

IN THE UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF TEXAS  
DALLAS DIVISION

TRUSEAL TECHNOLOGIES, INC.,	§	
	§	
Plaintiff,	§	
	§	
v.	§	Civil Action No. 3:08-CV-1836-N
	§	
GGK DISTRIBUTION, LLC, <i>et al.</i> ,	§	
	§	
Defendants.	§	

**ORDER**

This Order addresses Plaintiff Truseal Technologies, Inc.’s (“Truseal”) motion for summary judgment on damages for patent infringement [56]. Because Truseal has established that it has suffered \$171,157.64 in lost-profit damages due to Defendant GGK Distribution, LLC’s (“GGK”) patent infringement, the Court grants Truseal’s motion. The Court also awards Truseal prejudgment interest.

**I. ORIGINS OF TRUSEAL’S MOTION**

Truseal was awarded U.S. Patent No. 6,355,328 (“328 Patent”) for its Edgetherm window product. *See* Order, Mar. 16, 2011, at 1 [50]. On March 16, 2011, the Court found that GGK infringed on Truseal’s ‘328 Patent and granted summary judgment for Truseal on its infringement claims. *See id.*

Truseal now moves for summary judgment as to damages for GGK’s infringement.<sup>1</sup>

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<sup>1</sup>The Court granted Truseal leave to file a motion for summary judgment regarding damages on November 4, 2011 [58].

See Pl.'s Mem. Supp. Mot. Summ. J. [60] (hereinafter "Pl.'s Mot. Summ. J."). Truseal argues that GGK should compensate it for the lost profits it would have made on its '328 Patent "but for" GGK's infringement. See *id.* at 1-3. Truseal claims that these lost profits total \$171,157.64. See *id.* It provides affidavits from Todd R. Tucker, counsel for Truseal, and August J. Coppola, former president of Truseal and current Senior Vice President of Quanex Building Products Corporation, to support this contention. See App. to Pl.'s Mot. Summ. J. 5-6, 17-18 [60-1] (hereinafter "Pl.'s App.").<sup>2</sup> GGK has not responded to Truseal's motion for summary judgment.

## II. APPLICABLE LEGAL STANDARDS

### A. Summary Judgment

Courts "shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." FED. R. CIV. P. 56(a); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986). In making this determination, courts must view all evidence and draw all reasonable inferences in the light most favorable to the party opposing the motion. *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962).

The moving party bears the initial burden of informing the court of the basis for its belief that there is no genuine issue for trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323

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<sup>2</sup>Truseal has also provided documents evidencing GGK's purchase and sale of infringing products from Beijing Huali Architecture Decoration Co., Ltd., an entity against which Truseal obtained a default judgment for patent infringement of the '328 Patent. See *Truseal Techs., Inc. v. Beijing Hulali Architecture Decoration Co.* ("Beijing Hulali Architecture"), 2010 WL 5387585, at \*1 (D. Nev. 2010).

(1986). Once the movant has made this showing, the burden shifts to the nonmovant to establish that there is a genuine issue of material fact such that a reasonable jury might return a verdict in its favor. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986). Courts, however, need not sift through the record in search of triable issues. *Adams v. Travelers Indem. Co. of Conn.*, 465 F.3d 156, 164 (5th Cir. 2006). Indeed, if a “[party] fail[s] to respond to a [ ] motion for summary judgment, the inquiry must be whether the facts presented by the [moving party] create an appropriate basis to enter summary judgment against the [nonmoving party].” *Id.* at 164.

### ***B. Lost Profit Damages for Patent Infringement***

“Upon finding for the claimant, the court shall award . . . damages adequate to compensate for the infringement, but in no event less than a reasonable royalty for the use made of the invention by the infringer.” 35 U.S.C. § 284. Courts will award lost profits for infringement if two conditions regarding causation are met: (1) the claimant patentee demonstrates that “but for” the infringement, it would have made the sales that the infringer instead made – the direct causation element – and (2) the asserted harm was reasonably foreseeable – the proximate cause element. *See* ROGER E. SCHECTER & JOHN R. THOMAS, INTELLECTUAL PROPERTY: THE LAW OF COPYRIGHTS, PATENTS AND TRADEMARKS § 22.2.2, at 512 (2003); *see also, e.g., Rite-Hite Corp. v. Kelley Co.*, 56 F.3d 1538, 1545 (Fed. Cir. 1995) (en banc) (detailing both elements); *Kearns v. Chrysler Corp.*, 32 F.3d 1541, 1551 (Fed. Cir. 1994) (detailing direct causation element).

The standards for direct causation and proximate cause in patent damages cases are

well established. A claimant may show direct causation under the standard set forth in *Panduit Corp. v. Stahl Bros. Fibre Works, Inc.*, 575 F.2d 1152, 1156 (6th Cir. 1978). The claimant must show (1) that there was demand for the patented product, (2) an absence of noninfringing substitutes, (3) the claimant's manufacturing and marketing capability to exploit the demand for the patented product, and (4) the amount of profit the claimant, as the patent owner, would have made absent the infringement. *See id.*; *see also, e.g., Rite-Hite*, 56 F.3d at 1545; *Kearns*, 32 F.3d at 1551; *Versata Software Inc. v. SAP Am., Inc.*, 2011 WL 4017941 (E.D. Tex. 2011).<sup>3</sup> Once the claimant establishes a reasonable probability of direct causation, "the burden shifts to the . . . infringer to show that [the claimant's direct causation claim] is unreasonable for some or all of the lost sales." *Grain Processing Corp. v. Am. Maize-Prods. Co.*, 185 F.3d 1341, 1349 (Fed. Cir. 1999) (quotation and citation omitted); *see also Rite-Hite*, 56 F.3d at 1545, 1548.

To show proximate cause, the claimant must show that the harm was reasonably foreseeable, rather than remote, removed, or indirect. *See Rite-Hite*, 56 F.3d at 1545-47; SCHECTER & THOMAS, *supra*, at § 22.2.2, at 512. "If a particular injury was or should have been reasonably foreseeable by an infringing competitor in the relevant market, broadly

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<sup>3</sup>Though use of the *Panduit* factors is the most prevalent test for direct causation in patent cases, it is not the only method of proving lost profits; rather "the methodology of assessing and computing damages is committed to the sound discretion of the district court." *King Instruments Corp. v. Perefo*, 65 F.3d 941, 952 (Fed. Cir. 1995) (quotation omitted); *see also, e.g., Micro Chem., Inc. v. Lextron, Inc.*, 318 F.3d 1119, 1122 (Fed. Cir. 2003).

defined, that injury is generally compensable absent a persuasive reason to the contrary.”  
*Rite-Hite*, 56 F.3d at 1546.

### III. THE COURT GRANTS SUMMARY JUDGMENT FOR TRUSEAL

Truseal has satisfied both causation elements. First, it has provided evidence demonstrating direct causation under the *Panduit* factors. August Coppola, who is responsible for marketing and selling Truseal’s products, stated in his sworn affidavit that “there is substantial demand for the products covered by the patent-in-suit,” and that “Truseal has a manufacturing and marketing capacity sufficient to meet the substantial demand.” Pl.’s App., August J. Coppola Decl. ¶ 5 [60-1] (hereinafter “Coppola Decl.”). Truseal also claims “an absence of acceptable, non-infringing alternatives,”<sup>4</sup> Pl.’s Mot. Summ. J. 3, and \$171,157.64 in lost-profit damages. In support of this amount, Truseal provides evidence, in the form of sales documents and affidavits, that GGK sold 2,011,253.28 feet of infringing product. *See* Pl.’s Mot. Summ. J. 1; Pl.’s App., Tucker Decl. ¶¶ 4-5 [60-1] (hereinafter “Tucker Decl.”). This evidence shows that, during GGK’s infringement, (1) Truseal sold

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<sup>4</sup>Truseal has not provided summary judgment evidence in support of this claim. However, GGK has not created a fact issue because it has failed to respond and rebut Truseal’s assertion. Furthermore, “a patentee need not negate every possibility that the purchaser might not have purchased a product other than its own, absent the infringement” – that is, “a patentee need only show that there was a reasonable probability that the sales would have been made ‘but for’ the infringement.” *Rite-Hite*, 56 F.3d at 1545 (citing *Kaufman, Co. v. Lantech, Inc.*, 926 F.2d 1136, 1141 (Fed. Cir. 1991)). Absent any claim or argument to the contrary, Truseal’s motion – signed and filed under Federal Rule of Civil Procedure 11 – suffices to satisfy Truseal’s burden under the second *Panduit* factor.

products covered by the patent for approximately \$0.23 per foot, *see* Pl.’s Mot. Summ. J. 1; Tucker Decl. ¶ 6; Coppola Decl. ¶ 3, and (2) that these products typically have a thirty-seven percent (37%) margin, *see* Pl.’s Mot. Summ. J. 1; Tucker Decl. ¶ 6; Coppola Decl. ¶ 3. Applying this margin to GGK’s infringing activity yields \$171,157.64 in lost profit. *See* Pl.’s Mot. Summ. J. 1.

Additionally, the summary judgment evidence establishes that Truseal’s proposed lost-profit damage amount was objectively foreseeable. GGK could reasonably foresee that Truseal would suffer damages from its infringement equal to the price of the amount of product it could have sold “but for” GGK’s infringement. *See Rite-Hite*, 56 F.3d at 1546 (“Being responsible for lost sales of a competitive product is surely foreseeable; such losses constitute the full compensation set forth by Congress, as interpreted by the Supreme Court, while staying well within the traditional meaning of proximate cause.”).

#### CONCLUSION

Truseal has established that it has suffered \$171,157.64 in lost-profit damages due to GGK’s infringement. Accordingly, the Court grants Truseal’s motion for summary judgment and orders GGK to compensate Truseal for its infringement in the amount of its claimed lost profit: \$171,157.64. *See Beijing Hulali Architecture*, 2010 WL 5387585, at \*1-2 (awarding Truseal damages for lost profits based on what appears to be nearly the same evidence Truseal provided in this case).

The Court also orders GGK to pay Truseal prejudgment interest<sup>5</sup> from May 6, 2008

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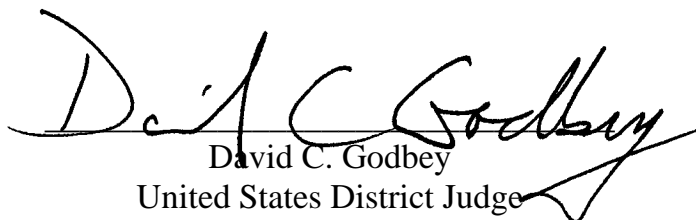
<sup>5</sup>Under 35 U.S.C. § 284, “[u]pon finding for the claimant the court shall award the claimant damages adequate to compensate for the infringement, . . . together with interest . . . as fixed by the court.” An award of prejudgment interest is not mandatory but rather is within the discretion of the court. *See General Motors Corp. v. Devex Corp.*, 461 U.S. 648, 656-57 (1983). However, “prejudgment interest should be awarded under § 284 absent some justification for withholding such an award.” *Id.* at 657.

Courts have “broad discretion to set the appropriate prejudgment interest rate,” *Mars, Inc. v. Coin Acceptors, Inc.*, 513 F. Supp. 2d 128, 132 (D.N.J. 2007) (citation omitted); *see, e.g., Kaufman*, 926 F.2d at 1144 (“The ascertainment of the prejudgment interest rate is within the sound discretion of the district court.”), and to determine the method of compounding, *see, e.g., Devon Distributing Corp. v. Miner*, 525 F. Supp. 2d 1089, 1097 (S.D. Iowa 2007) (citing *Datascope Corp. v. SMEC, Inc.*, 879 F.2d 820, 829 (Fed. Cir.1989)). However, most courts use either the Treasury Bill rate or the prime rate “as a rough estimation of what the infringed patent holder could have earned, or could have avoided paying, respectively,” *Mars, Inc.*, 513 F. Supp. 2d at 133, and most courts compound prejudgment interest, *see id.* at 137 (noting that most courts compound prejudgment interest “[b]ecause a patentee’s damages include the forgone use of money, [and] compounding is needed to account for the time value of money” and collecting cases); 7-20 DONALD S. CHISUM, CHISUM ON PATENTS § 20.03, at 325-26.

Truseal did not brief prejudgment interest and therefore did not provide the Court with a proposed rate or compounding method. *See* Pl.’s Mot. Summ. J. 3. Therefore, the Court, in its discretion, calculates prejudgment interest using the Treasury Bill rate – currently a 0.20% annual interest rate – compounded annually. *See* POST JUDGMENT RATE, U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS (week of 3/19/12 - 3/25/12), <http://www.txnd.uscourts.gov/publications/pjrate.html>; *see also, e.g., Laitram v. Corp. v. NEC Corp.*, 115 F.3d 947, 955 (Fed. Cir. 1997) (affirming district court’s use of Treasury Bill rate for prejudgment interest because “district court found that there was no evidence that [patentee] borrowed money at a higher rate, what that rate was, or that there was a causal connection between any borrowing and the loss of the use of the money awarded as a result of [defendant’s] infringement” and defendant did not show clear error in those findings); *Mars, Inc.*, 513 F. Supp. 2d at 136-37 (using the Treasury Bill rate because (1) the Treasury Bill rate is sensible absent evidence the patentee is entitled to a better rate, (2) using the Treasury Bill rate avoided speculation about possible higher-yielding but risky investments, and (3) the Treasury Bill rate is the statutorily prescribed measure for post judgment interest, and compounding interest to account for the time value of money); *Transocean Offshore Deepwater Drilling, Inc. v. GlobalStantaFe Corp.*, 2006 WL 3227315, at \*6 (S.D. Tex.

– the date on which GGK received the infringing material, *see* Pl.’s App. 8-15 – to the date of this Order,<sup>6</sup> of \$1,332.01, for a total award of **\$172,489.65**.

Signed March 21, 2012.

  
David C. Godbey  
United States District Judge

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2006) (“Because [patentee] has failed to demonstrate that the prime rate or a higher rate is necessary to fully compensate it for [defendant’s] infringement, the court concludes that the prejudgment interests should be based on the three-month [Treasury Bill rate].”); CHISUM, *supra*, at § 20.03, at 325-26 & n.75 (collecting Federal Circuit cases affirming annual compounding).

<sup>6</sup>A period of 3.88 years. As the Supreme Court has explained, “[a]n award of interest from the time that the royalty payments would have been received merely serves to make the patent owner whole, since his damages consist not only of the value of the royalty payments but also of the foregone use of the money between the time of infringement and the date of the judgment.” *Devex*, 461 U.S. at 655-56.