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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

KARL STORZ ENDOSCOPY-AMERICA,
INC.,

Plaintiff,

v.

STRYKER CORPORATION, et al.,

Defendants.

Case No. [14-cv-00876-RS](#) (JSC)

**ORDER RE: PLAINTIFF'S MOTION
TO STRIKE; ADMINISTRATIVE
MOTIONS TO FILE UNDER SEAL**

Re: Dkt. Nos. 379, 380, 393, 397

Plaintiff Karl Storz Endoscopy-America (“KSEA”) alleges Defendants Stryker Corporation and Stryker Communications, Inc. (together, “Stryker”) infringes three KSEA patents. Now pending before the Court are KSEA’s motion to strike portions of Stryker’s expert reports (Dkt. Nos. 379-4 & 380 (redacted version)); KSEA’s administrative motions to file under seal (Dkt. Nos. 379 & 397); and Stryker’s administrative motion to file under seal (Dkt. No. 393).¹ Having carefully reviewed the parties’ briefing and voluminous exhibits, the Court concludes that oral argument is unnecessary, see Civ. L.R. 7-1(b), VACATES the August 2, 2018 hearing, and GRANTS in part KSEA’s motion to strike; GRANTS in part KSEA’s motions to file under seal; and GRANTS Stryker’s administrative motion to file under seal.

BACKGROUND

The Court has previously addressed the factual and procedural background of this case. (See Dkt. Nos. 198 at 2-3, 329 at 1-2.) As relevant to the instant motions, Stryker recently served expert reports from the following: Jordan C. Christoff (Dkt. No. 380-3); Harold J. Walbrink (Dkt. No. 380-4); Vincent A. Thomas (Dkt. No. 392-6); and Robert Greene Sterne (Dkt. No. 392-8).

¹ Record citations are to material in the Electronic Case File (“ECF”); pinpoint citations are to the ECF-generated page numbers at the top of the documents.

1 These expert reports are the subject of KSEA’s pending motion to strike.

2 **LEGAL STANDARD**

3 Patent Local Rule 3–3(a) requires a defendant to serve invalidity contentions identifying
4 “each item of prior art that allegedly anticipates each asserted claim or renders it obvious.” “If
5 obviousness is alleged, [defendant must provide] an explanation of why the prior art renders the
6 asserted claim obvious, including an identification of any combinations of prior art showing
7 obviousness.” Patent L.R. 3-3(b). The invalidity contentions must further contain “[a] chart
8 identifying where specifically in each alleged item of prior art each limitation of each asserted
9 claim is found.” Patent L.R. 3-3(c).²

10 The disclosure requirements under the Patent Local Rules “are designed to require parties
11 to crystallize their theories of the case early in the litigation and to adhere to those theories once
12 they have been disclosed.” [Fresenius Medical Care Holdings, Inc. v. Baxter Intern., Inc., No. C
13 03-1431 SBA, 2006 WL 1329997, at *4 \(N.D. Cal. May 15, 2006\)](#) (internal quotation marks and
14 citation omitted). “[I]nvalidity theories not disclosed pursuant to Local Rule 3–3 are barred,
15 accordingly, from presentation at trial (whether through expert opinion testimony or otherwise).”
16 [MediaTek Inc. v. Freescale Semiconductor, Inc., No. 11-CV-53411-YGR, 2014 WL 690161, at *1
17 \(N.D. Cal. Feb. 21, 2014\)](#). Furthermore, “a party may not use an expert report to introduce . . .
18 new invalidity theories, or new prior art references not disclosed in the parties’ infringement
19 contentions or invalidity contentions.” [ASUS Comp. Int’l v. Round Rock Research, LLC, No. 12-
20 CV-02099-JST \(NC\), 2014 WL 1463609, at *1 \(N.D. Cal. Apr. 11, 2014\)](#). “The threshold
21 question in deciding whether to strike an expert report is . . . whether the expert has permissibly
22 specified the application of a disclosed theory or impermissibly substituted a new theory
23 altogether.” [Digital Reg of Tex., LLC v. Adobe Sys. Inc., No. CV 12-01971-CW, 2014 WL
24 1653131, at *2 \(N.D. Cal. Apr. 24, 2014\)](#).

25
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27 _____
28 ² Stryker served its Fourth Supplemental Invalidity Contentions on November 11, 2017, (see Dkt.
No. 380-9); all references herein to Stryker’s invalidity contentions and claims charts are to that
document.

1 **DISCUSSION**

2 **I. KSEA’s Motion to Strike**

3 KSEA requests that the Court strike the following from Stryker’s expert reports: (1) new
4 invalidity theories in Mr. Christoff’s Invalidity Report; (2) new obviousness and backup theories
5 in Mr. Walbrink’s Invalidity Report; (3) uncrystallized theories in Mr. Christoff and Mr.
6 Walbrink’s Invalidity Reports; (4) reliance on undisclosed fact witnesses in Mr. Christoff’s
7 Invalidity Report and Mr. Thomas’ Rebuttal; and (5) the Sterne Report in its entirety.

8 **1. Previously Undisclosed Theories in Mr. Christoff’s Invalidity Report**

9 KSEA argues that Mr. Christoff’s Invalidity Report contains previously undisclosed
10 invalidity theories; specifically, KSEA takes issue with: (1) obviousness theories in Section
11 VIII.E; (2) obviousness theories regarding claim 6 of the ’310 patent in Sections VIII.E.15, 19,
12 and 23; and (3) references to Endovision XL in Section VIII.C. The Court addresses each in turn.

13 **i. Section VIII.E**

14 KSEA insists that seven of Mr. Christoff’s invalidity theories for the ’310 patent in Section
15 VIII.E must be stricken because Mr. Christoff “flips Stryker’s previously-disclosed
16 combinations—using Stryker’s secondary references as primary and Stryker’s primary references
17 as secondary.” (Dkt. No. 379-4 at 6.) KSEA argues that such “flipping” creates entirely new
18 invalidity theories. Stryker counters that its “invalidity contentions disclosed all of the
19 combinations of references about which Mr. Christoff opines,” and there is “no support in the law”
20 for “KSEA’s novel ‘flipping’ theory.” (Dkt. No. 394 at 7.) The question then is whether Mr.
21 Christoff’s purported “flipping” of the combined references results in an entirely new theory
22 because it changes why that particular combination renders the asserted claim obvious, or whether
23 Mr. Christoff instead “permissibly specified the application of a disclosed theory,” see [Adobe Sys.
24 Inc., 2014 WL 1653131](#), at *2. KSEA provides no case law to support its “flipping” argument,
25 and the Court is unable to find on point authority addressing the issue of reference “flipping.” The
26 Court, however, has “wide discretion in enforcing the Patent Local Rules,” [Finjan, Inc. v.
27 Proofpoint, Inc., No. 13-cv-05808, 2015 WL 9460295, *1 \(N.D. Cal. Dec. 23, 2015\)](#) (citing
28 [SanDisk Corp. v. Memorex Prods., Inc., 415 F.3d 1278, 1292 \(Fed. Cir. 2005\)](#)), and finds that the

1 record demonstrates Stryker’s compliance with those rules.

2 Stryker’s invalidity contentions include a list of specific combinations of references that
3 allegedly render obvious the asserted claims of the ’310 patent. (Dkt. No. 380-9 at 58-71.) That
4 list includes the specific combinations referenced in Mr. Christoff’s report challenged by the
5 instant motion. Stryker’s invalidity contentions further note that “[t]he prior art identified herein
6 and in the attached charts³ can properly be combined in multiple ways to demonstrate the
7 obviousness of the asserted claims.” (Id. at 72.) With this in mind, the Court addresses each of
8 Mr. Christoff’s contested theories.

9 **a. Eto 581 and Okada 852**

10 Stryker’s invalidity contentions state, in pertinent part:

11 Certain claims of the ’310 . . . patent[] would have been obvious to
12 one of ordinary skill in the art at the time of the alleged invention of
13 the ’310 . . . patent[] based on Eto 581 in combination with or in
14 view of one or more of the following references (collectively, the
15 “Processor and Memory References”):

- 16 • Dowdy 082
- 17 • Okada 852
- 18 • Oshima 212
- 19 • Zu 391

20 (Dkt. No. 380-9 at 95.) Furthermore, the invalidity contentions state that:

21 Eto 581 discloses a video imaging system that comprises a camera
22 control unit, a cable, and a camera head. Eto 581 also discloses a
23 camera head including an imager, a timing generator, a converter, a
24 serializer, a digital serial driver, a digital serial receiver, a
25 multiplexer, and a processor. Eto 581 also discloses a camera
26 control unit including a digital serial receiver and a digital serial
27 driver that is controlled based at least in part upon the timing signal.

28 (Id.) As for Okada 852, the invalidity contentions state that:

Okada 852 also discloses a video imaging system for an endoscope
including a camera head and a camera control unit. The camera head
of Okada 852 includes a processor and memory containing
information about the camera head. The memory of Okada 852 is
accessible to the processor.

³ Stryker’s claim charts for the ’310 patent include a preface stating that “Stryker presents the state of the art at the time of the alleged invention of the ’310 patent in Section II.B.1, its general obviousness contentions in Section II.B.3, and a technology background in Section II.A, of Stryker’s Invalidation Contentions.” (Dkt. No. 394-2 at 2.)

1 (Id. at 96.) The invalidity contentions then explain why the combination of Eto 581 and the
2 Processor and Memory References, which include Okada 852, renders obvious claim 1 of the '310
3 patent. (Id. at 96-98.)

4 KSEA insists that Mr. Christoff's theory of obviousness based on the combination of Eto
5 581 and Okada 852 is "entirely new" because it relies on Okada 852 instead of Eto 581 as teaching
6 the following claimed features of the '310 patent: (i) "processing a continuous stream of digital
7 video data"; (ii) "connected to said cable, for providing the stream of digital video data, said
8 camera head including"; (iii) "an imager, for generating an analog stream of video data"; (iv) "a
9 timing generator, generating a timing signal particular to said camera head, the timing signal
10 actuating said imager and sent to said camera control unit"; (v) "a converter, for converting the
11 analog stream of video data into the stream of digital video data"; (vi) "a serializer, for serializing
12 the stream of digital video data for transmission over said cable"; (vii) "at least one digital serial
13 driver"; (viii) "said camera control unit having at least one digital serial receiver"; and (ix) "is
14 controlled based at least in part upon said timing signal particular to said camera head." (Dkt. No.
15 379-4 at 7-8.)

16 As Stryker correctly points out, however, the invalidity contentions and the claims chart
17 address limitations (i)-(v) and (ix) as also being taught by Okada 852. (See Dkt. No. 394 at 12-13.)
18 Furthermore, Stryker correctly notes that Mr. Christoff's opinion does not rely only on Okada 852
19 as teaching limitations (vi)-(viii), but instead relies on Eto 581 or both Eto 581 and Okada 852.
20 (See Dkt. No. 394 at 12 n.4) (citing Dkt. No. 380-3 at ¶ 122.) Thus, Mr. Christoff's Invalidity
21 Report does not present an entirely new theory, but instead, specifies a previously disclosed theory
22 of obviousness based on the combination of Eto 581 and Okada 852.

23 Accordingly, the Court denies KSEA's motion to strike Sections VIII.E.1-4 of Mr.
24 Christoff's Invalidity Report.

25 **b. Eto 581 and Dowdy 082**

26 The invalidity contentions state, in pertinent part:

27 Dowdy 082 discloses a video imaging system for an endoscope
28 including a camera head, a cable, and a camera control unit. The
camera head of Dowdy 082 includes a processor and memory

containing information about the camera head.

(Dkt. No. 380-9 at 95.) The invalidity contentions then explain why the combination of Eto 581 and the Processor and Memory References, which include Dowdy 082, renders obvious the asserted claims. (Id. at 96-98.) KSEA argues that Mr. Christoff’s theory of obviousness based on the combination of Eto 581 and Dowdy 082 is “entirely new” because it relies on Dowdy 082 instead of Eto 581 as teaching the following claimed features of the ’310 patent: (i) a camera control unit “processing a continuous stream of digital video data”; (ii) “for providing the stream of digital video data, said camera head including”; (iii) “an imager”; and (iv) “for generating an analog [sic] stream of video data”.⁴ (Dkt. No. 379-4 at 8.)

Again, however, Stryker correctly notes that its invalidity contentions and claims chart disclose limitations (i)-(iii) as also being taught by Dowdy 082. (Dkt. No. 394 at 13.) Thus, Mr. Christoff’s report is not setting forth a new theory based on those limitations. Furthermore, Mr. Christoff’s Invalidity Report does not rely only on Dowdy 082 as teaching limitation (iv), but instead relies on a combination of Eto 581 and Dowdy 082 for that element. (See Dkt. No. 380-3 at ¶ 178) (“The camera head would include an imager (e.g., Dowdy) and an ADC [analog to digital converter] (e.g., Eto) for generating a stream of digital video data.”) Because Mr. Christoff’s Invalidity Report specifies a previously disclosed obviousness theory based on a combination of Eto 581 and Dowdy 082, the Court denies KSEA’s motion to strike Sections VIII.E.5-6 of Mr. Christoff’s report.

c. Eto 581 and Oshima 212

Stryker’s invalidity contentions state, in pertinent part:

Oshima 212 also discloses a video imaging system for an endoscope including a camera head, a cable, and a camera control unit. The camera head of Oshima 212 includes a processor and memory containing information about the camera head. The memory of Oshima 212 is accessible to the processor.

⁴ KSEA’s purported limitation (iv) misstates claim 21 of the ’310 patent; the limitation should read “the stream of digital video data” instead of “an analog stream of video data.” (See Dkt. No. 379-4 at 8.) Claim 21 of the ’310 patent states, in pertinent part: “for providing the stream of digital video data, said camera head including; an imager, including an analog to digital converter for generating the stream of digital video data” (Dkt. No. 1-2 at 14-15) (emphasis added.)

1 (Dkt. No. 380-9 at 96.) The invalidity contentions then explain why the combination of Eto 581
2 and the Processor and Memory References, which include Oshima 212, renders obvious the
3 asserted '310 patent claims. (Id. at 96-98.) KSEA argues that Mr. Christoff's theory of
4 obviousness based on the combination of Eto 581 and Oshima 212 is "entirely new" because it
5 relies on Oshima 212 instead of Eto 581 as teaching the following claimed features of the '310
6 patent: (i) "processing a continuous stream of digital video data"; (ii) "for providing the stream of
7 digital video data, said camera head including"; (iii) "an imager"; and (iv) "for generating an
8 analog [sic] stream of video data."⁵ (Dkt. No. 379-4 at 9.)

9 KSEA's argument fails for the same reasons stated above. Stryker's invalidity contentions
10 and claims chart disclose limitations (i)-(iii) as also being taught by Oshima 212. (Dkt. No. 394 at
11 13-14.) Furthermore, Mr. Christoff's Invalidity Report does not rely only on Oshima 212 as
12 teaching limitation (iv), but instead relies on a combination of Eto 581 and Oshima 212 for that
13 element. (See Dkt. No. 380-3 at ¶ 204) ("The camera head would include an imager (e.g.,
14 Oshima) and an ADC [analog to digital converter] (e.g., Eto) for generating a stream of digital
15 video data.") Accordingly, the Court denies KSEA's motion to strike Sections VIII.E.7-8 of Mr.
16 Christoff's Invalidity Report.

17 **d. Nakamura 492 and Okada 852**

18 Stryker's invalidity contentions state, in pertinent part:

19 Certain claims of the '310 . . . patent[] would have been obvious to
20 one of ordinary skill in the art at the time of the alleged invention of
21 the '310 . . . patent[] based on Nakamura 492 in combination with
22 or in view of one or more of the following references (collectively,
23 the "Processor and Memory References"):

- 24 • Dowdy 082
- 25 • Okada 852
- 26 • Oshima 212
- 27 • Zu 391

28 (Dkt. No. 380-9 at 105.) Furthermore:

Nakamura 492 discloses a video imaging system that comprises a
camera control unit, a cable, and a camera head. Nakamura 492 also

⁵ KSEA again misstates Claim 21 of the '310 patent.

1 discloses a camera head including an imager, a timing generator, a
2 converter, a serializer, a digital serial driver, a multiplexer, and a
3 processor. Nakamura 492 also discloses a camera control unit
including a digital serial receiver that is controlled based at least in
part upon the timing signal.

4 (Id. at 106.) As for Okada 852, the invalidity contentions contain the same description noted
5 above. The invalidity contentions then explain why the combination of Nakamura 492 and the
6 Processor and Memory References, which include Okada 852, renders obvious claim 1 of the '310
7 patent. (Id. at 106-08.)

8 KSEA argues that Mr. Christoff's theory of obviousness based on the combination of
9 Nakamura 492 and Okada 852 is "entirely new" because it relies on Okada 852 instead of
10 Nakamura 492 as teaching the following claimed features of the '310 patent: (i) "processing a
11 continuous stream of digital video data"; (ii) "connected to said cable, for providing the stream of
12 digital video data, said camera head including"; (iii) "an imager, for generating an analog stream
13 of video data"; (iv) "a timing generator, generating a timing signal particular to said camera head,
14 the timing signal actuating said imager and sent to said camera control unit"; (v) "a converter, for
15 converting the analog stream of video data into the stream of digital video data"; and (vi) "is
16 controlled based at least in part upon said timing signal particular to said camera head." (Dkt. No.
17 379-4 at 10.)

18 KSEA's argument fails for the same reasons its argument for striking Sections VIII.E.1-4
19 fails—Stryker's invalidity contentions and claims chart address limitations (i)-(vi) as also being
20 taught by Okada 852. (See Dkt. No. 394 at 14.) Accordingly, the Court denies KSEA's motion to
21 strike Sections VIII.E.15-18 of Mr. Christoff's Invalidity Report.

22 **e. Nakamura 492 and Dowdy 082**

23 Stryker's invalidity contentions repeat the same description of Dowdy 082 noted above.
24 The invalidity contentions then explain why the combination of Nakamura 492 and the Processor
25 and Memory References, which include Dowdy 082, renders obvious claim 1 of the '310 patent.
26 (Id. at 106-11.) KSEA insists that Mr. Christoff's theory of obviousness based on the combination
27 of Nakamura 492 and Dowdy 082 is "entirely new" because it relies on Dowdy 082 instead of
28 Nakamura 492 as teaching the following claimed features of the '310 patent: (i) "processing a

1 continuous stream of digital video data”; (ii) “a cable, connected to said camera control unit”; (iii)
2 “an imager, for generating an analog stream of video data”; and (iv) “is controlled based at least in
3 part upon said timing signal particular to said camera head.” (Dkt. No. 379-4 at 11.)

4 Again, KSEA’s argument fails. Stryker correctly points out that its invalidity contentions
5 and claims chart address limitations (i)-(iii) as also being taught by Dowdy 082. (See Dkt. No.
6 394 at 15.) Furthermore, Stryker correctly notes that Mr. Christoff’s Invalidity Report does not
7 cite Dowdy 082 for limitation (iv); instead, Mr. Christoff relies on Nakamura 492 for that element.
8 (See Dkt. No. 394 at 15 n.7) (citing Dkt. No. 380-3 at 208.) Accordingly, the Court denies
9 KSEA’s motion to strike Sections VIII.E.19-22 of Mr. Christoff’s Invalidity Report.

10 **f. Nakamura 492 and Oshima 212**

11 Stryker’s invalidity contentions repeat the same description of Oshima 212 noted above.
12 The invalidity contentions then explain why the combination of Nakamura 492 and the Processor
13 and Memory References, which include Oshima 212, renders obvious claim 1 of the ’310 patent.
14 (Id. at 106-11.) KSEA argues that Mr. Christoff’s theory of obviousness based on the
15 combination of Nakamura 492 and Oshima 212 is “entirely new” because it relies on Oshima 212
16 (or Oshima or Nakamura) instead of Nakamura 492 as teaching the following claimed features of
17 the ’310 patent: (i) “a cable, connected to said camera control unit”; (ii) “for providing the stream
18 of digital video data, said camera head including”; (iii) “an imager, for generating an analog
19 stream of video data”; (iv) “a timing generator, generating a timing signal particular to said camera
20 head, the timing signal actuating said imager and sent to said camera control unit”; and (v) “is
21 controlled based at least in part upon said timing signal particular to said camera head.” (Dkt.
22 379-4 at 12.)

23 KSEA’s argument fails. Stryker’s invalidity contentions and claims chart address
24 limitations (i)-(iv) as also being taught by Oshima 212. (See Dkt. No. 394 at 15-16.) Once again,
25 Stryker also correctly notes that Mr. Christoff’s Invalidity Report does not cite Oshima 212 for
26 limitation (v); instead, Mr. Christoff relies on Nakamura 492. (See Dkt. No. 394 at 15 n.8) (citing
27 Dkt. No. 380-3 at 208.) Accordingly, the Court denies KSEA’s motion to strike Sections
28 VIII.E.23-26 of Mr. Christoff’s Invalidity Report.

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g. Endsley 613 and Dowdy 082

Stryker’s invalidity contentions state, in pertinent part:

To the extent they are not anticipated by or obvious in view of Endsley 613 alone, certain claims of the ’310 . . . patent[] would have been obvious to one of ordinary skill in the art at the time of the alleged invention of the ’310 . . . patent[] based on Endsley 613 in combination with or in view of one or more of the following references (collectively, the “Processor and Memory References”):

- Dowdy 082
- Okada 852
- Oshima 212
- Zu 391

(Dkt. No. 380-9 at 77.) Furthermore:

Endsley 613 discloses a video imaging system that comprises a camera, a cable, and a camera control unit. Endsley 613 also discloses a camera head with an imager that generates analog data, a timing generator that actuates the imager, a timing signal sent to the camera control unit, an analog-to-digital converter, a serializer, a digital serial driver, a digital serial receiver, a multiplexer, a processor, and a memory device accessible by the processor and containing camera head information. Endsley 613 also discloses a camera control unit with a digital serial receiver, a digital serial driver and that is controlled in part by the timing signal. Endsley 613 also discloses a plurality of interchangeable camera heads.

(Id. at 77-78.) As for Dowdy 082, the invalidity contentions repeat the same description noted above. The invalidity contentions then explain why the combination of Endsley 613 and the Processor and Memory References, which include Dowdy 082, render claim 1 of the ’310 patent obvious. (Id. at 78-80.) KSEA argues that Mr. Christoff’s theory of obviousness based on the combination of Endsley 613 and Dowdy 082 is “entirely new” because it relies on Dowdy 082 (or Dowdy and Endsley) instead of Endsley 613 as teaching the following claimed features of the ’310 patent: (i) “processing a continuous stream of digital video data”; (ii) “an imager, for generating an analog stream of video data”; (iii) “at least one digital serial driver”; (iv) “said camera control unit having at least one digital serial receiver.” (Dkt. No. 379-4 at 13.)

It follows from the above discussion that, again, KSEA’s argument fails. Stryker’s invalidity contentions and claims chart address limitations (i)-(iv) as also being taught by Dowdy 082. (See Dkt. No. 394 at 16.) Accordingly, the Court denies KSEA’s motion to strike Section VIII.E.35 of Mr. Christoff’s Invalidity Report.

1 **ii. Sections VIII.E 15, 19, and 23**

2 KSEA argues that three footnotes contained in Sections VIII.E.15, 19, and 23 must be
3 stricken because they constitute “new and previously-undisclosed” obviousness theories regarding
4 claim 6 of the ’310 patent. (Dkt. No. 379-4 at 14.) The Court agrees.

5 The footnotes state that the combinations of Nakamura and Okada, Nakamura and Dowdy,
6 and Nakamura and Oshima “also render[] obvious claim 6 of the ’310 patent.” (Dkt. No. 380-3 at
7 115 n.11, 134 n.12, 147 n.13.) The invalidity contentions assert, however, that only claims 1, 2, 9-
8 12, 15, 16, 21 and 22 are obvious based on those combinations. (Dkt. No. 380-9 at 61.) Thus, the
9 footnotes are impermissible because they do not reflect “the application of a disclosed theory,” but
10 are instead “a new theory altogether.” See [Apple Inc. v. Samsung Electronics Co., Ltd., No. 12-cv-](#)
11 [0630-LHK, 2014 WL 173409, at *1 \(N.D. Cal. Jan. 9, 2014\)](#) (noting that “[e]xpert reports may not
12 introduce theories not set forth in contentions.”).

13 Stryker argues that the footnotes should not be stricken because they are merely
14 “observations” and do not constitute “anything substantive [in] Mr. Christoff’s report.” (Dkt. No.
15 394 at 19.) Stryker cites no authority for its contention, and its argument betrays its position.
16 Accordingly, the Court grants KSEA’s motion to strike footnotes 11, 12, and 13 from Mr.
17 Christoff’s Invalidity Report.

18 **iii. Reliance on Endovision XL in Section VIII.C**

19 KSEA argues that Stryker is “precluded from relying on Endovision XL in Section
20 VIII.C,” and therefore, three citations in Mr. Christoff’s report that reference Endovision XL
21 should be stricken. (Dkt. No. 379-4 at 14.) The Court agrees.

22 As noted in the Court’s December 21, 2017 Order, (Dkt. No. 348 at 1), Stryker withdrew
23 its request to amend its invalidity contentions to include the Endovision XL endoscopic video
24 camera as a basis for obviousness. Stryker acknowledges that “the three citations [referencing
25 Endovision XL] that KSEA identified appear to have been inadvertently left in Mr. Christoff’s
26 report” following the Court’s Order. (Dkt. No. 394 at 19.) Accordingly, the Court grants KSEA’s
27 motion to strike Mr. Christoff’s citations that reference Endovision XL; specifically: (1) the
28 Kennedy Dep. Tr. at 32:15-33:5, 61:15-62:21; and (2) HIT185-187. (See Dkt. No. 380-3 at ¶¶ 35

1 n.1, 62.)

2 **2. Previously Undisclosed Theories in Mr. Walbrink’s Invalidation Report**

3 At the outset, Stryker acknowledges that the following combinations “were inadvertently
4 omitted from its contentions and thus withdraws Mr. Walbrink’s reliance on them”: “(1) Wang
5 541, the Touch Panel references, and POSITA as applied to claim 7 of the 821 patent,” (see Dkt.
6 No. 380-4 at 196 Table 4, n.11); and “(2) GlobalControl and Howell as applied to the 420 patent”
7 in Section 6.4.6.4. (Dkt. No. 394 at 19 n.9.) Stryker also withdraws Mr. Walbrink’s position
8 regarding his “obviousness theory of Hermes alone or with the knowledge of POSITA” in Section
9 6.5.4. (Id. at 20 n.10.) Therefore, the Court grants KSEA’s motion to strike those theories from
10 Mr. Walbrink’s Invalidation Report.

11 **i. Combination of Wang 541 and Knowledge of POSITA applied to ’821**

12 KSEA argues that it is prejudiced because “Mr. Walbrink’s Invalidation Report contains a
13 new theory that Wang 541 renders the ’821 patent obvious in combination with the knowledge of
14 a person having ordinary skill in the art (‘POSITA’).” (Dkt. No. 379-4 at 15.) Stryker counters
15 that “although the combination of Wang 541 and the knowledge of a POSITA may not be listed
16 [in the invalidity contentions], the combination is listed in Stryker’s claim chart E3.” (Dkt. No.
17 394 at 20.) Stryker further argues that KSEA “suffered no real prejudice” because “KSEA’s
18 expert, Mr. D’Amelio, spent nearly 11 pages in his report attempting to rebut this combination.”
19 (Id.) (citing [Nortek Air Solutions, LLC v. Energy Lab Corp., No. 14-cv-02919-BLF, 2016 WL](#)
20 [3856250, at *2 \(N.D. Cal. July 15, 2016\)](#) (finding that plaintiff suffered no prejudice where its
21 “expert was able to offer a rebuttal to each obviousness combination that [defendant] disclosed.”).

22 The Court agrees with Stryker. The ’821 claim chart states, in pertinent part:

23 Even if Wang 541 does not expressly or inherently disclose this
24 claim element, the claim would have been an obvious design choice
25 based on the inherent disclosure of the references and/or the
26 knowledge of one of ordinary skill in the art at the time of the
27 alleged invention of the ’821 Patent.

28 (Dkt. No. 394-7 at 12.) This information provided KSEA with sufficient notice of the theory of
obviousness based on the combination of Wang 541 and the knowledge of a POSITA. See [Finjan,
Inc. v. Symantec Corp., No. 14-cv-02998-HSG \(JSC\), 2018 WL 620156, at *6 \(N.D. Cal. Jan. 30,](#)

1 2018) (finding no prejudice where claims chart “disclosed enough information to put [plaintiff] on
2 notice” of challenged theory). Furthermore, KSEA fails to demonstrate how Mr. Walbrink’s
3 reliance on the combination of Wang 541 and the knowledge of a POSITA is prejudicial, given
4 that KSEA’s expert provided a lengthy rebuttal to that exact combination. (See Dkt. No. 394-8 at
5 5-17.)

6 Accordingly, the Court denies KSEA’s motion to strike Section 6.5.5.1 of Mr. Walbrink’s
7 Invalidity Report.

8 **ii. Backup Obviousness Theories**

9 KSEA argues that Mr. Walbrink’s Invalidity Report contains a “barebones” backup
10 obviousness theory regarding claim 3 of the ’420 patent that provides no analysis to support its
11 conclusion. Specifically, KSEA seeks to strike the following italicized language in Section 6.4.5
12 of Mr. Walbrink’s report:

13 In my opinion, Claim 3 is anticipated by Alpha O.R. and OR1. The
14 portions of these cited references teaching the claimed elements are
15 found in the summaries of Section 6.4.4 and in the tables for each
16 claim in Section 6.4.8. If Claim 3 is not anticipated [by Alpha O.R.
17 and OR1], it is obvious either alone, based on the reference and the
18 knowledge of one of ordinary skill in the art including as described
19 in the Technology Background section and section 6.4.4, or based
20 on the combinations of references described in Section 6.4.6.

21 (Dkt. No. 380-4 at 43) (emphasis added.) KSEA insists that “Mr. Walbrink’s Invalidity Report
22 contains no obviousness analysis” for Alpha O.R. and OR1. (Dkt. No. 379-4 at 16.) Furthermore,
23 KSEA cites Table 2 under Section 6.4.6 of Mr. Walbrink’s report, which contains “[r]eferences
24 rendering obvious ’420 patent claims,” but does not include Alpha O.R. and OR1.⁶ (Id. at 17)
25 (citing Dkt. No. 380-4 at 44.)

26 Stryker counters that Table 2 applies only to “combinations of references,” and “does not

27 ⁶ KSEA also cites deposition testimony of Mr. Walbrink wherein he was asked whether Table 2
28 reflects “all the combinations” that he plans to “opine on at trial regarding obviousness for the
’420 patent.” (Dkt. No. 379-4 at 16 n.7) Mr. Walbrink replied that “Table 2 represents the
combinations at the time of [his] report.” (Id.) Stryker argues that the “testimony is red herring”
because it concerns combinations of references, not single references like Alpha O.R. and OR1.
(Dkt. No. 394 at 22.) The Court agrees that the deposition testimony has no bearing on the
adequacy of the challenged language as it pertains Mr. Walbrink’s obviousness theories based on
Alpha O.R. and OR1 alone.

1 apply to obviousness positions based on the references alone.” (Dkt. No. 394 at 22.) Although it
 2 is a close call, Stryker is correct. Table 2 contains the following single references: (i) SP3; (ii)
 3 GlobalControl; and (iii) Salandro 548. (Dkt. No. 380-4 at 44.) Mr. Walbrink does not assert,
 4 however, that those references “alone” render obvious claim 3 of the ’420 patent. (Id. at 43.)
 5 Instead, Section 6.4.6 states that claim 3 is rendered obvious “based on the following prior art
 6 [references listed in Table 2] including the knowledge of one of ordinary skill in the art.” (Id.)
 7 (emphasis added.) Thus, the existence of Table 2 supports only superficially KSEA’s argument
 8 because Table 2 does not contain single references that “alone” render obvious claim 3.

9 In any event, Stryker asserts that Mr. Walbrink’s statement is adequate based on his
 10 references to: (i) Section 6.4.4 (containing descriptions of Alpha O.R. (Section 6.4.4.2) and OR1
 11 (Section 6.4.4.3)); (ii) the knowledge of one of ordinary skill in the art as described in the
 12 Technology background (Section 6.2); and (iii) the claims chart for claim 3 of the ’420 patent in
 13 Section 6.4.8. Stryker cites [Meyer Intellectual Props. Ltd. v. Bodum, Inc., 690 F.3d 1354, 1374-75](#)
 14 [\(Fed. Cir. 2012\)](#) for the proposition that Mr. Walbrink’s “assertion of obviousness” based on
 15 Alpha O.R. and OR1 is a “sufficiently detailed statement of his opinions and the basis for his
 16 conclusions” because the “sole surviving limitation” of claim 3⁷ is “simple and straightforward”
 17 and therefore, Mr. Walbrink’s report “need not go into excruciating detail over an obviousness
 18 analysis.” (Dkt. No. 394 at 21-22) (internal quotation marks omitted.)

19 Stryker’s reliance on Meyer is misplaced for two reasons. First, the technology involved in
 20 Meyer—“using a plunger to froth milk in a container”—was markedly less complex than the
 21 technology at issue under dependent claim 3—“A system as claimed in claim 2 [itself dependent
 22 on claim 1], wherein the display window is located between the plurality of source icons and the
 23 plurality of destination icons.” Compare [Meyer, 690 F.3d at 1375](#) with (Dkt. No. 380-4 at 114.)
 24 Second, the Meyer court considered the complexity of the invention as a whole (a device used to
 25 froth milk) instead of considering only the complexity of a dependent claim. [Meyer, 690 F.3d at](#)
 26

27 ⁷ Stryker asserts that “because KSEA disclaimed claims 1 and 2 of the ’420 patent to terminate
 28 Stryker’s IPRs, the only issue for analysis [under claim 3] is whether it would have been obvious
 to locate a display window between two pluralities of icons.” (Id. at 21.)

1 1375. As KSEA correctly points out, a dependent claim requires consideration of the invention
2 “as a whole.” (Dkt. No. 398 at 13) (quoting *W.L. Gore & Assocs., Inc v. Garlock, Inc.*, 721 F.2d
3 1540, 1548 (Fed. Cir. 1983)); see also *Hartness Intern. Inc. v. Simplimatic Eng’g Co.*, 819 F.2d
4 1100, 1108 (Fed. Cir. 1987) (holding that the district court erred in finding dependent claim 3
5 obvious because it “fail[ed] to consider that dependent claim 3 included all the limitations of
6 [independent] claim 1”); 35 U.S.C. § 112(d) (“A claim in dependent form shall be construed to
7 incorporate by reference all the limitations of the claim to which it refers.”). Here, because claim
8 3 is necessarily dependent on claim 2, which itself is dependent on claim 1, Mr. Walbrink cannot
9 merely “refer[] to the other parts of his report to support his obviousness opinions for [claim 3’s]
10 simple limitation,” as Stryker insists. (See Dkt. No. 394 at 21.)

11 Federal Rule of Civil Procedure 26(a)(2)(B)(i) requires that Mr. Walbrink provide a
12 “complete statement” of his opinions and “the basis and reasons for them.” Mr. Walbrink’s
13 obviousness theory involving Alpha O.R. and OR1 is conclusory and fails to comply with that
14 requirement. Accordingly, the Court grants KSEA’s motion to strike the challenged language
15 from Section 6.4.5.

16 **3. Uncrystallized Theories in the Christoff and Walbrink Invalidity Reports**

17 **i. Mr. Walbrink’s Theories in Sections 6.4.4 and 6.5.3**

18 KSEA moves to strike from Sections 6.4.4 and 6.5.3 of Mr. Walbrink’s Invalidity Report
19 the sentence: “Other references or portions of references may also be relevant.” (Dkt. No. 379-4
20 at 17) (citing Dkt. No. 380-4 at 36, 126.) KSEA argues that the sentence should be stricken
21 because Mr. Walbrink “provides no invalidity analysis of these references,” or “even identif[ies]
22 these references.” (Id.) Stryker counters that because “KSEA fails to identify what ‘other
23 references’ or ‘portions of references’ it believes Mr. Walbrink improperly relies upon,” KSEA
24 has “identified no real harm”; thus, “[t]here is nothing to strike.” (Dkt. No. 394 at 23.)

25 Sections 6.4.4 and 6.5.3 state, in pertinent part:

26 The following discussions are intended to be brief summaries of
27 certain prior art references. Additional portions of each reference are
28 identified in Section[s] 6.4.8 [and 6.5.7] below. These discussions
identify example references and portions thereof. Other references
or portions of references may also be relevant.

1 (Dkt. No. 380-4 at 36, 126) (emphasis added.) Taken in context, the Court fails to see how the
2 challenged language is prejudicial to KSEA or somehow contravenes [Rule 26\(a\)\(2\)\(B\)\(i\)](#), the lone
3 authority cited by KSEA in support of its argument. Mr. Walbrink does not assert that “[o]ther
4 references” not discussed are relevant; instead, he merely states that the “discussions identify
5 example references,” and therefore, “[o]ther references . . . may also be relevant.” (*Id.*) (emphasis
6 added.) In other words, Mr. Walbrink is clarifying that the discussions are not intended to
7 constitute a definitive list of relevant references. Absent any allegations of prejudice caused by
8 the challenged language, the Court denies KSEA’s motion to strike Sections 6.4.4 and 6.5.3.

9 **ii. “Disclaimers” in Section VIII.F of Mr. Christoff’s Report, and Sections**
10 **6.4.8 and 6.5.7 of Mr. Walbrink’s Report**

11 KSEA insists that the following language should be stricken from the claim charts included
12 with Mr. Christoff and Mr. Walbrink’s Invalidity Reports:

13 Even if these references do not expressly disclose this claim
14 element, the claim is obvious due to the inherent disclosure of the
15 references and/or the knowledge of one of ordinary skill in the art.
Examples of the knowledge of one of ordinary skill in the art are
described in the Technology Background section.

16 (Dkt. No. 379-4 at 18) (citing Dkt. Nos. 380-3 at 202-23, 380-4 at 108-16, 175-81.) KSEA argues
17 that such “broad reservations provide no analysis of the theories Stryker’s experts intend to
18 present.” (Dkt. No. 379-4 at 18.) The Court agrees.

19 The challenged statements provide conclusions with no reasoning, and therefore, fail to
20 comply with Rule 26(a)(2)(B)(i)’s requirement that expert reports contain “a complete statement
21 of all opinions the witness will express and the basis and reasons for them.” See also [Rembrandt
22 Vision Techs., L.P. v. Johnson & Johnson Vision Care, Inc., 725 F.3d 1377, 1381 \(Fed. Cir. 2013\)](#)
23 (“The purpose of the expert disclosure rule is to provide opposing parties reasonable opportunity
24 to prepare for effective cross-examination and perhaps arrange for expert testimony from other
25 witnesses.”) (internal quotation marks and citation omitted). The failure of Stryker’s experts to
26 provide any analysis supporting their conclusions is prejudicial to KSEA because it cannot
27 adequately prepare to cross-examine Mr. Christoff and Mr. Walbrink regarding said conclusions
28 or counter their reasoning with KSEA’s own experts.

1 Stryker’s argument that the challenged statements are not “reservations” or “disclaimers,”
2 but instead, reflect “the fact that the claim elements are also found elsewhere,” (Dkt. No. 394 at
3 23), does not address the problem with the experts’ lack of analysis. If Stryker is correct, then
4 there is no harm in striking the statements.

5 Accordingly, the Court grants KSEA’s motion to strike the challenged language from
6 Section VIII.F of Mr. Christoff’s Invalidity Report and from Sections 6.4.8 and 6.5.7 of Mr.
7 Walbrink’s Invalidity Report.

8 **iii. Mr. Christoff’s Obviousness Theories in Section VIII.E**

9 KSEA argues that Mr. Christoff’s use of “open-ended language regarding his obviousness
10 combinations should be stricken”; specifically, KSEA takes issue with Mr. Christoff’s use of “for
11 example” and “e.g.” in Section VIII.E. (Dkt. No. 379-4 at 18.) Presumably in support of its
12 argument, KSEA notes that “[n]o alternative examples or analyses are provided in Mr. Christoff’s
13 report.” (See *id.*) KSEA cites no authority for its contention, other than citing Rule 26(a)(2)(B)(i)
14 for the premise that “Mr. Christoff should be prevented from opining on analyses that do not
15 appear in his report.” (See *id.* at 19.) It is unclear to the Court how Mr. Christoff’s use of “for
16 example” and “e.g.” contravenes Rule 26(a)(2)(B)(i), and KSEA’s motion provides no clarity.

17 Accordingly, the Court denies KSEA’s motion to strike Mr. Christoff’s use of “for
18 example” and “e.g.” from Section VIII.E of his Invalidity Report. If, at trial, Mr. Christoff
19 attempts to testify to something that KSEA believes was not disclosed in the expert report, KSEA
20 may ask for appropriate relief from the trial judge.

21 **4. Undisclosed Fact Witnesses in the Christoff and Thomas Reports**

22 A party’s initial disclosures must identify witnesses who are “likely to have discoverable
23 information—along with the subjects of that information—that the disclosing party may use to
24 support its claims or defenses.” [Fed. R. Civ. P. 26\(a\)\(1\)\(A\)](#). A party has an affirmative obligation
25 to supplement its initial disclosures “in a timely manner” if they become “incomplete or
26 incorrect.” [Fed. R. Civ. P. 26\(e\)\(1\)\(A\)](#). “There is, however, no obligation to provide
27 supplemental or corrective information that has been otherwise made known to the parties in
28 writing or during the discovery process, as when a witness not previously disclosed is identified

1 during the taking of a deposition.” [Fed. R. Civ. P. 26\(e\)](#) advisory committee’s note to 1993
2 amendment.

3 KSEA argues that Messrs. Christoff and Thomas’s reports rely on undisclosed Stryker
4 witnesses, “often as the sole source of information”; specifically, “Mr. Christoff relies on Mr.
5 [William] Chang and Mr. [Keith] Evans, and Mr. Thomas relies on Ms. [Ann] Wong.” (Dkt. No.
6 379-4 at 19.) KSEA contends that it was “prejudiced by Stryker’s late disclosure” of those
7 witnesses, and requests that the Court strike from the reports any reliance on Mr. Chang, Mr.
8 Evans, or Ms. Wong. Stryker counters that it did disclose the three-named witnesses, either
9 directly or through deposition testimony of other witnesses.

10 **i. Mr. Evans**

11 KSEA argues that although “Mr. Evans was disclosed to KSEA as being knowledgeable
12 regarding sales and marketing of Stryker’s SwitchPoint products,” he was not “disclosed as being
13 knowledgeable regarding the topics Mr. Christoff cites him for, namely technical information
14 regarding Stryker’s 1488 Camera product.” (Id.) KSEA is wrong.

15 Stryker identified Keith Evans in its second supplemental initial disclosures as having
16 knowledge of “[s]ales and marketing of certain Stryker products accused of infringement,
17 specifically the accused SwitchPoint products, Sidne, and the 1488 camera.” (Dkt. No. 394-10 at
18 5, ¶ 8.) Stryker served KSEA its second supplemental initial disclosures on October, 11, 2017.
19 (Id. at 14.) On the same day, Stryker also designated Mr. Evans as a 30(b)(6) witness regarding
20 multiple topics, including technical, marketing, and sales information regarding Stryker’s 1488
21 camera. (Dkt. No. 394-11 at 3-4). KSEA then deposed Mr. Evans on October 27, 2017, and
22 specifically questioned him regarding the 1488 camera. (Dkt. No. 405-4 at 3-4.)

23 The Court denies KSEA’s request to strike reliance on Mr. Evans from Mr. Christoff’s
24 report because Stryker timely disclosed Mr. Evans as a witness regarding the topics referenced in
25 Mr. Christoff’s report, and KSEA deposed Mr. Evans.

26 **ii. Mr. Chang**

27 KSEA argues that William Chang was not “disclosed to KSEA during fact discovery.”
28 (Id. at 19.) The Court disagrees.

1 Mr. Chang’s identity and role as an employee of Stryker was disclosed to KSEA through
2 the deposition testimony of three Stryker witnesses. (E.g., Pang Dep., Dkt. No. 394-15 at 3
3 (identifying William Chang as Stryker’s Chief Technology Officer)); (Nambakam Dep., Dkt. No.
4 394-16 at 3-4 (identifying William Chang as a Stryker employee who “work[ed] on the 1488
5 camera”)); (Subramanian Dep., Dkt. No. 394-17 at 4 (identifying William Chang as Stryker’s
6 “CTO of Endoscopy,” and stating that Mr. Chang “was involved with the 1488 camera”).) This
7 disclosure is sufficient to relieve Stryker of its formal disclosure obligation under Rule 26(e)(1).
8 See [Fed. R. Civ. P. 26\(e\)](#) advisory committee’s note to 1993 amendment; see also [Procongps, Inc.
9 v. Sky patrol, LLC, 2013 WL 4551828, at *1 \(N.D. Cal. Aug. 27, 2013\)](#) (finding description of
10 witness by another witness during deposition sufficiently disclosed to plaintiff the former’s
11 “identity and role prior to the fact discovery cut-off.”); see also [Nuance Commc’ns, Inc. v. Abbyy
12 Software House, No. 08-2912, 2012 WL 2838431, at *1 \(N.D. Cal. July 10, 2012\)](#) (“[I]ncidental
13 discovery, particularly during a deposition, of information ordinarily subject to supplementation
14 satisfies the Rule 26(e)(1) duty as sufficiently as formal filing”) (internal quotation marks and
15 citation omitted).

16 Accordingly, the Court denies KSEA’s request to strike reliance on Mr. Chang from Mr.
17 Christoff’s report. Mr. Chang’s identity and role as an employee of Stryker likely to have
18 discoverable information was sufficiently disclosed to KSEA prior to the fact discovery cut-off.

19 **iii. Ms. Wong**

20 KSEA argues that Ann Wong was not “disclosed to KSEA during fact discovery.” (Dkt.
21 No. 379-4 at 19.) The Court disagrees.

22 KSEA deposed Stryker’s Vice President of Finance, Roderic Macleod on October 26,
23 2017. (Macleod Dep., Dkt. No. 394-18.) KSEA questioned Mr. Macleod regarding financial
24 information contained in multiple spreadsheets prepared for this litigation. (Id.) Mr. Macleod
25 identified Ms. Wong as a “finance manager” for Stryker, and further identified her as the
26 employee who created the spreadsheets in question. (Id. at 3-4.) In total, Mr. Macleod separately
27 identified Ms. Wong as the creator of eleven spreadsheets prepared for this litigation. (Id. at 5-
28 16.)

1 The Ninth Circuit has recognized that “a passing reference in a deposition to a person with
2 knowledge or responsibilities who could conceivably be a witness does not satisfy a party’s
3 disclosure obligations.” [Ollier v. Sweetwater Union High Sch. Dist.](#), 768 F.3d 843, 863 (9th Cir.
4 2014); see also [Nuance Commc’ns](#), 2012 WL 2838431, at *2 (“[M]erely mentioning the
5 individual’s name at a deposition or in a discovery response may not be enough to put the other
6 party on notice that the individual is being disclosed as a trial witness.”). Here, however, Mr.
7 Macleod did not “merely mention” Ms. Wong’s name or make a “passing reference” to her;
8 instead, Mr. Macleod identified Ms. Wong’s role with Stryker and indicated—clearly and
9 repeatedly—that she created the financial spreadsheets about which Mr. Macleod was being
10 questioned. Thus, KSEA was on notice that Ms. Wong was “likely to have discoverable
11 information—along with the subjects of that information—that [Stryker] may use to support its
12 claims or defenses.” See [Fed. R. Civ. P. 26\(a\)\(1\)\(A\)](#).

13 Accordingly, the Court denies KSEA’s request to strike reliance on Ms. Wong from Mr.
14 Christoff’s report. Ms. Wong’s identity and role as an employee of Stryker likely to have
15 discoverable information was sufficiently disclosed to KSEA prior to fact discovery cut-off.

16 **5. Mr. Sterne’s Expert Report**

17 KSEA argues that Mr. Sterne’s report should be stricken because it constitutes an improper
18 rebuttal, in that it did not ““contradict or rebut evidence on the same subject matter denied by
19 [KSEA’s] expert.”” (Dkt. No. 379-4 at 20 (quoting [Fed. R. Civ. P. 26\(a\)\(2\)\(D\)\(ii\)](#))). Stryker
20 counters that Mr. Sterne’s report was properly submitted as a rebuttal report in compliance with
21 Judge Seeborg’s Scheduling Order, (Dkt. No. 292 at 2). Stryker is correct.

22 Under Rule 26(a)(2)(D), “[a] party must make [its expert] disclosures at the times and in
23 the sequence that the court orders.” The time for expert disclosures set forth under Rule
24 26(a)(2)(D)(ii) applies “[a]bsent a stipulation or a court order.” Here, Judge Seeborg’s Scheduling
25 Order set December 21, 2017 as the “[d]eadline for serving expert reports for which a party bears
26 the burden of proof.” (Dkt. No. 292 at 2.) Mr. Sterne’s report rebuts KSEA’s charge of willful
27 infringement, a claim for which KSEA bears the burden of proof. (See Dkt. Xxx) Because
28 Stryker does not bear the burden of proof KSEA’s willful infringement claim, December 21, 2017

1 was not the proper date for Stryker to serve Mr. Sterne’s report. The Scheduling Order set
2 February 15, 2018 as the “[d]eadline for serving rebuttal expert reports”; Stryker served Mr.
3 Sterne’s report on February 15, 2018, in compliance with the Scheduling Order.

4 Accordingly, the Court denies KSEA’s motion to strike Mr. Sterne’s Expert Report.

5 **6. Interrogatory Responses**

6 KSEA’s motion to strike includes a footnote requesting that the Court also “strike the
7 entirety of [Stryker’s] supplemental interrogatory responses” because they “incorporat[e] its expert
8 reports and expert depositions by reference.” (Dkt. No. 379-4 at 5 n.2) (citing Dkt. Nos. 380-16 &
9 380-17.) KSEA’s reply clarifies that “[t]o the extent Stryker’s Supplemental Interrogatory
10 Responses include the information and opinions sought to be stricken by KSEA’s motion, it
11 should also be stricken from the Interrogatory Responses.” (Dkt. No. 398 at 17.) KSEA fails to
12 identify particular responses that may contain such information, and it also fails to explain why the
13 interrogatory responses need be stricken. At this stage of the litigation the expert reports, not
14 interrogatories, will govern the scope of the experts’ permissible testimony. In any event, the
15 Court expects that, absent a successful appeal to the district court, Stryker will abide by this
16 Court’s Order and not attempt to raise theories at trial that have been stricken by this Order.

17 **II. Administrative Motions to File under Seal**

18 There is a presumption of public access to judicial records and documents. [Nixon v.](#)
19 [Warner Commc’ns, Inc.](#), 435 U.S. 589, 597 (1978). “It is well-established that the fruits of pretrial
20 discovery are, in the absence of a court order to the contrary, presumptively public. [Federal Rule
21 of Civil Procedure] 26(c) authorizes a district court to override this presumption where ‘good
22 cause’ is shown.” [San Jose Mercury News, Inc. v. U.S. Dist. Ct.](#), 187 F.3d 1096, 1103 (9th Cir.
23 1999). Sealing is appropriate only where the requesting party “establishes that the document, or
24 portions thereof is privileged or protectable as a trade secret or otherwise entitled to protection
25 under the law.” N.D. Cal. Civ. L.R. 79-5(a). A party may meet this burden by showing that the
26 information sought to be withheld creates a risk of significant competitive injury and
27 particularized harm. [Phillips v. Gen Motors Corp.](#), 307 F.3d 1206, 1211 (9th Cir. 2006). A party
28 may also meet this burden by establishing that the information contains trade secrets that create a

1 risk of significant competitive injury and particularized harm, see [Apple, Inc. v. Psystar Corp.](#), 658
 2 [F.3d 1150, 1161-62 \(9th Cir. 2011\)](#) (citation omitted), or where disclosure of the information
 3 would violate a party’s legitimate privacy interest that similarly leads to such risk, see, e.g.,
 4 [Landmark Screens, LLC v. Morgan, Lewis & Bockius LLP](#), 2010 WL 3221859, at *5 (N.D. Cal.
 5 [Aug. 13, 2010](#)). Whatever the grounds, a party must “narrowly tailor” its request to sealable
 6 material only. *Id.*

7 **1. KSEA’s Motion to Strike and Exhibits C-F, J, and K**

8 Pursuant to Civil Local Rules 7-11 and 79-5, KSEA moves to file under seal portions of its
 9 motion to strike, and the entirety of exhibits C-F, J, and K to the Kosma Declaration (“Kosma
 10 Strike Declaration”). (Dkt. Nos. 379 & 380-1.) KSEA’s motion explains that the information it
 11 seeks to seal comprises confidential information as designated by Stryker. Pursuant to Rule 79-5,
 12 Stryker filed a declaration clarifying that KSEA’s motion to strike does not contain Stryker’s
 13 confidential information, and therefore may be filed publicly without redactions. (Dkt. No. 392 at
 14 ¶ 12.) Stryker’s declaration also clarifies that exhibit C was previously filed on March 1, 2018 as
 15 exhibit E, (*id.* at ¶¶ 13-27); by order dated July 18, 2018, (Dkt. No. 421), the Court granted the
 16 parties’ stipulated administrative motion to file portions of that document under seal, (Dkt. No.
 17 406). With regard to exhibits D and F, Stryker’s declaration clarifies that portions of those
 18 documents do not contain confidential information and requests that the Court file only the
 19 nonpublic, confidential business information under seal. (Dkt. No. 392 at ¶¶ 28-33.) Stryker’s
 20 declaration includes revised versions of exhibits D and F with proposed redactions. (Dkt. Nos.
 21 392-3 & 392-7.)

22 Stryker’s declaration also clarifies that the parties agreed to allow Stryker to re-file
 23 truncated versions of exhibits E, J, and K that include only the pages referred to in KSEA’s
 24 motions to strike and exclude, (Dkt. Nos. 380 & 386, respectively). (Dkt. No. 392 at ¶¶ 7-8; Dkt.
 25 Nos. 392-6, 392-9, 392-11.) Stryker declares that portions of exhibit E contain confidential
 26 information and requests that the Court file only the nonpublic information under seal. (Dkt. No.
 27 392 at ¶¶ 34-41.) As for exhibits J and K, Stryker does not believe the truncated versions contain
 28 confidential information and does not move to have the information sealed. (*Id.* at ¶¶ 48-50, 51-

1 53.) Concurrent with its declaration, however, Stryker filed the Keeler Declaration in support of
2 KSEA’s motion to seal portions of the truncated version of exhibits E and K. (Id. at ¶ 54.) The
3 Keeler declaration clarifies that highlighted portions of exhibits E and K contain KSEA’s
4 confidential information, and therefore should be filed under seal. (Dkt. No. 392-12 at ¶¶ 5-9.)

5 The Court has reviewed the proposed redactions and Rule 79-5 declarations and grants
6 KSEA’s motion in part. The proposed redactions in Stryker’s revised exhibits are narrowly
7 tailored and concern sensitive business information. Therefore, the revised exhibits D, E, F, and K
8 to the Kosma Strike Declaration shall be filed under seal with Stryker’s proposed redactions.
9 KSEA’s motion to strike and exhibit J to the Kosma Strike Declaration shall not be filed under
10 seal because the documents do not contain Stryker’s confidential information.

11 **2. Exhibit 9 to the Carrozza Declaration**

12 Stryker moves to file under seal a portion of exhibit 9 to the Carrozza Declaration filed in
13 support of Stryker’s opposition to KSEA’s motion to strike. (Dkt. No. 393.) Stryker explains that
14 the highlighted portion contains information designated by KSEA as confidential. (Dkt. No. 393-
15 1 at 2.) Pursuant to Rule 79-5, KSEA filed a declaration in support of Stryker’s motion, stating
16 that the highlighted portion contains nonpublic “business and product information, and other
17 technical information.” (Dkt. No. 396 ¶¶ 5-7.) The Court has reviewed the redacted portion of
18 exhibit 9 and agrees that it contains sensitive product information. Therefore, the Court grants
19 Stryker’s motion to seal exhibit 9 to the Carrozza Declaration.

20 **3. KSEA’s Reply and Exhibits B, C, and D**

21 KSEA moves to file under seal portions of its reply in support of its motion to strike and
22 portions of exhibits B, C, and D to the Kosma Declaration (“Kosma Reply Declaration”). (Dkt.
23 Nos. 397 & 398-1.) KSEA explains that the portions contain confidential information as
24 designated by Stryker. (Dkt. No. 397-1 at ¶ 8.) Pursuant to Rule 79-5, Stryker filed a declaration
25 clarifying that only some of the portions requested to be sealed by KSEA contained confidential
26 information. (Dkt. No. 405 at ¶ 4.) Stryker declares that KSEA’s reply and exhibits C and D do
27 not contain confidential information, and submits unredacted versions to be publicly filed. (Id.)
28 Stryker also submits a revised version of exhibit B, which is an excerpt of the deposition transcript

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of Chien Mien Pang, with “more narrowly-tailored redactions.” (Id. at ¶¶ 6-8.)

The Court reviewed the proposed redactions and Rule 79-5 declarations and agrees that exhibit B contains nonpublic business information. Therefore, the Court grants KSEA’s motion in part. The revised exhibit B to the Kosma Reply Declaration shall be filed under seal with Stryker’s proposed redactions. KSEA’s reply in support of its motion to strike and exhibits C and D to the Kosma Reply Declaration shall not be filed under seal.

This Order disposes of Docket Nos. 379, 380, 393, and 397.

IT IS SO ORDERED.

Dated: August 1, 2018



JACQUELINE SCOTT CORLEY
United States Magistrate Judge