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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

MULTIMEDIA PATENT TRUST,

vs.

APPLE INC., et al.,

Plaintiff,

Defendants.

CASE NO. 10-CV-2618-H (KSC)

**ORDER DENYING
DEFENDANTS' DAUBERT
MOTION TO EXCLUDE MPT'S
INFRINGEMENT EXPERT'S
EQUIVALENCE ANALYSIS**

[Doc. No. 458]

On October 23, 2012, Defendants filed a Daubert motion to exclude MPT's infringement expert's equivalence analysis. (Doc. No. 458.) On November 6, 2012, MPT filed an opposition to Defendants' motion. (Doc. Nos. 572, 580.) On November 13, 2012, Apple and LG filed their reply. (Doc. No. 624.) A hearing on the matter is currently scheduled for November 20, 2012 at 9:00 a.m. The Court, pursuant to its discretion under Local Rule 7.1(d)(1), determines this matter is appropriate for resolution without oral argument and submits the motion on the parties' papers. For the reasons below, the Court **DENIES** Defendants' Daubert motion.

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BACKGROUND

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2 On December 20, 2010, Plaintiff Multimedia Patent Trust (“MPT”) filed a complaint
3 for patent infringement against Defendants Apple, Inc. (“Apple”), LG¹, and Canon.² (Doc. No.
4 1, Compl.) The complaint alleges that Defendants are liable for infringement of one or more
5 of four patents related to video compression technology: U.S. Patent Nos. 4,958,226 (“the ’266
6 Patent”), 5,227,878 (“the ’878 Patent”), and 5,136,377 (“the ’377 Patent”) (collectively the
7 “Patents-in-Suit”). (Id.) On March 21, 2011, Apple, LG, and Canon filed their answers.
8 (Doc. Nos. 38-39, 41.) On November 9, 2012, the Court granted Canon’s motion for summary
9 judgment of its affirmative defense of patent exhaustion, removing Canon as a Defendant from
10 this case. (Doc. No. 608 at 9-10.)

DISCUSSION

I. Legal Standard for a Daubert Motion to Exclude Expert Testimony

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13 A district court’s decision to admit expert testimony under Daubert in a patent case
14 follows the law of the regional circuit. Micro Chem., Inc. v. Lextron, Inc., 317 F.3d 1387,
15 1390-91 (Fed. Cir. 2003). When considering expert testimony offered pursuant to Rule 702,
16 the trial court acts as a “gatekeeper” by “making a preliminary determination of whether the
17 expert’s testimony is reliable.” Elsayed Mukhtar v. Cal. State Univ., Hayward, 299 F.3d 1053,
18 1063 (9th Cir. 2002); see Kumho Tire Co. v. Carmichael, 526 U.S. 137, 150 (1999); Daubert
19 v. Merrell Dow Pharms., Inc., 509 U.S. 579, 597 (1993). Under Rule 702 of the Federal Rules
20 of Evidence, a court may permit opinion testimony from an expert only if such testimony “will
21 assist the trier of fact” and “(1) the testimony is based upon sufficient facts or data, (2) the
22 testimony is the product of reliable principles and methods, and (3) the witness has applied the
23 principles and methods reliably to the facts of the case.”

24 “The test for reliability [of expert testimony] is flexible and depends on the discipline

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27 ¹ “LG” includes LG Electronics, Inc., LG Electronics U.S.A., Inc., and LG Electronics
Mobilecomm U.S.A., Inc.

28 ² “Canon” includes Canon U.S.A., Inc. and Canon, Inc.

1 involved.” Wagner v. Cnty. of Maricopa, 2012 U.S. App. LEXIS 23631, at *14 (9th Cir. Nov.
2 16, 2012). “Under Daubert, the district judge is ‘a gatekeeper, not a fact finder.’ When an
3 expert meets the threshold established by Rule 702 as explained in Daubert, the expert may
4 testify and the jury decides how much weight to give that testimony.” Primiano v. Cook, 598
5 F.3d 558, 564-65 (9th Cir. 2010); see also Micro Chem., 317 F.3d at 1392 (“When . . . the
6 parties’ experts rely on conflicting sets of facts, it is not the role of the trial court to evaluate
7 the correctness of facts underlying one expert’s testimony.”). “[T]he test under Daubert is not
8 the correctness of the expert’s conclusions but the soundness of his methodology.” Primiano,
9 598 F.3d at 564. “Shaky but admissible evidence is to be attacked by cross examination,
10 contrary evidence, and attention to the burden of proof, not exclusion.” Id. (citing Daubert,
11 509 U.S. at 594, 596); accord i4i Ltd. P’ship v. Microsoft Corp., 598 F.3d 831, 856 (Fed. Cir.
12 2010).

13 Whether to admit or exclude expert testimony lies within the trial court’s discretion.
14 GE v. Joiner, 522 U.S. 136, 141-42 (1997); United States v. Calderon-Segura, 512 F.3d 1104,
15 1109 (9th Cir. 2008). The Ninth Circuit has explained that “[a] trial court not only has broad
16 latitude in determining whether an expert’s testimony is reliable, but also in deciding how to
17 determine the testimony’s reliability.” Mukhtar v. Cal. State Univ., 299 F.3d 1053, 1064 (9th
18 Cir. 2002).

19 **II. Legal Standards for Infringement of Means-Plus-Function Claims**

20 A patent infringement analysis proceeds in two steps. Markman v. Westview
21 Instruments, Inc., 52 F.3d 967, 976 (Fed. Cir. 1995), aff’d 517 U.S. 370. In the first step, the
22 court construes the asserted claims as a matter of law. See id. In the second step, the
23 factfinder compares the claimed invention to the accused device. Id.; see also Verizon Servs.
24 Corp. v. Cox Fibernet Va., Inc., 602 F.3d 1325, 1340 (Fed. Cir. 2010) (“A determination of
25 infringement is a question of fact . . .”). “To prove literal infringement, the patentee must
26 show that the accused device contains every limitation in the asserted claims. If even one
27 limitation is missing or not met as claimed, there is no literal infringement.” Riles v. Shell
28 Exploration & Prod. Co., 298 F.3d 1302, 1308 (Fed. Cir. 2002) (quoting Mas-Hamilton Group

1 v. LaGard, Inc., 156 F.3d 1206, 1211 (Fed. Cir. 1998)).

2 Literal infringement of a means-plus-function claim “requires that the relevant structure
3 in the accused device perform the identical function recited in the claim and be identical or
4 equivalent to the corresponding structure in the specification.” Odetics, Inc. v. Storage Tech.
5 Corp., 185 F.3d 1259, 1267 (Fed. Cir. 1999). An accused structure is equivalent if it “performs
6 the claimed function in substantially the same way to achieve substantially the same result.”
7 Id. at 1267; see also Chiuminatta Concrete Concepts, Inc. v. Cardinal Indus., Inc., 145 F.3d
8 1303, 1309 (Fed. Cir. 1998) (“The proper test is whether the differences between the structure
9 in the accused device and any disclosed in the specification are insubstantial.”). In addition,
10 for literal infringement to be met, the accused “structural equivalent under § 112 [¶ 6] must
11 have been available at the time of the issuance of the claim.” Al-Site Corp. v. VSI Int’l, Inc.,
12 174 F.3d 1308, 1320 (Fed. Cir. 1999); accord Welker Bearing Co. v. PHD, Inc., 550 F.3d
13 1090, 1099-1100 (Fed. Cir. 2008).

14 **III. Analysis**

15 Defendants first argue that Dr. Richardson’s equivalent structure infringement analysis
16 should be excluded because Dr. Richardson fails to provide any analysis stating that the
17 allegedly equivalent structures were available at the times the ’377 Patent, the ’226 Patent, and
18 the ’878 Patent issued. (Doc. No. 458-1 at 2-3.) In response, MPT argues that Dr. Richardson
19 has adequately provided evidence indicating that the technology embraced by the allegedly
20 equivalent structures was developed by the time the patents issued. (Doc. No. 596 at 1-4.)

21 Dr. Richardson’s infringement expert reports state that the use of integrated circuits to
22 implement video coding and encoding functionality was well known in the art by at least 1988.
23 (Doc. No. 596-1, Declaration of Bruce Zisser Ex. 1 at 40-41, Ex. 2 at 330-31.) In reply,
24 Defendants argue that this statement is insufficient because the accused equivalent structures
25 are not merely integrated circuits capable of implementing video coding generally, but rather
26 integrated circuits capable of implementing the algorithms or functions which are alleged to
27 be equivalent. (Doc. No. 624 at 3-5.) Defendants then argue that some of the allegedly
28 equivalent structures arose after the issuance of the patents. (Id. at 4.) Here, the structure that

1 MPT alleges is equivalent to the claimed structure is a decoder with integrated circuits. Dr.
2 Richardson has provided analysis concluding that the use of integrated circuits to implement
3 video coding and encoding functionality was well known in the art by at least 1988, prior to
4 the issuance of the Patents-in-Suit. (Doc. No. 596-1, Declaration of Bruce Zisser Ex. 1 at 40-
5 41, Ex. 2 at 330-31.) Defendants contest these facts, but disagreement with an expert's version
6 of the facts is not a proper basis to exclude his testimony under Daubert. See Micro Chem.,
7 317 F.3d at 1392. Rather, the proper course for contesting Dr. Richardson's testimony would
8 be through vigorous cross-examination and the presentation of Defendants' competing
9 infringement theory through their own expert witness. See id.; Primiano, 598 F.3d at 564.

10 Defendants also argue that Dr. Richardson's infringement analysis is insufficient
11 because he fails to provide any facts or analysis to support his assertions that the accused
12 structures are equivalent to the structures in the asserted claims. (Doc. No. 458-1 at 4-5; Doc.
13 No. 624 at 6-9.) Defendants base their argument on the fact that Dr. Richardson acknowledges
14 that there are differences between the structures in the accused products and the structures in
15 the asserted claims. (Id.) However, literal infringement of a means-plus-function claim can
16 be met by a structure that is merely equivalent to the corresponding structure in the
17 specification. Odetics, 185 F.3d at 1267. The overall structure does not need to be identical
18 as long as it "performs the claimed function in substantially the same way as the claimed
19 structures to achieve substantially the same result." Id. Defendants argue that Dr. Richardson
20 has failed to provide any analysis or argument showing that the structures in the accused
21 products function in the same way because he did not analyze the differences between the
22 claimed structures and the accused products. (Doc. No. 624 at 7-9.) However, as Defendants
23 admit in their briefs, Dr. Richardson did provide argument and analysis explaining how the
24 structures function in the same way. For example, Dr. Richardson acknowledges that the
25 accused products do not possess the structural component "multiplier 45," but he explains that
26 based on the way the accused products operate, "multiplier 45" is superfluous. (See Doc. No.
27 624-1, Declaration of Justin Barnes Ex. C at 4; Doc. No. 624-3, id. Ex. G at 100.) Defendants
28 may disagree with Dr. Richardson's conclusion that "multiplier 45" is superfluous, but that is

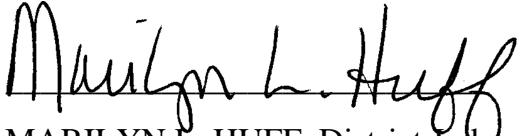
1 not a basis for excluding his testimony under Daubert. See Primiano, 598 F.3d at 564 (“[T]he
2 test under Daubert is not the correctness of the expert’s conclusions but the soundness of his
3 methodology.”).

4 **Conclusion**

5 For the reasons above, the Court **DENIES** Defendants’ motion to exclude Dr.
6 Richardson’s equivalence analysis without prejudice to any contemporaneous objections at
7 trial made outside the presence of the jury.

8 **IT IS SO ORDERED.**

9 Dated: November 19, 2012

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11 MARILYN L. HUFF, District Judge
12 UNITED STATES DISTRICT COURT
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