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HONORABLE RICHARD A. JONES

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

T-MOBILE USA, INC., a Delaware corporation,

Plaintiff,

v.

HUAWEI DEVICE USA, INC., a Texas corporation; and HUAWEI TECHNOLOGIES CO. LTD, a China corporation,

Defendants.

Case No. 14-cv-01351-RAJ

T-MOBILE USA, INC.'S MOTION FOR A NEW TRIAL PURSUANT TO FED. R. CIV. P. 59

NOTING DATE: July 7, 2017

ORAL ARGUMENT REQUESTED

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INTRODUCTION

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2 The jury's failure to award T-Mobile *any* recovery for the misappropriation of its trade
3 secrets requires a new trial. The jury was properly instructed that T-Mobile's unjust enrichment
4 recovery can be measured by determining a reasonable royalty—that is, the amount T-Mobile
5 and Huawei Device USA would have agreed to in a hypothetical negotiation for a license to
6 T-Mobile's technology. The evidence at trial overwhelmingly established both T-Mobile's
7 unwillingness to give away its trade secrets for free, and Huawei's willingness to pay for a
8 license to use those trade secrets. Accordingly, the jury's zero-dollar damages award was against
9 the weight of the evidence, and entering a final judgment on that verdict would constitute a
10 miscarriage of justice.

11 The jury's verdict was also impacted by an erroneous jury instruction regarding damages
12 for breach of contract. On its contract claims, T-Mobile was entitled to seek recovery
13 commensurate with the scope of the license Huawei Device USA unlawfully assumed, which
14 included Huawei Device USA's disclosure of T-Mobile's trade secrets to Huawei's related
15 corporate entities and the use of those trade secrets by the Huawei corporate family. But the
16 Court incorrectly ruled that, as a matter of Washington contract law, T-Mobile's reasonable
17 royalty recovery for breach of contract "must be measured according to any unjust enrichment
18 conferred on Huawei Device USA," thus excluding the unjust enrichment enjoyed by Huawei
19 Device USA's affiliates. In so doing, the Court distinguished between the scope of unjust
20 enrichment available under trade secret misappropriation and that available under breach of
21 contract. Washington law, however, does not recognize a difference in the manner in which a
22 reasonable royalty is measured under those two causes of action. This erroneous instruction
23 requires a new trial.

24 Further, the jury's finding that Huawei did not breach the MetroPCS contract is against
25 the weight of the evidence and also warrants a new trial. Huawei's conduct alleged to breach the
26 MetroPCS contract is the same conduct that was at issue with respect to the Handset and
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1 Accessory Supply Agreement on which the jury found breach. The MetroPCS contract’s non-
2 disclosure provisions are even broader than the corresponding provisions in the Handset and
3 Accessory Supply Agreement. And there simply was no factual dispute at trial that could have
4 allowed the jury to find other than that Huawei Device USA is a party to the MetroPCS contract
5 (as successor-in-interest to Futurewei), and is liable to T-Mobile for its breach of that contract.

6 Finally, the undisputed evidence at trial established the flagrant and willful misconduct of
7 Huawei Device USA and its affiliates, who together engaged in a concerted scheme to steal
8 T-Mobile’s trade secrets so that they could build a copycat robot. Washington law permits
9 punitive damages for such conduct. The Court erred, however, in requiring T-Mobile to show
10 that defendant acted out of spite, ill will, or an intent to harm. That is contrary to Washington
11 law.

12 To avoid a miscarriage of justice, the Court should exercise its discretion to order a new
13 trial on all issues.

14 LEGAL STANDARD

15 Under Federal Rule of Civil Procedure 59, the Court may “grant a new trial on all or
16 some of the issues—and to any party . . . after a jury trial, for any reason for which a new trial
17 has . . . been granted in an action at law in federal court.” Fed. R. Civ. P. 59(a)(1)(A). A trial
18 court “enjoys broad discretion with regard to a new trial motion.” *United States v. Hinkson*, 585
19 F.3d 1247, 1263 (9th Cir. 2009).

20 Courts grant new trials when “the verdict is against the weight of evidence” or “for other
21 reasons, the trial was not fair to the party moving.” *Molski v. M.J. Cable, Inc.*, 481 F.3d 724,
22 729 (9th Cir. 2007) (internal quotations omitted). In addition, “erroneous jury instructions, as
23 well as the failure to give adequate instructions, are . . . bases for a new trial.” *Murphy v. City of*
24 *Long Beach*, 914 F.2d 183, 187 (9th Cir. 1990) (citations omitted). “Ultimately, the district court
25 can grant a new trial . . . on any ground necessary to prevent a miscarriage of justice.”
26 *Experience Hendrix L.L.C. v. Hendrixlicensing.com Ltd*, 762 F.3d 829, 842 (9th Cir. 2014).

ARGUMENT

I. The Jury’s Failure to Award Any Recovery for Trade Secret Misappropriation Was Manifestly Erroneous and Against the Weight of the Evidence

The jury’s verdict holding Huawei Device USA liable for trade secret misappropriation accurately reflects what the evidence at trial clearly established—that Huawei devised and executed a concerted plan, over an extended period of time, to misappropriate and misuse T-Mobile’s trade secrets. As a corollary to that liability finding, in light of the undisputed evidence presented at trial, T-Mobile is entitled to a monetary recovery for Huawei’s misappropriation. Instruction 16 in the Court’s jury charge required, as a predicate to finding liability, a finding that “*Huawei Device USA’s misappropriation was a proximate cause of damages to T-Mobile and/or that, as a result of the misappropriation, Huawei Device USA or Huawei Device China, received money or benefits that in justice and fairness belong to T-Mobile.*” Dkt. 476 at 18 (emphases added). The jury’s liability verdict thus necessarily demonstrates that the jury concluded—as established by the overwhelming evidence at trial—that T-Mobile incurred losses and/or that Huawei was unjustly enriched by the misappropriation.

Under Washington law, T-Mobile “may recover damages for the actual loss caused by misappropriation” and “also may recover for the unjust enrichment caused by misappropriation,” provided that the two recoveries are not duplicative (which was not an issue in this case). Wash. Rev. Code § 19.108.030. A reasonable royalty is “one of a number of calculations available to measure damages for trade secret misappropriation, particularly the value of the benefit received by a defendant who misappropriates trade secrets.” *Veritas Operating Corp. v. Microsoft Corp.*, No. C06-0703-JCC, 2008 WL 7404617, at *2 (W.D. Wash. Feb. 26, 2008) (citation and internal quotations omitted). Accordingly, the jury was properly instructed that it could “award a reasonable royalty” as a “means of calculating unjust enrichment.” Dkt. 476 at 29 (Instruction No. 26). A reasonable royalty is determined using a hypothetical negotiation framework, which assumes that the parties negotiate over a license that is equal in scope to the use made of the technology by the defendant. *Storagecraft Tech. Corp. v. Kirby*, 744 F.3d 1183, 1185, 1189

1 (10th Cir. 2014) (Gorsuch, J.) (“[I]t is surely important when setting a reasonable royalty award
2 to account for the scope of the license the defendant assumed for himself.”).¹

3 Based on the Court’s instructions (and given the liability verdict), the jury’s refusal to
4 award T-Mobile *any* recovery for Huawei’s trade secret misappropriation was contrary to the
5 weight of the evidence at trial and warrants a new trial. *See Ajaxo Inc. v. E*Trade Fin. Corp.*,
6 187 Cal. App. 4th 1295, 1312 (2010) (a situation wherein “defendant would have benefitted by
7 the plaintiff’s efforts and ingenuity but the plaintiff could not be compensated would be
8 inconsistent with the public policies underlying the [trade secret] law”).

9 **A. The jury’s failure to find actual damages was against the weight of the**
10 **evidence**

11 T-Mobile’s expert, Dr. Sullivan, presented substantial evidence that T-Mobile sustained
12 \$8,277,757 in actual losses. But even if the jury did not credit that testimony, in light of the
13 record evidence, the jury could not find that T-Mobile had incurred *zero* actual damages. For
14 example, Huawei’s counsel, in both his opening and closing statements, conceded that T-Mobile
15 incurred at least \$15,800 in investigation costs, which the evidence supported. 4/25/2017 Trial
16 Tr. at 176:25–177:1, 209:2–6 (Huawei Opening); 5/15/17 Trial Tr. at 139:12–15 (Huawei
17 Closing); 5/8/2017 Trial Tr. at 142:3–5 (Cunningham). The jury’s failure to return a verdict
18 awarding even uncontested actual damages reflects fundamental confusion on its part.
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22 ¹ An alternative means by which the jury was entitled to award an unjust enrichment recovery to T-Mobile
23 was through a profits-based calculation, under which T-Mobile had the burden to prove Huawei’s sales revenues and
24 then the burden would shift to Huawei to prove which sales, if any, were not attributable to the misappropriated
25 trade secrets, and what portion of Huawei’s sales revenues were expenses. The burden shifts under Washington law
26 so that “the party in possession of the relevant information” (the seller, for purposes of attributing sales revenues)
27 has the burden. *See Petters v. Williamson & Assocs., Inc.*, 210 P.3d 1048, 1054–55 (Wash. Ct. App. 2009). The
Court also erred in assigning to T-Mobile the burden of showing which sales were “attributable to” the
misappropriation, (Dkt. 456 at 2; Dkt. 476 at 29 (Instruction No. 26)), thus effectively foreclosing that permissible
basis for recovery.

B. The jury's failure to find an unjust enrichment recovery was against the weight of the evidence

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2 T-Mobile proved at trial that Huawei Device USA stole, in close coordination with other
3 Huawei entities, T-Mobile's robot technology and made it available for unfettered use by
4 Huawei's corporate affiliates. The evidence at trial also proved that before the systemic thefts,
5 Huawei Device USA, at the behest of its headquarters, sought to buy that technology.
6 Specifically, the evidence included a May 3, 2012, internal Huawei email, from Yongjian Dong
7 to Richard Yao, stating that "HQ want[ed] to buy" T-Mobile's robotics testing system. PTX
8 1945 at 2. Mr. Yao confirmed at trial that Huawei "wanted to purchase T-Mobile's robotic
9 testing system" and that he "ask[ed] T-Mobile about buying the robotic testing system." 4/26/17
10 Trial Tr. at 93:9-12; *id.* at 94:9-11. Further, internal Huawei presentations discussed Huawei's
11 expected "Return on Investment" from that technology, including "enhancing the passing of
12 technical approval tests by X millions of China Mobile phones," which would have "economic
13 value of X hundred million Yuan" for Huawei, thus further substantiating that Huawei would
14 have paid to license the technology through a hypothetical negotiation. *See* PTX 2074 at 13.

15 In response to Mr. Dong's email, Mr. Yao explained that T-Mobile has "no plan to sell
16 the robot system to OEMs. . . . TMO [is] concern[ed] OEMs may use the system to test devices
17 for other mobile operators, for example AT[&]T." PTX 1945 at 2; *see also* 4/26/17 Trial Tr.
18 96:25-97:6 (Mr. Yao confirming that T-Mobile told him of its concern "that phone
19 manufacturers, like Huawei, would test devices for other carriers if they had the robot, because
20 there was . . . no way for T-Mobile to control what the phone manufacturers could do with the
21 robot, once they had it"). A T-Mobile internal document likewise reflected T-Mobile's pros-
22 and-cons analysis for "Licensing of Robot Stations," which listed as a "CON": that "OEMs
23 [would be] free to use the system for all devices, even non [T]-[M]obile ones" and "[intellectual
24 property] control would not be possible." PTX 922 at 4. Accordingly, T-Mobile decided that
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1 the Tappy technology was “not for sale.” DTX 4180 at 1²; *see also* 4/28/17 Trial Tr. at 186:19–
2 21 (Barnes) (“Q. Did T-Mobile ever consider selling or licensing Tappy to the OEMs instead? A.
3 Not to the OEMs.”); 5/2/17 Trial Tr. at 106:4–19 (Mantz) (testifying that T-Mobile would not
4 sell the Tappy technology to OEMs because T-Mobile “believed that Tappy was a very, very
5 unique solution and provided significant advantages” over competitors).

6 Two other automated testing companies, Sony and OptoFidelity, also sought to license or
7 buy Tappy. 5/10/17 Trial Tr. at 92:10–25 (Wolfe); PTX 960 at 1; 5/11/17 Trial Tr. at 81:2–7
8 (Mann); DTX 4250 at 2. In the counterfactual context of a hypothetical negotiation, T-Mobile
9 would have relied on the expressed interests of Sony and OptoFidelity to drive up the payment it
10 would insist upon from Huawei to license the Tappy Technology. In the real world, because
11 T-Mobile did not want to lose the competitive advantage it derived from being the only carrier to
12 have the Tappy technology, T-Mobile declined to negotiate a possible sale to Sony or
13 OptoFidelity. But unlike those companies, when T-Mobile rebuffed Huawei’s overtures to buy
14 Tappy, Huawei did not take no for an answer. Instead, Huawei necessarily calculated that its
15 need for the Tappy technology was so pressing that it resorted to corporate espionage, theft, and
16 concealment to take what it could not purchase at any price.

17 Although the hypothetical negotiation construct requires the jury to assume, counter to
18 fact, that T-Mobile would have been willing to license its trade secrets to Huawei, the Court
19 properly instructed the jury to consider T-Mobile’s actual “policy of . . . not licensing the trade
20 secrets,” which would drive up the amount of the royalty. *See* Dkt. 476 at 30–31 (Instruction
21 Nos. 27 and 28). The jury was also instructed to assume that “Huawei Device USA would have
22 been willing to pay T-Mobile” for a license to the misappropriated information. Dkt. 476 at 30
23 (Instruction No. 27). Given the un rebutted evidence that Huawei was willing to pay for the
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25 ² T-Mobile has informed Huawei that a different portion of DTX 4180 should be sealed, but there is no need
26 to seal the quoted language.

1 Tappy technology and that T-Mobile's policy was to not license it, the jury's denial of a
2 reasonable royalty was against the weight of the evidence and the jury instructions.

3 In light of this undisputed evidence, the jury could not have concluded that T-Mobile was
4 entitled to zero damages based on Huawei's argument that its use of the misappropriated
5 technology somehow benefitted T-Mobile. The trial evidence does not permit such a benign
6 assessment of Huawei's conduct. Through its misappropriation, Huawei assumed unrestricted
7 control over information that it should not have possessed, and overwhelming evidence
8 established that Huawei passed that information on to Huawei Device China. A reasonable
9 royalty analysis does not require T-Mobile to prove the extent to which Huawei Device USA or
10 its affiliates profited from the unauthorized use of the information at issue—the proper measure
11 of a royalty is the amount of money that Huawei would have had to pay to T-Mobile in order to
12 lawfully obtain the license it unlawfully assumed for itself. *See, e.g., Storagecraft*, 744 F.3d at
13 1189 (a defendant “can’t avoid reasonable royalty damages because he disclosed the trade secret
14 to others without anyone making commercial use of it”) (alterations omitted); *LinkCo, Inc. v.*
15 *Fujitsu Ltd.*, 232 F. Supp. 2d 182, 192 (S.D.N.Y. 2002) (“[T]he appropriate measure of damages
16 for plaintiff’s misappropriation of trade secrets claim, where defendant did not profit from the
17 alleged infringement, is a reasonable royalty.”). Here, Huawei’s admitted willingness to pay for
18 the Tappy technology, coupled with the uncontroverted evidence of T-Mobile’s policy against
19 licensing to equipment manufacturers like Huawei, meant that the jury could not refuse to award
20 T-Mobile a reasonable royalty entirely (as it did).

21 Similarly, the zero-dollar jury verdict on misappropriation of trade secrets cannot be
22 rationalized on the ground that the jury was theoretically entitled to reject Dr. Sullivan’s
23 testimony regarding the amount of a reasonable royalty. T-Mobile’s affirmative evidence that
24 the Tappy technology was of mutually recognized value was in no way limited to Dr. Sullivan’s
25 testimony. The entire pattern of dealing between Huawei and T-Mobile, and the response made
26 by Huawei to T-Mobile’s refusal to license, substantiates that the technology had substantial
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1 affirmative value. Accordingly, the jury could not reasonably assign zero value to the license
2 Huawei unilaterally assumed for itself. Not surprisingly, Huawei offered no factual evidence
3 that could justify the jury’s zero-dollar verdict, and the conclusory testimony of Huawei’s expert,
4 who admitted that she did not analyze the factors applicable to a hypothetical negotiation in her
5 report, cannot provide the support for a zero-dollar reasonable royalty finding. *See, e.g., 5/12/17*
6 *Trial Tr. at 88:5–7* (“I didn’t analyze a hypothetical negotiation in my report.”). Even if the jury
7 did not credit Dr. Sullivan’s testimony, other evidence clearly and undeniably established that
8 both parties to the hypothetical negotiation recognized the Tappy technology as valuable, making
9 the jury verdict unsupportable.

10 Finally, it is no answer to say that T-Mobile did not prove the amount of a reasonable
11 royalty with sufficient precision: Direct factual evidence of a reasonable royalty is not possible,
12 because the jury must hypothesize what would have occurred at a hypothetical negotiation that,
13 in reality, did not take place. *See i4i Ltd. P’ship v. Microsoft Corp.*, 598 F.3d 831, 857–58 (Fed.
14 Cir. 2010), *aff’d*, 564 U.S. 91 (2011) (“[A]ny reasonable royalty analysis necessarily involves an
15 element of approximation, and uncertainty.”).³

16 The jury’s failure to award a royalty for unjust enrichment, despite Huawei’s evident
17 willingness to pay for a license, reveals fundamental confusion on its part, which may have been
18 caused or exacerbated by the improper framing of Question 2(b) on the jury verdict form.
19 Question 2(b), which was added after the charging conference, erroneously focused the jury on
20 unjust enrichment “damages” that “T-Mobile incurred” from Huawei’s misappropriation. *See*
21 *Dkt. 484 at 2*. The verdict form should have asked the jury to determine the amount of the unjust
22 enrichment obtained by Huawei Device USA through its misappropriation and disclosure of
23 T-Mobile’s trade secrets. *See id.* at 3 (Question 7) (“What do you find is the total amount of
24

25 ³ Because it is impossible to have competent evidence of the precise result of a hypothetical negotiation,
26 T-Mobile was prejudiced by the Court’s rejection of its proposed instruction that “recovery of substantial damages is
27 not to be denied merely because the extent or amount thereof cannot be ascertained with mathematical precision”
and “[p]roof of the amount of damages need not be made with mathematical precision.” *Dkt 461 at 1*.

1 unjust enrichment *conferred on Huawei Device USA...?*) (emphasis added). The value of the
2 unjust enrichment conferred cannot be zero when the parties would have agreed to a paid license
3 as the result of a hypothetical negotiation. Regardless of the reason for its error, the jury’s
4 failure to award any unjust enrichment recovery was contrary to the weight of the evidence and
5 requires a new trial. *See, e.g., Rosario v. Livaditis*, 963 F.2d 1013, 1020–21 (7th Cir. 1992)
6 (reversing jury’s zero damages award on RICO claim where liability was established and jury
7 awarded over \$600,000 for separate claim “supported by identical facts”).

8 **II. The Court’s Ruling that Unjust Enrichment Damages for Breach of Contract Are**
9 **Not Coextensive with Unjust Enrichment Damages for Misappropriation of Trade**
10 **Secrets Was in Error and Caused Prejudice to T-Mobile**

11 The Court’s erroneous jury instruction regarding damages for breach of contract
12 separately requires a new trial. Before trial, the parties disputed whether T-Mobile could recover
13 a reasonable royalty for Huawei Device USA’s breach of contract. T-Mobile argued that a
14 reasonable royalty is available as one measure of damages for breach of contract, and explained
15 that the reasonable royalty analysis considers the scope of the license the defendant wrongly
16 appropriated, including the value of disclosing confidential information to third parties such as
17 the defendant’s related corporate entities. Dkt. 351 at 15–16. In opposition, Huawei argued that
18 a reasonable royalty is not available at all for breach of contract in this case. Dkt. 357 at 16; Dkt.
19 382 at 8. After extensive briefing by the parties, the Court correctly ruled that the jury could
20 award a reasonable royalty for Huawei’s breach of the two contracts governed by Washington
21 law. Dkt. 400 at 5–6 (citing *Veritas*, 2008 WL 7404617, at *4). In so ruling, however, the Court
22 stated—without citation to legal authority, and unprompted by either party—that because
23 “Huawei China is neither a party to this dispute nor a signatory to the MSA,” “unless T-Mobile
24 can establish that Huawei USA is responsible for Huawei China’s unjust enrichment *as a matter*
25 *of contract law*, then its contractual remedies must be limited accordingly.” *Id.* at 6 (emphasis in
26 original).
27

1 There is no basis in Washington law or in logic for distinguishing between the reasonable
2 royalty analysis in the misappropriation and breach of contract contexts, and therefore no reason
3 why Huawei China’s status as “neither a party to this dispute nor a signatory to the MSA” should
4 have precluded the jury from considering the full scope of the license Huawei Device USA
5 assumed when it breached its agreements with T-Mobile to enrich itself and its affiliates. Yet, at
6 the charge conference, Huawei erroneously insisted that the Court’s proposed jury instructions
7 be altered so that a reasonable royalty recovery for breach of contract would “be limited to any
8 benefits to Huawei Device USA, specifically.” 5/11/17 Charge Conf. Tr. at 23:14–16.
9 Thereafter, in its final jury instructions, the Court added language stating that “[b]ecause Huawei
10 Device China was not a signatory to the Handset and Accessory Supply Agreement or the Clean
11 Room Letter, unjust enrichment damages on T-Mobile’s contract claim must be measured
12 according to any *unjust enrichment conferred on Huawei Device USA*.” Dkt. 476 at 33
13 (Instruction No. 29) (emphasis added).

14 The Court’s improper conclusion regarding the scope of a reasonable royalty for breach
15 of contract is inconsistent with state law. In calculating a reasonable royalty for Huawei Device
16 USA’s breach of its non-disclosure agreements and improper disclosure to its corporate
17 affiliates, it is irrelevant whether those affiliates were signatories to the agreements in question.
18 “[C]ontract damages protect a party’s ‘expectation interests.’” *Veritas*, 2008 WL 7404617, at *4
19 (citation omitted). Here, T-Mobile—based on its agreements with Huawei Device USA—“had
20 the reasonable expectation that [Huawei Device USA] would not breach the contract by *using*
21 [T-Mobile’s] confidential information” to teach Huawei’s affiliates how to build an illicit
22 copycat robot, and therefore, as in *Veritas*, T-Mobile had “the reasonable expectation of being
23 compensated for [Huawei Device USA’s] *use* of [T-Mobile’s] confidential information.” *See id.*
24 (emphases added). Because Huawei Device USA’s “use” included disclosure to its related
25 corporate affiliates that could (and did) exploit the information for their own benefit, Washington
26 law permits the jury to award a reasonable royalty that measures the price of a hypothetical
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1 license that would have allowed such use. *See id.* at *2–3. Whether the affiliates who were put
2 in a position to benefit from Huawei Device USA’s unauthorized disclosure of T-Mobile’s
3 confidential information were signatories to the breached agreements is irrelevant.

4 On this point, then-Judge Neil M. Gorsuch’s opinion in *Storagecraft*, while rendered in
5 the misappropriation context, applies with full force to T-Mobile’s contract claim: Huawei
6 Device USA’s impermissible *use* of confidential information—in violation of its contract—had a
7 value that can be measured by a reasonable royalty, and that royalty analysis must take into
8 account the value of a license broad enough to cover disclosure to and use by Huawei’s corporate
9 affiliates. In *Storagecraft*, the Tenth Circuit held that a plaintiff was entitled to \$2.92 million in
10 reasonable royalty damages where the defendant “never used the secret for his own personal
11 profit,” but disclosed the secret to a non-party competitor. 744 F.3d at 1185. The plaintiff
12 argued that in misappropriating the secret and sharing it with a competitor, the defendant
13 “effectively *assumed for himself a license* to reveal the trade secret to [the] competitor” and
14 therefore “*should pay a royalty reflecting that much*,” whether or not the defendant *or* the
15 competitor had yet commercially used or profited from the secret. *Id.* at 1186 (emphases added).
16 The court agreed, concluding that disclosing a trade secret to a competitor is a “particular kind of
17 use,” and, even if the defendant never profited from the disclosure, the jury was entitled to “issue
18 an award premised on an understanding that the license [the defendant] assumed allowed him the
19 right to share the trade secret” *Id.* at 1190.

20 Here, Huawei Device USA’s *own witnesses* confirmed that it shared T-Mobile’s
21 confidential information with its affiliates, including Huawei Device China. *See, e.g.,* 4/27/17
22 Trial Tr. at 51:1–8, 179:3–10 (Yao); 5/5/17 Trial Tr. at 24:17–19, 69:17–22 (Cui); *see also* PTX
23 1898 (sealed) at 7 (Row 6), 9 (Rows 1, 2, 4), 10 (Rows 8, 9) (comparing Huawei’s
24 xDeviceRobot with T-Mobile’s robot technology, and asking for photos of T-Mobile’s
25 technology). The documentary evidence presented at trial also showed that Huawei Device USA
26 repeatedly and systematically leveraged its access to T-Mobile’s laboratory to obtain and provide
27

1 its affiliates with valuable confidential information regarding T-Mobile’s proprietary robotic
2 technology. *See, e.g.*, Trial Ex. 1924 at 6.

3 Once the Court correctly concluded that Washington law permits T-Mobile to recover a
4 reasonable royalty for breach of contract, that should have been the end of the matter—just as for
5 trade secret misappropriation, the Court should have instructed the jury that it could award a
6 reasonable royalty for breach of the relevant agreements, and left the jury to follow the Court’s
7 other instructions (Nos. 27 and 28) regarding the determination of a reasonable royalty. Had the
8 Court done so, the jury would have properly calculated a reasonable royalty and awarded a sum
9 commensurate with the full scope of the license Huawei Device USA wrongfully assumed for
10 itself—including the ability to disclose T-Mobile’s confidential information to its affiliates, for
11 their benefit.

12 Instead, through the language it added to Instruction No. 29, the Court erroneously
13 distinguished the reasonable royalty analysis for breach of contract from that for trade secret
14 misappropriation, and wrongly implied that the “unjust enrichment conferred on Huawei Device
15 USA” as a result of Huawei Device USA’s breach of contract could not include the full value of
16 the license that Huawei Device USA assumed when it instructed its affiliates how to build a
17 copycat robot.⁴ Huawei’s counsel took full advantage of the misleading instruction, arguing in
18 closing that the jury’s reasonable royalty award for breach of contract must be “measured
19 according to any unjust enrichment conferred on Huawei Device USA, *to the exclusion of any*
20 *other Huawei entity*,” and stated that the jury was “not allowed, by that instruction, to *confer*
21 *unjust enrichment from all of these other entities*.” 5/15/17 Trial Tr. at 137:22–138:12 (Huawei
22 Closing) (emphases added). The instruction thus prejudiced T-Mobile by effectively imposing a
23 limitation on breach of contract recovery that finds no support in Washington law. A new trial is

24 ⁴ Counsel has found no Washington authority holding that the reasonable royalty analysis for breach of
25 contract should be different from the reasonable royalty analysis for trade secret misappropriation. Dkt. 400 at 5–6.
26 Should the Court disagree that a new trial should be ordered, T-Mobile requests that the Court defer entry of final
27 judgment, and first certify this question to the Washington Supreme Court, pursuant to the Federal Court Local Law
Certificate Procedure Act. *See* Wash. Rev. Code § 2.60.020 (1965).

1 required to remedy this error. *See Rathke v. Roberts*, 207 P.2d 716, 727 (Wash. 1949)
 2 (remanding for new trial on breach of contract claim due to erroneous instructions); *see also*
 3 *White v. Ford Motor Co.*, 312 F.3d 998, 1020 (9th Cir. 2002).

4 **III. The Jury’s Failure to Hold Huawei Liable for Breaching the MetroPCS Agreement** 5 **Is Against the Weight of the Evidence**

6 The jury’s finding that Huawei did not breach the MetroPCS Supply Agreement conflicts
 7 with the weight of the evidence presented at trial. Despite this Court’s previous determination
 8 that Huawei breached the NDA and Clean Room Letter as a matter of law, and the jury’s
 9 subsequent determination that Huawei breached the Handset and Accessory Supply Agreement
 10 (Dkt. 484 at 3), the jury concluded that Huawei *did not* breach the MetroPCS Supply Agreement.
 11 That finding is inexplicable given that the same conduct formed the basis for all breaches, and
 12 that the MetroPCS Supply Agreement’s confidentiality protections are as broad—and in some
 13 respects broader—than the corresponding provisions in the Handset and Accessory Supply
 14 Agreement. *See, e.g., Greenleaf v. Garlock, Inc.*, 174 F.3d 352, 367 (3rd Cir. 1999) (on a motion
 15 for new trial, “the record must be evaluated in light of the fact that the jury found for the plaintiff
 16 against [other similarly situated defendants]” on the basis of “virtually identical evidence”);
 17 *compare* PTX 952 at 19–20 (Article XIV) *with* PTX 953 at 39–40 (Section 9.4).⁵

18 The evidence establishing that Huawei’s conduct violated the MetroPCS Supply
 19 Agreement was so overwhelming that Huawei did not even attempt to harmonize that conduct
 20 with the terms of the agreement. Instead, Huawei’s only argument was that it should escape
 21 liability because there was purportedly no evidence that the agreement was assigned by
 22 Futurewei, the original signatory, to Huawei. 5/15/17 Trial Tr. at 137:15–18 (Huawei Closing)
 23 (“There was no evidence that it was assigned to Huawei Device USA or anybody.”); *id.* at

24 ⁵ For example, both agreements prohibit the use of a counterparty’s confidential information except to
 25 perform obligations contemplated by the agreements. *See* PTX 952 at 20 (Section 14.2(b)); PTX 953 at 40 (Section
 26 9.4.1). But while the Handset and Accessory Supply Agreement does not specify which employees of a party can
 27 access confidential information, (PTX 953 at 39–40 (Section 9.4.1)), the MetroPCS Supply Agreement permits
 disclosure only to employees who have “a need to know.” PTX 952 at 20 (Section 14.2(a)).

1 142:23–143:5 (“Again, there’s no evidence that either of those contracts were ever assigned from
2 Futurewei, assigned by Futurewei.”). But an affirmative assignment was not necessary because a
3 change in corporate control did not terminate the agreement, and the successors to the signatories
4 became parties to the contract by operation of law. *See* PTX 952 at 18 (Section 12.2). And the
5 only evidence offered at trial established that Huawei was Futurewei’s successor-in-interest to
6 the contracts signed by Futurewei, and therefore bound by those contracts. *See* 5/4/17 Trial Tr.
7 at 146:24–147:10 (Mr. Cui confirming his understanding that the MSA between Futurewei and
8 T-Mobile was an agreement between Huawei and T-Mobile); *see also* 4/26/17 Trial Tr. 25:17–
9 19, 30:8–24 (Mr. Young testifying T-Mobile purchased MetroPCS in 2013 and Futurewei was
10 the predecessor-in-interest to Huawei Device USA); 4/26/17 Trial Tr. 49:7–11 (Huawei’s
11 counsel stating in his question to Mr. Young, “Futurewei which ultimately became Huawei
12 Device USA”); Dkt. 348 at 3 (parties’ proposed joint pretrial order acknowledging as an
13 admitted fact that Huawei Device USA “is a successor to Futurewei Technologies, Inc.”).
14 Huawei presented no evidence to the contrary.

15 Moreover, at the summary judgment phase, the Court rejected the mirror image of
16 Huawei’s trial argument when it rejected Huawei’s prior argument that *T-Mobile* was not a party
17 to the MetroPCS agreement because there was no explicit assignment from MetroPCS to
18 T-Mobile. *See* Dkt. 334 at 18. There, the Court found T-Mobile showed that it “assumed all of
19 MetroPCS’ liabilities by operation of law when the two entities merged.” *Id.* at n.1. The same
20 principle applies to Huawei Device USA, which the trial evidence uniformly established was
21 Futurewei’s successor-in-interest. And lest there be any doubt, the Court stated in that same
22 order that the “MetroPCS Agreement is a contract *with Huawei USA*” *Id.* (emphasis added).
23 Thus, the jury’s finding of no liability was necessarily against the weight of the evidence
24 (indeed, against the law of the case) and compels a new trial. *See Greenleaf*, 174 F.3d at 367
25 (reversing lower court’s denial of a new trial, and holding: “Given the evidence that the jury
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1 must have credited in returning the verdicts against [two liable defendants], we can find no
2 rational explanation for the jury's failure to find the [non-liable defendants] liable as well.”).

3 **IV. The Jury Must Be Properly Instructed Regarding Willful and Malicious Conduct at**
4 **a Retrial**

5 The Court erroneously instructed the jury that to find Huawei's conduct to be “willful”
6 and “malicious” under WUTSA, it must conclude Huawei acted with “ill will,” “spite,” or “for
7 the purpose of injuring [T-Mobile].” Dkt. 476 at 35 (Instruction No. 31). Washington law
8 imposes no such requirement.

9 Where, as here, key statutory terms are not defined, Washington courts resort to
10 dictionary definitions for clarification. *State v. Cooper*, 128 P.3d 1234, 1236 (Wash. 2006) (en
11 banc). For example, in considering *the same* WUTSA provision at issue here, the Washington
12 Court of Appeals relied upon Black's Dictionary to define “malicious” as “[s]ubstantially certain
13 to cause injury” or “[w]ithout just cause or excuse,” without imposing any requirement of ill
14 will, spite, or intent to injure. *Petters*, 210 P.3d at 1058 (quoting Black's Law Dictionary (8th
15 ed. 2004)); *see also Kassa Ins. Servs. v. Pugh*, 180 Wash. App. 1051, *5 (2014) (unpublished)
16 (same).

17 And numerous other Washington courts have affirmed exemplary damages awards under
18 WUTSA where there was *no* evidence of “ill will,” “spite,” or an intent “to injure.” For
19 example, the Washington Supreme Court, in *Boeing Co. v. Sierracin Corp.*, affirmed an
20 exemplary damages award under WUTSA for “willful” and “malicious” conduct where the
21 record indicated only that the defendant “knew its actions to be of dubious legality,” “engaged in
22 a massive effort to disguise its copying of [plaintiff's] drawings,” and “[t]he trial court did not
23 believe that [defendant] ever entertained any honest doubt as to the legality of its conduct, but
24 took a calculated risk and lost.” 738 P.2d 665, 680–81 (Wash. 1987) (en banc). The Washington
25 Court of Appeals similarly affirmed a trial court's finding of willful and malicious conduct under
26 WUTSA despite no evidence of ill will, spite, or an intent to injure plaintiff. *Staff Builders*
27 *Home Healthcare, Inc. v. Whitlock*, 33 P.3d 424, 426 (Wash. Ct. App. 2001). Overwhelming

1 evidence showed repeated and systematic theft of T-Mobile’s trade secrets, followed by
2 deception and lies to conceal the nature and scope of Huawei’s wrongful conduct—such
3 evidence more than satisfies the *Boeing* test for willful and malicious conduct.

4 Here, the Court rejected T-Mobile’s proposed instruction (*see* Dkt. 461 at 13–14) which
5 stated that “[i]t is not necessary that actual malice in the sense of personal ill will exist.” *See*
6 *McCormack & Dodge Corp. v. ABC Mgmt. Sys., Inc.*, 1983 WL 51859, at *7 (Wash. Super. Dec.
7 22, 1983) (jury found misappropriation to be “willful and malicious” when properly instructed
8 that “[i]t is not necessary that . . . personal ill will exist”). Absent the Court’s erroneous
9 instruction, the jury could not have failed to find willful and malicious conduct in this case. The
10 jury should be properly instructed at a retrial.

11 **CONCLUSION**

12 For the foregoing reasons, T-Mobile respectfully requests that the Court grant a new trial
13 on both liability and damages for Huawei’s trade secret misappropriation and breach of contract.
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1 DATED this 19th day of June, 2017.

2
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CERTIFICATE OF SERVICE

I hereby certify that on the 19th day of June, 2017, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to all counsel of record.

DATED this 19th day of June, 2017.

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