

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

MARTIN FLEISHER, AS TRUSTEE OF THE) Case No. 11-CV-8405 (CM)
MICHAEL MOSS IRREVOCABLE LIFE)
INSURANCE TRUST II and JONATHAN)
BERCK, AS TRUSTEE OF THE JOHN L.)
LOEB, JR. INSURANCE TRUST, on behalf)
of themselves and all others similarly situated,)
)
Plaintiffs,)
)
v.)
)
PHOENIX LIFE INSURANCE COMPANY,)
)
Defendant.)
)

SPRR LLC, on behalf of itself and all others) Case No. 14-CV-8714 (CM)
similarly situated,)
)
Plaintiffs,)
)
v.)
)
PHL VARIABLE INSURANCE COMPANY,)
)
Defendant.)

DECLARATION OF ROBERT MILLS

I. INTRODUCTION

1. I am an economist and Director at Micronomics, Inc., an economic research and consulting firm located in Los Angeles, California. Micronomics, Inc. is a subsidiary of ERS Group, a national economic and statistical consulting firm.

2. I have more than 18 years of economic research and consulting experience in areas that include the valuation of intellectual property and other assets, industrial organization, and the calculation of economic damages. I have qualified as an expert on damages and I have provided expert testimony before United States District Courts, state courts, and at arbitration. A biographical summary is attached as Exhibit 1.

3. I am aware that Martin Fleisher, as Trustee of the Michael Moss Irrevocable Life Insurance Trust II; Jonathan Berck, as Trustee of the John L. Loeb, Jr. Insurance Trust; and SPRR LLC (collectively “plaintiffs”) entered into a Stipulation of Settlement with Phoenix Life Insurance Company and PHL Variable Insurance Company (collectively, “defendants”) concerning the above-captioned putative and/or certified class action lawsuits.¹ I have been asked by counsel for plaintiffs to calculate the value of the settlement fund contemplated by the Stipulation of Settlement.

II. VALUE OF SETTLEMENT FUND

4. Pursuant to the Stipulation of Settlement, defendants will establish a settlement fund totaling up to \$42,500,000, from which payments to eligible class members shall be made.² This settlement fund is subject to reduction for exclusions or “opt-outs.”³ Under the

1. Stipulation of Settlement, May 29, 2015.

2. Stipulation of Settlement, May 29, 2015, pp. 10-11.

3. Stipulation of Settlement, May 29, 2015, p. 22.

terms of the Stipulation of Settlement, the amount of any such reduction is measured based on the proportion of additional COI charges collected through March 31, 2015 for the policies subject to the opt-outs as compared to all policies in the settlement class.⁴

5. Using data provided by defendants, I have tabulated additional COI charges collected (i.e., COI charges that would not have been collected under the pre-adjustment COI rates) for policies in the settlement class through March 31, 2015. Of the 1,663 policies in the settlement class, I have identified 1,312 policies for which additional COI charges were collected. The total amount of additional COI charges collected for these 1,312 policies amounts to \$62,025,756.22 through March 31, 2015.

6. Counsel for plaintiffs has provided me with a list of policies owned by individuals or entities that have opted out of the settlement class. The opt-outs encompass 254 class policies in total, of which 209 paid a COI overcharge. Excluding these 209 opt-outs from the analysis, I have identified 1,103 policies remaining in the class for which additional COI charges were collected. The total amount of additional COI charges collected for these 1,103 policies amounts to \$50,729,510.03 through March 31, 2015.

7. Adjusting the maximum settlement fund of \$42,500,000 to account for opt-outs in accordance with the terms of the Stipulation of Settlement yields an adjusted settlement fund of 34,759,820.88.⁵ This adjusted settlement fund amounts to 68.5 percent of the additional COI charges collected through March 31, 2015 for policies that remain in the settlement class after accounting for opt-outs.⁶

4. Stipulation of Settlement, May 29, 2015, p. 22.

5. $\$34,759,820.88 = \$42,500,000 \times (\$50,729,510.03 / \$62,025,756.22)$.

6. $68.5\% = \$34,759,820.88 / \$50,729,510.03$.

8. I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct to the best of my knowledge.

Executed on August 19, 2015, at Los Angeles, California.



Robert Mills

EXHIBIT 1

MICRONOMICS
Economic Research & Consulting

Micronomics
Forty-Sixth Floor
777 South Figueroa Street
Los Angeles, California 90017
Tel: 213 629 2655
Fax: 213 688 8899
www.micronomics.com

ROBERT MILLS
Director

Robert Mills has extensive experience quantifying economic damages in connection with commercial litigation. He has served as an expert witness or consultant in a wide range of matters, including patent, trademark and copyright infringement, theft of trade secrets, breach of contract, interference, conversion, fraud, predatory pricing, attempted monopolization, and labor disputes. His consulting experience spans many industries, including software, semiconductors, telecommunications, manufacturing, apparel, insurance, energy, entertainment, waste, real estate, sporting goods, health care, pharmaceuticals, and medical devices, among others. Mr. Mills has testified as an economic expert in Federal District Court, state courts in multiple jurisdictions, and at arbitration. He has appeared at mediation venues and before the U.S. Department of Justice.

Mr. Mills also engages in economic research and consulting activities outside the context of litigation. He has assessed the anticipated competitive effects of mergers and joint ventures on behalf of government regulatory agencies and merging parties; developed forecasts and strategic recommendations for government agencies and clients involved with real estate development; and assisted clients with the valuation of intangible assets and entire businesses.

FIELDS OF CONCENTRATION

Intellectual Property; Industrial Organization; Economic Valuation and Damages Calculations

EMPLOYMENT

Micronomics, 1998 – present (affiliated with InteCap, Inc., 2000 – 2003)
Los Angeles, California

Hobson Johnson & Associates
Associate, 1996 – 1998
Portland, Oregon

University of California, Santa Barbara
Teaching Assistant, Department of Economics, 1994 – 1995
Santa Barbara, California

SELECTED CONSULTING EXPERIENCE

Economic Damages/Lost Profits

- Calculated lost profits on behalf of plaintiffs and defendants in connection with contract disputes, patent infringement, fraud, interference, antitrust, and other causes of action. Addressed lost sales, incremental cost, market definition, capacity, foreseeability, mitigation, and alter ego issues.
- Quantified relevant profits under disgorgement theories of damages.
- Determined magnitude of alleged underpayment of overtime to a class of exempt employees on behalf of a national retail chain.
- Quantified lost earnings and benefits in connection with wrongful termination and personal injury matters.
- Analyzed irreparable harm issues in connection with motions for temporary restraining orders and preliminary injunctions.

Intellectual Property

- Determined reasonable royalties and calculated lost profits in connection with patent infringement matters on behalf of patent owners and alleged infringers. Addressed royalty base, reasonable royalty rates, commercial success, non-infringing substitutes, availability, comparability, capacity constraints, convoyed sales, price erosion damages, and the entire market value rule.
- Calculated damages on behalf of clients involved with theft of trade secrets, trademark infringement, and copyright infringement litigation.
- Reviewed numerous license and cross-license agreements covering technologies related to telecommunications, semiconductors, software, sporting goods, medical devices, security, construction materials, motion control, and consumer products, among other industries.
- Assisted with the negotiation of patent license agreements.

Valuation

- Valued controlling and minority interests in closely held businesses. Addressed issues of liquidity, marketability, comparability, and the cost of capital.
- Valued stock options, earn-outs, and escrowed contingencies in connection with acquisitions and intellectual property transfers.

- Analyzed commercial and industrial real estate appraisals and made strategic recommendations to government agencies contemplating real estate transactions.

Antitrust

- Assessed the anticipated competitive effects of mergers, acquisitions, and joint ventures on behalf of government regulatory agencies as well as merging parties.
- Estimated anticipated post-merger prices using merger simulation techniques on behalf of a manufacturer of branded consumer products. Presented findings to U.S. Department of Justice.
- Conducted studies of market definition, attempted monopolization, below-cost pricing, price discrimination, and economic damages on behalf of plaintiffs and defendants involved with antitrust litigation.
- Evaluated price fixing allegations in the semiconductor industry.
- Analyzed relevant markets and economic damages in connection with a patent misuse claim.
- Conducted econometric analyses of pricing and output in a matter involving price fixing allegations.

Real Estate

- Assisted government agencies with eminent domain compensation issues.
- Prepared numerous feasibility studies and financial projections for income producing properties, including commercial, industrial, residential, and resort projects.
- Prepared forecasts of vacancy, absorption, rental rates, and new construction for financial institutions, government agencies, and real estate developers.
- Conducted study of student housing options on behalf of a university. Recommended adjustments to university housing rental rates and determined target rates for planned development.
- Recommended development strategies to numerous real estate developers. Addressed product size, mix, location, and other qualitative factors.
- Calculated damages caused by interference with development of a master planned community.

Cost-Benefit Analysis

- Estimated the economic, fiscal, and social impact of instituting system development fees for new real estate development.
- Assisted a multi-jurisdiction planning commission in assessing economic, fiscal and social impacts of anticipated demilitarization.
- Advised the developer of a major destination resort of the economic and fiscal impacts of the proposed project.
- Advised client of financial and other costs and benefits of relocating headquarters and manufacturing operations.
- Assessed the impact of a large retail establishment on small retailers located near its stores.
- Recommended development strategies to a port authority based on analysis of the costs and benefits of its options.

Econometrics

- Developed econometric models used to assess the competitive impacts of proposed mergers.
- Estimated own- and cross-price elasticity of demand for differentiated products in the baking industry.
- Prepared and evaluated revenue and earnings forecasts on behalf of plaintiffs and defendants involved with commercial litigation.
- Evaluated econometric models provided to a government regulatory agency by parties contemplating a merger.
- Developed econometric models used to measure the effects of economic events on the value of firms.
- Assisted clients with survey design, sampling, and hypothesis testing.

Risk Analysis

- Assisted law firms, corporate legal departments, and mediators with assessments of litigation risk and the expected value of litigation.
- Analyzed risk associated with litigation versus settlement in insurance claim disputes on behalf of insurers and insured parties.

RECENT TESTIMONY

1. *SimpleAir, Inc. v. Google, Inc., et al.*
United States District Court, Eastern District of Texas
Case No. 2:14-cv-00011
Patent Infringement
Reports, Deposition
2. *ZiiLabs, Inc., Ltd. v. Samsung Electronics Co., Ltd., et al.*
United States District Court, Eastern District of Texas
Case No. 2:14-CV-203
Patent Infringement
Report, Deposition
3. *DataQuill Limited v. ZTE Corporation, et al.*
United States District Court, Eastern District of Texas
Case No. 2:13-CV-634
Patent Infringement
Reports, Deposition, Trial
4. *Ahmed Hussein v. UBS Financial Services, Inc.*
FINRA Dispute Resolution
Case No. 14-00162
Breach of Contract
Reports, Trial
5. *Unwired Planet LLC v. Apple Inc.*
United States District Court, Northern District of California
Case No. 3:13-CV-04134-VC
Patent Infringement
Reports, Deposition
6. *AAMP of Florida, Inc. v. Automotive Data Solutions, Inc.*
United States District Court, Middle District of Florida
Case No. 8:13-CV-02019-MSS-TGW
Patent Infringement
Report, Deposition
7. *Malibu Boats, LLC v. Nautique Boat Company, Inc.*
United States District Court, Eastern District of Tennessee
Case No. 3:13-CV-00656
Patent Infringement
Reports, Deposition

8. *Sentius International, LLC v. Microsoft Corporation*
United States District Court, Northern District of California
Case No. 5:13-CV-825-PSG
Patent Infringement
Reports, Deposition
9. *Droplets, Inc. v. Overstock.com, Inc., et al.*
United States District Court, Eastern District of Texas
Case No. 2:11-CV-401
Patent Infringement
Reports, Deposition, Trial
10. *Smartflash, LLC, et al. v. Apple Inc., et al.*
United States District Court, Eastern District of Texas
Case Nos. 6:13-CV-447 and 6:13-CV-448
Patent Infringement
Reports, Depositions, Trial
11. *PersonalWeb Technologies, LLC, et al. v. Yahoo! Inc.*
United States District Court, Eastern District of Texas
Case No. 6:12-CV-00658-LED
Patent Infringement
Reports, Deposition
12. *Superspeed, LLC v. Google Inc.*
United States District Court, Southern District of Texas
Case No. 4:12-CV-01688
Patent Infringement
Report, Deposition
13. *Straight Path IP Group, Inc. v. Bandwidth.com, Inc., et al.*
United States District Court, Eastern District of Virginia
Case No. 1:13-CV-00932-AJT-IDD
Patent Infringement
Reports, Depositions
14. *The Quantum World Corporation v. Dell, Inc., et al.*
United States District Court, Western District of Texas
Case No. 1:11-CV-00688-SS
Patent Infringement
Report, Deposition

15. *Battle Toys, LLC v. Lego Systems, Inc.*
United States District Court, District of Delaware
Case no. 1:12-CV-00928-GMS
Patent Infringement
Reports, Deposition
16. *AAMP of Florida, Inc. v. Audionics Systems, Inc.*
United States District Court, Central District of California
Case No. 2:12-cv-10763-MMM-JEM
Patent Infringement
Report, Deposition
17. *Beneficial Innovations, Inc. v. Advance Publications, Inc., et al.*
United States District Court, Eastern District of Texas
Case No. 2:11-cv-229-TJW
Patent Infringement
Report, Deposition
18. *SimpleAir, Inc. v. Microsoft Corporation, et al.*
United States District Court, Eastern District of Texas
Case No. 2:11-cv-416
Patent Infringement
Report, Depositions, Trials
19. *Martin Fleisher, et al. v. Phoenix Life Insurance Company*
United States District Court, Southern District of New York
Case No. 11 Civ. 8405 (CM)
Breach of Contract
Reports, Deposition
20. *TracBeam, LLC v. AT&T Inc., et al.*
United States District Court, Eastern District of Texas
Case No: 6:11-cv-00096-LED
Patent Infringement
Reports, Depositions
21. *Lake Cherokee Hard Drive Technologies, LLC v. Bass Computers, Inc. et al.*
United States District Court, Eastern District of Texas
Case No.: 2:10-cv-216
Patent Infringement
Reports, Deposition, Trial

22. *MicroUnity Systems Engineering, Inc. v. Apple, Inc., et al.*
United States District Court, Eastern District of Texas
Case No.: 02:10-cv-91-LED-RP
Patent Infringement
Reports, Deposition
23. *Ecologic Solutions, LLC v. Bio-Tec Environmental, LLC, et al.*
Arbitration before American Arbitration Association
Case No. 76 117 Y 00325 10
Breach of contract, misappropriation of trade secrets, fraud
Report, Deposition
24. *Gustavo Naranjo, et al. v. Spectrum Security Services, Inc.*
Superior Court of the State of California
Case No. BC 372146
Violations of California Labor Code
Report, Deposition
25. *REC Software USA, Inc. v. Bamboo Solutions Corporation, et al.*
United States District Court, Western District of Washington
Case No. 2:11-cv-554-JLR
Patent Infringement
Report, Deposition
26. *Versata Software, Inc., et al. v. Internet Brands, Inc., et al.*
United States District Court, Eastern District of Texas
Civil Action No. 2:08-cv-313-WCB
Patent Infringement, Breach of Contract, Interference
Reports, Deposition, Trial
27. *Samuel D. Adams v. Bio-Tec Environmental, LLC, et al.*
Arbitration before American Arbitration Association
Case No. 76-174-00048-11 LGB
Breach of Contract, Misappropriation of Trade Secrets
Reports, Trial
28. *SimpleAir, Inc. v. AWS Convergence Technologies, Inc., et al.*
United States District Court, Eastern District of Texas
Case No. 2:09-cv-289 (CE)
Patent Infringement
Reports, Deposition

29. *Shane Malek, et al. v. GR Hair Solutions, LLC, et al.*
Arbitration before JAMS
Reference No. 1220041531
Breach of Contract
Report, Trial
30. *LML Patent Corp. v. JPMorgan Chase & Co., et al.*
United States District Court, Eastern District of Texas
Case No. 2:08-cv-448 DF
Patent Infringement
Report, Depositions
31. *Trent West v. Jewelry Innovations, Inc., et al.*
United States District Court, Northern District of California
Case No. C 07-1812 JF (HRL)
Patent Infringement
Report, Deposition
32. *Abstrax, Inc. v. Sun Microsystems, Inc., et al.*
United States District Court, Eastern District of Texas
Case No. 2:07-CV-333-(DF)(CE) and 2:07-CV-221-(DF)(CE)
Patent Infringement
Reports, Depositions
33. *One Industries, LLC v. Jim O'Neal Distributing, Inc.*
U.S. District Court, Central District of California
No. 06 CV 1133 JAH (AJB)
Trademark and Trade Dress Infringement
Report, Deposition

EDUCATION

M.A., Economics, University of California, Santa Barbara, 1995
M.S., Applied Economics, Portland State University, 1994
B.S., Economics and History, Portland State University, 1992

PAPERS/SPEECHES/PRESENTATIONS

- "Practical Elements of Finance," Practising Law Institute, New York, New York, June 13-14, 2011.

-
- “Regression Analysis Applications in Litigation,” (with Dubravka Tasic), chapter in *Pocket MBA: Finance for Lawyers*, Practising Law Institute, March 2011.
 - “Industry Norms and Reasonable Royalty Rate Determination,” (with Roy Weinstein and Michelle Porter), *les Nouvelles*, March 2008.
 - “Market Concentration and Unilateral Effects,” UCLA First Annual Institute on US and EU Antitrust Aspects of Mergers and Acquisitions, Ritz-Carlton Hotel, Marina Del Ray, California, February 28, 2004.
 - “Hot Topics in Intellectual Property Valuation,” California Mandatory Continuing Legal Education Program, Los Angeles, November 2000.
 - “Valuing Intellectual Property,” California Mandatory Continuing Legal Education Program, Los Angeles, July 2000.
 - “Unilateral Effects in Merger Analysis: The Simulation Approach,” for the Los Angeles County Bar Association, February 1999.

AFFILIATIONS

American Economic Association
Licensing Executives Society
American Bar Association, Intellectual Property Law Section, Associate Member