

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

TQ DELTA, LLC,

Plaintiff,

v.

COMCAST CABLE COMMUNICATIONS LLC,

Defendant.

Civil Action No. 15-611 (RGA)

FILED UNDER SEAL

TQ DELTA, LLC,

Plaintiff,

v.

COXCOM LLC and
COX COMMUNICATIONS INC.,

Defendants.

Civil Action No. 15-612 (RGA)

FILED UNDER SEAL

TQ DELTA, LLC,

Plaintiff,

v.

DISH NETWORK CORPORATION, *et al.*,

Defendants.

Civil Action No. 15-614 (RGA)

FILED UNDER SEAL

TQ DELTA, LLC,

Plaintiff,

v.

TIME WARNER CABLE INC. and TIME
WARNER CABLE ENTERPRISES LLC,

Defendants.

Civil Action No. 15-615 (RGA)

FILED UNDER SEAL

TQ DELTA, LLC,	:	
	:	
Plaintiff,	:	
	:	Civil Action No. 15-616 (RGA)
v.	:	
	:	FILED UNDER SEAL
VERIZON SERVICES CORP.,	:	
	:	
Defendant.	:	

**SPECIAL MASTER ORDER #21 – RULING ON DEFENDANTS’
MOTION TO STRIKE AND EXCLUDE PLAINTIFF TQ DELTA,
LLC’S [ALLEGEDLY] UNTIMELY DISCLOSED DAMAGES THEORIES**

I. INTRODUCTION

Pending before the Court is Defendants’¹ Motion to Strike and Exclude Plaintiff TQ Delta LLC’s [Allegedly] Untimely Disclosed Damages Theories (the “Motion”).² Defendants contend that Plaintiff TQ Delta (“Plaintiff” or “TQ Delta”) improperly supplemented interrogatory responses and Rule 26 disclosures on May 7, 2022 (defined below as the “May Supplements”), ten weeks after the close of fact discovery, to introduce new damages theories and new evidence. According to Defendants, the new theories and new evidence were “the foundation for certain damages opinion” in the Expert Report of Catharine M. Lawton (the “Lawton Report”) served by TQ Delta on May 12, 2022. OB at 1. Defendants also contend that TQ Delta’s introduction of new damages theories and new evidence through the May Supplements violated Special Master Order No. 6, which required TQ Delta to provide a complete disclosure of its damages theories

¹ “Defendants” refer collectively to Defendants DISH Network Corporation, et al. (“DISH Defendants”), Comcast Cable Communications Inc. (“Defendant Comcast”), CoxCom LLC, Cox Communications Inc. (collectively with CoxCom LLC, “Cox Defendants”), Time Warner Cable, Inc., Time Warner Cable Enterprises LLC (collectively, with Time Warner Cable, Inc., the “TWC Defendants”), and Verizon Services Corp. (“Defendant Verizon”).

² C.A. No. 15-611 (RGA), D.I. 476; C.A. No. 15-612 (RGA), D.I. 460; C.A. No. 15-614 (RGA), D.I. 431; C.A. No. 15-615 (RGA), D.I. 459; C.A. No. 15-616 (RGA), D.I. 481. Unless otherwise noted, all docket citations are to C.A. No. 15-611 (RGA).

and supporting evidence. For this reason, Defendants seek to strike the May Supplements and all portions of the Lawton Report that reflect these alleged new theories and new evidence disclosed in the May Supplements.

TQ Delta opposes the Motion, asserting that it fully complied with Special Master Order No. 6 by properly and timely supplementing its damages disclosures to include an initial computation of damages and information regarding alternative forms of royalty base, royalty rate, comparable licenses, relevant recurring revenue, and an assessment of the *Georgia-Pacific* factors. TQ Delta asserts that its May Supplements did not disclose new theories or new evidence. Rather, TQ Delta asserts that the May Supplements “appropriately refined and supplemented” its prior damages disclosures in anticipation of the Lawton Report, and in accordance with Federal Rule of Civil Procedure 26. AB at 1.

After considering the written submissions of the parties and oral argument of the parties’ respective counsel on July 27, 2022, for the reasons set forth below, IT IS HEREBY ORDERED that the Motion is GRANTED IN PART and DENIED IN PART.

II. BACKGROUND AND RELEVANT PROCEDURAL POSTURE

TQ Delta filed these lawsuits against Defendants alleging infringement of U.S. Patent Nos. 8,718,158 (“the ‘158 patent”) and 9,014,243 (“the ‘243 patent”) (collectively, with the ‘158 patent, the “Asserted Patents”) by making, using, selling, offering to sell and/or importing products that implement communications standards established by the Multimedia over Coax Alliance (“Accused MoCA Products”). The adequacy of Plaintiff’s damages disclosures was a source of contention through fact discovery in the DISH action (C.A. No. 15-614 (RGA)), and first came before the Special Master on October 1, 2021 through DISH’s Motion to Compel Plaintiff TQ Delta to provide a more complete disclosure under Federal Rule of Civil Procedure 26(a)(1)(A)(iii)

and a more complete response to DISH's Interrogatory No. 1 ("DISH's Damages Disclosure Motion").³ C.A. No. 15-614 (RGA), D.I. 317. On October 19, 2021, the Special Master issued Special Master Order No. 6, which granted DISH's Damages Disclosure Motion and ordered TQ Delta to supplement its damages disclosures to include (among other things) the factual bases upon which TQ Delta damages are based, and an identification of any documents that TQ Delta intended to rely on in support of its damages claims. C.A. No. 15-614 (RGA), D.I. 326 ("SMO No. 6") at 11-14. In SMO No. 6, the Special Master noted that it was not his expectation that TQ Delta's supplemental damages disclosures would include TQ Delta's final calculation of damages. Rather, SMO No. 6 contemplated "that TQ Delta's damages calculation will be updated, further refined and/or supplemented by an expert report and testimony consistent with the applicable deadlines of the scheduling order." *Id.* at 10; *see also id.* at 16-17 ("It should be understood by all that TQ Delta may specify or make clear that its damages computation is initial or preliminary based on

³ DISH served TQ Delta with DISH's First Set of Interrogatories to TQ Delta, which included Interrogatory No. 1, on May 6, 2016. (D.I. 73). Interrogatory No. 1 specifically sought:

For each Asserted Patent, describe the full factual and legal bases for TQ Delta's damages claims against DISH, including but not limited to: (1) the amount of damages sought as to each Accused Product; (2) the methodology and calculation of such damages, including the royalty rate, royalty base (including whether TQ Delta intends to rely on the entire market value for the Accused Products), relevant time period, and lump-sum amount, if any; (3) the type of damages sought (e.g., lost profits, established royalty, reasonable royalty, etc.); (4) all allegedly comparable licenses or settlement agreements and the factual circumstances related to each such license or settlement agreement; (5) the date of the purported hypothetical negotiation, if any; (6) all factors, including those described under *Georgia-Pacific Corp. v. U.S. Plywood Corp.*, 318 F. Supp. 1116 (S.D.N.Y. 1970), that TQ Delta contends support its damages claims and a description of how each such factor allegedly supports its claims; and (7) all evidence allegedly supporting TQ Delta's contentions with respect to the above.

the information reasonably available to it at the current time and that its damages computation, the factual bases on which it is based, and the documents and/or other evidence identified in support of its claimed damages, may be further refined, updated and supplemented as discovery continues and/or by expert report consistent with Rule 26.”). At the same time, SMO No. 6 was clear that, although the law allowed and the Special Master expected some updating, further refinement and/or supplementation by TQ Delta of its initial damages computation, “TQ [could not] simply punt its obligation under Rule 26 to adequately disclose its computation of damages.” *Id.* at 10-11.

Pursuant to SMO No. 6 (and a subsequent stipulation between the parties to extend the deadline set by SMO No. 6), TQ Delta served upon the DISH Defendants its (Corrected) Second Supplemental Rule 26(a)(1) Initial Disclosures and its (Corrected) Fourth Supplemental Objection and Response to Defendants’ Interrogatory No. 1 on November 24, 2021. AB, Ex. BA; OB, Ex. A. TQ Delta subsequently served its Second Supplemental Rule 26(a)(1) Initial Disclosures upon Defendant Comcast on December 3, 2021; served them upon the Cox Defendants on December 7, 2021; served them upon the TWC Defendants on December 10, 2021; and served them upon Defendant Verizon on December 17, 2021 (collectively, the “November-December Disclosures”). AB, Exs. CA, DA, EA, and FA.

Relevant to the Motion, the November-December Disclosures provided that TQ Delta intended to “seek damages measured based on a reasonable royalty (plus applicable enhancement) for Defendant’s acts of infringement.” AB, Ex. BA at 15; *see also* Ex. CA at 15 (same); Ex. DA at 14 (same); Ex. EA at 14 (same); Ex. FA at 15(same). TQ Delta disclosed to Defendants that it “may rely upon Defendant’s financial performance associated with sale/rental/lease/deployment and/or other benefits or consideration derived directly or indirectly from the Accused Products

and/or the services employing the same.” AB, Ex. BA at 15-16; Ex. CA at 15-16 (same); Ex. DA at 15 (same); Ex. EA at 14-15 (same); Ex. FA at 16 (same). TQ Delta further disclosed that it “expect[ed] its damages expert to provide expert opinions regarding three methodologies for assessing patent damages: Income Approach, Market Approach, and Cost Approach.” AB, Ex. BA at 82; *see also* Ex. CA at 94; Ex. DA at 83; Ex. EA at 91-92; Ex. FA at 88. The November-December Disclosures then addressed and analyzed each of these three methodologies. With regard to the Income Approach, the November-December Disclosures assessed the matter of recurring revenue to develop a gross margin attributable to Whole Home DVR. *See* AB, Ex. BA at 103-107; Ex. CA at 115-121; Ex. DA at 101-106; Ex. EA at 109-113; and Ex. FA at 107-114. Specifically, the November-December Disclosures estimated the gross profitability for each of the accused-products, and determined each product’s incremental gross revenue, and incremental gross margin. *Id.* That analysis was based upon each Defendant’s own service fees and average useful life of products. *Id.*

With regard to the Market Approach, the November-December Disclosures disclosed that TQ Delta intended to estimate a reasonable royalty for the Asserted Patents. AB, Ex. BA at 83; Ex. CA at 95; Ex. DA at 84; Ex. EA at 92; and Ex. FA at 89. Within this discussion, TQ Delta indicated that it would be relying on license agreements pertaining to the *TiVo v. DirecTV/EchoStar* litigation, and specifically identified the April 2011 Confidential Settlement and Patent License Agreement between TiVo, DISH and EchoStar (the “TiVO-DISH/EchoStar License”). AB, Ex. BA at 84-88; Ex. CA at 95-100; Ex. DA at 84-88; Ex. EA at 93-96; and Ex. FA at 89-93. TQ Delta discussed substantively the DISH-TiVo litigation, setting forth details about the \$41.3 million jury award. AB, Ex. BA at 85-87; Ex. CA at 97-99; Ex. DA at 85-87; Ex. EA at 94-96; and Ex. FA at 91-93. TQ Delta stated that “[t]he jury’s reasonable royalty award of

\$41.3 million matched the reasonable royalty opinion offered by TiVo's damages expert of \$41.3 million." AB, Ex. BA at 85; Ex. CA at 97; Ex. DA at 86; Ex. EA at 94; and Ex. FA at 91. TQ Delta further provided details behind TiVo's expert damages calculation, including that "TiVo's damages expert converted the approximately 4.1 million infringing units to an equivalent monthly subscriber number that was used as the royalty base" (AB, Ex. BA at 85-86; Ex. CA at 95; Ex. DA at 84; Ex. EA at 92; and Ex. FA at 89) and that "[t]he expert applied a royalty rate of \$1.25 per subscriber per month to the royalty base" which was based on a 2002 Development Agreement between DirecTV and TiVo (the "DirecTV-TiVo Development Agreement") "where the 'DirecTV explicit rate' was \$1.00 per subscriber per month." AB, Ex. BA at 86; Ex. CA at 98; Ex. DA at 86; Ex. EA at 95; and Ex. FA at 92. This discussion referenced and cited the trial transcript from the *TiVo v. EchoStar* litigation. See AB, Ex. BA at 83-95; Ex. CA at 95-107; Ex. DA at 84-95; Ex. EA at 92-102; and Ex. FA at 89-101. TQ Delta further engaged in a discussion regarding the TiVo-DISH/EchoStar License. AB, Ex. BA at 87-88; Ex. CA at 99-100; Ex. DA at 87-88; Ex. EA at 96; and Ex. FA at 93.

Fact discovery closed on February 25, 2022. D.I. 398.

On May 7, 2022, TQ Delta served its Third Supplemental Rule 26(a)(1) Initial Disclosures on Defendants. AB, Exs. BC, CC, DC, EC, and FC. On the same day, TQ Delta served upon the DISH Defendants its Sixth Supplemental Objection and Response to Defendants' Interrogatory No. 1 (OB, Ex. G), and served upon the other Defendants its Fifth Supplemental Objection and Response to Defendants' Interrogatory No. 1. OB, Exs. B-E.⁴

Through the May Supplements, TQ Delta sought to supplement and further refine its

⁴ The Third Supplemental Rule 26(a)(1) Initial Disclosures and the supplemental responses to Interrogatory No. 1 served upon the Defendants are collectively referred to as the "May Supplements."

valuation analysis. Specifically, the May Supplements set forth additional analysis concerning the Income Approach, and detailed four different analyses within the Income Approach that TQ Delta would rely on to calculate its damages: (1) Splitting of Differential Revenue Attributable to Whole-Home DVR ARPU per Month; (2) Excess Profits Associated with the Higher Return on Investment in Lower Cost Client Hardware; (3) Increased ROI Generated by Whole-Home DVR; and (4) Working Capital Cost Savings Associated with Whole-Home DVR. AB, Ex. BC at 152-159; Ex. CC at 179-185; Ex. DC at 169-173; Ex. EC at 177-181; and Ex. FC at 178-183. Through these analyses, TQ Delta relied upon DirecTV's fee service rates per subscriber per month for its DVR and Whole-Home DVR services, as well as Defendants' own financial data. *Id.* The May Supplements also provided additional analysis on TQ Delta's valuation under the Market Approach, stating that TQ Delta would consider "the evidence presented at the *TiVo v. EchoStar* trial and statements after the trial as to the commercial royalty paid by DirecTV of \$1.00 per subscriber per month." AB, Ex. BC at 159-161; Ex. CC at 186-187; Ex. DC at 174-175; Ex. EC at 181-182; and Ex. FC at 183-184. Within this analysis, TQ Delta further identified that DirecTV's service fee revenue was \$5.00 per subscriber per month"; thus, the "DirecTV royalty represents 20% of DirecTV's DVR service fee based on an ARPU revenue split." AB, Ex. BC at 159-60; Ex. CC at 186-187; Ex. DC at 174; Ex. EC at 181-182; and Ex. FC at 183.

On May 11, 2022, counsel for Defendants wrote to TQ Delta's counsel objecting to the May Supplements on grounds that they disclosed new damages theories and relied upon new evidence. Thus, the May Supplements were untimely according to Defendants. On May 16, 2022, TQ Delta served the Lawton Report. AB, Exs. BB, CB, DB, EB, and FB.

The Lawton Report seeks reasonable royalty damages implementing a royalty structure based on a per subscriber per month fee. AB, Ex. BB at 915; Ex. CB at 938; Ex. DB at 915; Ex.

EB at 881; and Ex. FB at 1012. Relevant to this Motion, the Lawton Report engages in analysis to apply the Income Approach to the facts of the present actions through the four different analyses disclosed in the May Supplements. AB, Ex. BB at 800-827; Ex. CB at 820-848; Ex. DB at 800-827; Ex. EB at 765-788; and Ex. FB at 877-907. With regard to the Market Approach, the Lawton Report reveals that “the only agreement that the parties to the hypothetical negotiation would have considered is the *TiVo v. EchoStar* Trial, April 2006 jury verdict, and April 29, 2011 Confidential Settlement and License Agreement.” AB, Ex. BB at 845; Ex. CB at 866; Ex. DB at 846; Ex. EB at 806; and Ex. FB at 925. Ms. Lawton relies upon the TiVo April 2006 jury verdict, which set forth a reasonable royalty rate of \$1.25 per subscriber per month, that was based on the DirecTV rate of \$1.00 per subscriber per month plus \$0.25 per subscriber month related to advertising. AB, Ex. BB at 848; Ex. CB at 869; Ex. DB at 849; Ex. EB at 810; and Ex. FB at 928. The Lawton Report opines that “the evidence presented at the *TiVo EchoStar* trial and statements after the trial provides certain data that is useful to determining the reasonable royalty in this case.” AB, Ex. BB at 852; Ex. CB at 873; Ex. DB at 853; Ex. EB at 815; and Ex. FB at 932. Ms. Lawton continues her opinion applying the commercial royalty rate paid by DirecTV of \$1.00 per subscriber per month to DirecTV’s DVR service fee revenue of \$5.00 per subscriber per month, and opining that the TiVo-DirecTV royalty represents 20% of DirecTV’s DVR service fee revenue. AB, Ex. BB at 852; Ex. CB at 873; Ex. DB at 853; Ex. EB at 815; and Ex. FB at 932.

Pursuant to the current Scheduling Order, rebuttal expert reports are due on August 12, 2022, and reply expert reports are due on September 16, 2022. D.I. 490. Expert discovery closes on October 14, 2022. *Id.* No trial date has been scheduled in this action to date. Rather, following the close of discovery, the parties are required to jointly submit a status report proposing a schedule going forward. *Id.*

On June 17, 2022, Defendants filed the Motion, and simultaneously lodged upon the Special Master their opening brief in support of the Motion. *See* Defendants’ Opening Brief In Support of Their Motion to Strike and Exclude Plaintiff TQ Delta, LLC’s Undisclosed Damages Theories (“Opening Brief” or “OB”). On July 1, 2022, TQ Delta opposed the Motion. *See* Plaintiff’s Opposition to Defendants’ Motion to Strike and Exclude Plaintiff TQ Delta, LLC’s Allegedly Undisclosed Damages Theories (“Answering Brief” or “AB”). On July 8, 2022, Defendants served their Reply Brief. On July 15, 2022, TQ Delta served its Sur-Reply. *See* Defendants’ Reply In Support of Their Motion to Strike and Exclude Plaintiff TQ Delta, LLC’s Undisclosed Damages Theories (“Reply” or “RB”); Plaintiff’s Sur-Reply to Defendants’ Motion to Strike and Exclude Plaintiff TQ Delta, LLC’s Allegedly Undisclosed Damages Theories (“Sur-Reply” or “SRB”). The Special Master heard argument on the Motion on July 27, 2022.⁵

The issue for the Special Master to decide is whether the May Supplements and the corresponding theories from the Lawton Report should be stricken.

III. LEGAL STANDARDS

Rule 26(a)(1)(A)(iii) of the Federal Rules of Civil Procedure requires that a party disclose to all other parties “a computation of each category of damages claimed by the disclosing party—who must also make available for inspection and copying as under Rule 34 the documents or other evidentiary material . . . on which each computation is based, including materials bearing on the nature and extent of injuries suffered[.]” Fed. R. Civ. P. 26(a)(1)(A)(iii).

“A party must make its initial disclosures based on the information then reasonably available to it . . . [and] is not excused from making its disclosures because it has not fully

⁵ On July 27 and 28, 2022, after oral argument on the Motion and upon the request of the Special Master, TQ Delta lodged upon the Special Master a “summary chart” which purportedly identified the specific quote and location cites for each contributing component of the damages calculation set forth by the Lawton Report.

investigated the case . . .” Fed. R. Civ. Pro. 26(a)(1)(E) (emphasis added). Through Rule 26 disclosures, “a party [is not] expected to provide a calculation of damages . . . [that] depends on information in the possession of another party or person.” Fed. R. Civ. P. 26 advisory committee notes (1993). “The purpose of the initial disclosures provided for in Rule 26 is to prevent a party from being unfairly surprised by the presentation of new evidence.” *Alza Corp. v. Andrx Pharms., LLC*, 2008 WL 1886042, at *2 (D. Del. Apr. 28, 2008) (citation omitted). Parties are under a continuing obligation to supplement their Rule 26 disclosures, as well as their interrogatory responses. Fed. R. Civ. P. 26(e)(1)(A)-(B). “The law recognizes that experts will elaborate on their opinions, particularly when calculating damages.” *Acceleration Bay LLC v. Activision Blizzard, Inc.*, 2017 WL 11517421, at *4 (D. Del. Nov. 7, 2017).

“If a party fails to provide information . . . as required by Rule 26(a) . . . , the party is not allowed to use that information . . . to supply evidence on a motion, at a hearing, or at a trial, unless the failure was substantially justified or is harmless.” Fed. R. Civ. P. 37(c)(1). The decision to exclude testimony at trial is within the Court’s discretion. *NexStep, Inc. v. Comcast Cable Commc’ns, LLC*, 2021 WL 5356293, at *1 (D. Del. Nov. 17, 2021). In the Third Circuit, courts consider the following factors which are known as the *Pennypack* factors to determine whether a failure to disclose was substantially justified or is harmless: “(1) the prejudice or surprise to the party against whom the evidence is offered; (2) the possibility of curing the prejudice; (3) the potential disruption of an orderly and efficient trial; (4) the presence of bad faith or willfulness in not disclosing the evidence; and (5) the importance of the information withheld. *Meyers v. Pennypack Woods Home Ownership Ass’n*, 559 F.2d 894, 904-905 (3d Cir. 1977); *TQ Delta, LLC v. Adtran, Inc.*, 2020 WL 4529865, at *1 (D. Del. July 31, 2020) (citing *Konstantopoulos v. Westvaco Corp.*, 112 F.3d 710, 719 (3d Cir. 1997).

IV. ANALYSIS

The Special Master first examines whether TQ Delta disclosed to Defendants each of the alleged new damages theories and the evidence TQ Delta relies upon in support of its damages theories prior to the May Supplements and/or the Lawton Report. To the extent the Special Master finds that some or all of TQ Delta's damages theories or the underlying evidence to TQ Delta's damages theories were not disclosed to Defendants, the Special Master will then examine whether the non-disclosure was justified or harmless under the *Pennypack* factors.

A. TQ Delta's Disclosure of the Alleged New Damages Theories and Evidence

Defendants assert, that through the May Supplements and the Lawton Report, TQ Delta abandoned its previously disclosed damages theories and claims damages based upon five new theories with new supporting evidence that were not disclosed to Defendants during fact discovery or at any time prior to the May Supplements. OB at 5-6. Specifically, according to Defendants, the November-December Disclosures set forth a single Income Approach – the “Gross Margin Theory” – under which TQ Delta “considered the revenues received by Defendants for whole-home DVR service of the useful life of each of the Accused Products . . . then determined the alleged gross margin for each accused product and computed a per device royalty by multiplying the gross margin percentage by the revenues received for the whole-home DVR service of the lifetime of the Accused Products.” OB at 5. Further, according to Defendants, the November-December Disclosures also identified a Market Approach theory that “alleged technical and economic comparability to the TiVo-DISH/EchoStar License and used that analysis to determine a royalty.” *Id.*

Defendants contend that, in the May Supplements, these theories are abandoned and

instead TQ Delta relies upon the TiVo-DirecTV Development Agreement and DirecTV's service fees to assert a new Market Approach analysis and two new Income Approach theories: (1) Splitting of Differential Revenue Attributable to Whole-Home DVR ARPU per Month, and (2) Increased ROI Generated by Whole Home-DVR. OB at 5-6. Defendants also contend that TQ Delta relies upon Defendants' own financial data such as subscriber acquisition costs, capital cost savings, hardware lease fees, and customer premises equipment costs to assert two additional new Income Approach theories: (1) Excess Profits Associated with the Higher Return on Investment in Lower Cost Client Hardware, and (2) Working Capital Cost Savings Associated with Whole-Home DVR. OB at 7-8. Defendants argue that TQ Delta's reliance upon this evidence to support these alleged new damages theories is improper because TQ Delta never disclosed that such evidence would be relied upon. *Id.* at 8. Finally, Defendants argue that TQ Delta relies upon these alleged new damages theories to "seek damages utilizing a completely different structure," shifting TQ Delta's damages from a per-device basis to a per-subscriber-per-month basis. *Id.* at 2.

TQ Delta disputes Defendants' contentions, asserting that its damages theories set forth in the November-December Disclosures are not as limited as Defendants suggest, and that the May Supplements and the Lawton Report simply reflect an "appropriate[] refine[ment] and supplement[ation]" of the November-December Disclosures. AB at 1.

As stated above, Rule 26 requires a party to disclose "a computation of any category of damages claimed." Fed. R. Civ. P. 26(a)(1)(A)(iii). SMO No. 6 set forth the Federal and Third Circuit's interpretation of the requirements of Rule 26, and required TQ Delta to (1) provide an initial computation of its damages; (2) disclose the factual bases upon which its damages are based, "including, but not limited to, identifying the royalty base, the appropriate royalty rate, identifying any relevant conveyed or collateral sales that are or may be incorporated in the damages analysis,

and identifying any relevant recurring or subscription revenue that is or may be incorporated in the damages analysis[.]” the factual bases supporting the application of the *Georgia-Pacific* factors, and the factual bases supporting damages under the income approach, the market approach and the Cost Approach; and (3) identify any documents it intends to rely on in support of its damages claims. SMO No. 6 at 10-15. Nonetheless, consistent with the precedent in the District, SMO No. 6 expressly recognized that “a party’s damages are dependent upon expert opinion to some extent.” SMO No. 6 at 10; *Acceleration Bay LLC.*, 2017 WL 11517421, at *4. Further, the Special Master indicated that he did not “expect[] [or] require[] TQ Delta to set forth a *final* calculation of its damages at this stage of the action. . . . However, TQ Delta [could not] simply punt its obligation under Rule 26 to adequately disclose its computation of damages.” SMO No. 6 at 10-11 (emphasis in original).

Thus, the Special Master must determine whether each of the alleged five new damages theories is a new theory or based upon new evidence being disclosed for the first time through the May Supplements, or whether the May Supplements merely refine and supplement TQ Delta’s previously disclosed damages theories. Based on the analysis that follows, the Special Master finds that some of TQ Delta’s alleged new theories and the evidence supporting the theories were timely disclosed by TQ Delta prior to the May Supplements or the Lawton Report. However, some of the alleged new damage theories and the evidence supporting the theories were not previously disclosed by TQ Delta to Defendants prior to the May Supplements or the Lawton Report.

1. TQ Delta’s Valuation Under the Income Approach

Defendants object to two of TQ Delta’s alleged new Income Approach analyses – (1) Splitting of Differential Revenue Attributable to Whole-Home DVR ARPU Per Month, and (2)

Increased ROI Generated by Whole-Home DVR theory – on the basis that “front and center” to these theories is the TiVo-DirectTV Development Agreement as well as the allegedly undisclosed DirectTV service fees. OB at 7.

a) Splitting of Differential Revenue Attributable to Whole-Home DVR ARPU Per Month

In the May Supplements, TQ Delta set forth its Splitting of Differential Revenue Attributable to Whole-Home DVR ARPU Per Month analysis, considering whole-home DVR incremental ARPU. AB, Ex. BC at 153; Ex. CC at 180-181; Ex. DC at 169-171; Ex. EC at 177-178; and Ex. FC at 178-180. The analysis indicates that “[i]n order to determine a benchmark metric starting point for how TQ Delta and DISH would split the revenue attributable to whole-home DVR incremental ARPU, TQ Delta’s expert may consider the TiVo-DirectTV revenue split of 20% (*i.e.*, DirectTV’s DVR revenue was \$5.00 per subscriber per month and DirectTV paid TiVo a royalty of \$1.00 per subscriber per month), or \$0.60 per subscriber per month (*i.e.*, [REDACTED]

[REDACTED] The \$1.00 royalty paid by DirectTV to TiVo reflects a benchmark that is publicly available.” AB, Ex. BC at 153; *see also* AB, Ex. CC at 180-181 (relevant information for Comcast); Ex. DC at 169-170 (relevant information for Cox); Ex. EC at 177-178 (relevant information for TWC); and Ex. FC at 178-179 (relevant information for Verizon). The Lawton Report does indeed consider the TiVo-DirectTV DVR ARPU revenue split of 20%. *See e.g.*, AB, Ex. BB at 810-819; CB at 831-841; Ex. DB at 811-821; Ex. EB at 774-783; and Ex. FB at 886-895.

In evaluating Defendants’ contention that this analysis presents a new damages theory, the Special Master examines whether TQ Delta disclosed to Defendants the factual underpinnings of this analysis in the November-December Disclosures. First, the Special Master considers whether TQ Delta disclosed the \$1.00 royalty rate derived from the TiVo-DirectTV Development

Agreement to Defendants and finds that TQ Delta sufficiently disclosed its reliance upon the DirecTV-TiVo Development Agreement. Although the TiVo-DirecTV Agreement was not “front and center” to the November-December Disclosures, TQ Delta referenced the agreement, discussed the underlying pertinent information in detail and cited to the publicly available trial transcript. Specifically, the November-December Disclosures set forth that TQ Delta expected to estimate a reasonable royalty for the Accused MoCA Products. AB, Ex. BA at 83; Ex. CA at 96; Ex. DA at 84; Ex. EA at 92; and Ex. FA at 89. TQ Delta specifically discussed the litigation brought by TiVo against DISH/EchoStar in 2004 and, within that discussion, TQ Delta specifically identified the royalty rate used by the DirecTV-TiVo Development Agreement. *See* AB, Ex. BA at 86 (“[t]he expert applied a royalty rate of \$1.25 per subscriber per month to the royalty base. The \$1.25 per subscriber per month rate was based on a TiVo-DirecTV 2001 agreement where the ‘DirecTV explicit rate’ was \$1.00 per subscriber per month.”); Ex. CA at 98 (same); Ex. DA at 86 (same); Ex. EA at 95 (same); and Ex. FA at 92 (same).⁶ The fact that this discussion was located within TQ Delta’s analysis of its Market Approach valuation analysis does not preclude TQ Delta from relying upon it as part of a separate valuation analysis. Defendants had (or should have had) adequate notice that the TiVo-DirecTV Development Agreement may serve as a comparable license and may form the basis of a reasonable royalty in TQ Delta’s damages calculation.

The Special Master further finds that TQ Delta’s failure to produce a copy of the DirecTV-TiVo Development Agreement is not fatal to TQ Delta’s ability to rely upon it in the Lawton Report. Indeed, during oral argument, both parties conceded that (1) the DirecTV-TiVo

⁶ The November-December Disclosures refer to a “TiVo-DirecTV 2001 agreement.” *Id.* The Special Master believes that this merely reflects a typographical error by TQ Delta – 2001 should say 2002. Had Defendants referred to the trial transcript, which was cited to repeatedly by TQ Delta, the Defendants would have discovered the DirecTV-TiVo Development Agreement.

Development Agreement is publicly available in redacted form; and (2) such redacted form does not contain the applicable royalty rate.⁷ Significantly, the \$1.00 royalty rate relied upon by TQ Delta is set forth in the *TiVO v. EchoStar* trial transcript, which was cited to by TQ Delta in the November-December Disclosures, and is publicly available to Defendants. While Defendants complain that they only possess a redacted copy of the DirecTV-TiVo Development Agreement, TQ Delta confirmed that it also does not possess an unredacted copy of the DirecTV-TiVo Development Agreement. SRB at 2. Therefore, the Special Master concludes that the DirecTV-TiVo Development Agreement and the \$1.00 reasonable royalty rate were sufficiently disclosed by TQ Delta prior to the May Supplements.

The Special Master must next examine whether TQ Delta disclosed to Defendant the “relative to what” portion of the revenue split prior to the May Supplements. During oral argument on the Motion, counsel for TQ Delta represented that the November-December Disclosures did disclose the “relative to what” portion of the revenue split to Defendants.⁸ However, as set forth in the November-December Disclosures, TQ Delta applied the royalty rate only to Defendants’ DVR service fees. *See e.g.*, AB, Ex. BA at 94. The November-December disclosures did not apply the royalty rate to DirecTV’s services fees, nor did they make any reference to DirecTV’s service fees whatsoever. The Lawton Report makes clear that TQ Delta abandoned its reliance on Defendants’ own DVR service fees and instead based its damages calculations solely upon DirecTV’s service fees. *See e.g.*, AB, Ex. BB at 805-807; Ex. CB at 826-828; Ex. DB at 806-808; Ex. EB at 768-771; and Ex. FB at 881-883.

TQ Delta should have, but failed to, provide a timely supplement to disclose its reliance upon the DirecTV monthly service fees for DVR and whole-home DVR as opposed to its reliance

⁷ *See* Transcript of July 27, 2022 Oral Argument.

⁸ *See* Transcript of July 27, 2022 Oral Argument.

on Defendants' own DVR service fees. Without such supplementation to the November-December Disclosures prior to the May Supplements, TQ Delta failed to timely disclose to Defendants that TQ Delta would rely specifically on DirecTV's service fees or, even more generally, the fact that TQ Delta may consider such service fees as a proxy for Defendants' service fees. Therefore, the Special Master concludes that TQ Delta failed to disclose to Defendants the Splitting of Differential Revenue Attributable to Whole-Home DVR ARPU Per Month theory prior to the May Supplements and the Lawton Report. *See MLC Intellectual Property, LLC v. Micron Tech., Inc.*, 10 F.4th 1358 (2021) (affirming the district court's decision to exclude plaintiff's expert testimony regarding the royalty base based upon the district court's conclusion that plaintiff failed to disclose the factual underpinnings of its royalty rate).⁹

b) Increased ROI Generated by Whole-Home DVR

TQ Delta's failure to disclose to Defendants its reliance upon DirecTV's service fees is similarly unfavorable to TQ Delta's Increased ROI Generated by Whole-Home DVR theory. The May Supplements indicate that TQ Delta's Increased ROI Generated by Whole-Home DVR analysis was "directed to estimating the magnitude of the increase in [Defendant's] ROI, as a result of increased ARPU and reduced customer premises equipment costs [], that is reasonably attributable to Whole-Home DVR." AB, Ex. BC at 158; Ex. CC at 184; Ex. DC at 172; Ex. EC at

⁹ The Special Master notes that, in *MLC*, the Federal Circuit affirmed the district court's decision on the basis that the district court did not abuse its discretion in requiring the disclosure of certain facts underlying its damages theories. Indeed, *MLC* contains no clear standard of what is required to be disclosed under Rule 26. Nonetheless, the Special Master agrees with the district court that a party should disclose the factual underpinnings of its claims. *See MLC Intell. Prop., LLC v. Micron Tech., Inc.*, No. 14-CV-03657-SI, 2019 WL 2863585, at *14 (N.D. Cal. July 2, 2019), *aff'd*, 10 F.4th 1358 (Fed. Cir. 2021) ("The Court also concludes that MLC never disclosed the factual underpinnings of its claim that the Hynix and Toshiba licenses 'reflect' a 0.25% royalty rate, and that pursuant to Rule 37(c)(1), this failure is a separate and independent basis for excluding evidence and argument that those licenses contain such a rate.")

180; and Ex. FC at 181. In the Lawton Report, the analysis under this methodology utilized the ARPU calculated using DirecTV's monthly service fees. AB, Ex. BC at 823-824; Ex. CB at 844-85; Ex. DB at 824; Ex. EB at 785-786; and Ex. FB at 899-902. Thus, because the Special Master has already concluded that the evidence underlying the calculation of the ARPU was not timely disclosed by TQ Delta to Defendants, the Special Master also concludes that the Increased ROI Generated by Whole-Home DVR relies upon the Direct TV monthly service fees that were not timely disclosed by TQ Delta to Defendants.

c) Excess Profits Associated with the Higher Return on Investment in Lower Cost Client Hardware and Working Capital Cost Savings Associated with Whole-Home DVR

Defendants also object to TQ Delta's Excess Profits Associated with the Higher Return on Investment in Lower Cost Client Hardware analysis and Working Capital Cost Savings Associated with Whole-Home DVR analysis because TQ Delta bases these analyses upon Defendants' own financial data that was not specifically identified by TQ Delta in the November-December Disclosures. OB at 2.

The May Supplements provide that TQ Delta's Excess Profits Associated with the Higher Return on Investment in Lower Cost Client Hardware analysis will consider "excess profit associated with the lease fees on the lower cost client boxes when compared to the higher cost DVR boxes." AB, Ex. BC at 154; Ex. CC at 181; Ex. DC at 171; Ex. EC at 178; and Ex. FC at 180. This analysis specifically examines both the costs of a client box and lease rates, and specifically examines the financials of each respective Defendant. AB, Ex. BC at 154-155; Ex. CC at 181-184; Ex. DC at 171-172 Ex. EC at 178-180; and Ex. FC at 180-181. With regard to TQ Delta's Working Capital Cost Savings Associated with Whole-Home DVR analysis, the May Supplements indicate that such analysis will "consider the cost savings associated with the lower

cost of the client boxes when compared to the higher cost DVR boxes with a hard drive.” AB, Ex. BC at 158; Ex. CC at 184; Ex. DC at 172; Ex. EC at 180; and Ex. FC at 181. Again, this analysis looks at the costs of the client hardware boxes specific to each respective Defendant. AB, Ex. BC at 158-159; Ex. CC at 184-185; Ex. DC at 172-173; Ex. EC at 180-181; and Ex. FC at 181-182.

After considering both the November-December Disclosures and the May Supplements, the Special Master finds that both of these theories were adequately disclosed by TQ Delta in the November-December Disclosures. Although the November-December Disclosures did not specifically identify these exact analyses in the precise manner the May Supplements did, the November-December Disclosures referenced Defendants’ pricing, and discussed the costs of Defendants’ devices, including equipment costs and subscriber acquisition costs. Moreover, both analyses are based upon Defendants’ own financial information, which TQ Delta indicated may be relied on. *See* AB, Ex. BA at 15-16 (disclosing that TQ Delta “may rely upon Defendant’s financial performance associated with sale/rental/lease/deployment and/or other benefits or consideration derived directly or indirectly from the Accused Products and/or the services employing the same.”; Ex. CA at 15-16 (same); Ex. DA at 15 (same); Ex. EA at 14-15 (same); and Ex. FA at 16 (same). Thus, the November-December Disclosures disclosed to Defendants that TQ Delta would be considering Defendants’ financial data to analyze the Asserted Patents’ economic value to each Defendant. The May Supplements were an appropriate supplementation and refinement of the November-December Disclosures. Also, to the extent any specific financial data of a defendant was not specifically disclosed in the November-December Disclosures, the Special Master does not find this prejudicial to Defendants given that such data is Defendants’ own financial information already in Defendants’ possession.

2. TQ Delta's Valuation Under the Market Approach

Defendants similarly object to the Market Approach analysis disclosed by TQ Delta in the May Supplements because Defendants contend that the analysis relies upon the DirecTV Development Agreement and DirecTV's monthly service fees. The Special Master's analysis here mirrors the analysis of Section IV.A.1.a., *supra*. Specifically, the Special Master finds that TQ Delta's reliance on the TiVo-DirecTV Development Agreement was previously disclosed to Defendants through the November-December Disclosures. Thus, to the extent the Market Approach analysis of the Lawton report relies upon the TiVo-DirecTV Development Agreement to calculate the applicable royalty rate, the analysis does not represent a new theory. However, the Special Master finds that TQ Delta never disclosed its reliance on DirecTV as a proxy for Defendants or its intention to rely upon DirecTV's service fees in lieu of Defendants' own monthly service fees prior to the May Supplement. Thus, to the extent the Market Approach analysis set forth in the May Supplement and the Lawton Report relies on DirecTV's service fees, those portions of the Market Approach analysis represent new theories that were not timely disclosed.

3. TQ Delta's Calculation of Damages Using Royalty Based Upon Per-Subscriber-Per-Month

Finally, Defendants argue that TQ Delta relies upon its alleged new damages theories and evidence to "advance an entirely different royalty structure" calculated on a per-subscriber-per-month basis, rather than the per-device theory detailed in the November-December Disclosures. OB at 6.

While the Special Master finds that the November-December Disclosures did disclose TQ Delta's potential reliance upon a per-subscriber-per-month royalty calculation, the Special Master observes that this disclosure expressly contemplated that Defendants' own information would be considered in calculating the royalty base. *See* AB, Ex. BA at 143 ("notwithstanding the

expectation of the use of infringing devices as the royalty base, upon full consideration of the fact record, the damages expert may use subscriber-months as the royalty base. In such circumstances, the damages expert would express the royalty rate on a per subscriber-month basis.”); Ex. CA at 157 (same); Ex. DA at 140 (same); Ex. EA at 148 (same); and Ex. FA at 151 (same). While the November-December Disclosures also include other instances of disclosure of the potential reliance upon a per-subscriber-per-month royalty calculation, in these instances, the per subscriber per month disclosure is based upon Defendants’ own financial data. *See e.g.*, AB, Ex. BA at 149; Ex. CA at 166; Ex. DA at 148; Ex. EA at 157; and Ex. FA at 158.

The Lawton Report, however, opines that the reasonable royalty adequate to compensate TQ Delta for Defendants’ alleged infringement should be based on a per subscriber per month running royalty applied to Defendants’ whole home DVR subscribers, and in calculating this, Ms. Lawton relies on DirecTV’s Whole-Home DVR premium, and 20% revenue split to ultimately arrive at a subscriber per month rate. AB, Ex. BB at 915; Ex. CB at 939; Ex. DB at 916; Ex. EB at 881; Ex. FB at 1012. Although the Special Master recognizes that SMO No. 6 did allow for some refinement or supplementing of TQ Delta’s initial damages computation, the Special Master finds that establishing a damages theory upon a third-party’s DVR and Whole-Home DVR service fees as opposed to Defendants’ own information, without any prior indication that such third party’s fees may be considered or relied upon, goes beyond merely supplementing or refining a theory.

For these reasons, the Special Master concludes that the per-month-per-subscriber royalty base, to the extent it is based upon DirecTV’s monthly fee services, is a new damages theory not disclosed in the November-December Disclosures.

B. Application of the *Pennypack* Factors

The Special Master next considers whether TQ Delta's failure to timely disclose the Undisclosed Damages Theories¹⁰ of certain of TQ Delta damages theories and/or factual underpinnings was justified or harmless under the *Pennypack* factors. "Courts applying the *Pennypack* factors in the case of sophisticated, complex litigation involving parties represented by competent counsel have been less indulgent in their application and more willing to exclude evidence without a strict showing that each of the *Pennypack* factors has been satisfied." *Bridgestone Sports Co. v. Acushnet Co.*, 2007 WL 521894, at *4 (D. Del. Feb. 15, 2007) (citing *Astrazeneca AB v. Mutual Pharm. Co.*, 278 F.Supp.2d 491 (E.D.Pa.2003)). The Special Master specifically finds that this litigation is "sophisticated [and] complex" and that the parties to this action are represented by "competent counsel." Also, the Special Master recognizes the Third Circuit's and this Court's reluctance to exclude an expert report, "absent a showing of bad faith or other deceptive conduct that puts the moving party under extreme prejudice if exclusion is not granted." *Acceleration Bay LLC*, 2017 WL 11517421, at *2.

1. The Prejudice to the Party Against Whom the Evidence is Offered.

The first *Pennypack* factor is the prejudice or surprise to the party against whom the evidence is offered. In determining whether Defendants will be prejudiced by TQ Delta's Undisclosed Damages Theories, the Special Master considers the factual underpinnings of such theories, and whether TQ Delta relies upon Defendants' own financial data or upon DirecTV's pricing. Certainly, TQ Delta's expert can rely upon Defendants' own financial data to supplement and/or refine its damages analysis. However, the Special Master finds that Defendants will be

¹⁰ "Undisclosed Damages Theories" collectively refer to the theories the Special Master concluded were not disclosed by TQ Delta to Defendants through the November-December Disclosures and prior to the May Supplements.

prejudiced by TQ Delta's failure to disclose to Defendants its intention to rely upon DirecTV's monthly fee rates for DVR and Whole-Home DVR. Had TQ Delta at least disclosed to Defendants that it would use DirecTV as a proxy, Defendants would have been on notice that DirecTV's service fees were at issue. But TQ Delta did not even disclose that it would use DirecTV as a proxy. Indeed, this was the exact situation the Special Master attempted to avoid when he ordered TQ Delta to "provide a complete listing of the documents and/or other evidence it contends supports its claims for damages" or to supplement its disclosures with such information "as soon as it is able to do so." SMO No. 6 at 15-16; *see also Alza Corp. v. Andrx Pharms., LLC*, 2008 WL 1886042, at *2 (D. Del. Apr. 28, 2008) ("The purpose of the initial disclosures provided for in Rule 26 is to prevent a party from being unfairly surprised by the presentation of new evidence.").

Defendants are prejudiced because TQ Delta's intent to rely upon DirecTV's service fees was not disclosed to Defendants before the end of fact discovery. Therefore, Defendants did not have the appropriate opportunity to explore DirecTV's service fees or take discovery regarding whether DirecTV's service fees are relevant or applicable. For these reasons, the Special Master finds that Defendants are prejudiced by the Undisclosed Damages Theories that rely upon DirecTV's financials.

2. The Possibility of Curing the Prejudice.

The prejudice caused to Defendants by the Undisclosed Damages Theories that rely upon DirecTV's financials cannot be cured at the present time. The fact discovery deadline passed more than five (5) months ago. Even if fact discovery was reopened, the necessary discovery to further explore DirecTV's pricing, whether DirecTV's pricing is applicable here, and/or whether Defendants are similarly situated to DirecTV would need to come, at least in part, from DirecTV – a non-party to these actions. Although expert discovery does not close until October 14, 2022,

the additional expert discovery time does not eliminate the prejudice the Defendants face concerning TQ Delta's reliance upon DirecTV's financials. Moreover, the additional expense and delay that would result if fact discovery was reopened to explore DirecTV's financials would further harm Defendants under the circumstances. Thus, this factor favors striking the Undisclosed Damages Theories that rely upon DirecTV's financials.

3. The Likelihood of Disruption of the Trial.

Allowing TQ Delta to continue to pursue the Undisclosed Damages Theories that rely upon DirecTV's financials would cause delay and would disrupt trial in this action. Although no trial date has been scheduled in this matter to date, the remaining expert discovery deadlines would need to be stayed to allow for any necessary fact discovery regarding DirecTV's financials and/or the applicability of DirecTV's financials. Thus, this factor favors striking the Undisclosed Damages Theories that rely upon DirecTV's financials.

4. The Presence of Bad Faith or Willfulness In Not Timely Disclosing Its Damages Theories.

In considering whether TQ Delta's failure to timely disclose the Undisclosed Damages Theories was in bad faith or willful, the Special Master recognizes TQ Delta's obligations to supplement the November-December Disclosures imposed by both Rule 26 and SMO No. 6. Fed. R. Civ. P. 26(e)(1)(A) (requiring a party to "timely" supplement its Rule 26 disclosures if "additional or corrective information has not otherwise been made known to the other parties during the discovery process"); SMO No. 6 at 16 ("TQ Delta should supplement its Damages Disclosures as soon as it is able to do so in accordance with its duty to supplement its disclosures and discovery responses as required by Rule 26"). Here, TQ Delta waited more than ten (10) weeks after the close of fact discovery to disclose or refine its new damages theories to Defendants. Particularly troubling to the Special Master is TQ Delta's reliance upon DirecTV's pricing as a

proxy for Defendants' own pricing. TQ Delta contends that its reliance upon DirecTV's pricing as a proxy is a result of Ms. Lawton's "independent research to identify contemporaneous evidence on pricing for whole home DVR subscription fees by others in the marketplace" following Mr. Gelston's testimony [REDACTED] AB at 10. However, Mr. Gelston's deposition occurred on December 21, 2021. TQ Delta had at least an additional two months after Mr. Gelston's deposition and before the close of fact discovery to disclose to Defendants that it intended to rely upon DirecTV's pricing as a proxy. Yet, TQ Delta failed to do so in a timely manner. Instead, TQ Delta delayed another ten (10) weeks after the close of fact discovery and disclosed its reliance upon DirecTV's pricing only days before issuing the Lawton Report. Such conduct suggests that TQ Delta may take lightly or not recognize the importance of its obligations to supplement in a timely manner as required by Rule 26 and SMO No. 6. *In re Paoli R.R. Yard PCB Litig.*, 35 F.3d 717, 792 (3d Cir. 1994). Indeed, this is not the first instance in these actions that TQ Delta has failed to honor disclosure deadlines set by the Court. *See* C.A. No. 15-614 RGA, D.I. 427 (Special Master Order No. 17 – Ruling on DISH's Motion to Strike/Exclude Plaintiff TQ Delta's Doctrine of Equivalents Infringement Theories Under Rule 37) at 15. Therefore, this factor favors striking the Undisclosed Damages Theories that rely upon DirecTV's pricing.

5. The Importance of the New Damages Theories.

Finally, the Special Master finds that TQ Delta's Undisclosed Damages Theories are not so important as to excuse their untimely disclosure. Although TQ Delta's damages expert opinions are important in these actions, the Motion seeks to strike only those portions of the Lawton Report that were not timely disclosed by Defendants. Further, the Lawton Report sets forth and contemplates alternative damages that are not subject to the Motion and that TQ Delta can rely

upon. Therefore, this factor favors striking the Undisclosed Damages Theories.

Given the analysis of the *Pennypack* factors set forth above, the Special Master finds that all portions of TQ Delta's damages theories in the May Supplements and/or the Lawton Report that rely upon or are based upon DirecTV's financial data (and more specifically, DirecTV's monthly service fees) are stricken and excluded. On the other hand, to the extent TQ Delta's damages theories rely upon the DirecTV-TiVo Development Agreement and/or Defendants' own financial data (and do not rely on DirecTV's monthly service fees) the Special Master finds that those theories are not stricken and/or excluded and will remain in the case.

V. CONCLUSION

For all the foregoing reasons, IT IS HEREBY ORDERED that the Motion is GRANTED IN PART and DENIED IN PART. The parties shall confer and identify the exact provisions of the May Supplements and the Lawton Report that rely upon or are based upon DirecTV's monthly service fees and, within seven (7) days of this Order, the parties shall submit a proposed form of Order identifying the exact provisions of the May Supplements and the Lawton Report that are stricken consistent with the findings of this Order.

ENTERED this 11th day of August, 2022.



Gregory B. Williams (#4195)
Special Master

SO ORDERED this _____ day of _____, 2022.

UNITED STATES DISTRICT COURT JUDGE