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6 **IN THE UNITED STATES DISTRICT COURT**
 7 **FOR THE DISTRICT OF ARIZONA**

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9	TriQuint Semiconductor, Inc.,)	CV-09-1531-PHX-JAT
10	Plaintiff(s),)	
11	v.)	ORDER
12	Avago Technologies Limited, et al.,)	
13	Defendant(s).)	
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15 Pending before the Court are Defendant and Counterclaim Plaintiff Avago's Motion
 16 for Reconsideration (Doc. 466) and Plaintiff and Counterclaim Defendant TriQuint's Motion
 17 for Partial Reconsideration or Clarification (Doc. 469). Both Motions seek reconsideration
 18 of the Court's February 24, 2012 Order on Summary Judgment (Doc. 454). The Court now
 19 rules on the Motions.

20 **I. ANALYSIS**

21 **A. Legal Standard**

22 Generally, motions for reconsideration are appropriate only if: 1) the movant presents
 23 newly discovered evidence; 2) the Court committed clear error or the initial decision was
 24 manifestly unjust; or 3) an intervening change in controlling law has occurred. *School Dist.*
 25 *No. 1J, Multnomah County, Or. v. ACandS, Inc.*, 5 F.3d 1255, 1263 (9th Cir. 1993). A party
 26 should not file a motion to reconsider to ask a court "to rethink what the court had already
 27 thought through, rightly or wrongly." *Above the Belt, Inc. v. Mel Bohannon Roofing, Inc.*,
 28 99 F.R.D. 99, 101 (E.D. Va. 1983). "No motion for reconsideration shall repeat in any

1 manner any oral or written argument made in support of or in opposition to the original
2 motion.” *Motorola, Inc. v. J.B. Rodgers Mech. Contractors, Inc.*, 215 F.R.D. 581, 586 (D.
3 Ariz. 2003). The Court ordinarily will deny “a motion for reconsideration of an Order absent
4 a showing of manifest error or a showing of new facts or legal authority that could not have
5 been brought to its attention earlier with reasonable diligence.” Local Rule of Civil
6 Procedure 7.2(g)(1).

7 **B. Avago’s Motion for Reconsideration**

8 Avago requests reconsideration on several issues, though it has only met the high
9 standard for reconsideration with respect to the antitrust issues. The Court’s reasons for
10 denying or granting Avago’s various requests for reconsideration follow.

11 With respect to Avago’s spoliation claims, Avago does not meet the high standard for
12 reconsideration. Instead, Avago merely reasserts its arguments regarding any alleged
13 prejudice it may have suffered as a result of TriQuint’s alleged spoliation. Doc. 466 at 4-5.
14 However, the Court fully considered the issue of prejudice in the summary judgment order,
15 Doc. 454 at 7-8, and thus must deny Avago’s request for the Court “to rethink what [it] has
16 already thought through.” *See Above the Belt*, 99 F.R.D. at 101.

17 Avago also does not meet the standard for reconsideration of the Court’s ruling that
18 Avago’s layout files do not contain trade secrets. Avago contends that the Court erred in its
19 finding that Avago acknowledged that reverse engineering of layout files could be used to
20 determine their approximate dimensions and that the Court also erred in finding that Avago
21 did not establish that the dimensions of the layout files provide economic value. Again, the
22 Court fully considered the parties’ arguments with respect to reverse engineering and
23 economic value in the summary judgment order, Doc. 454 at 29-31, and will not revisit its
24 analysis simply because Avago does not agree with the outcome. *See Above the Belt*, 99
25 F.R.D. at 101.

26 The Court will also not reconsider its decision to exclude the declarations of Drs.
27 Elbrecht, Howe, Milsom, and Muralt. As is clear from the summary judgment order, the
28 Court interpreted TriQuint’s motion as one to exclude all untimely expert opinions.

1 Furthermore, as the Court noted in that order, it was incapable of determining which, if any,
2 of the opinions in the declarations also appeared in the timely filed expert reports. Indeed,
3 as Avago's "Exhibit A" to its motion for reconsideration demonstrates, a 15-page chart is
4 apparently needed to make that determination. Doc. 466-1. Of course, that chart was not
5 provided with the declarations. Further, as TriQuint's "Exhibit 1" to its response to Avago's
6 motion demonstrates, it can fill another 25-page chart disputing whether such support
7 actually exists in the timely expert reports. Doc. 490-1. Again, this information was also not
8 available to the Court at the time that it would have needed to parse through the declarations,
9 which did not themselves cite to any timely expert reports, to determine what opinions, if
10 any, could fairly be considered. Finally, and most importantly, throughout the summary
11 judgment order, the Court cited repeatedly to the timely expert reports provided by both
12 parties. Thus, it did not err in excluding the declarations.

13 With regard to the Court's ruling on assignor estoppel, Avago has not met the standard
14 for reconsideration. Instead, Avago simply reasserts its arguments related to the alleged
15 knowledge and assistance provided by Drs. Aigner and Fattinger to TriQuint. The Court
16 fully considered this issue in the summary judgment order. Doc. 454 at 40-47. Hence, it
17 must decline Avago's request for the Court "to rethink what [it] has already thought
18 through." *See Above the Belt*, 99 F.R.D. at 101.

19 The Court will also not reconsider its ruling that U.S. Patent No. 6,933,807 ("the '807
20 patent") is invalid for indefiniteness. Avago argues that the Court failed to apply the
21 standard that patents must be proved invalid by clear and convincing evidence. Doc. 466 at
22 14-15. However, in the *Markman* order, the Court repeatedly cited to and applied, including
23 in its discussion of the indefinite claim, the standard in *Metabolite Laboratories, Inc. v.*
24 *Laboratory Corp. of America*, wherein the Federal Circuit stated that "[o]nly when a claim
25 remains insolubly ambiguous without a discernible meaning after all reasonable attempts at
26 construction must a court declare it indefinite." 370 F.3d 1354, 1366 (Fed. Cir. 2004) (citing
27 *Exxon Research & Eng'g Co. v. United States*, 265 F.3d 1371, 1375 (Fed. Cir. 2001)). The
28 Federal Circuit has held that this standard properly considers a patent's statutory presumption

1 of validity and the need to show invalidity by clear and convincing evidence. *See Datamize,*
2 *LLC v. Plumtree Software, Inc.*, 417 F.3d 1342, 1347-48 (Fed. Cir. 2005) (“By finding
3 claims indefinite only if reasonable efforts at claim construction prove futile, we accord
4 respect to the statutory presumption of patent validity and we protect the inventive
5 contribution of patentees, even when the drafting of their patents has been less than ideal.’
6 *Exxon Research & Eng’g Co.*, 265 F.3d at 1375. In this way we also follow the requirement
7 that clear and convincing evidence be shown to invalidate a patent.”). Thus, the Court
8 applied the proper standard and will not reconsider its ruling that the ‘807 patent is invalid
9 for indefiniteness.

10 Avago has not met the standard for reconsideration of the Court’s ruling that U.S.
11 Patent No. 6,262,637 (“the ‘637 patent”) is not infringed. Avago first argues that the Court
12 erred in excluding Dr. Howe’s untimely declaration; however, as discussed above, the Court
13 will not reconsider its decision to exclude Dr. Howe’s declaration. Avago’s remaining
14 arguments essentially ask the Court to reach a different conclusion regarding Dr. Howe’s
15 opinions in his timely expert report. The Court fully considered Dr. Howe’s timely opinions
16 regarding the ‘637 patent in the summary judgment order and thus must decline Avago’s
17 request for the Court “to rethink what [it] has already thought through.” *See Above the Belt,*
18 99 F.R.D. at 101.

19 Avago’s request for reconsideration of noninfringement of U.S. Patent No. 6,377,137
20 (“the ‘137 patent”) must also be denied. Again, Avago asks the Court to reach a different
21 conclusion regarding Dr. Howe’s opinions in his expert report. Avago also presents a new
22 argument that the ‘137 patent itself, in combination with Dr. Howe’s opinions, somehow
23 presents a genuine issue of material fact that TriQuint infringes that patent. However, the
24 Court fully considered Dr. Howe’s expert opinions in the motion for summary judgment and
25 must deny Avago’s request for the Court to revisit its analysis. *See Above the Belt,* 99 F.R.D.
26 at 101.

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1. Avago’s Motion for Summary Judgment on TriQuint’s Antitrust Claims

In the Summary Judgment Order, the Court held that questions of material fact existed that precluded granting summary judgment for either party. However, in so doing, the Court did not explicitly discuss its analysis with regard to whether TriQuint had carried its burden on the issues of market power and antitrust injury. Rather, the Court only provided a detailed discussion of the parties’ arguments on the issue of market definition. Because a failure by TriQuint to carry its burden on any of these issues would result in granting summary judgment in favor of Avago, the Court finds that to not clearly articulate its reasoning on two of these issues leaves open a question of whether its initial decision was manifestly unjust to Avago. *See ACandS*, 5 F.3d at 1263. Thus, Avago has met the standard for reconsideration, and the Court will provide a more detailed analysis of the market power and antitrust injury issues. The Court nevertheless affirms its decision to deny summary judgment to either party on the antitrust issues. In short, “[t]his case is a complex antitrust matter with several unresolved material issues. Such a case simply cannot be disposed of in a summary fashion pursuant to Federal Rule of Civil Procedure 56.” *United States v. Syufy Enters.*, No. C-86-3057-WHO, 1987 WL 39931, at *2 (N.D. Cal. Dec. 18, 1987).

a. Market Power

With respect to a plaintiff’s burden on the issue of market power, the Ninth Circuit has stated the following:

Market power may be demonstrated through either of two types of proof. One type of proof is direct evidence of the injurious exercise of market power. If the plaintiff puts forth evidence of restricted output and supracompetitive prices, that is direct proof of the injury to competition which a competitor with market power may inflict, and thus, of the actual exercise of market power. . . . The more common type of proof is circumstantial evidence pertaining to the structure of the market. To demonstrate market power circumstantially, a plaintiff must: (1) define the relevant market, (2) show that the defendant owns a dominant share of that market, and (3) show that there are significant barriers to entry and show that existing competitors lack the capacity to increase their output in the short run.

Rebel Oil Co., Inc. v. Atl. Richfield Co., 51 F.3d 1421, 1434 (9th Cir. 1995) (internal citations omitted). In its summary judgment briefs, TriQuint points to several facts in the record that

1 could sufficiently establish that Avago has market power in at least one of the various
2 markets proposed by the parties.

3 The Court initially notes that “[i]t is impossible to determine market share without
4 first defining the relevant market.” *Forsyth v. Humana, Inc.*, 114 F.3d 1467, 1476 (9th Cir.
5 1997). Further, “[t]he additional issues of monopoly power and the maintenance of
6 monopoly power depend upon a resolution of the relevant market question. . . . Whether the
7 defendants engaged in anticompetitive behavior is dependent upon resolution of these
8 issues.” *Id.* at 1477. As mentioned above, the Court found in the Summary Judgment order
9 that several issues of material fact precluded a determination of the relevant market on
10 summary judgment. Hence, in order for TriQuint to fail to carry its burden on market power,
11 it must have failed to present sufficient facts establishing market power in any (i.e., not even
12 one) of the potential markets. TriQuint has not failed to do this.

13 First, with regard to direct evidence of market power, TriQuint has offered evidence
14 that Avago has reduced output and raised prices. TriQuint asserts that by acquiring Infineon
15 and eliminating its production capacity, Avago reduced BAW output. This, in turn, cut off
16 supply of BAW die to Avago’s competitors, thereby further reducing output. None of these
17 competitors, including TriQuint, were able to sufficiently increase short-term capacity to
18 compete. Thus, TriQuint argues that had it not been for the acquisition, competition in the
19 relevant market would have proceeded unabated.

20 Also, with regard to circumstantial evidence, TriQuint has offered evidence that
21 Avago’s share in various markets has ranged from 65% to 95%. This includes evidence from
22 TriQuint’s expert that Avago has up to a 95.2 percent share in the BAW filter market, up to
23 a 92.1 percent share in the BAW filter die for UMTS Band 2 market, and up to a 76 percent
24 share in the Band 2 duplexers market. These shares are high enough, particularly when
25 combined with the other evidence presented by TriQuint, to reasonably support a finding of
26 market power.

27 Furthermore, with regard to high barriers to entry and inability of current competitors
28 to expand capacity, Avago’s expert, Dr. Robert Dolan, stated that development of BAW

1 technology is “very difficult to do . . . and a number of firms have tried to do it, [but have]
2 been unable to do it.” Doc. 417-4, Ex. 29 at 288. Dr. Dolan also described how Infineon
3 required five full years of development between when it “got [it’s] first product” and when
4 it had “a mature process.” *Id.* TriQuint has further presented evidence that Avago’s
5 allegedly illegal acquisition of its BAW patent portfolio and refusal to license that patent
6 technology also presents a barrier to entry in the relevant markets. Thus, TriQuint has
7 presented sufficient evidence that high barriers to entry may exist in the relevant markets and
8 that existing competitors may lack the ability to sufficiently expand capacity in the short run.

9 To be clear, the Court did address this evidence in the summary judgment order with
10 regard to its discussion of the application of the *Philadelphia National Bank* presumption.
11 Doc. 454 at 20-21; *see also United States v. Phila. Nat’l Bank*, 374 U.S. 321 (1963). Further,
12 though Avago disputes TriQuint’s direct and circumstantial evidence, Avago primarily
13 argues in its motion for reconsideration that, even in light of this evidence, a finding of
14 market power is necessarily foreclosed by the decision in *United States v. Syufy Enterprises*,
15 903 F.2d 659 (9th Cir. 1990) (hereinafter “*Syufy*”), and that the Court did not adequately
16 address this argument in the summary judgment order. The Court will therefore take this
17 opportunity to expand on why it did not find Avago’s *Syufy* argument sufficient to grant
18 summary judgment in favor of Avago.

19 Though Avago acknowledges its high market shares, it asserts that overall, the
20 evidence demonstrates that Avago’s shares and prices are declining and that output in the
21 relevant markets is increasing. Thus, in Avago’s view, competition has not been harmed, and
22 Avago does not have market power. Avago relies on the Ninth Circuit’s decision in *Syufy*
23 to support this argument. In that case the defendant operated first-run movie theaters in Las
24 Vegas. After much early success and rapid expansion, the defendant eventually owned all
25 of the first-run movie theaters in Las Vegas. The government then brought claims for
26 antitrust violations. After a bench trial, the trial court held that the defendant did not have
27 market power, largely based on its finding that there were no barriers to entry in the relevant
28 market. *Id.* at 661. The Ninth Circuit affirmed, also resting its decision primarily on the

1 evidence of an absence of barriers to entry in the first-run film market in Las Vegas. *Id.* at
2 666-67. Thus, even though the defendant at one point controlled a very high market share,
3 he was not able to maintain that market share once new entrants entered the market, which
4 they were able to do very rapidly. Thus, in the Ninth Circuit's view, there was no harm to
5 competition and the defendant did not have market power. *Id.* at 670-71.

6 However, the facts of *Syufy* can be readily distinguished from those in the present
7 case. Specifically, after the defendant in *Syufy* gained a 100 percent market share over the
8 first-run film market in Las Vegas, a new competitor emerged in that market almost
9 immediately. *Syufy*, 903 F.2d at 665. Further, within approximately two years, that new
10 competitor had a larger market share, in terms of total screens, than the defendant. *Id.* After
11 approximately two more years, the new competitor had sold its business to a large national
12 movie theater chain, which led to further erosion of the defendant's market share. *Id.* Thus,
13 the *Syufy* court could readily conclude that "Syufy's acquisitions did not short circuit the
14 operation of the natural market forces; Las Vegas' first-run film market was more
15 competitive when [the] case came to trial than before Syufy bought out [its competitors]." *Id.*

17 Based on the evidence in this record, however, the proposed markets have not shown
18 nearly the same competitive resiliency in the wake of Avago's acquisition of Infineon.
19 Indeed, Avago's market shares in the relevant markets do appear to be declining, and thus
20 Avago's heavy reliance on *Syufy* is understandable. But, as described above, there is
21 evidence in the record that suggest that the proposed markets are not the type in which it is
22 possible for a new competitor to unexpectedly emerge and very rapidly gain a dominant
23 market share within two years, as was the case in *Syufy*.

24 Rather, the evidence in the record, viewed in a light most favorable to TriQuint,
25 indicates that Avago has likely been able to maintain its very high market shares better than
26 the defendant in *Syufy*. For example, in the markets for BAW filter die, BAW filter die for
27 UMTS Band 2, and Band 2 duplexers, Avago's market share has not dropped below 65
28 percent, and has even been as high as 95 percent. Meanwhile, according to the data provided

1 by the parties, TriQuint, as Avago’s strongest competitor, has apparently never held a market
2 share in any of these three markets that has exceeded 40 percent of Avago’s share. These
3 numbers, coupled with the additional evidence of barriers to entry and Avago’s alleged
4 anticompetitive behavior described above, are sufficient to raise a question of material fact
5 as to whether Avago has the ability to maintain market share. *See Syufy*, 903 F.2d at 665-66
6 (“In evaluating monopoly power, it is not market share that counts, but the ability to *maintain*
7 market share.”) (emphasis in original). Thus, this issue can only be resolved by weighing the
8 evidence of potential market power against the evidence of potentially increasing
9 competition, which properly lies within the province of a jury.

10 In sum, TriQuint has provided, *inter alia*, evidence of what it asserts to be high
11 barriers to entry in the relevant markets. Viewing this evidence in a light most favorable to
12 TriQuint, the Court will assume that high barriers to entry exist in those markets. TriQuint
13 also has presented evidence of Avago’s dominant market shares in the relevant markets.
14 Though Avago acknowledges its high market shares, it nevertheless ardently asserts that its
15 shares in the relevant markets are declining and that consequently competition in those
16 markets has not suffered. In considering whether this case may be properly disposed of on
17 summary judgment, the Court is thus left with the following question: Can a jury “reasonably
18 [find] that a firm with a consistently high, albeit declining, market share in a market with
19 high barriers to entry possesse[s] market power[?]” *Oahu Gas Serv., Inc. v. Pac. Resources,*
20 *Inc.*, 838 F.2d 360, 367 (9th Cir. 1988). In response to this question, the Ninth Circuit has
21 definitively answered “yes.” *Id.*

22 There is no indication that *Syufy* provides a different answer except in markets where
23 barriers to entry are nonexistent. *See Syufy*, 903 F.2d at 671 n.21 (noting the determinative
24 influence that “the total lack of entry barriers” in the Las Vegas movie theater market had on
25 the outcome of the “relevant factors” of the case, including that the defendant “lacked the
26 ability to maintain market share, the power to control prices, and the capability of excluding
27 competitors”) (internal brackets and quotation omitted). Thus, at the very least, it appears
28 to this Court that, while the *Syufy* court may not have expressly cabined its holding only to

1 markets with an absence of entry barriers, *see Safeway Inc. v. Abbott Labs.*, 761 F. Supp. 2d
2 874, 890 (N.D. Cal. 2011), when the question of the existence of high barriers to entry is
3 unresolved, application of *Syufy* in the manner suggested by Avago, and particularly at the
4 summary judgment stage, is not appropriate. *See United States v. Syufy Enters.*, No. C-86-
5 3057-WHO, 1987 WL 39931, at *2 (N.D. Cal. Dec. 18, 1987) (denying parties' cross-
6 motions for summary judgment and finding that the "most important unresolved issue in
7 [that] case" involved the existence of entry barriers in the relevant market).

8 **b. Antitrust Injury**

9 To survive summary judgment, TriQuint must also "offer some evidence
10 demonstrating the existence of an antitrust injury, which is to say injury of the type the
11 antitrust laws were intended to prevent and that flows from that which makes defendant's
12 acts unlawful." *Forsyth v. Humana*, 114 F.3d 1467, 1477 (9th Cir. 1997) (citing *Atl.*
13 *Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 334 (1990)) (internal quotations omitted).
14 Furthermore, a plaintiff's burden "is satisfied by its proof of some damage flowing from the
15 unlawful [act]; inquiry beyond this minimum point goes only to the amount and not the fact
16 of damage. It is enough that the illegality is shown to be a material cause of the injury; a
17 plaintiff need not exhaust all possible alternative sources of injury in fulfilling his burden of
18 proving a compensable injury." *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S.
19 100, 114 n.9 (1969).

20 Here, TriQuint has presented evidence that it has been injured by Avago's alleged
21 unlawful conduct. This includes evidence that (1) Avago's acquisition of Infineon's BAW
22 business cut off TriQuint's supply of BAW die; (2) Avago's efforts to issue and enforce the
23 "End of Life" notice regarding Infineon BAW die generated concern among TriQuint's
24 customers; (3) Avago's sending of letters to TriQuint customers warning them of TriQuint's
25 infringement of Avago's intellectual property and threatening legal action; and (4) Avago's
26 refusal to license its intellectual property and its demands for unlawful agreements not to
27 compete. TriQuint alleges that these actions led to lost sales, increased costs, strained
28 customer relationships, and a hampered ability to develop new competitive products.

1 Avago, on the other hand, asserts that any injury suffered by TriQuint was of its own
2 making. Specifically, Avago points to evidence of long-running quality and reliability issues
3 with TriQuint’s products and internal supply problems that led to an inability to meet
4 demands from customers and strained relationships with those customers. Avago also states
5 that TriQuint had independently decided to rely on its own BAW filters rather than taking
6 advantage of Avago’s “End-of-Life” offer, and thus Avago’s decision to stop supplying
7 TriQuint with Infineon products could not have injured TriQuint.

8 Having considered both parties’ arguments, the Court finds that TriQuint has
9 sufficiently alleged antitrust injury to survive summary judgment. Though, as Avago’s
10 evidence suggests, TriQuint’s own decisions and actions may have contributed to some of
11 its alleged injuries, Avago’s evidence does not completely rule out the possibility that any
12 potential illegal conduct by Avago may have also injured TriQuint. *See William Inglis &*
13 *Sons Baking Co. v. ITT Cont’l Baking Co.*, 668 F.2d 1014, 1051 (9th Cir. 1981) (finding that
14 plaintiff had introduced sufficient evidence of causation and stating that “the law does not
15 require precision in this area. [Defendant’s] pricing need only have been a material cause of
16 [plaintiff’s] decline, and causation may be inferred if [plaintiff’s] injury was ‘the type of loss
17 that the claimed violations of the antitrust laws would be likely to cause.’”) (internal citation
18 omitted). Thus, it will be up to a jury to determine and separate any antitrust damages from
19 any damages that resulted from TriQuint’s own conduct and decision-making. *See Forsyth*,
20 114 F.3d at 1478.

21 C. TriQuint’s Motion for Reconsideration

22 TriQuint has also moved for reconsideration or clarification of the Court’s Summary
23 Judgment Order. Though the Court does not find that TriQuint has met the standard for
24 reconsideration, its motion is granted to the extent that it seeks clarification of the Court’s
25 order.

26 In its motion, TriQuint asserts that the Court relied on a photograph from Dr. Howe’s
27 excluded declaration in determining that an issue of material fact existed with regard to non-
28 infringement of U.S. Patent No. 7,268,436 (“the ‘436 patent”), and that such reliance was

1 error. However, as is evident from the analysis in the summary judgment order, the Court
2 relied on several pieces of evidence in reaching its conclusion, including Dr. Howe’s timely
3 expert report and deposition testimony of both parties’ experts. Doc. 454 at 86-88. Thus,
4 the Court did not improperly rely on any excluded photographs in denying summary
5 judgment to TriQuint on the issue of non-infringement of the ‘436 patent, and thus to
6 reconsider its decision on that issue would require the Court to improperly “rethink what [it]
7 has already thought through.” *See Above the Belt*, 99 F.R.D. at 101.

8 TriQuint also asserts that the Court failed to address all of TriQuint’s arguments
9 regarding whether Avago has properly asserted infringement under the doctrine of
10 equivalents. In its motion for partial summary judgment, TriQuint included a brief section
11 arguing that Avago should be precluded from making any assertions of infringement under
12 the doctrine of equivalents. Doc. 415 at 84-85. The Court refused to grant this blanket
13 request for summary judgment, and instead opted to consider the doctrine-of-equivalents
14 arguments that TriQuint substantively argued on a claim-by-claim basis. Doc. 454 at 56-58.
15 The Court did, in fact, consider and rule on those arguments in the summary judgment order.
16 Thus, the Court will not revisit this issue on a motion for reconsideration. To be clear, the
17 summary judgment order granted summary judgment to TriQuint on the issue of non-
18 infringement under the doctrine of equivalents with respect to the ‘907, ‘340, ‘637, and ‘137
19 patents.

20 **1. Clarification of the Court’s Claim Constructions**

21 TriQuint bases its request for clarification of the Court’s claim constructions on the
22 Court’s refusal to find that three of the claim elements considered in the summary judgment
23 order required an element of intent or subjective motivation. Specifically, the Court cited the
24 Federal Circuit’s decision in *Dow Chemical Co. v. Mee Industries, Inc.*, wherein that court
25 stated “the motive of the accused infringer when performing a claimed method is simply not
26 relevant.” 341 F.3d 1370, 1380 (Fed. Cir. 2003). TriQuint argues that the Court improperly
27 applied this statement, which directly references method claims, to apparatus claims.
28 TriQuint further argues that the Court’s application of this decision in the summary judgment

1 analysis is inconsistent with the *Markman* order, wherein the Court stated with regard to the
2 ‘807 patent that “[w]hile intent may not be automatically imputed into claims, an applicant
3 is not prevented from [including] an intent element in the claims.” Doc. 229 at 42. The
4 Court based this statement on citations to Federal Circuit cases in which that court either
5 construed method claims to incorporate a scienter requirement, *Koito Mfg. Co., Ltd. v. Turn-*
6 *Key-Tech, LLC*, 381 F.3d 1142, 1150 n.2 (Fed. Cir. 2004), or construed a preamble to reflect
7 an intentional purpose for which a method must be performed. *Jansen v. Rexall Sundown,*
8 *Inc.*, 342 F.3d 1329, 1333-34 (Fed. Cir. 2003). TriQuint also refers to the Court’s analysis
9 of the ‘4619 patent in the *Markman* order, wherein the court cited a Federal Circuit case that
10 held that a claimed method required deliberate forming of folds. *Combined Sys., Inc. v. Def.*
11 *Tech. Corp. of Am.*, 350 F.3d 1207, 1211-14 (Fed. Cir. 2003). TriQuint has requested the
12 Court to “indicate the claim constructions that will govern at trial,” Doc. 469 at 6.

13 First, the Court notes that all of the cases to which TriQuint cites for the proposition
14 that motivation or intent may be incorporated into an apparatus claim involved method
15 claims. See *Koito Mfg.*, 381 F.3d at 1150 n.2; *Combined Sys.*, 350 F.3d at 1211-14; *Jansen*,
16 342 F.3d at 1333-34. Thus, for the Court to similarly apply *Mee Industries*, which also
17 involved a method claim, to negate TriQuint’s interpretation of the apparatus claim
18 constructions was not error. Indeed, the only cases this Court has found that have addressed
19 the issue of incorporating an intent limitation into an apparatus claim have refused to do so
20 and have distinguished the line of cases cited by TriQuint. See *3M Co. v. Avery Dennison*
21 *Corp.*, Civil No. 10-2630, 2012 WL 1004865, at *7 (D. Minn. March 22, 2012); *ADC*
22 *Telecomms., Inc. v. Switchcraft, Inc.*, No. Civ. 04-1590ADMJSM, 2005 WL 2206115, at *9
23 (D. Minn. Sept. 09, 2005). Further, and contrary to TriQuint’s assertion in its motion for
24 reconsideration, the Court had not previously considered the *Mee Industries* case in the
25 *Markman* order.

26 Second, none of the claim constructions of the ‘4619 or ‘922 patents in the *Markman*
27 order explicitly references any person’s subjective motivation or intent when performing a
28 claimed method or infringing an apparatus claim. Thus, TriQuint’s interpretation that some

1 of the claims require an intent element arises from comments the Court made in arriving at
2 those claim constructions. Indeed, as TriQuint noted in its motion for reconsideration, “the
3 Court set forth its holding that design intent may be an element of a patent claim while
4 discussing a limitation of the ‘807 patent . . . and the same analysis should apply to all claims
5 containing intent limitations.” Doc. 469 at 2. The problem with this interpretation of the
6 Court’s *Markman* order is that it leaves it to the parties to determine which claims, other than
7 perhaps the ‘807 patent, contain intent limitations.¹ Thus, because the parties’ interpretations
8 of the claim constructions go beyond what the Court intended in its *Markman* order, the
9 Court finds that it is necessary to clarify its claim constructions with regard to any intent
10 limitations prior to trial.²

11 **a. U.S. Patent No. 6,864,619**

12 With regard to the ‘4619 patent, the Court construed the term “the detuning layer
13 sequence comprises at least a first layer having a first acoustic impedance and a second layer
14 having a second acoustic impedance in order to shift a resonance frequency of the first
15 piezoelectric resonator relative to the resonance frequency of the second piezoelectric
16 resonator” to mean “the detuning layer sequence comprises at least a first layer having a first
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18 ¹Because the Court has held the ‘807 patent invalid, it will not revisit the claim
19 constructions of that patent. Similarly, with regard to U.S. Patent No. 6,377,137 (“the
20 ‘137 patent”), which the Court held to be noninfringed in the Summary Judgment Order,
21 the Court will limit its comments to simply reaffirming its analysis in the Summary
22 Judgment Order in which it held that intent or subjective motivation was not incorporated
23 into the claim constructions of that patent. Finally, in its *Markman* briefing, TriQuint also
24 argued for intent limitations for claims in U.S. Patent Nos. 6,812,619 (“the ‘2619 patent”)
25 and 6,262,637 (“the ‘637 patent”). Though those limitations were not considered in the
26 Court’s summary judgment analysis, the Court notes that it refused to incorporate the
27 language “designed to cause” into the ‘637 patent claim construction and “specifically
28 designed” into the ‘2619 patent claim construction. Thus, the Court did not recognize
any intent limitations in those patent claims.

²To the extent that these clarifications might, in the parties’ views, alter the claim
constructions, the Court notes that a court may “amend[] the claim construction to clarify
its original intent.” *Utah Med. Prods., Inc. v. Graphic Controls Corp.*, 350 F.3d 1376,
1382 (Fed. Cir. 2003).

1 acoustic impedance and a second layer having a second acoustic impedance for the purpose
2 of shifting the resonance frequency of the first piezoelectric resonator relative to the
3 resonance frequency of the second piezoelectric resonator.” Thus, the Court construed the
4 phrase “in order to shift” to mean “for the purpose of shifting.”

5 The claim construction, though its references a “purpose,” does not mention any
6 decision making or choices made by one practicing the invention. Further, to the extent that
7 the Court’s citation to *Combined Systems* could be construed to read an “intent limitation”
8 into the claim, it could only do so insofar as the limitation requires “foreknowledge of certain
9 facts” or otherwise involves facts that can be “objectively verified and do not depend on a
10 particular person’s unfettered, subjective opinion.” See *Datamize, LLC v. Plumtree Software,*
11 *Inc.*, 417 F.3d 1342, 1355-56 (Fed. Cir. 2005) (discussing *Combined Systems* and *Koito*
12 *Manufacturing*). The case does not stand for the proposition that a choice made by one
13 practicing an invention may be considered in an apparatus claim, and the Court did not intend
14 the interpretation adopted by TriQuint.

15 In its motion for summary judgment, TriQuint stated that “[a]lthough TriQuint uses
16 an alternating sequence of tungsten and an aluminum-copper alloy and those two materials
17 have different acoustic impedances, TriQuint does not . . . choose layers with two different
18 . . . acoustic impedances for the purpose of shifting the relative frequencies of the
19 resonators.” Doc. 415 at 75. TriQuint asserted that its choice to use that sequence of
20 materials instead depends on electrical conductivity, acoustic properties, and manufacturing
21 advantages, which precludes the possibility of infringement. *Id.* However, while TriQuint’s
22 use of the sequence of materials and the acoustic impedance of those materials are
23 objectively verifiable, considering whether a structural element in one of TriQuint’s products
24 is present because TriQuint subjectively chose to use it for one reason or another falls far
25 closer to construing a claim element to depend on an unfettered, subjective opinion.³ Rather,

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27 ³The Court further notes that TriQuint’s interpretation essentially builds into the
28 apparatus claim a “step” in which TriQuint chooses to use a layer sequence for one reason
or another. While such a “step” of expressing intention or foreknowledge may

1 a determination of infringement of this claim language depends on whether it can be shown
2 that TriQuint’s sequence does, in fact, shift the relative frequencies, which would not only
3 constitute the purpose of the sequence, but is also objectively verifiable. In other words, a
4 sequence that is identical to the claimed sequence, except that does not shift the relative
5 frequencies in the manner described in the patent, could not have such shifting as its purpose
6 and thus could not infringe under the Court’s claim construction. Thus, the Court’s citation
7 to *Combined Systems* does not at all support TriQuint’s interpretation of the claim
8 construction.

9 Further, TriQuint’s reading of a person’s choice into the claim construction is not
10 consistent with the patent specification. The written description of the patent states the
11 following:

12 The detuning layer sequence **52** influences the resonance frequency of the
13 piezoelectric resonator **10**. It *serves for* detuning the piezoelectric resonator
14 **10**, that is for shifting its resonance frequency, with regard to a piezoelectric
resonator not having a detuning layer sequence **52** and otherwise not having
the same properties.

15 ‘4619 patent at 7:43-48 (emphasis added). The only “purpose” that is referenced by the
16 specification is that of the detuning layer sequence, not any intention or choice of one
17 practicing the invention.⁴ Thus, the Court’s use of the word “purpose” in its claim

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19 appropriately be incorporated into a method claim in limited instances, *see Koito Mfg.*,
20 381 F.3d at 1150 n.2; *Combined Sys.*, 350 F.3d at 1211-14; *Jansen*, 342 F.3d at 1333-34,
21 doing so in an apparatus claim appears to amount to an improper mixing of classes of
invention. *See* 35 U.S.C. § 101 (classes of invention are listed in disjunctive form).

22 ⁴In this regard, the “in order to” phrase in the claim may be better interpreted as a
23 functional limitation to the apparatus claim. *See Microprocessor Enhancement Corp. v.*
24 *Texas Instruments Inc.*, 520 F.3d 1367, 1375 (Fed. Cir. 2008) (“Functional language may
25 also be employed to limit the claims without using the means-plus-function format.”).
26 Indeed, as the Court noted in the *Markman* order, the phrase “in order to” is simply
27 defined as “for the purpose of.” Doc. 229 at 57. Further, though the word “purpose” may
28 refer to “something that one hopes or intends to accomplish,” it may also refer to “the
action for which a person or thing is specially fitted or used or for which a thing exists”
and in that respect is synonymous with the word “function.” *See* MerriamWebster Online
Thesaurus, <http://www.m-w.com> (last viewed April 19, 2012). The Court finds that the
latter meaning is supported by the patent’s intrinsic record, while the former meaning is

1 construction should accordingly be interpreted in the context of the patent’s written
2 description. To that end, the only “design intent” that can be incorporated into the claim
3 construction arises from the fact that for a detuning layer sequence to infringe the claim, it
4 must also shift the resonance frequencies as described in the claim. A detuning layer
5 sequence that does not do so does not incorporate such “design intent.”

6 The Court therefore maintains the language of the original construction of this claim
7 term. However, to the extent that either party interpreted the *Markman* order to mean that
8 the claim term also incorporated an intent or subjective motivation requirement, the Court
9 now clarifies that such a requirement is inconsistent with the intrinsic record of the ‘4619
10 patent. Furthermore, because the Court is not changing the language of the construction, but
11 only clarifying that an additional intent element, which the Court never explicitly built into
12 the construction, is not required, the Court finds that supplemental expert reports on this
13 claim term are not necessary. Additionally, the Court notes that the analysis of the ‘4619
14 patent in the summary judgement order did not read an intent element into the claim
15 construction, and thus was consistent with the correct interpretation of the construction.

16 In sum, and to paraphrase *Mee Industries*, the issue is whether by using a detuning
17 layer sequence comprising at least a first layer having a first acoustic impedance and a
18 second layer having a second acoustic impedance, the resonance frequency of the first
19 piezoelectric resonator relative to the resonance frequency of the second piezoelectric
20 resonator was shifted. Even if a potential infringer chose to use the claimed detuning layer
21 sequence for an entirely different reason, that would not avoid infringement. *See Mee Indus.*,
22 341 F.3d at 1380.

23
24 not. *See Phillips v. AWH Corp.*, 415 F.3d 1303, 1321 (Fed. Cir. 2005) (en banc)
25 (“[H]eavy reliance on the dictionary divorced from the intrinsic evidence risks
26 transforming the meaning of the claim term to the artisan into the meaning of the term in
27 the abstract, out of its particular context, which is the specification. . . . Thus, there may
28 be a disconnect between the patentee’s responsibility to describe and claim his invention,
and the dictionary editors’ objective of aggregating all possible definitions for particular
words.”).

1 **b. U.S. Patent No. 6,841,922**

2 TriQuint has also asked for clarification of the Court’s refusal to recognize an intent
3 limitation in the claim language of the ‘922 patent. Specifically, in construing the claims of
4 that patent, the Court gave the term “due to technological limitations in the manufacturing
5 of this layer” its plain and ordinary meaning. Doc. 229 at 34-35. Nowhere in the *Markman*
6 order did the court discuss an intent limitation with regard to this claim term. Nor did either
7 of the parties argue for one in the *Markman* briefs. Further, the Court cannot reasonably
8 interpret the plain and ordinary meaning of this apparatus claim term, in the context of the
9 patent specification, to incorporate any consideration of a person’s intent or motivation.

10 To be clear, however, the Court reiterates that this term, as it is used in the claims of
11 the ‘922 patent, does not incorporate any motive or intent requirement. Consistent with both
12 the construction in the *Markman* order and the analysis in the summary judgment order, one
13 of ordinary skill in the art would understand the plain and ordinary meaning of the claim
14 language to require that technological limitations in the manufacturing of the layer at the
15 quarter-wavelength thickness would be present and that those limitations were minimized or
16 avoided at a decreased thickness of the layer relative to the quarter-wavelength thickness.

17 This construction is consistent with the patent’s specification, which indicates that this
18 limitation generally refers to the knowledge of those of ordinary skill in the art that certain
19 materials can be manufactured at the optimal quarter-wavelength thickness only with
20 difficulty. ‘922 patent at 2:20-32. Deviating from the optimal thickness can “minimize[] or
21 avoid[]” the “problems associated with the manufacturing of thick layers.” *Id.* at 3:7-11.
22 Further, the only reference in the patent to any “deliberate” action is the deliberate deviation
23 from optimum layer thickness. *Id.* at 3:44-49. Thus, to again paraphrase *Mee Industries*, the
24 issue is whether by deviating from quarter-wavelength layer thickness, manufacturing
25 limitations were minimized or avoided. Even if a potential infringer chose to deviate from
26 quarter-wavelength layer thickness for an entirely different reason, that would not avoid
27 infringement. *See Mee Indus.*, 341 F.3d at 1380.

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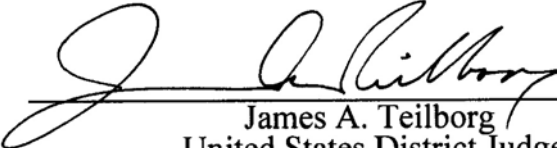
II. CONCLUSION

Accordingly,

IT IS ORDERED denying in part and granting in part Avago's Motion for Reconsideration (Doc. 466). The motion is granted with respect to Avago's motion for summary judgment on TriQuint's antitrust claims and denied with respect to all other issues.

IT IS FURTHER ORDERED granting TriQuint's Motion for Partial Reconsideration or Clarification (Doc. 469) to the extent that it requests clarification. To the extent that the motion requests reconsideration, it is denied. This Order does not change any of the Court's rulings in the Summary Judgment Order dated February 24, 2012 (Doc. 454).

DATED this 25th day of April, 2012.



James A. Teilborg
United States District Judge