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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

FEDERAL TRADE COMMISSION,
Plaintiff,
v.
QUALCOMM INCORPORATED,
Defendant.

Case No. 17-CV-00220-LHK

**ORDER DENYING THE FTC'S
MOTION TO EXCLUDE EXPERT
TESTIMONY OF DR. EDWARD
SNYDER**

Re: Dkt. No. 788

Before the Court is Plaintiff Federal Trade Commission's ("FTC") motion to exclude the expert testimony of Defendant Qualcomm Incorporated's ("Qualcomm") expert Dr. Edward Snyder. Having considered the parties' briefs, the relevant law, and the record in this case, the Court DENIES the FTC's motion.

I. LEGAL STANDARD

Federal Rule of Evidence 702 allows admission of "scientific, technical, or other specialized knowledge" by a qualified expert if it will "help the trier of fact to understand the evidence or to determine a fact in issue." Fed. R. Evid. 702. Expert testimony is admissible pursuant to Rule 702 if it is both relevant and reliable. *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 589 (1993). An expert witness may provide opinion testimony if: (1) the testimony is

1 based upon sufficient facts or data; (2) the testimony is the product of reliable principles and
2 methods; and (3) the expert has reliably applied the principles and methods to the facts of the case.
3 Fed. R. Evid. 702.

4 When considering expert testimony offered pursuant to Rule 702, the trial court acts as a
5 “gatekeeper” by “making a preliminary determination that the expert’s testimony is reliable.”
6 *Elsayed Mukhtar v. Cal. State Univ., Hayward*, 299 F.3d 1053, 1063 (9th Cir. 2002). In *Daubert*,
7 the United States Supreme Court identified “four factors that may bear on the analysis”: (1)
8 whether a theory or technique can be and has been tested; (2) whether the theory or technique has
9 been subjected to peer review and publication; (3) the known or potential rate of error; and (4)
10 whether the theory is generally accepted in the scientific community. *Murray v. S. Route*
11 *Maritime SA*, 870 F.3d 915, 922 (9th Cir. 2017) (citing *Daubert*, 509 U.S. at 593-94). However,
12 the Ninth Circuit has explained that “the reliability analysis remains a malleable one tied to the
13 facts of each case” and that the “*Daubert* factors are exemplary, not constraining.” *Id.* The Ninth
14 Circuit has also stated that “[i]t is important to remember that the factors are not ‘equally
15 applicable (or applicable at all) in every case,’” and that “[a]pplicability ‘depend[s] on the nature
16 of the issue, the expert’s particular expertise, and the subject of his testimony.’” *Id.* (first quoting
17 *Daubert v. Merrell Dow Pharm., Inc.*, 43 F.3d 1311, 1317 (9th Cir. 1995), then quoting *Kumho*
18 *Tire Co. v. Carmichael*, 526 U.S. 137, 150 (1999)) (third alteration in original).

19 “Because of the fluid and contextual nature of the inquiry, district courts are vested with
20 ‘broad latitude’ to ‘decid[e] how to test an expert’s reliability’ and ‘whether or not [an] expert’s
21 relevant testimony is reliable.’” *Id.* (quoting *Kumho Tire*, 526 U.S. at 152-53) (alterations and
22 emphasis in original). Thus, the Court “may permissibly choose not to examine factors that are
23 not ‘reasonable measures of reliability in a particular case.’” *Id.* (quoting *Kumho Tire*, 526 U.S. at
24 153); *see also id.* at 924 (“District courts have broad range to structure the reliability inquiry and
25 may choose not to comment on factors that would not inform the analysis.”).

26 Moreover, the inquiry into admissibility of expert opinion is a “flexible one,” where
27 “[s]haky but admissible evidence is to be attacked by cross examination, contrary evidence, and

1 attention to the burden of proof, not exclusion.” *Primiano v. Cook*, 598 F.3d 558, 564 (9th Cir.
2 2010) (citing *Daubert*, 509 U.S. at 594, 596). “Under *Daubert*, the district judge is ‘a gatekeeper,
3 not a fact finder.’ When an expert meets the threshold established by Rule 702 as explained in
4 *Daubert*, the expert may testify and the jury decides how much weight to give that testimony.” *Id.*
5 (quoting *United States v. Sandoval-Mendoza*, 472 F.3d 645, 654 (9th Cir. 2006)).

6 Furthermore, although the *Daubert* inquiry must still be performed, it is well established
7 that the Court’s gatekeeping duty is “less pressing” regarding a bench trial. *AngioScore, Inc. v.*
8 *TriReme Med., Inc.*, 87 F. Supp. 3d 986, 1016 (N.D. Cal. 2015); *see also Fed. Trade Comm’n v.*
9 *BurnLounge, Inc.*, 753 F.3d 878, 888 (9th Cir. 2014) (explaining that in a bench trial, “there is less
10 danger [than in a jury trial] that a trial court will be unduly impressed by the expert’s testimony or
11 opinion”) (internal quotation marks omitted). As the Ninth Circuit has held, in a bench trial, “the
12 risk that a verdict will be affected unfairly and substantially by the admission of irrelevant
13 evidence is far less than in a jury trial.” *E.E.O.C. v. Farmer Bros. Co.*, 31 F. 3d 891, 898 (9th Cir.
14 1994); *see also United States v. Flores*, 901 F.3d 1150, 1165 (9th Cir. 2018) (“*Daubert* is meant to
15 protect *juries* from being swayed by dubious scientific testimony.” (citation omitted) (emphasis in
16 original)).

17 **II. DISCUSSION**

18 Dr. Snyder is a professor of economics and management and the Dean of the Yale School
19 of Management. ECF No. 788-2, Expert Report of Dr. Edward Snyder (“Snyder Report”), ¶ 1.
20 Qualcomm retained Dr. Snyder to address the FTC’s allegation that Qualcomm’s conduct harmed
21 competition in the modem chip industry. *Id.* ¶ 7.

22 The FTC moves to exclude Dr. Snyder’s opinions on three distinct grounds. First, the FTC
23 contends that Dr. Snyder’s opinion on the three factors affecting the performance of modem chip
24 suppliers is “not grounded in a generally accepted or reliable theory or methodology, and is
25 instead nothing more than a factual narrative.” ECF No. 788 (“Mot.”) at 6. Second, the FTC
26 contends that Dr. Snyder’s opinion on modem chip supplier performance is not helpful to the
27 Court because Dr. Snyder “never considered (or tested) the possibility that Qualcomm’s conduct

1 affected its rivals’ performance” on the three factors Dr. Snyder discusses. *Id.* at 12. Third, the
2 FTC contends that Dr. Snyder’s opinion that “industry performance directly contradicts Plaintiff’s
3 Hypothesis” is not reliable or relevant. *Id.* at 15. The Court addresses each argument in turn.

4 **A. Dr. Snyder’s Opinions on the Performance of Other Modem Chip Suppliers are**
5 **Supported by a Reliable Methodology**

6 The FTC first attacks Dr. Snyder’s opinion that “the success and failure of firms depend on
7 their foresight, the efficiency of their investments, and ability to execute,” and that those three
8 factors—rather than Qualcomm’s conduct—explain the performance of other modem chip
9 suppliers. Snyder Report ¶ 20. The FTC contends that Dr. Snyder’s three-factor test is not
10 reliable because Dr. Snyder’s theory has not been peer reviewed, nor is there evidence that
11 economists apply the same three factors to analogous industries. Mot. at 6. In opposition,
12 Qualcomm argues that Dr. Snyder’s methodology is reliable because Dr. Snyder, in accordance
13 with industrial organization theory, “conduct[ed] an in-depth analysis of an industry to identify the
14 factors that affect the success or failure of firms within it,” and then applied those factors to
15 specific modem chip suppliers. ECF No. 874 (“Opp”) at 10. Qualcomm has the better argument.

16 In his expert report, Dr. Snyder “first review[s] fundamental industrial organization
17 principles and then frame[s] their relevance to the modem chip industry.” Snyder Report ¶ 38.
18 Dr. Snyder’s overview of industrial organization principles discusses how models of competition
19 vary across industry, and Dr. Snyder cites numerous academic articles in support. *See id.* ¶¶ 40–
20 45 & nn. 29–46. Then, Dr. Snyder explains how characteristics unique to the modem chip
21 industry—such as “successive shifts from one generation of wireless standards to the next”—
22 affect the factors that influence a modem chip supplier’s success in the industry. *Id.* ¶ 48. Based
23 on Dr. Snyder’s analysis of the modem chip industry, *id.* ¶¶ 57–178, Dr. Snyder identifies three
24 factors “generally” relevant to a modem chip supplier firm’s ability to compete in the industry:
25 foresight, investment, and execution. *Id.* ¶ 186. In the bulk of his report, Dr. Snyder tests whether
26 those three factors explain the performance of Qualcomm and other modem chip suppliers. *Id.* ¶¶
27 213–474.

1 To attempt to paint Dr. Snyder’s opinions as unreliable, the FTC focuses only on the final
 2 step of Dr. Snyder’s analysis, his three-factor analysis of modem chip supplier performance, and
 3 contends that no other economist has applied those three factors to an analogous industry.
 4 However, that no other expert has applied Dr. Snyder’s precise three factors to another industry
 5 does not render his testimony unreliable. *See UFCW Local 1776 & Participating Emp’rs Health*
 6 *& Welfare Fund v. Teikoku Pharma USA*, 296 F. Supp. 3d 1142, 1187 (N.D. Cal. 2017) (admitting
 7 expert testimony where, although there was “no other case where an expert has employed the
 8 exact model,” the expert’s testimony was “consistent with accepted economic theory and well-
 9 established principles”). Indeed, the point of industrial organization theory is to analyze “how
 10 competition plays out in *different markets* and how it relates to industry structure.” ECF No. 875-
 11 20 at 146 (academic article on “empirical industrial organization”) (emphasis added). Therefore,
 12 it is no surprise that Dr. Snyder’s analysis of the modem chip supplier industry focuses on factors
 13 that Dr. Snyder believes are unique to the industry. *See, e.g.*, Snyder Report ¶ 53 (opining that
 14 although “the development and transfer of knowledge” is a “challenge[] for any industry,” the
 15 challenge is “especially acute in the modem chip industry given the investments required”); *see*
 16 *also* ECF No. 875-8 at 6 (book explaining that industrial organization is concerned with how
 17 “variations and imperfections” in particular markets affect success).

18 The FTC’s other primary argument for why Dr. Snyder’s methodology is unreliable is that
 19 Dr. Snyder’s opinions are not quantifiable. However, the point of the *Daubert* inquiry is to ensure
 20 that the “knowledge underlying [expert testimony] has a reliable basis in the knowledge and
 21 experience of the relevant discipline.” *Primiano v. Cook*, 598 F.3d 558, 565 (9th Cir. 2010)
 22 (citation and internal quotation marks omitted). As the United States Supreme Court explained in
 23 *Kumho Tire*, “*Daubert*’s list of specific factors neither necessarily nor exclusively applies to all
 24 experts or in every case.” 526 U.S. at 141. In *Primiano*, for example, the Ninth Circuit held that
 25 the district court abused its discretion by excluding expert testimony simply because “there was no
 26 publication supporting [the expert’s] opinion.” *Id.* at 567. Similarly, the FTC identifies no
 27 *Daubert* requirement that all expert testimony requires use of quantifiable “metrics.” *Cf.* Mot. at

1 7. To the contrary, as the district court explained in *Mullins*, a “qualitative analysis” may bear on
 2 the answer to a qualitative question, such as “how many excessive force complaints are too
 3 many.” *Mullins v. Premier Nutrition Corp.*, 178 F. Supp. 3d 867, 900 (N.D. Cal. 2016) (citing
 4 *Thomas v. City of Chattanooga*, 398 F. 3d 426, 431–32 (6th Cir. 2005). Thus, district courts have
 5 rejected attempts to exclude expert economic testimony because the testimony relied on
 6 “qualitative factors.” *TV Interactive Data Corp. v. Sony Corp.*, 929 F. Supp. 2d 1006, 1027 (N.D.
 7 Cal. 2013); *see also Aloe Vera of Am. Inc. v. United States*, 2014 WL 3072981, at *4 (D. Ariz.
 8 July 7, 2014) (admitting economist’s qualitative expert testimony because it reliably applied
 9 principles of an economics field that could “involve qualitative assessments such as examining
 10 business models, market characteristics, and the like”).

11 Here, the Court concludes that Dr. Snyder’s testimony is based on a reliable methodology
 12 and is not the “junk science” *Daubert* aims to preclude from jury consideration. *Wendell v.*
 13 *GlaxoSmithKline*, 858 F.3d 1227, 1236 (9th Cir. 2017). Tellingly, the FTC does not contend that
 14 Dr. Snyder misapplied industrial organization theory, attack Dr. Snyder’s qualifications as an
 15 economist, or contend that industrial organization theory is not a valid discipline. *See id.* at 1233–
 16 36 (concluding that district court erred by excluding opinions of “highly qualified doctors” who
 17 applied “sound methodology” based on their experience, the record before them, and the relevant
 18 literature). Moreover, Dr. Snyder’s theory is testable. *See Murray*, 870 F.3d at 922 (explaining
 19 that “whether the theory can be and has been tested” is often relevant to the *Daubert* analysis).
 20 Another economist can test whether Dr. Snyder’s three factors explain the successes or failures of
 21 all modem chip suppliers. Ultimately, if the FTC believes that Dr. Snyder’s three-factor analysis
 22 is incorrect or incomplete, “the appropriate way to discredit [Dr. Snyder’s] theory [is] through
 23 competing evidence and incisive cross-examination.” *Id.* at 925.

24 Finally, the FTC contends that Dr. Snyder is not a qualified expert because he has no
 25 special expertise in modem chips. However, Dr. Snyder need not be an expert in modem chips to
 26 opine on the performance of modem chip suppliers, so long as he applies a reliable economic
 27 methodology. As this Court has explained, “*Daubert* and its progeny explicitly contemplate the

1 admission of expert opinions in new fields.” *Apple, Inc. v. Samsung Elecs. Co.*, 2014 WL 794328,
 2 at *15 (N.D. Cal. Feb. 25, 2014). Given that Dr. Snyder applies his expertise in industrial
 3 organization to the modem chip industry, Dr. Snyder provides an opinion that is more than “a
 4 narrative of the case which a juror is equally capable of constructing.” *In re Rezulin Prods.*
 5 *Liability Litig.*, 309 F. Supp. 2d 531, 539 (S.D.N.Y. 2004). Moreover, the appropriate way to
 6 challenge Dr. Snyder’s theory based on his lack of modem chip expertise is through cross-
 7 examination. Therefore, the Court rejects the FTC’s arguments that Dr. Snyder’s opinion is
 8 unreliable.

9 **B. Dr. Snyder’s Opinions on the Performance of Other Modem Chip Suppliers are**
 10 **Helpful to the Court**

11 The FTC argues that Dr. Snyder’s opinions on the performance of other modem chip
 12 suppliers are not helpful to the Court because Dr. Snyder fails to consider “whether Qualcomm’s
 13 conduct caused anticompetitive harm.” Mot. at 12. However, under *Daubert*, “[e]xpert testimony
 14 is relevant if the knowledge underlying it has a valid connection to the pertinent inquiry.”
 15 *Primiano*, 598 F.3d at 565. The FTC’s burden in this case is to demonstrate that Qualcomm’s
 16 conduct had anticompetitive effects. *See Rambus Inc. v. Fed. Trade Comm’n*, 522 F.3d 456, 463
 17 (D.C. Cir. 2008) (holding that under the Sherman Act, “to be condemned as exclusionary, a
 18 monopolist’s act must have ‘anticompetitive effect’”) (quoting *United States v. Microsoft Corp.*,
 19 253 F.3d 34, 58 (D.C. Cir. 2001) (en banc)); *see also* ECF No. 1 (“Compl”), ¶ 136 (alleging that
 20 “Qualcomm’s anticompetitive practices have excluded competitors, increased consumer prices,
 21 and suppressed innovation.”).

22 The thrust of Dr. Snyder’s analysis is whether three industry factors, rather than
 23 Qualcomm’s conduct, explain the relative performance of other modem chip suppliers. *See*
 24 Snyder Report ¶ 31 (concluding that “industry factors . . . exert a strong influence on industry
 25 structure, competition among modem chip suppliers, [and] the successes and failures of
 26 suppliers”). Certainly, Dr. Snyder’s opinion is relevant to whether Qualcomm’s conduct had
 27 anticompetitive effects under the Sherman Act. Moreover, to the extent that the FTC argues that

1 Dr. Snyder ignores how Qualcomm’s conduct interacts with the three industry factors, Dr. Snyder
2 testified that he “identified the industry factors that [he] believed would not influenced by the
3 conduct.” Snyder Dep., 43:9–11. At trial, the FTC can press its point that Dr. Snyder’s opinions
4 are irrelevant because they fail to consider the impact of Qualcomm’s conduct through “[v]igorous
5 cross-examination [and] presentation of contrary evidence.” *Daubert*, 509 U.S. at 596.

6 At the *Daubert* gatekeeping stage, “[t]he district court is not tasked with deciding whether
7 the expert is right or wrong, just whether his testimony has substance such that it would be
8 helpful” to the trier of fact. *Alaska Rent-A-Car, Inc. v. Avis Budget Grp., Inc.*, 738 F.3d 960, 969–
9 70 (9th Cir. 2013). Because Dr. Snyder’s testimony is relevant to whether Qualcomm’s conduct
10 caused any anticompetitive effects on the modem chip supplier industry, the Court rejects the
11 FTC’s argument that it is unhelpful.

12 **C. Dr. Snyder’s Opinions on the Health of the Modem Chip Industry are Helpful to**
13 **the Court and Supported by a Reliable Methodology**

14 Lastly, the FTC argues that Dr. Snyder’s opinions on the health of the modem chip
15 industry overall are unreliable and unhelpful because “Dr. Snyder fails to provide any logical or
16 verifiable reasoning” to suggest that overall industry performance is relevant to the FTC’s
17 allegations. Mot. at 15. The FTC’s argument on this point is spare. In essence, the FTC argues
18 that Dr. Snyder offers no basis to believe that an industry’s performance proves the absence of
19 anticompetitive effect. In Section VI of his report, Dr. Snyder analyzes “whether there is evidence
20 of any such impaired performance” in the modem chip industry. Snyder Report ¶ 475.

21 As explained above, Dr. Snyder’s opinion is at least probative of whether the FTC has
22 proven its allegation that Qualcomm’s conduct “suppressed innovation” and otherwise had
23 anticompetitive effect. Compl. ¶ 136. In fact, the FTC’s own expert, Dr. Carl Shapiro, offers
24 analogous expert testimony that “[i]ndustries that are growing and where technology is advancing
25 are certainly not immune from antitrust problems.” ECF No. 789-6, Ex. 6, Rebuttal Expert Report
26 of Dr. Carl Shapiro (“Shapiro Report”), ¶ 258. Dr. Snyder’s failure to address the precise legal
27 question as the FTC sees it—whether Qualcomm’s conduct *reduced* competition—is a subject for

1 cross-examination. *See* Mot. at 15; *see also Microsoft*, 253 F.3d at 58 (stating that conduct has an
2 anticompetitive effect where it “harm[s] the competitive process and thereby harm[s] consumers”).

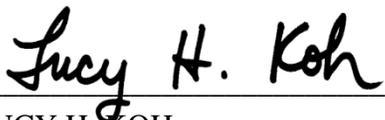
3 In addition, Dr. Snyder’s testimony is reliable, in that Dr. Snyder measured industry
4 performance by reference to metrics measuring “the pace of innovation, quality-adjusted prices,
5 and overall benefits to consumers.” Snyder Report ¶ 476. For example, Dr. Snyder analyzes
6 innovation by reference to modem chip suppliers’ spending on research and development, and
7 compares modem chip suppliers’ investments in that area to other analogous industries. *Id.* ¶ 478.
8 Other metrics that Dr. Snyder examines include modem chip prices, data speed, and consumer
9 surplus, none of which the FTC contends are incorrect means to measure industry performance.
10 *Id.* ¶ 479–96. Instead, the FTC contends, essentially, that Dr. Snyder’s opinion is not relevant.
11 *See* Mot. at 16 (arguing that Dr. Snyder should have opined “whether the industry could have
12 experienced greater innovation or larger price decreases in the absence of Qualcomm’s
13 exclusionary conduct”) (emphases omitted). As explained, the FTC is free to press that point on
14 cross-examination of Dr. Snyder. *Primiano*, 598 F.3d at 564 (“Shaky but admissible evidence is
15 to be attacked by cross examination, contrary evidence, and attention to the burden of proof, not
16 exclusion.”).

17 **III. CONCLUSION**

18 For the foregoing reasons, the Court DENIES the FTC’s motion to exclude Dr. Snyder’s
19 expert opinions.

20
21 **IT IS SO ORDERED.**

22 Dated: December 17, 2018

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24 _____
25 LUCY H. KOH
26 United States District Judge
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