury did not reach the unjust-enrichment claim.

On KPN's motion, the Court entered a final judgment stating that KPN has "preserved its right of recovery under its in-the-alternative claim of unjust enrichment" and that Samsung owes \$286,929,726 in expectation damages—KPN having remitted \$70,274—plus pre-judgment interest. Samsung now moves for JNOV or, alternatively, for a new trial or the suggestion of a substantial remittitur.

LEGAL STANDARD

JNOV "is appropriate under two different circumstances: (1) when there is no proof on which the jury could have made its findings or (2) when, as a matter of law, the claim or defense presented is not viable and should never have been presented to the jury." *Schindley v. Ne. Texas Cmty. Coll.*, 13 S.W.3d 62, 65 (Tex. App.—Texarkana 2000, pet. denied). It "is also permitted when a legal principle precludes recovery even though all the allegations are proven." *Id.* "[E]vidence is legally insufficient to support a finding and a JNOV must be granted when the record demonstrates: (1) the complete absence of evidence on a vital fact; ... [or] (3) the evidence offered to prove a vital fact amounted to no more than a scintilla." *Jefferson v. Parra*, 651 S.W.3d 643, 649 (Tex. App.—Houston [14th Dist.] 2022, no pet.) (citing *City of Keller v. Wilson*, 168

S.W.3d 802, 810 (Tex. 2005)). “Evidence that is ‘so weak as to do no more than create a mere surmise,’ however, is no more than a scintilla and, thus, no evidence.” *B & W Supply, Inc. v. Beckman*, 305 S.W.3d 10, 15–16 (Tex. App.—Houston [1st Dist.] 2009, pet. denied) (quoting *Ford Motor Co. v. Ridgway*, 135 S.W.3d 598, 601 (Tex. 2004)).

A motion for new trial is required to raise the “factual insufficiency of the evidence,” argue that “a jury finding is against the overwhelming weight of the evidence,” and present the “excessiveness of the damages found by the jury.” Tex. R. Civ. P. 324(b).

Remittitur is proper where “some portion of the award is unsupported by sufficient evidence or is so against the great weight and preponderance of the evidence as to be manifestly unjust.” *Wal-Mart Stores, Inc. v. Berry*, 833 S.W.2d 587, 594 (Tex. App.—Texarkana 1992, writ denied).

ARGUMENT

As Samsung explained in its motion for a directed verdict, which it incorporates in full here by reference, Samsung is entitled to JNOV because KPN has not presented legally or factually sufficient evidence to support its claims for relief. In the alternative, Samsung is entitled to a new trial or, at the very least, a substantial remittitur.

I. SAMSUNG IS ENTITLED TO JUDGMENT NOTWITHSTANDING THE VERDICT ON KPN’S BREACH-OF-CONTRACT CLAIM

The jury verdict in KPN’s favor rests on KPN’s theory that, under Article 2.3.1 of the Agreement, whenever Samsung takes a license from a pool that includes KPN patents, Samsung must pay to license those patents, even if the pool is divisible and allows Samsung to select patents *a la carte*. It further rested on KPN’s theory that, when Samsung entered into the Sisvel Settlement Agreement, Samsung must have taken a license from the MCP pool, which contains KPN patents, despite the fact that nothing in that agreement’s licensing provisions mentions the MCP pool.

No reasonable jury could reach those conclusions as a matter of law, for multiple reasons.

First, the jury verdict rests on an erroneous misconstruction of Article 2.3.1. That provision merely prohibits Samsung from obtaining a pre-netting discount if it takes licenses to KPN patents in a pool, as Samsung might otherwise be able to do if it were to take a license from an indivisible pool containing KPN patents. It does not require Samsung to license KPN patents contained in a divisible pool like the MCP pool. That is clear from the text, structure, and industry context of the Agreement, and KPN's corporate representative admitted as much at trial. The contrary reading on which the verdict rests is a legally erroneous misinterpretation of the contract language.

Second, even if a reasonable jury could have so construed the Agreement, KPN's own trial evidence refutes any finding that Samsung took a "license from a Patent Pool" when it entered into the Sisvel Settlement Agreement—a necessary predicate of the breach-of-contract verdict. As a threshold matter, to be a "license from a Patent Pool" under the Agreement, a license must include at least one KPN Non-Asserted Patent, so the Sisvel Settlement Agreement itself could not qualify as a "Patent Pool" because the evidence conclusively establishes that no KPN patents were licensed under that agreement. Presumably for that reason, KPN argued at trial that Samsung took an MCP pool license when it entered into the Sisvel Settlement Agreement. But even if that faulty premise were true, the evidence fails to establish that the MCP pool is a "Patent Pool" as defined in the Agreement because it shows that the MCP pool contains patents that have not been declared standard-essential. And at any rate, no competent evidence supports the claim that Samsung took an MCP pool license. Indeed, KPN's evidence indicates that the Wilus patents licensed from Sisvel were *not* in the MCP pool. And nothing in the text of the Sisvel Settlement Agreement otherwise suggests that Samsung took a license from the MCP pool.

Finally, even if this Court declines to enter JNOV on Samsung's liability for breach of contract, it should at least grant JNOV reducing the damages to approximately \$73 million as a matter of law. The remainder of the damages covered periods *before* the alleged 2021 breach, as reflected in the jury's verdict. Those are not proper contract-breach damages under settled New York law.

For each of those reasons, the Court should grant JNOV to Samsung.

A. The Jury's Verdict Rests On A Misinterpretation Of The Agreement

The jury verdict of breach of contract rests on a legally erroneous misinterpretation of Article 2.3.1 of the Agreement. Article 2.3.1 did not require Samsung to include KPN patents in the Sisvel Settlement Agreement or to otherwise make any payment to KPN.

KPN made two arguments to the jury in support of its breach-of-contract claim, both resting on legal error. First, it argued that by making the \$35 million payment to Sisvel under the terms of the Sisvel Settlement Agreement—which KPN argued was a “Patent Pool Payment” (*but see* Section I.B, *infra*)—Samsung breached the express language of Article 2.3.1 of the Agreement. According to KPN, Article 2.3.1 means that whenever Samsung obtains a license from a patent pool that contains KPN patents, even if the pool is divisible, Samsung must either include KPN patents in its pool license or pay KPN what it would receive if its patents were included in the license. As KPN's counsel told the jury in summation after quoting Article 2.3.1:

[E]veryone agrees that the payment Samsung made to the patent pool did not include the KPN share of royalties. KPN's share was excluded. . . . KPN is not included in the agreement.

That is a breach

Samsung promised it wouldn't cut us out of its joint license with Sisvel.

Trial Tr. (Day 4) 53:6-11, 54:16-17.

Second, KPN argued that even if the express language of the Agreement does not impose any such obligation on Samsung, the covenant of good faith and fair dealing does:

But even if there could be any doubt that there was a breach of the express terms of the agreement, you heard the Court instruct you about the implied covenant of good faith. Samsung can't do something that would have the effect of destroying KPN's right to receive the fruits of the contract. That's this situation. . . .

What did Samsung do? They wrote a contract with Sisvel's MCP program that excluded KPN. . . . They got KPN to waive damages by promising the KPN share, and they went and took an MCP license that they [sic] excluded KPN.

Id. at 54:18-24, 55:3-11.

Each of these arguments is erroneous as a matter of law. Nothing in the Agreement states that Samsung must include KPN patents whenever it takes a license to a divisible patent pool, and KPN's "share" of a payment for a license that does not include its patents is necessarily zero. Likewise, the covenant of good faith and fair dealing does not support implying an obligation to include KPN patents in licenses to divisible patent pools. Such an implied term is not necessary to ensure that KPN receives the bargained-for fruits of Article 2.3.1's exception. Unlike the MCP pool at issue here, many patent pools are *indivisible*. For those pools, Article 2.3.1 ensures that Samsung cannot receive the so-called "pre-netting" discount when it obtains licenses from those pools. KPN's entire argument—and the jury's verdict—thus rests on an improperly implied obligation to include KPN patents in pool licenses even where the pool does not require Samsung to do so.

1. The Express Language Of The Agreement Does Not Require Samsung To Include KPN Patents In Pool Licenses

No provision of the Agreement requires Samsung to include KPN patents in licenses to divisible patent pools, which allow licensees to select patents *a la carte*. The contrary finding the jury adopted rests on an erroneous construction of the second sentence of Article 2.3.1.

a. The first sentence of Article 2.3.1 provides that liability and damages will not accrue for Samsung products during the life of the Agreement. The second sentence then provides, “as an exception to the foregoing,” that if “Samsung takes a license from a Patent Pool, KPN shall have the right . . . to receive the KPN share of any Patent Pool Payment made by Samsung to that Patent Pool.”

The plain language of that sentence establishes that KPN’s covenant not to sue and damages waiver do not forfeit any entitlement KPN may otherwise have to shares of patent pool payments under its agreements with pool administrators. The sentence refers to a preexisting “share” (“the KPN share”) to which KPN is entitled. Because the Agreement does not define “the KPN share,” that term necessarily adverts to rights that KPN has under separate agreements with pool administrators, as KPN’s corporate representative acknowledged at trial. *See* Trial Tr. (Day 2) 30:2-6 (Ms. Gerritse agreeing that “the KPN share is calculated . . . under some totally different agreement [KPN] ha[s] with Sisvel”). Thus, the sentence makes clear that nothing in the Agreement *negates* a right that KPN otherwise holds under a pool agreement to a share of Samsung’s payments. But where KPN does *not* have any right under a pool agreement to a share of Samsung’s payment, the sentence has no application.

That makes perfect sense in the context of the well-settled operation of patent pools. Some patent pools are indivisible: The licensee must either take a license to all of the patents in the pool or none of them.² Despite that all-or-nothing approach, “some pool administrators . . . commit to

² *E.g.*, *Zenith Elecs.*, 2016 WL 7177530, at *1 (“MPEG LA is authorized to license this pool of patents as a whole, but is not authorized to do so as to the individual patents.”); *U.S. Philips Corp. v. Int’l Trade Comm’n*, 424 F.3d 1179, 1182 (Fed. Cir. 2005) (addressing a patent pool where “[p]otential licensees who sought to license patents to the technology for manufacturing CD-Rs

'pre-netting' policies, which reduce the royalty rate owed by any individual licensee if that licensee is already subject to royalty obligations with a pool member pursuant to an independent bilateral licensing agreement." Barnett, *From Patent Thickets to Patent Networks*, 55 *Jurimetrics J.* at 53 n.112. As KPN's own corporate representative explained at trial, under pre-netting policies, when a licensee "comes to the pool and has already existing licenses with some of the member of the pool, then he doesn't have to pay for [those] licenses." Trial Tr. (Day 1) 237:13-19.

The second sentence of Article 2.3.1 ensures that a pool administrator will not treat KPN's covenant not to sue and damages waiver as a license to the KPN Non-Asserted Patents entitling Samsung to a pre-netting discount. That is no mere hypothetical concern. The United States Court of Appeals for the Federal Circuit has explained that "[a] covenant not to sue is equivalent to a nonexclusive or 'bare' license." *Molon Motor*, 946 F.3d at 1360; see *Prism Techs. LLC v. Sprint Spectrum L.P.*, 849 F.3d 1360, 1370 (Fed. Cir. 2017) ("We have frequently recognized that a (non-exclusive) license to practice a patent is in substance nothing but a covenant not to sue: what such a license is, at its core, is an elimination of the potential for litigation."). Thus, Article 2.3.1 guarantees that KPN will receive whatever share of Samsung's pool payment that KPN's contract with the pool administrator otherwise entitles it to receive, despite the Agreement's effective license to the Non-Asserted Patents.

That provision has real force. For example, if Samsung were to take a license to KPN patents in a pool and then convince the pool administrator to grant a pre-netting discount eliminating the royalties owed to KPN, on the ground that the Agreement is a license to the KPN

or CD-RWs were not allowed to license those patents individually and were not offered a lower royalty rate for licenses to fewer than all the patents in a package"); *Wuxi Multimedia, Ltd. v. Koninklijke Philips Elecs., N.V.*, 2006 WL 6667002, at *7 (S.D. Cal. Jan. 5, 2006) (rejecting anti-trust challenge to indivisible patent pool).

Non-Asserted Patents, KPN could sue Samsung for breach of contract. Similarly, if Samsung filed a lawsuit to recoup a portion of its pool payments from KPN on pre-netting grounds, KPN could point to Section 2.3.1 as a defense.

b. The jury verdict, however, rests on a far more radical and erroneous interpretation of Article 2.3.1. On KPN's theory as adopted by the jury, even where Samsung takes a license from a *divisible* pool like the MCP pool, the second sentence of Article 2.3.1 imposes an affirmative obligation on Samsung to license any KPN Non-Asserted Patents contained in the pool. That is a legally erroneous interpretation of that sentence and finds no support in the evidence at trial..

First, and most clearly, as KPN's corporate representative repeatedly admitted, Article 2.3.1 does not say that Samsung must license KPN patents.³ It would have been easy for the parties to add such a requirement if they had intended Samsung to assume that obligation. Yet the parties agreed only that KPN would be entitled to "the KPN share" of Samsung's pool payments—*i.e.*, the share required by KPN's contract with the pool administrator. That is a different, and far more limited, obligation than affirmatively requiring Samsung to license KPN Non-Asserted Patents.

Second, the jury's erroneous finding of breach ignores that Article 2.3.1 is an "exception to the foregoing" covenant not to sue and damages waiver. Under KPN's theory as adopted by the jury, the sentence is much more than an "exception"; it imposes a sweeping *new* obligation on

³ Trial Tr. (Day 2) 63:2-7 ("Q. And if we look for any version of you must include my patents, you promised to include my patents, you promised to include KPN's patents, you cannot exclude KPN's patents, we don't find words anywhere like that in the document we're looking at, 2.3.1, do we? A. No."); *id.* at 53:18-23 ("And I believe you've also given testimony in your deposition that there's nothing about this that would prohibit Samsung from taking a license from less than all the participants in a pool. This doesn't prohibit that, does it? A. Yes."); *id.* at 54:6-11 ("Q. . . . There's nothing in here that prohibits Samsung and Sisvel from doing exactly what they did, which is reach an agreement and a license with people who are just a tiny part of the pool? Nothing prevents that? A. That's true.").

Samsung to take a license to KPN Non-Asserted Patents (and pay accordingly) whenever it takes a license to a divisible pool that includes those patents. It makes no linguistic sense to describe such significant new financial liability as an “exception” to a waiver of liability. By contrast, if the sentence prevents Samsung from obtaining a pre-netting discount, it is naturally described as an “exception to the foregoing”: Although the Agreement gives Samsung a de facto license that would ordinarily support a pre-netting discount, the exception does not allow Samsung to obtain one.

Third, the structure of the Agreement is inconsistent with construing Article 2.3.1 to impose a massive new obligation on Samsung as the jury’s finding does. Article 2.3.1 is housed in Article 2 of the Agreement, which is entitled “License and Covenant Not to Sue by KPN.” Unsurprisingly, the Article contains KPN’s obligation to license the patents asserted in KPN’s prior patent-infringement lawsuit and KPN’s covenant not to sue Samsung for infringement of the Non-Asserted Patents, as well as the bar on the accrual of liability or damages for Samsung products during the term of the Agreement. The placement of the second sentence of Article 2.3.1 in that Article reflects that it is a limitation on the scope of that effective license. In contrast, Samsung’s principal obligation (payment for the license) is contained in Article 3—entitled “Financial Conditions.” If Samsung had also promised to license KPN Non-Asserted Patents (and pay accordingly) whenever it takes a pool license, the drafters would have placed that obligation in Article 3.

In short, Article 2.3.1 does not impose any obligation on Samsung to add KPN patents to pool licenses that do not require them. Rather, it ensures that when Samsung takes a license to a KPN Non-Asserted Patent through a pool—such as where it takes a license to an indivisible pool—

it cannot invoke the Agreement to avoid the paying the “the KPN share” by obtaining a pre-netting discount.

c. Once the Agreement is properly construed, Samsung is entitled to JNOV. As KPN’s own corporate representative testified, the MCP pool is *divisible*. By its terms, it permits licenses to pick and choose which patents to license. Trial Tr. (Day 2) 51:2-7 (“[Y]ou understood that Sisvel had the right to enter into licenses for some but not all of the members of the pool when they were wearing their patent administrator hat, right? A. Yes.”); *see* PX146 (KPN-Sisvel Agreement). KPN receives a share of MCP pool payments only when a licensee selects KPN’s patents to include in its license. If a licensee selects only patents from other pool members, KPN receives nothing. Trial Tr. (Day 2) 50: 23-25 (“[I]f your patents are not part of the license, you don’t get paid, right? A. That’s right.”); *id.* at 55:25-56:5 (“Q. . . In your business, which is all about licensing patents, your patents are not part of the license, it wouldn’t be reasonable for you to expect to receive royalties, would it? A. No.”). Accordingly, even under KPN’s theory of the case, KPN’s “share” of Samsung’s supposed pool payment was \$0—no different from any of the other companies in the MCP pool that own patents that Samsung did not license. *See* Trial Tr. (Day 2) 51:20-25. That resolves this case as a matter of law.

KPN’s primary response has been that under that plain-language construction of Article 2.3.1, the provision would be pointless because Samsung could always circumvent it by excluding KPN’s patents. *See* Trial Tr. (Day 3) 45:3-4; *id.* (Day 4) 89:8-9 (“They would always exclude us. They would exclude us every time.”). But that argument overlooks indivisible pools. Samsung cannot exclude KPN’s patents from those pools. As to those, Article 2.3.1 ensures that Samsung cannot obtain a pre-netting discount when it takes a pool license that includes KPN Non-Asserted Patents. Here, however, KPN has alleged only that Samsung took a license from a divisible pool

(MCP) in which licensees can choose which patents to license. Because Samsung's purported pool license did not include KPN patents, KPN "share" is zero.

2. The Covenant of Good Faith And Fair Dealing Does Not Support An Implied Promise To License KPN Patents

Lacking any serious argument that Samsung breached the plain text of Article 2.3.1, KPN alternatively asked the jury to rely on the covenant of good faith and fair dealing to imply a term forbidding Samsung from entering into an MCP pool license that "excluded KPN." Trial Tr. (Day 4) 54:18-25, 55:1-13. But that theory violates blackletter New York law because it adds a new term to the Agreement that the parties did not bargain for, and it is not necessary to ensure that KPN can enjoy the benefits of the Agreement that it *did* bargain for.

Under New York law, the good-faith covenant implies only those promises necessary to prevent the promisor from "destroying or injuring the right of the other party to receive the fruits of the contract." *Dalton v. Educ. Testing Serv.*, 87 N.Y.2d 384, 389 (1995) (cleaned up). For that reason, any implied promise must be one that "a reasonable person in the position of the promisee would be justified in understanding were included." *Id.* In other words, the covenant protects parties only from "[s]ubterfuges and evasions." Restatement (Second) of Contracts § 205, cmt. d.

Given that narrow compass, "[t]he covenant of good faith and fair dealing cannot be used to add a *new* term to a contract, especially to a commercial contract between two sophisticated commercial parties represented by counsel." *D & L Holdings, LLC v. RCG Goldman Co., LLC*, 734 N.Y.S.2d 25, 31 (2001) (emphasis added); *see Compania Embotelladora Del Pacifico, S.A. v. Pepsi Cola Co.*, 976 F.3d 239, 248 (2d Cir. 2020) (same) (collecting New York cases); *see also Ashwood Capital, Inc. v. OTG Mgmt., Inc.*, 948 N.Y.S.2d 292, 297 (1st Dep't 2012) (explaining that the requirement to enforce a contract as written applies "with even greater force in commercial contracts negotiated at arm's length by sophisticated counseled businesspeople," where "courts

should be extremely reluctant to interpret an agreement as impliedly stating something which the parties have neglected to specifically include”) (internal quotation marks omitted). And the covenant “does not extend so far as to undermine a party’s general right to act on its own interests in a way that may incidentally lessen the other party’s anticipated fruits from the contract.” *M/A-COM Security Corp. v. Galesi*, 904 F.2d 134, 136 (2d Cir. 1990) (internal quotation marks omitted).

For example, in *Broder v. Cablevision Systems Corp.*, 418 F.3d 187 (2d Cir. 2005), the United States Court of Appeals for the Second Circuit held that New York law did not permit the covenant of good faith to “transform” a cable company’s “obligation to refrain from changing the customer’s rates except in accordance with applicable law into an affirmative obligation to change his rates” to come into compliance with the law. *Id.* at 199. Similarly, in *SING for Service, LLC v. DOWC Administration Services*, 2022 WL 36478 (S.D.N.Y. Jan. 3, 2022), an administrator of extended vehicle warranties contracted for another company to finance those warranties but “failed to include covenants in its agreements requiring . . . a minimal level of service to purchasers.” *Id.* at *1. The United States District Court for the Southern District of New York declined to infer those covenants, which would have enhanced the terms of the contract because “the implied covenant of good faith and fair dealing does not graft new substantive obligations into a contract.” *Id.*; see also *Sussman Sales Co., Inc. v. VWR Int’l, LLC*, 2021 WL 1165077, at *15 (S.D.N.Y. Mar. 26, 2021) (“The Court cannot rewrite the Agreement where Plaintiff failed to negotiate for the requirements that it now deems vital to the Agreement’s purpose.”).

Under those settled legal standards, the jury’s verdict cannot rest on the covenant of good faith and fair dealing. As explained above, the second sentence of Article 2.3.1 ensures that Samsung’s effective license to the Non-Asserted Patents will not deprive KPN of the shares of

pool payments to which it is otherwise entitled under agreements with pool administrators. *See* pp. 7-8, *supra*. Thus, when Samsung takes a pool license that includes KPN Non-Asserted Patents—such as a license to an indivisible pool—the provision bars Samsung from obtaining a pre-netting discount excluding royalty payments to KPN. But nothing in the text or purpose of Article 2.3.1 suggests that Samsung bears a further obligation to include KPN patents in a pool license where the patent holders’ agreements with the pool administrator do not require Samsung to do so. KPN can fully enjoy the fruits of its bargain without implying such a term, because the protection against pre-netting where KPN Non-Asserted Patents are included in a pool license remains in force.

As a result, KPN’s argument under the covenant of good faith and fair dealing ultimately seeks exactly what New York law forbids: to “add a new term to a contract . . . between two sophisticated commercial parties represented by counsel.” *D & L Holdings*, 734 N.Y.S.2d at 31. As noted above, the sophisticated, counseled parties here easily could have required Samsung to include KPN patents in all licenses to divisible pools containing KPN patents, if that had been part of their bargain. But they did not do so. To imply such a term where the Agreement’s terms are already clear and efficacious lies on the impermissible side of the line drawn by New York law. The verdict therefore rests on legal error and cannot stand.

B. No Reasonable Jury Could Find That Samsung Took A License From A Patent Pool

Even if the jury’s finding of breach based on KPN’s erroneous interpretation of the Agreement were correct (*but see* Section I.A, *supra*), Samsung is entitled to JNOV because no reasonable juror could find that Samsung took a license from a “Patent Pool” within the meaning of Article 2.3.1 when it entered into the Sisvel Settlement Agreement. *See City of Keller*, 168

S.W.3d at 827 (describing legal-sufficiency review). Such a conclusion contradicts the plain text of the Agreement and KPN's own evidence.

As explained above, the Agreement defines "Patent Pool" as:

a patent pool or a joint licensing program for a standard, and wherein at least one KPN Non-Asserted Patents is evaluated and found to be essential by an independent evaluator, and which joint license program or patent pool is offered by several patent owners, and managed jointly by the patent owners or by a joint licensing agent, and is consisting of their patents declared or, evaluated and found, to be essential for a standard.

Id. (boldface and underlining added). Under that language, KPN's own trial evidence demonstrates that Samsung did not take a license from a Patent Pool when it entered into the Sisvel Settlement Agreement.

1. The Sisvel Settlement Agreement Is Not A "Patent Pool"

As an initial matter, the Sisvel Settlement Agreement cannot itself qualify as a "Patent Pool" under the Agreement's definition. Most obviously, the Sisvel Settlement Agreement does not include any KPN Non-Asserted Patents. Nor does it naturally fit the terms "joint licensing program" or "patent pool," which suggest an ongoing "program" offered to many participants, not a one-off settlement agreement. For similar reasons, any separate joint licensing agreement between Sisvel and Wilus, outside the auspices of the MCP pool, would not qualify as a "Patent Pool." Like the Sisvel Settlement Agreement, such an arrangement would not include KPN patents.

2. The MCP Pool Is Not A "Patent Pool," And Samsung Did Not Take A License From The MCP Pool

Recognizing that none of its patents were licensed under the Sisvel Settlement Agreement, KPN's primary argument at trial was that because Sisvel is the administrator of the MCP pool, Samsung must have taken a license to the MCP pool, which purportedly qualifies as a "Patent Pool," when it settled its infringement dispute with Sisvel. In particular, KPN argued that Sisvel

could not have included the Wilus patents in Samsung's license without donning its pool-administrator hat. As KPN's counsel told the jury in summation, "Sisvel put Wilus on the menu because Wilus was in the MCP program, and Samsung was doing a joint MCP license with Sisvel." Trial Tr. (Day 4), at 48: 23-25.

There are two fatal problems with that theory. *First*, KPN's own evidence shows that the MCP pool does not meet the Agreement's definition of "Patent Pool." *Second*, the same evidence shows that Samsung did not take a license to the MCP pool because the MCP pool does not contain the Wilus patents included in the Sisvel Settlement Agreement.

a. KPN's own evidence demonstrates that the MCP pool is not a "Patent Pool" because it is not a pool "consisting of [the patent owners'] patents declared or, evaluated and found, to be essential for a standard." Agreement art. 1. The words "consisting of" signify that *all* of the patents in the pool must be standard-essential. "Consist of" means "to be formed or made up of." *See Consist Of*, Merriam-Webster.⁴ It would be unnatural to say that a patent pool that includes *both* standard-essential patents *and* non-standard essential patents is "made up of" standard-essential patents. That would be like saying that an equestrian team is "made up of males" (or "consists of males") when the team in fact has both male and female riders. It is also "well understood in patent usage that 'consisting of' is closed-ended and conveys limitation and exclusion." *CIAS, Inc. v. All. Gaming Corp.*, 504 F.3d 1356, 1361 (Fed. Cir. 2007). Although the Agreement is of course not a patent, the unusual syntax of the definition of "Patent Pool" (*e.g.*, "wherein at least one KPN Non-Asserted Patents," "is consisting of their patents") invokes that specialized terminology.

⁴ <https://www.merriam-webster.com/dictionary/consist%20of>

To find breach of contract, therefore, the jury would have had to determine that *all* of the patents in the MCP pool had been declared or found to be essential to a standard. But KPN's own evidence shows just the opposite. KPN introduced patent brochures from Sisvel that identify all of the patents in the MCP pool. PX207, PX208; *see* Trial Tr. (Day 1) 211:15–213:21. One column of those brochures indicates the portions of the 3G or 4G standard to which each patent is purportedly essential. Another column indicates whether each patent or patent family has been declared essential to the European Telecommunications Standards Institute. For a number of patent families, both columns are blank.⁵ Here are some examples:

Family	Patent Owner	Exemplary Patent	Family Members	Claim(s)	Exemplary sections of the standard	ETSI Declaration	iling Date
LY201	Albus DS	FR 829541	US 7 872 728	1	3GPP TS 36.211 V9.1.0 Sections 6.1.6.1.1, 6.2, 6.2.1, 6.2.2, 6.10, 6.10.1, 6.10.1.1, 6.10.1.2, 6.10.2, 6.10.2.1, 6.10.2.2, 6.10.3, 6.10.3.1, 6.10.3.2, 6.10.4, 6.10.4.1, 6.10.4.2, 7.2, Figure 6.2.2-1, 6.10.1.1-1, 6.10.1.2-1, 6.10.2.1-1, 6.10.2.2-1, 6.10.3.1-1, 6.10.3.2-1, 6.10.3.2-2, 6.10.3.2-3, 6.10.4.1-1, 6.10.4.2-1, 6.10.4.2-2	SID-201309-002	2 Sep 2011 29 Aug 2011
LY2078	NELCO		CN 20078005418.7 EP 2125451(OE) EP 2125451(BE) EP 2125451(GB) #94942801 #5111540 US 8249385 US 8412248				2 Dec 2007 18 Sep 2018 18 Sep 2018 18 Sep 2018 2 Dec 2007 20 Jun 2010 2 Dec 2007 1 May 2012
LY2081	NELCO		AU 2011201566 AU 2011201567 CN 2012016000018.1 CN 2020040 #3550097 KR 10133991.1 KR 101473229 KR 10179871.2 KR 101809931.4 RU 2413716 RU 2478027				28 Apr 2011 8 Jul 2014 2 Feb 2008 2 Feb 2008 2 Oct 2007 2 Aug 2010 2 Aug 2011 2 May 2014 2 Oct 2011 2 Feb 2008 2 Jun 2011

PX208.

This was KPN's only evidence that the MCP pool meets the Agreement's definition of "Patent Pool," and that evidence fails to support any such finding. KPN introduced no other evidence—none—that any of the patent families with blank columns had been "declared or,

⁵ In addition, for a number of patent families, the brochures indicate that only some of the patents are declared essential. Those patents also indicate that the MCP is not a "Patent Pool" within the meaning of the Agreement. But even if the declared-essential status of one patent could extend to its family members, the brochures also contain entire patent families with no indication of essential status.

evaluated and found, to be essential for a standard” or that declaring one patent essential necessarily means that all other patents in the family are considered declared-essential. Agreement art. 1.

That absence of key evidence is fatal to the jury’s breach-of-contract finding. KPN failed to meet its burden of proving that the MCP pool qualifies as a “Patent Pool” within the meaning of the Agreement because it failed to establish that all of the patent families in the pool had been found or declared standard essential. Because KPN cannot establish that Samsung took a license to a “Patent Pool,” Samsung is entitled to JNOV.

b. Even if the MCP pool qualifies as a Patent Pool under the Agreement, no reasonable jury could conclude that Samsung took an MCP license when it entered into the Sisvel Settlement Agreement. As noted, KPN introduced two patent brochures that listed all MCP patents. PX207, PX208. But the specific Wilus patents that Samsung licensed through the Sisvel Settlement Agreement *are not listed in them*. KPN therefore introduced no evidence that the Wilus patents were contained in the MCP pool at the time that Samsung entered into the Sisvel Settlement Agreement. Its own evidence points decidedly to the opposite conclusion.

KPN may cite the testimony from its corporate representative about the inclusion of Wilus patents in the MCP pool. But that testimony merely states that Wilus was a member of the MCP pool—not that the MCP pool contained the specific patents included in the Sisvel Settlement Agreement. *See* Trial Tr. (Day 1) 200:15-20, 208:10-18, 231:7-14; *id.* (Day 2) 97:14-15. And even if the corporate representative had testified that the specific Wilus patents were contained in the MCP brochures, that would be refuted by the text of the brochures themselves, which are in evidence. PX207, PX208.

Accordingly, there is no plausible basis for a reasonable jury to conclude from the trial evidence that Samsung took an MCP license. The Sisvel Settlement Agreement contained only Sisvel's own patents (including those of its affiliates), which it necessarily had full authority to license,⁶ and the Wilus patents that KPN's own evidence shows were not included in the MCP pool.

The remaining evidence accords with that conclusion. Most clearly, the Sisvel Settlement Agreement does not state or suggest that Samsung was taking an MCP license. DX144. No substantive provision even mentions the MCP pool. Further, the Samsung officer who signed the agreement testified that the "2021 Sisvel and Samsung agreement was not a patent pool agreement." Trial Tr. (Day 2) 281:6-8. KPN did not present any contrary evidence of the contemporaneous understanding of the people who actually negotiated the agreement.

The only "evidence" supporting KPN's theory that Samsung took a license to the MCP pool was trivial at best—and falls far short of the evidence needed to support a reasonable jury verdict. For example, KPN told the jury that during negotiations over the Sisvel Settlement Agreement, Samsung had inquired about pricing of a license that would include patents owned by Sisvel and Mitsubishi (a member of the MCP pool). Trial Tr. (Day 2) 266:20–269:21. But that claim is irrelevant because Samsung ultimately took a license to patents owned by Sisvel and Wilus, not Mitsubishi, and KPN introduced no evidence that the MCP pool contained the Wilus patents at the time that Samsung and Sisvel settled. At any rate, the witness explained that it was

⁶ There is no plausible basis to infer that Sisvel would need to wear its pool-administrator hat to license its affiliates' patents. Affiliated companies regularly license each other's patents. *E.g.*, *Optimum Content Prot., LLC v. Microsoft Corp.*, 2014 WL 12452439, at *1 (E.D. Tex. Aug. 25, 2014) ("Microsoft entered into a license agreement with Acacia Research Corporation (ARC). The agreement provided Microsoft with licenses to certain patents held by ARC and its affiliates ...").

Sisvel's idea to offer Mitsubishi patents, and that Samsung merely responded by asking how much that would cost. *Id.* at 268:11-12; 268:24-269:1. That hardly suggests that Samsung was seeking to obtain, let alone actually obtained, an MCP license.

Nor could a reasonable jury rely on KPN's reference to the provision of the Sisvel Settlement Agreement governing communications between the parties. That provision states that when mailing correspondence to Sisvel, the second line of the address should say "Attn.: MCP Program Manager." Trial Tr. (Day 2) 284:14-20; DX144, § 9.01. KPN contends that the fact that Samsung must direct mail to someone with apparent responsibility for the MCP program means that Samsung must have taken an MCP pool license, even though none of the provisions governing the license mention the MCP. But the fact that an MCP Program Manager might have other duties related to licensing agreements generally (or might simply be responsible for forwarding correspondence to the appropriate point person) does not establish that Samsung took a license to the MCP pool. At most, the line in the address block "create[s] a mere surmise" that Samsung took an MCP license and thus "is no more than a scintilla" of evidence that cannot sustain the jury's verdict. *B & W Supply*, 305 S.W.3d at 15-16 (quoting *Ford Motor Co.*, 135 S.W.3d at 601).

Nor could a reasonable jury rely on KPN's other "evidence," which lies ever further afield. KPN placed heavy reliance, for example, on the fact that Sisvel's invoice to Samsung assigned Samsung an alphanumerical customer ID that included the letters "MCP" ("MCP/0006") and referred to the Sisvel Settlement Agreement as the "Sisvel Mobile Communication Settlement and License Agreement." Trial Tr. (Day 2) 282:11-284:12; PX223. But what internal codes Sisvel uses for accounting purposes has no bearing on the substance of the agreement, and the Sisvel Settlement Agreement *did* relate to mobile-communication technology, so there was nothing notable about what the invoice called the agreement (which at any rate was not the actual title of

the agreement). KPN also pointed to the fact that the *file name* of an earlier *draft* of the Sisvel Settlement Agreement contained the word MCP. Trial Tr. (Day 2) 281:16–282:10. Yet the file name someone gave a draft cannot trump the actual text of the agreement negotiated between the parties, which says nothing to suggest that Samsung took an MCP pool license.

None of these points, which range from tangential to irrelevant, can support a reasonable jury verdict in KPN’s favor given that (i) the Sisvel Settlement Agreement nowhere mentions the MCP pool and (ii) KPN introduced no evidence that the relevant Wilus patents were in the MCP pool when the parties signed the Sisvel Settlement Agreement. Samsung is entitled to a judgment of no liability because KPN presented insufficient evidence that Samsung took a license from a Patent Pool.

C. KPN’s Damages Evidence Was Legally Insufficient To Sustain The Jury’s Verdict

1. No Legally Competent Evidence Supports The Damages Award

As Samsung explained in its motion to exclude, motion for a directed verdict, and objections to the charge, the damages evidence that KPN put on through its expert, Donald Fancher, amounted to mere speculation, and as such constitutes no evidence to support the jury’s verdict. Samsung’s Mot. To Exclude Expert Testimony (Dec. 20, 2023) (“*Robinson Mot.*”); Samsung’s Mot. for Directed Verdict (Feb. 23, 2024), at 12; Samsung’s Objections to the Charge of the Court (Feb. 23, 2024), at 6-8. Fancher purported to calculate what Sisvel would have paid to KPN if Samsung had obtained an MCP pool license from Sisvel in 2021 that included KPN patents. Trial Tr. (Day 2) 143:16-25. But to calculate that figure, it is necessary to determine what range of prices Samsung would have agreed to pay Sisvel for KPN’s patents. Yet KPN presented no evidence to allow the jury to answer that question.

Indeed, KPN's implicit theory about that hypothetical negotiations is absurd—and certainly not supported by evidence. KPN essentially claims that Samsung would have been willing to settle Sisvel's infringement suit not for \$35 million—what happened in the real world—but for **\$322 million** (\$287 million + \$35 million). That incredible claim contradicts the only relevant evidence in the record: The Samsung officer who negotiated the Sisvel Settlement Agreement testified that Samsung would not have paid that amount to settle the Sisvel suit, and no other evidence suggests anything to the contrary. Trial Tr. (Day 3) 93:9-20.

KPN's damages evidence suffers from another fatal flaw. Fancher testified that the "KPN share" is established by two agreements entered into by KPN and Sisvel in 2017. Trial Tr. (Day 2) 143:16-25. But he misunderstood those agreements. Neither agreement provides that KPN is entitled to receive a fixed per-unit rate from Sisvel. Rather, each agreement states that KPN is entitled to a share of what Sisvel receives from the patent licensee. PX146 § 3.5; PX137 § 2.2. One of the two agreements even describes the fixed rate on which Fancher based his damages models as a "fictional number." PX146 § 1.12. A damages verdict must be based in fact, not fiction. Samsung is entitled to judgment because KPN offered no reality-based damages figure and thus failed to marshal any evidence to prove that element of its claim.

In fact, because of all those flaws, the court should have excluded Fancher's testimony. *See* Section III.C, *infra*. Had the court done so, KPN would have presented *no* evidence to support its damages request. Accordingly, because the court should determine now that Fancher's testimony was improperly admitted, Samsung is entitled to JNOV based on "the complete absence of evidence on" KPN's damages. *Jefferson*, 651 S.W.3d at 649.

2. At A Minimum, Damages Could Not Accrue Before 2021

Even if the judgment as to liability stands, the Court should grant a judgment to Samsung reducing the damages award to approximately \$73 million because the remainder of the award has

no legal justification under settled damages principles. Alternatively, the Court should suggest remittitur to that amount and grant a new trial if that is not accepted.

It is axiomatic that the ordinary remedy for breach of contract is expectation damages, which “put [the non-breaching] party in as good a position as it would have been in had the contract been performed.” *Goodstein Const. Corp. v. City of New York*, 80 N.Y.2d 366, 373 (1992) (citing Restatement (Second) of Contracts § 347, cmt. a); accord *MSW Corpus Christi Landfill, Ltd. v. Gulley-Hurst, L.L.C.*, 664 S.W.3d 102, 106 (Tex. 2023) (“The purpose of benefit of the bargain damages is to place the [plaintiff] in the same economic position he would have been in had the contract been performed.”) (quotations omitted). Under that principle, KPN’s damages from Samsung’s purported breach of the Agreement are straightforward. KPN claims that Samsung should have licensed the KPN patents contained within the MCP pool when Sisvel and Samsung executed the Sisvel Settlement Agreement on August 30, 2021. Trial Tr. (Day 3) 91:25. Accordingly, the proper damages figure is whatever Sisvel would have paid KPN in royalties had Samsung licensed the KPN patents beginning on that date.

But KPN’s damages expert, Fancher, went far beyond ordinary expectation damages. He divided his damages analysis into three periods. Trial Tr. (Day 2) 155:2–156:2. The third period ran from “the point in time that Samsung and Sisvel signed their agreement up to the end of 2024” (when the Agreement’s covenant not to sue expires). *Id.* at 155:24–156:2. Only that period was arguably relevant to expectation damages because it purports to reflect what Sisvel would have paid KPN had Samsung licensed KPN patents through the MCP pool in 2021 (although Samsung has raised other objections to Fancher’s methodology, *see* Sections I.C, *supra*, and III.C, *infra*).

But the first two periods of Fancher’s damages analysis—from 2010 to 2016 (“Period 1”) and from 2016 to 2021 (“Period 2”)—bear no rational relationship to the expectation measure. *See*

Trial Tr. (Day 2) 155:16-24. The first period covers the six years in which KPN theoretically could have pursued patent-infringement damages against Samsung if the parties had not settled KPN's infringement action in 2016. Trial Tr. (Day 2) 150:12-22. And the second period is the time in which the Agreement was in force but Samsung had not yet committed a breach (under KPN's theory). Neither has any obvious relationship to expectation damages, and Fancher did not provide any sensible explanation for why awarding a royalty on all Samsung 3G and 4G products going back to 2010 is legally supportable.

Indeed, Fancher acknowledged that, in reaching back to 2010, he had calculated a variant of infringement damages that KPN might have received in 2016 had the parties *never signed* Article 2.3 of the Agreement. When asked "why are you looking all the way back to 2010 in your analysis," Fancher explained:

[I]n 2016, when KPN signed its agreement with Samsung, they didn't have to settle that case. And even if they settled that case for those five patent families, they didn't have to go through the process of also giving a covenant not to sue for the remainder of their portfolio. They could have walked out of that negotiating table after signing that agreement and say, now we're going to sue you on other patents. And had they done that, they could have gone back to 2010 to seek damages.

Trial Tr. (Day 2) 150:14-22 (emphasis added). In other words, Fancher testified that the expectation-damages measures entitled KPN to what it could have obtained by suing for patent infringement in 2016 *if it had not entered into the Agreement*. Fancher thus calculated damages accruing as far back as 2010 given the Patent Act's six-year outer limit for recovering past damages.

That calculation is inconsistent with the very concept of expectation damages. Under New York law (like under Texas law), expectation damages require a jury to determine what the plaintiff would have received had the defendant *performed*—not what the plaintiff would have received had the parties not signed the contract. See *TNT USA, Inc. v. DHL Express (USA), Inc.*, 2013 WL

12366931, at *3 (E.D.N.Y. Mar. 19, 2013) (applying New York law) (“Any damages beyond those two [] years would put TNT in a *better* position than it would have been [in] had DHL complied with the two-year notice termination provision; therefore they are not compensable expectation damages.”); accord *MSW Corpus Christi Landfill, Ltd.*, 664 S.W.3d at 107 (“[E]xpectation damages compare a party’s current position to the position it would occupy had the contract been fully performed—not had there been no contract at all . . .”). Most of the jury’s damages award—all damages for periods before 2021—violates the “fundamental” principle “that the injured party should not recover more from the breach than he would have gained had the contract been fully performed.” *Freund v. Washington Square Press, Inc.*, 34 N.Y.2d 379, 382 (1974); see *Bamira v. Greenberg*, 744 N.Y.S.2d 367, 369 (2002) (reversing “a windfall double recovery”). Here, had the Agreement (as construed by KPN) been performed, KPN would have received some payment beginning in 2021, but not before.

Fancher’s assumption that KPN would have received a royalty on all Samsung 3G and 4G products going back to 2010 is also inconsistent with undisputed features of the Agreement and patent law. For example, the Agreement itself releases Samsung from liability for all infringement damages before its effective date—*i.e.*, Fancher’s Period 1. Agreement § 5.1. It is not plausible to conclude that Samsung would have paid past-use royalties in 2021 for a period of time for which Samsung had already obtained a release. Likewise, if KPN had sued Samsung for patent infringement in 2021, the Patent Act would not have enabled KPN to obtain damages before 2015. See 35 U.S.C. § 286.

But more broadly, Fancher simply provided no coherent explanation for why the KPN “share” in 2021 would have included full royalties on Samsung products going back to 2010. His testimony at most demonstrated that Sisvel’s agreement with KPN would have allowed Sisvel to

attempt to obtain such amounts. His brief explanation for why Samsung and Sisvel actually would have negotiated to that enormous windfall was so incomprehensible as to amount to no competent evidence. *See* Trial Tr. (Day 2) 150:2–151:1, 212:23–213:25, 225:24–226:14. Without any discernible basis to conclude that Sisvel actually would have obtained from Samsung that amount of royalties for past use, the verdict cannot stand with respect to Period 1 and Period 2 damages.

That requires JNOV, not just a new trial. It was KPN’s burden to bring forward evidence to support its damages request. *In re Marriage of Bills*, 2014 WL 5585778, at *3 (Tex. App.—Texarkana Nov. 4, 2014, no pet.) (mem. op.) (“The burden is on the plaintiff to establish ... the amount of loss within a reasonable degree of certainty; the amount may not be speculative.”); *Largent v. Cassius Classic Cars & Exotics, LLC*, 2023 WL 2179465, at *6 (Tex. App.—Fort Worth Feb. 23, 2023, no pet.) (mem. op.) (same). With respect to Periods 1 and 2, KPN failed to do so. Samsung is thus entitled to JNOV on those damages awards, which are separately demarcated in the final judgment. *McDaniel v. Dindy*, 673 S.W.3d 24, 28–29 (Tex. App.—Fort Worth 2023, no pet.) (reducing damages by affirming JNOV on only punitive damages award against one of two defendants); *LMMM Houston #41, Ltd. V. Santibanez*, 2018 WL 4137971, at *14 (Tex. App.—Houston [1st Dist.] Aug. 30, 2018, no pet.) (mem. op.) (“[T]he trial court did not err in granting La Michoacana Meat Market a JNOV on the ground that no evidence supported the jury’s award of \$120,000 in future medical expenses.”).

Accordingly, even if the Court otherwise upholds the jury’s verdict, it should excise the damages that KPN’s expert said corresponded to the periods before the signing of the Sisvel Settlement Agreement, entering JNOV in the amount of \$76,075,939.62 in damages. *See* Trial Tr. (Day 2) 157:5–7.

At an absolute minimum, if the Court determines that KPN presented some evidence that Samsung would have paid some amount in 2021 for its supposed past use of KPN's technology, it should suggest a remittitur to a reasonable amount and grant new trial if that is not accepted.

D. Expectation Damages Could Not Begin To Accrue Until August 30, 2021

If the Court eliminates Period 1 and Period 2 damages, a further small error warrants correction. KPN's damages expert began Period 3 on July 1, 2021, because that was the effective date of the Sisvel Settlement Agreement. Trial Tr. (Day 3) 91:19-25. But the parties did not sign the Sisvel Settlement Agreement until August 30, 2021. *Id.* Under KPN's theory of breach, then, the contract breach did not occur until that point. Expectation *damages* therefore should have run beginning on August 30, 2021. That would require a further reduction of \$3,628,328.63 in the judgment, for a final amount of \$72,447,610.99.

II. SAMSUNG IS ENTITLED TO JUDGMENT NOTWITHSTANDING THE VERDICT ON UNJUST ENRICHMENT

For five reasons, any judgment allowing KPN's unjust-enrichment claim would be erroneous as a matter of law, and the Court should grant JNOV or modify the judgment accordingly to foreclose any award based on unjust enrichment.

First, the Sixth Court of Appeals has held that “[u]njust enrichment, itself, is not an independent cause of action.” *Casstevens v. Smith*, 269 S.W.3d 222, 229 (Tex. App.—Texarkana 2008, pet. denied). “Rather, it is an element of an action for restitution,” *Barnett v. Coppell N. Texas Ct., Ltd.*, 123 S.W.3d 804, 816 (Tex. App.—Dallas 2003, pet. denied), but KPN did not plead a restitution claim. *See Freeman v. Harleton Oil & Gas, Inc.*, 528 S.W.3d 708, 740 (Tex. App.—Texarkana 2017, pet. denied).

Second, under Texas law, “when a valid, express contract covers the subject matter of the parties’ dispute, there can be no recovery under a quasi-contract theory.” *Freeman*, 528 S.W.3d

at 740 (quoting *Fortune Prod. Co. v. Conoco, Inc.*, 52 S.W.3d 671, 684 (Tex. 2000)).⁷ Here, the Agreement governs the subject matter in dispute, *i.e.*, Samsung’s obligations to compensate KPN for the alleged use of the KPN Non-Asserted Patents. The Agreement generally provides that KPN will not sue Samsung for infringement of the patents until 2025, art. 2.3, and waives damages for the use of the patents during the term of the Agreement, art. 2.3.1. The Agreement therefore governs the subject matter of the unjust-enrichment claim. As a result, the claim is barred.

Third, federal patent law preempts the unjust-enrichment claim. Under settled preemption principles, a court must dismiss state-law claims that conflict with patent law or rest “on conduct that is protected or governed by federal patent law.” *Hunter Douglas v. Harmonic Design, Inc.*, 153 F.3d 1318, 1335 (Fed. Cir. 1998), *overruled in part on other grounds by Midwest Indus. v. Karavan Trailers, Inc.*, 175 F.3d 1356, 1361 (Fed. Cir. 1999) (en banc). Unjust-enrichment claims premised on the defendant’s alleged infringement of the plaintiff’s intellectual property are especially likely to be preempted because they have “the potential to take aim at the federal scheme.” *Ultra-Precision Mfg., Ltd. v. Ford Motor Co.*, 411 F.3d 1369, 1382 (Fed. Cir. 2005).⁸

⁷ Texas law applies because, although the Agreement is governed by New York law, unjust enrichment is an alternative only if the Agreement does not cover the subject matter of the dispute. *STP Invs. LLC v. NeoTek Energy, Inc.*, 2023 WL 2606584, at *3 (E.D. Tex. Mar. 2, 2023), *report and recommendation adopted*, 2023 WL 2601203 (E.D. Tex. Mar. 22, 2023) (“An unjust enrichment claim exists in the absence of a contract. The ‘Governing Law’ Provision does not apply to Plaintiffs’ unjust enrichment claim.”). It was therefore erroneous to include the instruction, taken from New York law, that “[u]njust enrichment requires finding that the defendant unjustly profited at the plaintiff’s expense, and that it is against equity and good conscience to permit the defendant to retain what is sought to be recovered.” *See* KPN’s Proposed Charge (Question 3 at n.13 (citing New York law)).

⁸ Although the United States District Court for the Eastern District of Texas remanded this case after Samsung sought removal, its order did not address preemption or apply the legal standards governing a preemption analysis. *See Koninklijke KPN N.V. v. Samsung Elecs. Co.*, 2024 WL 2019739 (E.D. Tex. Apr. 4, 2024), *report and recommendation adopted sub nom. Koninklijke KPN N.V. v. Samsung Elecs. Co.*, 2024 WL 2019726 (E.D. Tex. Apr. 24, 2024).

In *Ultra-Precision Manufacturing*, for example, the plaintiffs alleged unjust enrichment against Ford, seeking a “royalty-like award” because Ford had incorporated their design for air compressors without due credit, although the plaintiffs had not patented that particular design. 411 F.3d at 1380. The Federal Circuit found that claim preempted because it conflicted with 35 U.S.C. § 271, the statute governing patent infringement. *Id.* at 1377-82. The court explained that if such an “unjust enrichment claim were available, a would-be inventor need not satisfy any of the rigorous standards of patentability to secure a perpetual patent-like royalty under state law based on the use of an unpatented idea.” *Id.* at 1381. An unjust-enrichment claim that “seeks a patent-like remedy” for “making, using, and selling products” is an impermissible end-run around patent law. *Id.* at 1382; *see also Tavory v. NTP, Inc.*, 297 F. App’x 976, 977 (Fed. Cir. 2008) (holding that patent law preempted an unjust enrichment claim); *Heat Techs., Inc. v. Papierfabrik Aug. Koehler SE*, 2020 WL 12309512, at *4 (N.D. Ga. June 5, 2020) (“Federal courts routinely find unjust enrichment and conversion claims preempted under similar circumstances” (collecting cases)).

KPN’s unjust-enrichment claim even more clearly seeks to circumvent patent law than the claim in *Ultra-Precision*. KPN’s unjust-enrichment theory at trial was that Samsung used the KPN Non-Asserted Patents without a license, *see* Trial Tr. (Day 2) 160:17-13, and it sought damages equal “to what Samsung would be paying if they had, in fact, licensed those patents,” *id.* at 161:18-20. That is not merely a claim similar to infringement with a “royalty-like award,” *Ultra-Precision*, 411 F.3d at 1380; it is the very definition of an infringement claim with a royalty award, but without the substantive standards and procedural requirements of federal patent law. *See* 35 U.S.C. § 271 (defining infringement as use “without authority”); *id.* § 284 (defining damages as “in no event less than a reasonable royalty for the use made of the invention”).

Indeed, Fancher repeatedly made clear that his damages opinion rested on the assumption that Samsung had infringed the KPN Non-Asserted Patents:

- “[U]njust enrichment is really looking at the value received by, in this case, Samsung for essentially not paying KPN for the use of their patents or their patent technology over that period of time from 2010 through now, really.” Trial Tr. (Day 2) 160:19-23.
- “In the unjust enrichment, we’re really looking to what Samsung would be paying if they had, in fact, licensed those patents.” *Id.* at 161:18-20.
- “Q. . . . The premise of your unjust enrichment claim, the one that gets up to over \$600 million, is that Samsung was using KPN’s technology, right?” “A. It’s Samsung -- yes, they had the use of the technology from 2010 forward, that’s correct.” *Id.* at 218:11-15.

Even more clearly than in *Ultra-Precision*, therefore, KPN is attempting to recover royalties for infringement under cover of unjust enrichment. That claim is preempted.

Fourth, even if the unjust-enrichment claim were proper, KPN could succeed on that claim only by showing “fraud, duress, or the taking of an undue advantage,” *Heldenfels Bros. v. City of Corpus Christi*, 832 S.W.2d 39, 41 (Tex. 1992), but KPN did not seriously attempt to satisfy that standard. KPN merely argued that if Samsung’s interpretation of the Agreement were correct, the Agreement *itself* conferred an “undue advantage.” As KPN’s counsel put it, “what they got for free, according to our position, happened in 2016 when Samsung got both the covenant not to sue and an eight-year damage waiver in return for what Samsung says is a promise that binds them to do nothing.” Trial Tr. (Day 3) 143:10-14. According to KPN, “that would be undue advantage.” *Id.* at 143:16.

For multiple reasons, that argument rests on legal error. Most clearly, as a matter of law, “[t]he doctrine of unjust enrichment does not operate to rescue a party from the consequences of a bad bargain, and the enrichment of one party at the expense of the other is not unjust where it is permissible under the terms of an express contract.” *Freeman*, 528 S.W.3d at 740 (cleaned up). For that reason alone, Samsung is entitled to judgment on the claim. But at any rate, the premise

of KPN's argument rests on a misinterpretation of the Agreement. For all the reasons given above, it is not true that the plain-language interpretation of Article 2.3.1 does "nothing." It ensures that when Samsung takes a pool license that includes the KPN Non-Asserted Patents, it cannot obtain a pre-netting discount on the ground that the Agreement's covenant not to sue and damages waiver qualify as a license to those Non-Asserted Patents. KPN's complaint that Article 2.3.1 does not further require Samsung to include KPN Non-Asserted Patents in every license that it takes from a Patent Pool is just a post hoc objection to the deal that the parties struck. KPN cannot escape its bargain through an unjust-enrichment claim.

Finally, KPN's entire unjust-enrichment case, including its request for \$609 million in damages, rested on the unsupported assumption that Samsung had "used" KPN's technology—essentially, had infringed its patents. As shown above, Fancher repeatedly said as much. But KPN introduced no evidence that Samsung actually infringed KPN's patents or otherwise practiced its technology. Without any such evidence, the jury had no basis to conclude that Samsung had unjustly enriched itself.

For each of these independent reasons, KPN's unjust-enrichment claim has no legal basis. Samsung is entitled to JNOV or a modified judgment on that claim.⁹

III. IN THE ALTERNATIVE, SAMSUNG IS ENTITLED TO A NEW TRIAL OR REMITTITUR

If this Court does not grant Samsung JNOV, it should grant a new trial in the interests of justice and fairness. The jury's award of \$287 million in damages for Samsung's alleged breach of Article 2.3.1 resulted from multiple prejudicial errors, is not supported by factually sufficient

⁹ To the extent the Court determines that a motion to modify the judgment is more appropriate for the unjust-enrichment claim that the jury did not reach, Samsung moves for such relief along with moving for JNOV.

evidence, and is excessive. At minimum, the Court should suggest a substantial remittitur and grant new trial if that is not accepted.

A. KPN's Unjust-Enrichment Evidence Likely Prejudiced The Jury

For the many reasons stated in Section II, *supra*, KPN's unjust-enrichment theory had no basis in the law. In addition, as Samsung argued in its motion to exclude Fancher's expert testimony, unjust enrichment must be tried to the bench, not to a jury, because it is an equitable claim. Samsung's Mot. To Exclude Expert Testimony, at 16 (Dec. 20, 2023) ("*Robinson Mot.*"). Accordingly, KPN should not have been permitted to present evidence of unjust enrichment to the jury (in the form of Fancher's testimony). And Samsung repeatedly objected to the admission of that evidence. *See* Trial Tr. (Day 2) 108:16–21, 116:13–16.

That evidence almost certainly prejudiced Samsung by tainting the jury's consideration of KPN's breach-of-contract claim. That was no accident: Fancher admitted on the witness stand that "this is a breach of contract case" and that his proposal for \$609 million in damages for unjust enrichment was a "reference point" to place the contract claim and corresponding damages "in context." *Id.* (Day 2) 166:4-16. Rarely is a party's witness so candid that one claim is just a pretext to anchor damages on another claim.

KPN also leveraged its improper unjust-enrichment claim to suggest that Samsung must have breached the Agreement even if the Agreement's express terms said otherwise. KPN's mantra for unjust enrichment was that if the Agreement meant what Samsung said it did, then Samsung "got something for nothing." For example, KPN argued that "[e]ither Samsung breached this agreement, as we contend, or Samsung was unjustly enriched because they got something for nothing." Trial Tr. (Day 1) 138:2-4; *see also id.* (Day 4) 54:18–55:12. The unjust-enrichment claim therefore likely prejudiced the jury's consideration of the merits of the breach-of-contract claim. And the fact that the jury was ultimately instructed on unjust enrichment likely reinforced

the jury's sense that the unjust-enrichment claim had at least potential merit, in turn making it seem more plausible that the Agreement would have required Samsung to license KPN Non-Asserted Patents. *See Schindler Elevator Corp. v. Ceasar*, 670 S.W.3d 577, 587 (Tex. 2023) (explaining that a judgment must be reversed for the jury charge "probably caused the rendition of an improper verdict").

B. KPN Improperly And Prejudicially Elicited Testimony About Samsung's Revenue

Over Samsung's objection, KPN elicited testimony and introduced evidence about both (i) Samsung's total revenue in 2023 (\$200 billion) and (ii) Samsung's revenue from the sale of 3G, 4G, and 5G devices over multiple years (nearly \$700 billion). PX263, PX284; *see* Pretrial Hr. Tr. at 141:9–142:10; Trial Tr. (Day 2) 117:25–119:3, 151:4-10; *see also id.* at 158:16-159:3 (Court sustaining objection but only after expert told the jury that "Samsung's revenue last year was almost \$200 billion"). Samsung objected to that testimony because even KPN's improper damages calculation had nothing whatsoever to do with Samsung's revenue from the sale of 3G, 4G, and 5G devices, let alone Samsung's total revenue; it was based on a per-unit rate. *Id.* at 158:23–159:1. The testimony was legally improper. *See Bayoh v. Afropunk LLC*, 2020 WL 6269300, at *6 (S.D.N.Y. Oct. 26, 2020) (explaining that because "[t]he plaintiff has failed to identify any admissible evidence that would tie any alleged infringement of Bayoh's copyrights to Afropunk's revenues," "Afropunk's gross revenues is irrelevant and must be excluded as highly prejudicial"). KPN's barely concealed purpose was to encourage the jury to see KPN's request for \$287 million in breach damages as reasonable in light of Samsung's revenue. Indeed, KPN's counsel admitted that the purpose of eliciting that testimony was "[t]o give the jury some context" for the damages figure. Trial Tr. (Day 2) 118:13-15.

There is a strong likelihood that the improper testimony influenced the jury. “A person seeking to reverse a judgment based on evidentiary error need not prove that but for the error a different judgment would necessarily have been rendered, but only that the error probably resulted in an improper judgment.” *Pack v. Crossroads, Inc.*, 53 S.W.3d 492, 499 (Tex. App.—Ft. Worth 2001, pet. denied) (citing Tex. R. App. P. 61.1); *McCraw v. Maris*, 828 S.W.2d 756, 758 (Tex. 1992); *King v. Skelly*, 452 S.W.2d 691, 696 (Tex. 1970)). That standard is readily met here, where KPN intentionally elicited irrelevant financial information from its expert to put its damages request in “context.” Indeed, “[e]xpert witnesses can have an extremely prejudicial impact on the jury, in part because of the way in which the jury perceives a witness labeled as an expert.” *E.I. du Pont de Nemours & Co. v. Robinson*, 923 S.W.2d 549, 553 (Tex. 1995) (*Robinson*). A new trial is thus required.

C. Fancher’s Testimony Should Have Been Excluded

Before trial, Samsung moved to exclude Fancher’s testimony under Texas Rule of Evidence 702 and *Robinson* on two grounds, but the Court denied the motion. *See Robinson Mot.* For the sake brevity, those arguments are incorporated by reference and summarized here in brief.

First, for the reasons explained above (Section I.C, *supra*), Fancher’s testimony conflicted with New York contract law because it did not reflect a proper calculation of expectation damages insofar as it included periods before the putative breach. *Robinson Mot.* 8-12. Should this Court conclude that Samsung is not entitled to a reduced damages award on that ground as a matter of law, it should at minimum suggest a remittitur to \$72,447,610.99 plus pre-judgment interest. *See* Section I.C, *supra*. *Second*, Samsung’s motion to exclude Fancher’s testimony explained that, for several reasons, his use of a hypothetical MCP pool license between Samsung and Sisvel was speculative and unsupported by facts: (i) the record contains no evidence that Samsung ever entered into a license for 3G or 4G technology in which it agreed to pay royalties on a per-unit

basis; (ii) Fancher offered no factual basis for his assumption that Samsung would use a per-unit rate; (iii) given the Agreement's release of claims before August 17, 2016, he had no basis to assume that Samsung would pay royalties over that period; (iv) he had no basis to assume that Samsung would pay royalties to KPN in foreign jurisdictions in which KPN holds no patents; and (v) he failed to reduce his calculation to take account of Samsung's existing licenses to certain KPN patents. *Robinson* Mot. 12-15.

These fundamental flaws in Fancher's testimony inarguably tainted the verdict because the jury awarded precisely what he recommended for breach damages. *See Children's Broad. Corp. v. Walt Disney Co.*, 245 F.3d 1008, 1018-19 (8th Cir. 2001) (affirming grant of new trial because the damage's expert's incredible calculations "gave the jury an unrealistic idea of the appropriate measure of damages"). And without Fancher's testimony, KPN would have lacked any evidence to support its damages request. Accordingly, Samsung is entitled at minimum to a new trial on damages.

D. The Jury Verdict Is Not Supported By Factually Sufficient Evidence And The Damages Award Is Excessive

For the reasons stated above, the record fails to show legally sufficient evidence that KPN breached the Agreement. That is true both because the finding of breach rests on multiple errors in construing Article 2.3.1, *see* Section I.A, *supra*, and because no reasonable jury could find that, in entering into the Sisvel Settlement Agreement, Samsung took a license to a Patent Pool, *see* Section I.B, *supra*. But if this Court were to conclude that JNOV is not appropriate on those grounds, it should at least grant a new trial because the jury's finding of liability is not supported by factually sufficient evidence such "that it is clearly wrong and unjust." *Dow Chem. Co. v. Francis*, 46 S.W.3d 237, 242 (Tex. 2001).

Similarly, the jury's astronomical damages figures is excessive, supported by factually insufficient evidence, and fundamentally unjust for the reasons stated in Sections I.C and I.D, *supra*. Most clearly, it includes damages for an eleven-year period *before* the alleged breach. *See* Section I.C, *supra*. There is no evidentiary or legal justification for that award. The Court should at minimum suggest a remittitur of the damages to \$72,447,610.99 plus pre-judgment interest, which would cover the period after the alleged breach. *See* Section I.C, *supra*.

CONCLUSION

For the foregoing reasons, the Court should render JNOV for Samsung. Alternatively, the Court should order a new trial, or, at a minimum, suggest a remittitur to \$72,447,610.99 plus pre-judgment interest, conditioned upon the grant of a new trial in the interests of justice and fairness if that suggestion is not accepted.

Dated: June 3, 2024

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CERTIFICATE OF SERVICE

I hereby certify that on June 3, 2024, all counsel of record who are deemed to have consented to electronic service are being served with a copy of this document via electronic mail.

/s/ Melissa R. Smith
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Deputy

Case No. 22-0762

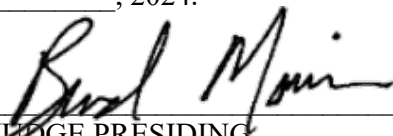
KONINKLIJKE KPN N.V.,	§	IN THE DISTRICT COURT
	§	
	§	
Plaintiff,	§	
	§	
v.	§	OF HARRISON COUNTY, TEXAS
	§	
SAMSUNG ELECTRONICS CO., LTD.	§	
	§	
	§	
	§	
Defendants.	§	71st JUDICIAL DISTRICT

**ORDER DENYING DEFENDANT’S MOTION FOR JUDGMENT
NOTWITHSTANDING THE VERDICT AND, IN THE ALTERNATIVE,
NEW TRIAL OR REMITTITUR**

Before the Court is Defendant’s Motion for Judgment Notwithstanding the Verdict and, in the Alternative, New Trial or Remittitur. After reviewing the briefing and hearing arguments of counsel, the Court is of the opinion that the motion should be DENIED.

It is therefore, ORDERED, ADJUDGED, and DECREED that Defendant’s Motion for Judgment Notwithstanding the Verdict and, in the Alternative, New Trial or Remittitur is DENIED.

SIGNED this 15 day of July, 2024.



JUDGE PRESIDING

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Notwithstanding the Verdict and, in the Alternative, New Trial or Remittitur

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