

EXHIBIT 12

Not Reported in F.Supp.2d, 2004 WL 5642907 (C.D.Cal.)
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Only the Westlaw citation is currently available.

United States District Court,
C.D. California.
QR SPEX, INC., et al.
v.
MOTOROLA, INC., et al.
No. CV 03-6284-JFW (FMOx).

Oct. 28, 2004.

Named Expert: Dr. David Goodman
Charles L. Richardson, Fred E. Stoops, Sr., Gary L. Richardson, Mark L. Collier, Stephanie Dinsmore Phipps, Richardson Stoops Richardson & Ward, Tulsa, OK, Melvin N.A. Avanzado, Jeffer Mangels Butler and Marmaro, Los Angeles, CA, for QR Spex, Inc., et al.

Brian Thomas Clarke, Theodore T. Herhold, Townsend Townsend & Crew, Palo Alto, CA, for Motorola, Inc., et al.

PROCEEDINGS (IN CHAMBERS): ORDER GRANTING DEFENDANT FROG DESIGN, INC.'S MOTION FOR SUMMARY JUDGMENT OR, IN THE ALTERNATIVE, SUMMARY ADJUDICATION OF ISSUES [filed 9/28/04];

ORDER GRANTING IN PART AND DENYING IN PART DEFENDANT FROG DESIGN, INC.'S MOTION TO EXCLUDE PLAINTIFFS' EXPERT REPORTS [filed 9/28/04]

Honorable JOHN F. WALTER, District Judge.

*1 Shannon Reilly, Courtroom Deputy

On September 28, 2004, Defendant Frog Design, Inc. ("Frog Design") filed a Motion for Summary Judgment or, in the Alternative, for Summary Adju-

dication of Issues. On October 14, 2004, Plaintiffs QR Spex, Inc. and Thomas Swab (collectively "Plaintiffs") filed their Opposition. On October 18, 2004, Frog Design filed a Reply.

On September 28, 2004, Frog Design filed a Motion to Exclude Plaintiffs' Expert Reports. On October 14, 2004, Plaintiffs filed their Opposition. On October 18, 2004, Frog Design filed a Reply.

Pursuant to [Rule 78 of the Federal Rules of Civil Procedure](#) and Local Rule 7-15, the Court found these matters appropriate for submission on the papers without oral argument. The matters were, therefore, removed from the Court's October 25, 2004 hearing calendar and the parties were given advance telephonic notice. After considering the moving, opposing, and reply papers, and the arguments therein, the Court rules as follows:

I. Factual Background

A. Plaintiff's Eyewear Concept

In 1999, Plaintiff Thomas Swab first conceived of a concept for eyewear with detachable temple pieces. In April of 2000, Mr. Swab hired Frog Design to develop a prototype of his eyewear concept. Prior to providing Frog Design with any information regarding Mr. Swab's eyewear concept, Plaintiff QR Spex, Inc., a corporation founded by Mr. Swab, entered into a non-disclosure agreement with Frog Design in which Frog Design agreed that it would "not use the Confidential Information [provided to Frog Design by Plaintiffs] for its own benefit ... or permit its use by others for their benefit or to the detriment of [Plaintiffs]." ^{FNI} During the first meeting between Frog Design and Mr. Swab in April of 2000, Mikal Greaves of Frog Design suggested the inclusion of "Bluetooth" technology into the eyewear concept which would allow the eyewear to communicate with a plurality of other Bluetooth enabled devices. Mr. Swab agreed to incorporate Bluetooth technology into the eyewear

concept. Thereafter, Frog Design developed a prototype of Plaintiffs' eyewear concept with detachable temples that was configured to communicate with an Erickson Bluetooth cell phone.

FN1. Plaintiffs and Frog Design entered into a second agreement which also contained a similar non-disclosure provision in August of 2002.

In April of 2001, Plaintiffs applied to the United States Patent Office for a patent on their eyewear concept. On October 31, 2002, the Patent Office published Plaintiffs' patent application entitled "eyewear with exchangeable temples housing bluetooth enabled apparatus." On August 3, 2004, the Patent Office issued a patent to Plaintiffs entitled "eyewear with exchangeable temples housing a transceiver forming ad hoc networks with other devices" (the "**767 Patent**").

In June of 2001, employees of Frog Design introduced Mr. Swab to Jason Pelski of Motorola, Inc.'s ("Motorola") PCS division to explore Motorola's interest, if any, in Plaintiffs' eyewear concept. Prior to any discussions with Motorola, Plaintiffs and Motorola entered into a non-disclosure agreement. Mr. Swab then mailed a brochure to Mr. Pelski which detailed the eyewear concept, including photos and conceptual drawings. After several discussions and meetings regarding Plaintiffs' eyewear concept, Motorola eventually declined to enter into any agreements with Plaintiffs for the manufacture and sale of Plaintiffs' eyewear concept. Plaintiffs have not yet manufactured or marketed their eyewear concept.

B. Motorola and Frog Design's "Offspring Wearables" Concept

***2** In 1999, before Mr. Swab even envisioned his concept for eyewear with detachable temples, Motorola's Integrated Digital Enhanced Network ("IDEN") division engaged MIT Media Lab ("MIT") to design a family of "next generation"

"wearable" devices, including a pen, bracelet, pendant, wristwatch and sunglasses, which would be able to communicate with one another via wireless technology. After MIT provided Motorola with the initial design work for the "Wearables" concept, in May of 2002, Motorola's IDEN division engaged Frog Design to assist in the design and creation of "Offspring Wearables"-compatible modular wearable wirelessly connected devices. Frog Design built appearance models of the "Offspring Wearables" for Motorola which were non-functioning and did not contain any electronic components or wireless technology. On March 10, 2003, Motorola and Frog Design issued a press release introducing their "Offspring Wearables" concept which included pictures of the non-functioning appearance models built by Frog Design. Although the use of Bluetooth technology had been discussed internally by Motorola and Frog Design in connection with the "Offspring Wearables" concept, at the time Motorola and Frog Design issued their press release, they had not yet decided on what technology they would use to create the wireless network. As a result, the press release issued by Motorola and Frog Design was silent as to the technology that would be used and did not mention Bluetooth technology. Motorola and Frog Design have not yet manufactured, marketed, or even completed the development of their "Offspring Wearables" concept.

II. Procedural Background

On September 3, 2003, Plaintiffs filed a Complaint against Frog Design and Motorola (collectively "Defendants") alleging: (1) Breach of confidential relationship against both Defendants; (2) Breach of implied-in-fact contract against Motorola; (3) Unjust enrichment against both Defendants; (4) Conversion against both Defendants; (5) Unfair Competition under California law against both Defendants; (6) Misappropriation of trade secret under Illinois law against Motorola; (7) Misappropriation of trade secret under California law against Frog Design; (8) Breach of contract by Defendant Frog Design; (9) Breach of contract by Defendant Mo-

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torola; (10) Patent infringement against both Defendants; (11) Tortious interference with prospective business relations against Motorola; and (12) Fraud and deceit against both Defendants.

On December 5, 2003, Motorola filed a Motion to Dismiss. Plaintiffs filed a First Amended Complaint on December 11, 2003 in which Plaintiffs realleged the same substantive claims for relief with the exception of their claim for tortious interference with prospective business relations against Motorola which Plaintiffs chose not to pursue. Shortly thereafter, on December 23, 2003, Plaintiffs filed a Second Amended Complaint in which they dropped Motorola IDEN as a defendant and also chose not to pursue their claim for patent infringement.

*3 On January 8, 2004, and January 12, 2004, respectively, Motorola and Frog Design each filed a motion to dismiss portions of Plaintiffs' Second Amended Complaint. After a hearing on those motions, the Court granted in part and denied in part Motorola's motion and dismissed Plaintiffs' Second, Fifth and Tenth Claims for Relief against Motorola with prejudice. The Court denied Frog Design's motion to dismiss in its entirety.

On May 12, 2004, and May 18, 2004, respectively, Motorola and Frog Design each moved for summary judgment on all claims remaining against them. On June 16, 2004, after a hearing on Defendants' motions for summary judgment, the Court denied both motions.^{FN2} On October 5, 2004, Plaintiffs filed a stipulation to dismiss their remaining claims against Motorola. As a result, the only claims remaining in this action are Plaintiffs' claims for breach of confidential relationship, unjust enrichment, conversion, unfair competition, misappropriation of trade secrets, breach of contract and fraud against Frog Design.

^{FN2}. In support of its first motion for summary judgment, Frog Design failed to present any evidence in opposition to Plaintiffs' statement of genuine issues and instead made an apparent tactical decision

to lodge boilerplate objections to each of the facts alleged by Plaintiffs. Frog Design's objections were overruled by the Court as a violation of the Court's Scheduling and Case Management Order. *See* CMO at 6-9. Based on Frog Design's failure to offer any evidence in opposition to Plaintiffs' statement of genuine issues, the Court denied Frog Design's Motion.

III. Discussion

A. *Frog Design's Motion for Summary Judgment*

Summary judgment is proper where “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” [Fed.R.Civ.P. 56\(c\)](#). The moving party has the burden of demonstrating the absence of a genuine issue of fact for trial. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). A party opposing a properly made and supported motion for summary judgment may not rest upon mere denials but “must set forth specific facts showing that there is a genuine issue for trial.” [Fed.R.Civ.P. 56\(e\)](#); *see also Taylor v. List*, 880 F.2d 1040, 1045 (9th Cir.1989) (“A summary judgment motion cannot be defeated by relying solely on conclusory allegations unsupported by factual data.”). In particular, when the non-moving party bears the burden of proving an element essential to its case, that party must make a showing sufficient to establish a genuine issue of material fact with respect to the existence of that element or be subject to summary judgment. *See Celotex Corp. v. Catrett*, 411 U.S. 317, 322 (1986). “An issue of fact is not enough to defeat summary judgment; there must be a genuine issue of material fact, a dispute capable of affecting the outcome of the case.” *American International Group, Inc. v. American International Bank*, 926 F.2d 829, 833 (9th Cir.1991) (Kozinski, dissenting).

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An issue is genuine if evidence is produced that would allow a rational trier of fact to reach a verdict in favor of the non-moving party. *Anderson*, 411 U.S. at 248. “This requires evidence, not speculation.” *Meade v. Cedarapids, Inc.*, 164 F.3d 1218, 1225 (9th Cir.1999). The Court must assume the truth of direct evidence set forth by the opposing party. See *Hanon v. Dataproducts Corp.* 976 F.2d 497, 507 (9th Cir.1992). However, where circumstantial evidence is presented, the Court may consider the plausibility and reasonableness of inferences arising therefrom. See *Anderson*, 477 U.S. at 249-50; *TW Elec. Serv., Inc. v. Pacific Elec. Contractors Ass'n*, 809 F.2d 626, 631-32 (9th Cir.1987). Although the party opposing summary judgment is entitled to the benefit of all reasonable inferences, “inferences cannot be drawn from thin air; they must be based on evidence which, if believed, would be sufficient to support a judgment for the nonmoving party.” *American International Group*, 926 F.2d at 836-37. In that regard, “a mere ‘scintilla’ of evidence will not be sufficient to defeat a properly supported motion for summary judgment; rather, the nonmoving party must introduce some ‘significant probative evidence tending to support the complaint.’ ” *Summers v. Teichert & Son, Inc.*, 127 F.3d 1150, 1152 (9th Cir.1997).

1. Plaintiffs' Seventh Claim for Relief for Misappropriation of Trade Secrets

*4 The heart of Plaintiffs' lawsuit against Frog Design is Plaintiffs' claim for misappropriation of certain alleged trade secrets embodied in Plaintiffs' eyewear concept as alleged in Plaintiffs' Seventh Claim for Relief. Under the California Uniform Trade Secrets Act, *Cal. Civ.Code § 3426, et seq.* (“CUTSA”), a “trade secret” is defined as:

[I]nformation, including a formula, pattern, compilation, program, device, method, technique, or process, that:

(1) Derives independent economic value, actual or potential, from not being generally known to

the public or to other persons who can obtain economic value from its disclosure or use; and

(2) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

Cal. Civ.Code § 3426.1(d). Misappropriation is defined under CUTSA as the “[d]isclosure or use of a trade secret of another without express or implied consent by a person who ... [a]t the time of disclosure or use, knew or had reason to know that his or her knowledge of the trade secret was ... [a]cquired under circumstances giving rise to a duty to maintain its secrecy or limit its use.” *Cal. Civ.Code § 3426.1(b)*.

Plaintiffs' claim of misappropriation is based upon two alleged trade secrets. ^{FN3} The first trade secret was disclosed in Claim 1 of the '767 Patent and consists of: “An eyewear comprising: a frame; and a Bluetooth transceiver for short-distance wireless communication, wherein said Bluetooth transceiver is embedded in said frame, and wherein said Bluetooth transceiver is configured to form an ad hoc wireless network with a plurality of devices” (the “Bluetooth Trade Secret”). ^{FN4} Undisputed Fact (“U.F.”) ¶ 10. The second alleged trade secret consists of the “look and form factor” of Plaintiffs' eyewear concept. U.F. ¶ 11. Plaintiffs allege that Frog Design improperly used or otherwise misappropriated both of these trade secrets in connection with the design of the “Offspring Wearables” eyewear.

^{FN3}. Plaintiffs claim that the “cable management system” (also referred to as the “wire management technology”) used in Plaintiffs' eyewear concept is a third trade secret at issue in this case. However, Plaintiffs admit that they do not have any evidence to support their claim that Frog Design used or otherwise misappropriated their cable management system trade secret. See Undisputed Fact ¶ 14.

^{FN4}. Frog Design does not dispute that the

Bluetooth Trade Secret is a trade secret protected under CUTSA.

In its Motion for Summary Judgment, Frog Design demonstrates that it did not use, disclose, or otherwise misappropriate Plaintiffs' alleged trade secrets at any time, either prior to or after the publication of Plaintiffs' patent application on October 31, 2002. Frog Design argues that Plaintiffs have failed to offer any admissible evidence that would support their claim that Frog Design improperly used or disclosed either of Plaintiffs' trade secrets by incorporating them into the "Offspring Wearables" concept. Additionally, Frog Design contends that the "look and form" of Plaintiffs' eyewear concept is not a protectable trade secret.

a. *Plaintiffs' Bluetooth Trade Secret.*

On October 31, 2002, the United States Patent Office published Plaintiffs' patent application entitled "eyewear with exchangeable temples housing bluetooth enabled apparatus" which disclosed Plaintiffs' Bluetooth Trade Secret. "It is well established that disclosure of a trade secret in a patent places the information comprising the secret into the public domain. Once the information is in the public domain and the element of secrecy is gone, the trade secret is extinguished and the patentee's only protection is that afforded under the patent law." *Stutz Motor Car of America, Inc. v. Reebok International, Ltd.*, 909 F.Supp. 1353, 1359 (C.D.Cal.1995) *aff'd* 113 F.3d 1258 (9th Cir.1997); *see also Robotron Corp. v. Lake Shore Burial Vault Co., Inc.*, 712 F.2d 1214 (7th Cir.1983). It is undisputed that the Bluetooth Trade Secret which was disclosed in the patent application lost its trade secret status as of October 31, 2002-more than five months prior to Motorola and Frog Design's press release announcing their "Offspring Wearables" concept. U.F. ¶ 9. As a result, the only time frame relevant to Plaintiffs' claim of misappropriation of the Bluetooth Trade Secret is the period from April of 2000 (the date that Plaintiffs first introduced their eyewear concept to Frog Design) to October

31, 2002 (the date of the publication of Plaintiffs' patent application disclosing the Bluetooth Trade Secret). In other words, in order to prevail on their claim for misappropriation, Plaintiffs must establish that Frog Design improperly used or disclosed Plaintiffs' Bluetooth Trade Secret between April of 2000 and the end of October of 2002.

*5 In support of their claim of misappropriation of their Bluetooth Trade Secret, Plaintiffs rely on news articles from March of 2003 discussing Motorola and Frog Design's March 10, 2003 press release disclosing the "Offspring Wearables" concept. Those articles state that "Bluetooth was indeed the vehicle by which the 'Offspring Wearables' devices would communicate" and that the "Offspring Wearables" are "Bluetooth enabled." Plaintiffs also offer e-mails from employees at Frog Design which indicate that the "Offspring Wearables" "devices would employ Bluetooth," were "Bluetooth enabled" and "would utilize Bluetooth" and also rely on the deposition testimony of an employee of Frog Design that "Bluetooth technology was contemplated for use in the 'Offspring Wearables' devices." Plaintiffs argue that the foregoing constitutes circumstantial evidence that Frog Design used or disclosed the concept of Bluetooth enabled eyewear to Motorola and that when Motorola and Frog Design issued their March 10, 2003 press release, Plaintiffs "lost the ability to attempt to capture and exploit the potential mindshare that might be established regarding Bluetooth enabled glasses." Opposition to MSJ at 17.

Plaintiffs' argument fails for two reasons: 1) Plaintiffs have not and cannot allege a trade secret in the general concept of Bluetooth enabled eyewear; and 2) Plaintiffs were the first to place the Bluetooth Trade Secret in the public domain in October of 2002-more than five months prior to the press release issued by Motorola and Frog Design. Plaintiffs have admitted that their Bluetooth Trade Secret is narrowly limited to that which was disclosed in Claim 1 of their '*767 Patent-embedding a Bluetooth chip in an eyewear frame*. Plaintiffs

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simply do not have a trade secret in the general concept of Bluetooth enabled eyewear and any evidence that Frog Design used or intended to use such a concept in the creation of the “Offspring Wearables” is irrelevant to Plaintiffs' claim that Frog Design misappropriated Plaintiffs' Bluetooth Trade Secret.

Frog Design also argues that Plaintiffs cannot rely on the Expert Report and opinions of their expert, Dr. David Goodman, to support their position that Frog Design used Plaintiffs' Bluetooth Trade Secret.^{FN5} In his Expert Report, Dr. Goodman concludes that “the goggles in the Offspring Product line embody all of the elements of Claim 1 of the ‘767 Patent” and more specifically that the appearance of the goggles pictured in the Motorola and Frog Design press releases “can be achieved only by embedding the computer and communication technology (including Bluetooth) in the frame of the goggles.” See Goodman Report at ¶¶ 26, 29. Although they do not cite his Expert Report, Plaintiffs rely on Dr. Goodman's opinions in support of their argument that “[t]he Motorola ‘Offspring Wearable’ product appear [sic] to be a Bluetooth enabled eyewear wherein Bluetooth is embedded in the frame of the eyewear and is capable of communicating with a cell phone and a plurality of devices.” Opposition to MSJ at 10.

FN5. Although Plaintiffs did not offer or cite to Dr. Goodman's Expert Report or his deposition testimony in support of their Opposition to Frog Design's Motion for Summary Judgment, Frog Design chose to include Dr. Goodman's Expert Report and excerpts from his deposition as part of the record before this Court. Accordingly, the Court will address the admissibility of Dr. Goodman's Expert Report and opinions in connection with its ruling on Frog Design's Motion for Summary Judgment.

*6 As discussed more fully in Section III.B. *infra*, the Court finds that Dr. Goodman's opinions do not meet the standards for reliability set forth in Feder-

al Rule of Civil Procedure 702 and Daubert, and are therefore inadmissible. See discussion *infra* at Section III.B. Even if Dr. Goodman's opinions were admissible, they fail to raise a genuine issue of material fact that would defeat summary judgment. In reaching his opinions, Dr. Goodman did not review any of the “Offspring Wearables” appearance models built by Frog Design despite his admission at his deposition that a review of the models would have been “useful” in reaching his opinions. See Goodman Dep. at 44:8-16. When asked if he had any evidence that Frog Design or Motorola ever embedded a Bluetooth transceiver in the frame of eyewear, Dr. Goodman stated that he “just inferred it from their pictures on their website” and admitted that he had no evidence that “they actually did that.” *Id.* at 27:23-28:3. Indeed, during his deposition, Dr. Goodman admitted “I don't know anything about trade secrets,” explained that he had been hired to “form an opinion on what [Frog Design and Motorola] intended to do” and that his “opinion is based on what they said they would make, not what they actually made.” *Id.* at 16:10; 34:8-9; 41:14-15.

“When determining, under Rules 56, as well as 50, whether a triable issue of fact has been raised to warrant submission of a case to a jury, the court is not required to accept something as true, simply because an expert has said it is so.” *Miskin v. Baxter Healthcare Corp.*, 107 F.Supp.2d 669, 674, n. 7 (D.Md.1999). Moreover, a conclusory statement by an expert “is wholly insufficient to raise a genuine evidentiary dispute for a jury.” *Johnston v. IVAC Corp.*, 885 F.2d 1574, 1578 (Fed.Cir.1989). Dr. Goodman's opinions, which are based upon nothing more than his own speculation and unsupported assumptions, do not create a genuine issue of material fact on Plaintiffs' claim of misappropriation.

b. Plaintiffs' “Look and Form” Trade Secret.

As part of their Seventh Claim for Relief, Plaintiffs claim that the “look and form” of their eyewear is a trade secret which was misappropriated by Frog

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Design in the design of the “Offspring Wearables” eyewear. In its Motion for Summary Judgment, Frog Design argues that the “look and form” of Plaintiffs' eyewear concept is not protectable as a trade secret because it was not so unique as to “[d]erive independent economic value ... from not being generally known to the public.” [Cal. Civ.Code § 3426.1\(d\)](#). Additionally, Frog Design claims that Plaintiffs have “disavowed” their alleged trade secret in the look and form of their eyewear concept.

Based on the evidence in the record, the Court finds that the “look and form” of the eyewear concept was not unique. For example, at his deposition, Plaintiff Swab testified that the look of the eyewear concept was not “novel or revolutionary.” Although Plaintiffs dispute that they have “disavowed” their “look and form” trade secret, Plaintiffs have failed to offer any evidence in support of their claim as required by [Federal Rule of Civil Procedure 56](#) and this Court's Scheduling and Case Management Order. *See* Statement of Genuine Issues at ¶ 18; [Fed.R.Civ.P. 56](#); CMO at 6-9. Plaintiffs' expert, Dr. Goodman, understandably does not address the alleged “look and form” trade secret in his expert report because, as he admitted at his deposition, he had not been asked “to render an opinion about the look and form of the QR Spex eyewear.” Goodman Dep. at 57:13-15. In fact, contrary to Plaintiffs' position, it is Dr. Goodman's opinion that Plaintiffs' eyewear concept “closely resemble [s] conventional wrap around sunglasses.” Goodman Report at ¶ 29. Dr. Goodman supports his opinion with a quote from an article which states that the “Offspring Wearables” goggles, which Plaintiffs contend are almost identical to their eyewear concept, “look like an ordinary pair of wraparound sunglasses.” *Id.* at ¶ 30. In the absence of any evidence to support Plaintiffs' position that the “look and form” of their eyewear concept is entitled to trade secret protection, the Court finds that the “look and form” of the eyewear concept is not a trade secret protected by CUTSA.

*7 In their Opposition to Summary Judgment, Plaintiffs have simply failed to provide the Court with any admissible evidence that Frog Design misappropriated Plaintiffs' trade secrets. Indeed, at his deposition, Plaintiff Swab admitted that he did not have any knowledge or information that Frog Design used or disclosed his trade secrets and/or confidential information to Motorola:

Q. Do you have any knowledge that Jason Pelski or anybody at Motorola PCS ever disclosed any of your confidential information to anybody at Motorola iDEN?

A. No

Q. And do you have any information that anybody at Frog who worked on your project disclosed any confidential information to anybody at Motorola iDEN?

A. No.

Deposition of Thomas Swab at Vol. 1, 278:12-19. Although the party opposing summary judgment is entitled to the benefit of all reasonable inferences, “inferences cannot be drawn from thin air; they must be based on evidence which, if believed, would be sufficient to support a judgment for the nonmoving party.” [American International Group, 926 F.2d at 836-37](#). “This requires evidence, not speculation.” [Meade, 164 F.3d at 1225](#). In that regard, “a mere ‘scintilla’ of evidence will not be sufficient to defeat a properly supported motion for summary judgment; rather, the nonmoving party must introduce some ‘significant probative evidence tending to support the complaint.’ ” [Summers, 127 F.3d at 1152](#). There is no evidence in this record that Frog Design used Plaintiffs' trade secrets, and Plaintiffs' speculation, without more, is not enough to defeat Frog Design's Motion for Summary Judgment.

Accordingly, the Court finds that there are no genuine issues of material fact and Frog Design is entitled to judgment as a matter of law on Plaintiffs'

Seventh. Claim for Relief for misappropriation of trade secrets.

2. Plaintiffs' Remaining Claims for Relief Against Frog Design

Each of Plaintiffs' remaining claims for breach of confidential relationship, unjust enrichment, conversion, unfair competition, breach of contract and fraud against Frog Design is dependant upon Plaintiffs proving that Frog Design improperly used, disclosed or otherwise misappropriated Plaintiffs' trade secrets and/or confidential information. As set forth in the preceding section, Plaintiffs have not presented the Court with any admissible evidence that Frog Design used, disclosed, or otherwise misappropriated their trade secrets and/or confidential information.

Accordingly, the Court finds that there are no genuine issues of material fact and Frog Design is entitled to judgment as a matter of law on Plaintiffs' First, Third, Fourth, Fifth, Eighth, and Twelfth Claims for Relief.

B. *Frog Design's Motion to Exclude Dr. David Goodman's Expert Report and Opinions*

In its Motion to Exclude Plaintiffs' Expert Reports, Frog Design argues that Dr. David Goodman's opinions are inadmissible under Federal Rule of Civil Procedure 702 and *Daubert* because they are not based on sufficient facts and data, and because Dr. Goodman did not apply reliable principles and methods to the facts of this case. *See* Motion to Exclude at 23; *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993); Fed.R.Civ.P. 702. Pursuant to Rule 702:

*8 If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill experience, training, or education may testify thereto in the for of an opinion or otherwise, if

(1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

Fed.R.Civ.P. 702. Under Rule 702, it is the responsibility of the Court to ensure “that an expert's testimony both rests on a reliable foundation and is relevant to the task at hand.” *Daubert*, 509 U.S. at 597. When “[f]aced with a proffer of expert scientific testimony ... the trial judge must determine at the outset, pursuant to Rule 104(a), whether the expert is proposing to testify to (1) scientific knowledge that (2) will assist the trier of fact to understand or determine a fact in issue.” *Id.* at 592. This gatekeeping function extends beyond scientific testimony to “testimony based on ... ‘technical’ and ‘other specialized’ knowledge.” *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 141, 119 S.Ct. 1167, 143 L.Ed.2d 238 (1999). Plaintiffs have the burden of establishing by a preponderance of the evidence that Dr. Goodman's Expert Report is admissible under Rule 702. *See, e.g., Lust, By and Through Lust v. Merrell Dow Pharm., Inc.*, 89 F.3d 594, 598 (9th Cir.1996). “Expert testimony which does not relate to any issue in the case is not relevant and ergo, non-helpful.” *Daubert*, 509 U.S. at 591.

According to his Expert Report, Dr. Goodman, a Professor in the Department of Electrical and Computer Engineering at Polytechnic University in Brooklyn, New York, was hired by Plaintiffs to “opine on the relationship of the technology claimed in U.S. Patent 6,769,767 ('767 patent) to certain product plans disclosed by defendants Motorola and frog design on and after March 10, 2003” and to “render an opinion as to whether the technology claimed in the '767 patent was in the public domain on October 31, 2002.” Goodman Report at ¶ 1. In his Expert Report, Dr. Goodman concludes that “the products described by Motorola and frog conform to the technology disclosed in Claim 1 of the '767 patent ...” and, more specifically, that “the goggles in the Offspring Product line

embody all of the elements of Claim 1 of the '767 Patent" *Id.* at ¶¶ 6, 26. Dr. Goodman also concludes that "the technology disclosed in Claim 1 of the '767 patent was not in the public domain on October 31, 2002." *Id.* at ¶ 7. Upon review of Dr. Goodman's Expert Report and the excerpts of his deposition which are part of the record before this Court, the Court finds that Dr. Goodman's opinions do not meet the standards for relevance and reliability as required by Rule 702 and *Daubert*. Dr. Goodman's Expert Report and the opinions contained therein are therefore inadmissible under Rule 702.

*9 The Court finds that Dr. Goodman's first opinion—that "the goggles in the Offspring Product line embody all of the elements of Claim 1 of the '767 Patent"—does not meet the standard for reliability under the factors set forth in Rule 702. Goodman Report at ¶ 26. As an initial matter, Dr. Goodman's opinion is not "based upon sufficient facts or data." Fed.R.Civ.P. 702. In support of his opinion, Dr. Goodman states that "[i]n the Offspring product line, '[t]he individual pieces communicate via Bluetooth.'" Goodman Report at ¶¶ 27-32. This purported "fact" is a quote copied from a March 11, 2003 news article published at phonescoop.com discussing Motorola and Frog Design's March 10, 2003 press release regarding the "Offspring Wearables" concept. However, the March 10, 2003 press release did not mention Bluetooth, and as of March 10, 2003, Motorola and Frog Design had not decided which technology would be used for the wireless network. When asked at his deposition what evidence he had "other than thephonescoop.com publication that Frog and Motorola actually use Bluetooth with their wearable devices," Dr. Goodman replied that thephonescoop.com article was "the only direct evidence [he] could cite to." Goodman Dep. at 25:11-15. As a result, the crucial predicate "fact" upon which Dr. Goodman's opinion is based is not only inaccurate, it is contradicted by the direct evidence submitted by Frog Design in support of its Motions. In the absence of this "fact," Dr. Goodman's opinion lacks foundation. Indeed, Dr. Goodman admitted at his deposition that "[i]f

there was no Bluetooth, then I don't think there would be a dispute here." *Id.* at 81:14-15.

Additionally, Dr. Goodman's first opinion is not "the product of reliable principles and methods." Fed.R.Civ.P. 702. In reaching his opinion, Dr. Goodman did not review any of the "Offspring Wearables" appearance models created by Frog Design despite his admission at his deposition that a review of the models would have been "useful" in formulating his opinions. *See* Goodman Dep. at 44:8-16. Instead, Dr. Goodman merely reviewed the description of the goggles and the pictures of the appearance models from the press release and Motorola's website. From the description and the pictures, Dr. Goodman leaps to the conclusion that the appearance of the "Offspring Wearables" goggles "can be achieved only by embedding the computer and communication technology (including Bluetooth) in the frame of the goggles." ^{FN6} Goodman Report at ¶ 29. When asked if he had any evidence that Frog Design or Motorola ever embedded a Bluetooth transceiver in the frame of eyewear, Dr. Goodman stated that he "just inferred it from their pictures on their website" and had no evidence that "they actually did that." Goodman Dep. at 27:23-28:3. Indeed, his conclusion was based upon nothing more than the fact that "because nothing stuck out" from the goggles in the pictures he reviewed, "that, therefore, the Bluetooth transceiver must be embedded in the eyewear frame." *id.* at 81:5-8.

^{FN6}. In fact, Dr. Goodman testified at his deposition that at the time he drafted his Expert Report, he was unaware that appearance models of the goggles had been built—he did not know whether the "graphic material" he reviewed was merely conceptual drawings or photographs of actual objects. *See* Goodman Dep. at 45:1-18.

*10 It is undisputed that the appearance models built by Frog Design did not contain Bluetooth, nor did they utilize any electronic or wireless technology. Yet when this crucial fact was presented to

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Dr. Goodman during his deposition, he testified that he had been hired to “form an opinion on what [Frog Design and Motorola] intended to do” and that his “opinion is based on what they said they would make, not what they actually made.” Goodman Dep. at 34:8-9; 41:14-15. An opinion as to the possible future intent of Frog Design, which is founded upon nothing more than Dr. Goodman's own conjecture and speculation, simply fails to meet the test for reliability set forth in Rule 702.

With respect to Dr. Goodman's second opinion regarding whether Plaintiffs' Bluetooth Trade Secret was in the public domain as of October 31, 2002, the Court excludes that opinion because it is not relevant to the issues raised by Frog Design's motion for summary judgment. As an initial matter, the Court notes that Dr. Goodman lacks the qualifications to offer an opinion concerning the trade secret status of Plaintiffs' Bluetooth Trade Secret based on his own admission during his deposition that “I don't know anything about trade secrets.” Goodman Dep. at 16:10. Moreover, it is undisputed that Plaintiffs' Bluetooth Trade Secret was in fact a trade secret prior to the publication of Plaintiffs' ' [767 patent](#) application on October 31, 2002. *See* Footnote 4, *supra*. As a result, Dr. Goodman's opinion on this matter is simply not relevant to the disputed issues presently before the Court.

Accordingly, Frog Design's Motion to Exclude Plaintiffs' Expert Reports is **GRANTED** as to Dr. Goodman's Expert Report and opinions.

IV. Conclusion

For all of the foregoing reasons, Frog Design's Motion for Summary Judgment or, in the Alternative, for Summary Adjudication of Issues is **GRANTED**.

Frog Design's Motion to Exclude Plaintiffs' Expert Reports is **GRANTED in part**. Dr. Goodman's Expert Report and the opinions contained therein are inadmissible under Federal Rule of Civil Procedure

702. In light of this Court's decision to grant Frog Design's Motion for Summary Judgment, the balance of Frog Design's Motion to Exclude Plaintiffs' Expert Reports is **DENIED as moot**.

IT IS SO ORDERED.

The Clerk shall serve a copy of this Minute Order on all parties to this action.

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