

1 UNITED STATES DISTRICT COURT  
2 NORTHERN DISTRICT OF CALIFORNIA

3 **ANGIOSCORE, INC.,**

4 Plaintiff,

5 v.

6 **TRIEME MEDICAL, INC., ET AL.,**

7 Defendants.  
8

Case No. 12-cv-03393-YGR

**PRE-TRIAL ORDER NO. 5 (PATENT CLAIMS)**

Re: Dkt. Nos. 470-71, 514, 680-81, 685-87

9 This Order addresses: (1) the parties' outstanding motions *in limine*; (2) a *Daubert* motion  
10 as to plaintiff's damages expert; and (3) several pending administrative motions to seal. Having  
11 considered the papers submitted, the arguments of counsel at the August 21, 2015 pretrial  
12 conference, and good cause shown, the Court rules as follows.

13 **I. MOTIONS *IN LIMINE***

14 Plaintiff filed three motions *in limine* (Dkt. No. 681) and defendants filed seven (Dkt. Nos.  
15 680, 682-87). In light of apparent concessions in various opposition briefs, the parties were  
16 instructed to meet and confer and advise the Court of the aspects of the motions still at issue. The  
17 parties submitted a stipulation addressing defendants' motions *in limine* numbers four through six  
18 (Dkt. No. 725) and defendants submitted a supplemental statement regarding the same (Dkt. No.  
19 726). The parties also provided revised proposed orders, indicating the specific rulings still  
20 required. (Dkt. Nos. 727, 738.) To the extent certain aspects of the motions were not reflected in  
21 the revised proposed orders, the Court deems them **WITHDRAWN**.<sup>1</sup> On August 24, 2015, the Court  
22 issued Pre-Trial Order No. 4, addressing defendants' motions *in limine* one through three. (Dkt.  
23 No. 736.) The Court now addresses the remaining motions *in limine*.

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26 <sup>1</sup> Moreover, certain motions *in limine* seek to preclude various experts from testifying  
27 outside the scope of their reports. All expert witnesses at trial must tether their testimony to the  
28 contents of their respective reports, and are precluded from exceeding the scope of their reports.  
The Court does not specifically address this aspect of the various motions herein unless specific  
guidance is required prior to trial based on the issues presented.

1           **A. Plaintiff’s Motion *in Limine* No. 1**

2           In its first motion *in limine*, plaintiff seeks to exclude, pursuant to Federal Rules of  
3 evidence 401, 402, and 403, testimony by defendants’ expert Neil Sheehan which is purportedly  
4 contrary to the Court’s claim construction orders. Specifically, plaintiffs seek to exclude: (i)  
5 paragraphs 114-17, 120-23, 128-29, 134, 140, and 144-45 from the Sheehan report relating to the  
6 construed terms “longitudinal expansion” and “longitudinally shorten,” and (ii) paragraphs 151  
7 and 154 relating to the construed term “attached.” The Court **GRANTS IN PART** and **DENIES IN**  
8 **PART** the motion.

9           **i. Longitudinal Expansion and Longitudinally Shorten**

10          The Court previously construed the relevant, disputed terms as follows:

- 11           • Longitudinal expansion: “reshaping by straightening” (Dkt. No. 218 at 2).
- 12           • Longitudinally shorten: “reshaping by returning to a bended state” (Dkt. No. 679 at  
13           1).

14          Plaintiff contends aspects of the November 19, 2014 Sheehan Report (Dkt. No. 681-3) are  
15 inconsistent with these constructions, including by adding an additional requirement that the  
16 expansion of struts at issue occurs along a particular axis. To the contrary, the relevant paragraphs  
17 explicitly adopt the Court’s previous construction. Plaintiff misconstrues the Court’s concern over  
18 defendant’s proposed construction as it related to the *connectors* described in Claim 8 of U.S.  
19 Patent No.7,691,119 (the “patent-in-suit” or “119 Patent”) as applying to the struts as well. To  
20 the contrary, in construing “longitudinal expansion,” the Court found that “[g]iven that the struts  
21 consist of metal wires, ‘straightening’ necessarily means that when they expand, they expand in a  
22 longitudinal direction.” (Dkt. No. 218 at 17.) Thus, to the extent the paragraphs in question  
23 discuss measurements along a longitudinal axis, such an approach is not contrary to the Court’s  
24 prior orders. Moreover, Sheehan does not opine that the claims require the struts to grow or  
25 elongate, but rather merely to bend or straighten—an approach that is also consistent with the  
26 Court’s earlier order. (*See* Dkt. No. 218 at 17 (“Nothing in the patent suggests this metal wire [of  
27 the struts] somehow increases in length. Rather, when the working portion of the balloon expands  
28 and applies radial pressure to the interior of the struts, the curvature of the bends in the struts

1 decreases.”.) The motion on this ground is therefore **DENIED**.

2 **ii. Attached**

3 The Court also previously resolved a claim construction dispute regarding the term  
4 “attached,” finding its ordinary and customary meaning applies. (Dkt. No. 218 at 2.) Plaintiff had  
5 proposed the construction “directly or indirectly attached” and defendants had proposed “fixed  
6 directly to.” (Dkt. No. 218 at 18.) The Court agreed with plaintiff that the patent does not require  
7 “direct, surface-to-surface attachment of the ends of the hypo tube to the ends of the catheter  
8 shaft.” (*Id.*) It further found that plaintiff “is entitled to the full breadth” of the claim term  
9 “attached,” rejecting defendants’ contention that the prosecution history limited the claims to  
10 “direct, surface-to-surface attachment.” (*Id.* at 19-21.) The Court found, however, that nothing  
11 suggests the patent uses “attached” as a technical term of art requiring elaborate interpretation and  
12 that the term’s plain and ordinary meaning “more accurately captures the term’s emphasis on  
13 connection and junction” than did plaintiff’s proposal. (*Id.* at 18, 22.)

14 Now, plaintiff argues paragraphs 151 and 154 of the Sheehan report misconstrue the  
15 Court’s earlier findings in an attempt to rebut plaintiff’s expert. The Court agrees in part. The  
16 first two sentences of paragraph 151 merely quote language from the patent and express the  
17 expert’s understanding about a point of agreement between the parties regarding the connection  
18 point of the catheter shafts in the accused devices (at the balloon necks). Those apparently  
19 uncontroverted propositions shall not be stricken. However, the Court **STRIKES** the remainder of  
20 paragraph 151 and all of paragraph 154. Those portions of the report incorrectly suggest  
21 “attached,” as used in the patent, cannot encompass indirect attachment. To the contrary, the  
22 Court previously rejected this specific argument by defendants as noted above.

23 **B. Plaintiff’s Motion *in Limine* No. 2**

24 Plaintiff’s second motion *in limine* seeks to exclude “evidence, testimony, and argument  
25 regarding statements by Martin B. Leon concerning the Chocolate balloon catheter” pursuant to  
26 Federal Rules of Evidence 403, 801, and 802 and Federal Rule of Civil Procedure 26. The Court  
27 has reviewed the relevant statement submitted in the form of an audiovisual recording of Leon.  
28 Therein, Leon discusses the Chocolate device, noting it is different than a scoring or cutting

1 balloon (the types of devices covered by the patent-in-suit according to defendants). These  
2 statements are relevant to the question of infringement in this case. However, as out-of-court  
3 statements offered for the truth of the matters asserted, they are also hearsay under Rule 801.

4 Defendants argue they are not hearsay under Rule 801(d)(2)(A) and (C) (exempting from  
5 hearsay a party opponent’s statements or those made by one authorized to speak on the subject on  
6 the party’s behalf), because Leon is listed as chairman of plaintiff’s medical advisory board.  
7 Defendants have failed to provide evidence describing the particulars of this role and legal  
8 authority addressing whether statements made by a company’s *advisor*—as in the case of certain  
9 statements by its *officers* or *directors*—are *per se* authorized. Defendants have also failed to  
10 proffer any evidence suggesting the statements were specifically authorized in this case.

11 Defendants alternatively argue the statement should be admitted under Rule 807’s residual  
12 exception because they have “equivalent circumstantial guarantees of trustworthiness” because  
13 plaintiff’s CEO has testified Leon is highly regarded in the field. This proffer is insufficient to  
14 warrant introduction of this classic hearsay evidence.

15 Thus, finding no basis to admit the evidence, the motion is **GRANTED** insofar as it seeks  
16 exclusion of the video itself. The motion is otherwise **DENIED** without prejudice to plaintiff  
17 raising appropriate objections at trial. Defendants may be permitted to examine AngioScore  
18 witnesses regarding their knowledge of Leon’s statement.

19 **C. Plaintiff’s Motion *in Limine* No. 3**

20 Plaintiff’s third motion *in limine* seeks to exclude, pursuant to Rules 401, 402, and 403,  
21 evidence, testimony, and argument regarding the July 2015 notices of allowance by the U.S.  
22 Patent and Trademark Office regarding defendants’ U.S. Patent Application Nos. 13/044,425,  
23 13/761,525, and 13/972,761, which defendants claim cover the Chocolate devices accused of  
24 infringement in this lawsuit. Plaintiff correctly notes that, in general, “where [a] defendant has  
25 appropriated the material features of the patent in suit, infringement will be found ‘even when  
26 those features have been supplemented and modified to such an extent that the defendant may be  
27 entitled to a patent for the improvement.’” *Atlas Powder Co. v. E.I. du Pont De Nemours & Co.*,  
28 750 F.2d 1569, 1580 (Fed. Cir. 1984). On this basis, plaintiff argues the recent allowance of these

1 patents does not have any relevance to the question of whether the accused devices infringe  
2 plaintiff's preexisting patent.

3 By contrast, defendants argue the allowance may be relevant for a number of purposes,  
4 including: (1) as evidence of separate patentability, suggesting non-infringement under the  
5 doctrine of equivalents; (2) to rebut plaintiff's damages expert's reliance on a license of the newly  
6 allowed patents; (3) as evidence of the design and operation of the accused devices; and (4) as  
7 evidence relevant to whether any infringement by defendants was willful. The Court finds the first  
8 argument persuasive. Pending developments at trial, newly allowed patents may be relevant as to  
9 the question of whether the accused devices infringe the patent-in-suit. *See Nat'l Presto Indus.,*  
10 *Inc. v. W. Bend Co.*, 76 F.3d 1185, 1192 (Fed. Cir. 1996) ("Whether a modified device is within  
11 the scope of the prior patent, literally or by equivalency, depends on the particular facts. The fact  
12 of separate patentability is relevant, and is entitled to due weight."); *Siemens Med. Solutions USA,*  
13 *Inc. v. Saint-Gobain Ceramics & Plastics, Inc.*, 637 F.3d 1269, 1281 (Fed. Cir. 2011) (noting  
14 "separate patentability, while potentially relevant to the equivalence issue and deserving of due  
15 weight in the infringement analysis, does not merit a heightened evidentiary burden" in an  
16 infringement analysis). Defendants have proffered that they will be able to establish the necessary  
17 links at trial establishing the relevance of this evidence (e.g., demonstrating that the accused  
18 devices practice the newly allowed patents). Accordingly, it is improper to exclude this evidence  
19 at this juncture.<sup>2</sup>

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21 <sup>2</sup> Defendants' remaining arguments are not particularly persuasive. As to the second, the  
22 fact of the patents' recent allowance is of minimal probative value to rebut plaintiff's reliance on a  
23 early license of these patents—prior to their allowance and, indeed, at a time when only a  
24 provisional application had been filed. At the time, the fact that they would ultimately be allowed  
25 was not known. Nevertheless, it may have some probative value on this question as tending to  
26 show, based on the subsequent allowance, that one knowledgeable in the field might have, early  
27 on, considered them promising. To the extent the evidence is otherwise admitted to show separate  
28 patentability, there is no risk of additional undue prejudice to plaintiff by admitting this evidence  
for this additional purpose. As to the third, defendants have designated no expert who will testify  
to the fact that the accused devices practice the newly allowed patents, and in any event the fact of  
their recent allowance (as opposed to the applications themselves) is not relevant to the operation  
of the accused devices. As to the fourth, defendants' reliance on *King Instrument Corp. v. Otari*  
*Corp.*, 767 F.2d 853, 867 (Fed. Cir. 1985) for the proposition that this evidence is relevant to  
willfulness is misplaced, as there the patents in question had apparently issued prior to the time  
period at issue. Here, the patents were not allowed until months before trial. Thus, any probative  
value of this evidence to the question of willfulness is minimal.

1           Therefore, the Court **DENIES** the motion. The Court will entertain an appropriate jury  
2 instruction proposal, informing the jury that the allowances in question do not preclude a finding  
3 of infringement of the patent-in-suit.

4           **D. Defendants' Motion *in Limine* No. 4**

5           Defendants move to preclude evidence of a device constructed for plaintiff's employee and  
6 designated expert Jeffrey Bleam that purportedly embodies the patent-in-suit. (Dkt. No. 685.)  
7 The purpose of constructing the device was apparently to rebut anticipated testimony by  
8 defendants that a device as described in the '119 Patent is not feasible. (Dkt. No. 743 (Tr.) at 90-  
9 91.) Specifically, defendants seek to strike paragraphs 7-13 of Bleam's expert report on the  
10 grounds that: (1) plaintiff failed to identify such a device in their infringement contentions; and (2)  
11 Bleam does not offer an opinion that the constructed device actually embodies the '119 Patent.  
12 (Dkt. No. 688-9.) As plaintiff has indicated it only seeks to introduce this evidence in rebuttal, to  
13 the extent defendants argue the patented design is not feasible, the Court **RESERVES** on this  
14 remaining portion of the motion.

15           **E. Defendants' Motion *in Limine* No. 5**

16           Defendants move to preclude certain testimony by plaintiff's expert Marc Levenston.  
17 (Dkt. Nos. 686 (Motion), 393-14 (Report).) Specifically, they seek to exclude testimony regarding  
18 three claim limitations: "attached," "longitudinal expansion," and "end." They also seek to  
19 preclude him from testifying on the ultimate issue of whether the accused devices infringe.

20           As for the "attached" limitation, defendants argue Levenston's opinion contradicts the  
21 Court's construction. As discussed above in connection with plaintiff's motion *in limine* number  
22 one, the Court did not hold that "attached" excludes indirect attachment. Defendants again  
23 misconstrue the Court's earlier order. The motion on this ground is **DENIED**.

24           As for the "longitudinal expansion" term, defendants contend that Levenston's opinion  
25 relies on measurements of two accused Chocolate devices for which he improperly withheld the  
26 underlying data. Plaintiff asserts Levenston will no longer rely upon aspects of his opinion  
27 derived from the measurement data, but argues he should be permitted to rely on opinions based  
28 on simple visual observations—not measurements—of the status of the balloon as inflated or

1 deflated. The Court agrees with and hereby adopts that approach. Therefore, the motion on this  
2 ground is **GRANTED IN PART**. The following aspects of the report are **STRICKEN** as clearly falling  
3 within the scope of this ruling: on page 12 of the report, the sentence referencing “experimental  
4 measurements”; the first full paragraph on page 13 through the end of section 1e on page 15;  
5 pages 26-38 (section regarding experimental measurements); and the text listing measurements  
6 accompanying Figures 4 and 8. In light of this ruling excluding testimony as to any of these  
7 measurements, to the extent Levenston seeks to opine as to his observations, plaintiffs shall first  
8 make a proffer, outside of the presence of the jury, establishing that testimony did not  
9 inappropriately rely on the excluded measurements.

10 As for the term “end,” defendants argue the report fails to identify the function, way, or  
11 result by which the accused devices purportedly infringe the patent-in-suit under the doctrine of  
12 equivalents. As a result, they claim the testimony should be stricken. However, the authority they  
13 provide for this proposition does not go so far. In *Amgen Inc. v. F. Hoffman-La Roche Ltd.*, 580  
14 F.3d 1340, 1382 (Fed. Cir. 2009), the Federal Circuit held an expert offering an opinion of  
15 infringement under the doctrine of equivalents is required to present, “on a limitation-by-limitation  
16 basis, particularized testimony and linking argument” either: (1) “as to the insubstantiality of the  
17 differences between” the limitation and the accused product; or (2) “with respect to the function,  
18 way, result test.” In the report, Levenston opines that “[e]limination of a small fraction of one  
19 strut would not alter the behavior of the Chocolate devices in a manner that would fall outside of  
20 any of the claim limitations” and would merely constitute “normal design iteration,” not  
21 “substantial differences.” (Dkt. No. 393-14 at 10.) Therefore, the motion on this ground is  
22 **DENIED** in light of prong one of *Amgen*.

23 Finally, as to the request to preclude Levenston’s testimony as to the ultimate issue of  
24 infringement, the Court **RESERVES**.

25 **F. Defendants’ Motion in Limine No. 6**

26 Defendants move to preclude testimony of plaintiff’s expert Michael Horzewski (Dkt. No.  
27 393-13) regarding certain infringement theories not disclosed in plaintiff’s infringement  
28 contentions and testimony concerning the ultimate issue of infringement. The motion is

1 **GRANTED IN PART** and **DENIED IN PART**. The Court notes, as a threshold matter, that plaintiff  
2 sought leave to amend its infringement contentions in November 2014. Plaintiff submitted to the  
3 Court, and defendants, a proposed amended set of contentions at that time, including many of the  
4 specific theories or explanations now challenged. (Dkt. No. 352.) Leave to amend was denied as  
5 untimely and unnecessary in light of plaintiff’s contention that no new theories of infringement  
6 were presented, merely additional detail. (Dkt. No. 453.)

7 “The scope of contentions and expert reports are not . . . coextensive.” *Apple Inc. v.*  
8 *Samsung Electronics Co.*, No. 5:12-CV-0630-LHK-PSG, 2014 WL 173409, at \*1 (N.D. Cal. Jan.  
9 9, 2014) (“Contentions need not disclose specific evidence, whereas expert reports must include a  
10 complete statement of the expert’s opinions, the basis and reasons for them, and any data or other  
11 information considered when forming them.”). In evaluating defendants’ challenge, the Court  
12 considers whether the paragraphs at issue permissibly address, in greater detail, a previously  
13 disclosed theory, or impermissibly substitute a new theory altogether. *Id.*

14 First, as to the limitation “wherein each strut extends from the proximal end to the distal  
15 end,” defendants seek to strike paragraphs 34-36 and page 6 of Exhibit 3 of the report regarding  
16 the doctrine of equivalents. The Court finds that paragraph 34 merely describes the Chocolate  
17 device, and therefore need not be stricken. Paragraph 36 notes “eliminating a very small segment  
18 of the strut is an insubstantial difference because the missing segment is not necessary to allow  
19 longitudinal or radial expansion of the constraining structure.” (Dkt. No. 393-13 at ¶ 36.) While  
20 neither party provided a copy of the infringement contentions, plaintiff represents that the  
21 contentions similarly asserted that removing “a small portion of the strut” was an “insubstantial  
22 difference.” Thus, the general theory underlying paragraph 36 was apparently disclosed.  
23 Paragraph 35, however, asserts that the struts and rings of the accused device are “part of a single  
24 integral structure,” thus performing “substantially the same function as the end-to-end struts of the  
25 claimed ’119 device—to provide longitudinal structures that allow the constraining structure to  
26 span the entire inflatable portion of the balloon with no unterminated struts exposed to the vessel.”  
27 (See Dkt. No. 352-2 at 15.) This doctrine of equivalents theory was apparently not disclosed in  
28 the contentions. Therefore, paragraph 35 and the similar language in the last paragraph on the

1 right side of page 6 of Exhibit 3 are **STRICKEN**.

2 As to the “attached” limitation, plaintiff represents the infringement contentions asserted  
3 the “attached” limitation was literally infringed by the accused devices. The challenged portions  
4 of the report—paragraphs 46-49, and page 8 of Exhibit 3—merely discuss theories of indirect  
5 attachment, including by way of reference to specifications not available to plaintiff at the time of  
6 its infringement contentions. These opinions merely present greater detail as to the basic theory of  
7 infringement. Thus, the motion on this ground is **DENIED**.

8 As to the “longitudinal expansion” limitation, defendants seek to strike paragraphs 41-42  
9 and page 7 of Exhibit 3. These paragraphs are **STRICKEN** to the extent they rely on Levenston’s  
10 separately stricken measurements (for which the underlying data was undisclosed, as addressed  
11 above). To the extent they rely on his observations, however, these opinions are permitted.  
12 Plaintiff shall make a proffer to the Court, outside the presence of the jury, before presenting any  
13 opinions from these paragraphs, establishing that they were not indirectly derived from the  
14 impermissible measurements.

15 Additionally, defendants move to preclude testimony regarding “summary points” not  
16 included in any expert report, but instead in a document entitled “Additional Support for My  
17 Opinions Based on Claim Construction Order and Sheehan Report.” (Dkt. No. 688-20.) As noted  
18 above, no expert may offer testimony exceeding the bounds of their reports. The Court does not  
19 construe this document as an expert report or supplement thereto. To the extent material included  
20 in that document was also part of a report, such testimony may be elicited at trial if not otherwise  
21 prohibited.

22 Finally, as to the request to preclude Horzewski’s testimony as to the ultimate issue of  
23 infringement, the Court **RESERVES**.

24 **G. Defendants’ Motion *in Limine* No. 7**

25 Defendants seek to preclude plaintiff from introducing evidence at trial of defendant  
26 TriReme’s 510(k) submissions to the U.S. Food and Drug Administration relating to the Chocolate  
27 PTA Balloon Catheter devices. (Dkt. No. 687.) For the reasons stated on the record at the August  
28 21, 2015 hearing, the motion is **GRANTED**.

1       **II.    DAUBERT MOTION**

2           Defendants seek to exclude the testimony of plaintiff’s damages expert, Gary Olsen, as  
3       unreliable. (Dkt. No. 471.) Plaintiff opposes the motion. (Dkt. No. 499.) Rule 702 provides that  
4       “scientific, technical, or other specialized knowledge” by a qualified expert is admissible if it will  
5       “help the trier of fact to understand the evidence or to determine a fact in issue.” Fed. R. Evid.  
6       702. *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993) and *Kumho Tire Co. v.*  
7       *Carmichael*, 526 U.S. 137(1999), “require that the judge apply his gatekeeping role . . . to all  
8       forms of expert testimony, not just scientific testimony.” *White v. Ford Motor Co.*, 312 F.3d 998,  
9       1007 (9th Cir. 2002). However, “far from requiring trial judges to mechanically apply the  
10      *Daubert* factors—or something like them—to both scientific and non-scientific testimony, *Kumho*  
11      *Tire* heavily emphasizes that judges are entitled to broad discretion when discharging their  
12      gatekeeping function.” *United States v. Hankey*, 203 F.3d 1160, 1168 (9th Cir. 2000). Indeed, the  
13      Ninth Circuit has determined that a “trial court not only has broad latitude in determining whether  
14      an expert’s testimony is reliable, but also in deciding how to determine the testimony’s  
15      reliability.” *Elsayed Mukhtar v. Cal. State Univ.*, 299 F.3d 1053, 1064 (9th Cir. 2002) (citing  
16      *Hankey*, 203 F.3d at 1167) (emphasis in original), *overruled on other grounds*, *Estate of Barabin*  
17      *v. AstenJohnson, Inc.*, 740 F.3d 457, 467 (9th Cir. 2014).

18           Defendants argue Olsen’s report contains a number of flawed methodologies. For  
19      instance, they argue: (1) his starting royalty rate is flawed; and (2) his upward adjustments from  
20      that figure are improper.

21           As to the first, they argue the 2.2-8.9 percent starting range is flawed because of the use of  
22      data from a limited, 13-month time period and use of average gross margins in a purportedly  
23      improper industry classification (Medical and Hospital Equipment). However, as to the former,  
24      the expert relied on that time period as a result of then-available data produced by defendants. As  
25      to the latter, a difference of opinion as to the proper classification is not grounds for excluding the  
26      report in its entirety. Additional challenges to the starting rate, such as his failure to consider  
27      earlier gross margins (he determined the earlier figures were less relevant as the defendants were  
28      in start-up mode at the time), also go to weight, not admissibility. In his Second Supplemental

1 Report, Olsen further relied upon Eitan Konstantino’s license to QT Vascular Ltd., and  
2 specifically the finding of independent financial adviser SAC Capital that the 5 percent rate was at  
3 the lower end of a 2-30 percent range for comparable licenses. (Dkt. No. 463-3 ¶ 14.)

4 As to the second, defendants raise a slew of challenges, including as to: (a) Olsen’s  
5 reliance on a development agreement license between defendant TriReme Medical, LLC and  
6 InnoRa GmbH; (b) Olsen’s failure to afford weight to the transaction in which plaintiff acquired  
7 the patent-in-suit; (c) Olsen’s assumption of a worldwide, exclusive license; and (d) Olsen’s  
8 reliance on “comparable” license summaries selected from a reference database by plaintiff. The  
9 approaches are not so unreasonable as to warrant exclusion under Rule 702 and *Daubert*. In  
10 evaluating “comparable” licenses, an expert “must consider licenses that are commensurate with  
11 what the defendant has appropriated.” *ResQNet.com, Inc. v. Lansa, Inc.*, 594 F.3d 860, 872 (Fed.  
12 Cir. 2010) (“If not, a prevailing plaintiff would be free to inflate the reasonable royalty analysis  
13 with conveniently selected licenses without an economic or other link to the technology in  
14 question.”). The Court agrees that some of Olsen’s decisions regarding comparable licenses are  
15 questionable, however those concerns, in this case, are more properly directed to the weight of the  
16 testimony, not its admissibility. Olsen presented a colorable, though perhaps questionable, basis  
17 for selecting and weighing each of the licenses included (or, in the case of plaintiff’s acquisition of  
18 the patent, for choosing to discount that particular transaction). Defendants may challenge each of  
19 these bases during cross-examination. Plaintiff also adequately defends, for purposes of  
20 admissibility, Olsen’s assumption of a “worldwide” license by contending it was necessarily  
21 limited to the United States—because the hypothetical license involves only a U.S. patent—and  
22 suggests Olsen’s finding that it would have been an “exclusive” license is also of minimal  
23 significance, because he placed limited weight on that particular factor. Thus, the motion is  
24 **DENIED.**

### 25 **III. MOTIONS TO SEAL**

26 The Court has pending before it three administrative motions to seal briefs or other  
27 documents filed in connection with various pretrial motions. (Dkt. Nos. 470, 514, 680.) In the  
28 Ninth Circuit, two different standards govern motions to seal, depending upon the nature of the

1 proceeding in connection with which the documents are submitted. *Pintos v. Pac. Creditors*  
2 *Ass'n*, 565 F.3d 1106, 1115-16 (9th Cir. 2009) *opinion amended and superseded on denial of*  
3 *reh'g*, 605 F.3d 665 (9th Cir. 2010). For many judicial records, the party seeking to seal the record  
4 must demonstrate “compelling reasons” that would overcome the public’s right to view public  
5 records and documents, including judicial records. *Id.* (citing *Kamakana v. City & County of*  
6 *Honolulu*, 447 F.3d 1172, 1178 (9th Cir. 2006)). However, a different standard applies to private  
7 documents submitted in connection with non-dispositive motions, since such motions are often  
8 unrelated or only tangentially related to the merits of the underlying claims. *Kamakana*, 447 F.3d  
9 at 1179-80. The Rule 26(c) “good cause” standard applies to documents submitted in connection  
10 with non-dispositive motions, such as discovery motions, which the court may seal “to protect a  
11 party or person from annoyance, embarrassment, oppression, or undue burden or expense.”  
12 *Pintos*, 565 F.3d at 1116. The requested redactions involve information related to the functioning  
13 of the accused devices, along with other purportedly proprietary business information, such as  
14 contract terms (e.g., royalty rates) or financial statements.

15 The Court finds the requests sufficiently justified and narrowly tailored for purposes of the  
16 pending, non-dispositive motions with which they are connected. Thus, the Court **GRANTS** the  
17 motions, but solely for purposes of those motions and under the lower “good cause” standard. The  
18 documents and portions of documents subject to the motions are therefore sealed. The Court  
19 cautions the parties, however, that the documents are sealed *solely* for purposes of these pretrial  
20 motions. This Order does not allow any party to seal the documents or portions thereof in  
21 connection with trial or with any dispositive motions. Any party seeking to seal documents in  
22 those contexts will be required to meet the higher “compelling reasons” standard. The parties are  
23 directed to meet and confer on the proper scope of any sealing requests at trial and to present them  
24 jointly.

25 **IV. CONCLUSION**

26 For the foregoing reasons, the Court rules as follows:

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1. Motions *in Limine*
  - a. Plaintiff’s motion *in limine* number one to exclude testimony by Neil Sheehan regarding construed terms “longitudinal expansion,” “longitudinally shorten,” and “attached” is **GRANTED IN PART** and **DENIED IN PART**.
  - b. Plaintiff’s motion *in limine* number two to exclude statements by Martin B. Leon is **GRANTED IN PART** and **DENIED IN PART**.
  - c. Plaintiff’s motion *in limine* number three seeking to exclude recent notices of allowance is **DENIED**.
  - d. The Court **RESERVES** on defendants’ motion *in limine* number four to preclude rebuttal evidence concerning a device constructed for Jeffrey Bleam that purportedly embodies the patent-in-suit.
  - e. Defendants’ motion *in limine* number five to preclude testimony by Marc Levenston regarding three claim limitations (“attached,” “longitudinal expansion,” and “end”) is **GRANTED IN PART** and **DENIED IN PART**, and the Court **RESERVES** on the question of whether Levenston may testify as to the ultimate issue of infringement.
  - f. Defendants’ motion *in limine* number six seeking to preclude testimony of Michael Horzewski regarding infringement theories that were purportedly not disclosed in plaintiff’s infringement contentions is **GRANTED IN PART** and **DENIED IN PART**, and the Court **RESERVES** on the question of whether Horzewski may testify as to the ultimate issue of infringement.
  - g. Defendants’ motion *in limine* number seven seeking to preclude plaintiff from introducing evidence of defendant TriReme’s 510(k) submissions is **GRANTED**.
2. Defendants’ motion to exclude the testimony of plaintiff’s damages expert Gary Olsen is **DENIED**.
3. The pending administrative motions to seal various pretrial motions are **GRANTED**.

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This Order terminates Docket Numbers 470-71, 514, 680-81, 687.

**IT IS SO ORDERED.**

Dated: September 8, 2015

  
**YVONNE GONZALEZ ROGERS**  
**UNITED STATES DISTRICT COURT JUDGE**