IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

PERSONALIZED USER MODEL, L.L.P., Plaintiff, v. GOOGLE, INC., Defendant.	C.A. No. 09-525 (LPS)
GOOGLE, INC. Counterclaimant, v. PERSONALIZED USER MODEL, L.L.P. and YOCHAI KONIG, Counterclaim-Defendants.	**REDACTED - PUBLIC VERSION**

PUM'S OPENING BRIEF IN SUPPORT OF ITS MOTION TO EXCLUDE PORTIONS OF DR. EDWARD FOX'S NON-INFRINGEMENT REPORT FOR FAILURE TO APPLY THE COURT'S CLAIM CONSTRUCTION

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Plaintiff Personalized User Model L.L.P. ("PUM" or "Plaintiff") respectfully moves to exclude certain opinions of Defendant Google's ("Google" or "Defendant") technical expert (Dr. Edward A. Fox) and to preclude introduction of those opinions and theories at trial.

I. NATURE AND STATE OF THE PROCEEDINGS

PUM filed this patent infringement case in July 2009 against Google. Plaintiff asserts that Google infringes two patents—U.S. Patent No. 6,981,040 (the "'040 patent") and U.S. Patent No. 7,685,276 ("the '276 patent"). This Court issued its claim construction Opinion and Order on January 25, 2012. (D.I. 347 and 348). Expert discovery closed on November 27, 2012. Trial is scheduled to begin on March 10, 2014.

II. SUMMARY ARGUMENT

Proper expert testimony, for example, testimony where a qualified expert compares an accused product to the claim language as construed by the Court, can assist a jury in resolving a patent dispute. Improper expert testimony, however, such as when an expert offers opinions that are contrary to the Court's claim constructions, is unreliable, unhelpful, and should be excluded from the trial.

Here, several of Dr. Fox's non-infringement opinions disregard the Court's claim construction and/or are based on an interpretation of the Court's claim construction that was previously rejected by the Court. More specifically, Dr. Fox opines:

- [redacted]

[1] The cited portions of Dr. Fox's report are attached as Exhibit 1 to the Declaration of Jennifer Bennett ("Bennett Decl."). All emphasis is added unless otherwise noted.

[redacted] But the Court rejected this construction and argument when it rejected Google's attempt to define "User Model specific to the user" as a "model *unique* to the user, …" (D.I. at 24–27)[2] and instead defined "User Model specific to the user" as "an *implementation* of a learning machine updated in part by *data specific to the user*." (*Id.* at 28). The Court similarly rejected this argument for "user-specific" learning machine, defining the phrase as "a learning machine [as construed] specific to the user." (*Id.*) Because Dr. Fox's opinions fail to apply the Court's constructions (and rely on arguments previously and explicitly rejected by the Court), they should be stricken and this theory should be excluded from trial.

- [redacted] But the Court never made such a finding (D.I. 347 at 32–33).[3] Because Dr. Fox's opinions of non-infringement based on the "estimating" term fail to apply the Court's construction that explicitly encompasses calculations, they should be stricken and this theory should be excluded from trial.

- [redacted] But the Court rejected Google's "percentage chance" construction of "probability," construing the term to mean "numerical degree of belief or likelihood" (D.I. 347 at 33–34), a construction that even Dr. Fox recognized during his deposition as not being limited to between 0 and 1. *See* Fox Depo. at 129:22–130:3; 126:21–127:14. Here again because Dr. Fox failed to follow the Court's construction and instead read in a previously rejected argument, his opinions should be stricken and this theory should be excluded from trial.

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[2] The Court also rejected Google's attempted compromise definition that a User Model specific to the user meant a "model restricted to the user, …." *Id.* at 25 n.18.

[3] [redacted] Deposition of Dr. Fox ("Fox Depo.") at 136:25–138:19; 139:13–15; 140:4–20. The cited portions of Dr. Fox's deposition testimony are collected at Exhibit 2 of the Bennett Decl.

III. ARGUMENT

A. Applicable Legal Principles

The Court acts as the gatekeeper to ensure that expert testimony is relevant and reliable. *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 589 (1993). The party offering the expert testimony bears the burden of proving its admissibility. *Elcock v. Kmart Corp*., 233 F.3d 734, 741 (3d Cir. 2000). For Dr. Fox's testimony to be admitted, Google must demonstrate by a preponderance of the evidence that: (a) Dr. Fox is qualified; (b) his testimony is reliable; and (c) his testimony is relevant to an issue in the case. *Daubert*, 509 U.S. at 590–91. The Third Circuit recognizes Rule 702 "embodies a trilogy of restrictions on expert testimony: qualification, reliability and fit." S*chneider ex rel. Estate of Schneider v. Fried*, 320 F.3d 396, 404 (3d Cir. 2003). Fit requires that "the expert's testimony must be relevant for the purposes of the case and must assist the trier of fact." *Schneider*, 320 F.3d at 404.

Expert testimony that conflicts with the Court's constructions is neither relevant nor helpful to the jury. *See, e.g., Callpod, Inc. v. GN Netcom, Inc.*, 703 F. Supp. 2d 815, 821–22 (N.D. Ill. 2010) ("Expert opinions that conflict with a court's established claim construction tend only to create confusion and are thus unhelpful to the jury."). Thus, the Federal Circuit has approved the exclusion of expert testimony where an accused infringer tried to circumvent a claim construction order by re-advancing a rejected claim construction theory under the guise of arguing the factual question of infringement. *Liquid Dynamics Corp. v. Vaughan Co.*, 449 F.3d 1209, 1224 & n.2 (Fed. Cir. 2006) (district court did not err in excluding expert testimony inconsistent with claim construction); *see also Cytologix Corp. v. Ventana Med. Sys., Inc.*, 424 F.3d 1168, 1172 (Fed. Cir. 2005) (noting the impropriety of allowing expert opinions premised on an incorrect claim construction); *MarcTec, LLC v. Johnson & Johnson*, No. 07-CV-825, 2010

WL 680490, at *4 (S.D. Ill. Feb. 23, 2010) ("This Court excluded expert testimony premised on this mischaracterization of the claim construction as inadmissible under [Daubert] and [Fed. R. Evid. 702] because it 'd[id] not address the requirements of the Court's claim construction and is irrelevant to the question of infringement.'" (third alteration in original) (quoting *MarcTec, LLC v. Johnson & Johnson*, 638 F. Supp. 2d 987, 1006 (S.D. Ill. 2009)).

The Federal Circuit has warned that "[o]nce a district court has construed the relevant claim terms, and unless altered by the district court, then that legal determination governs for purposes of trial. No party may contradict the court's construction to a jury." *Exergen Corp. v. Wal-Mart Stores, Inc.*, 575 F.3d 1312, 1321 (Fed. Cir. 2009). Thus, an expert's testimony can be properly excluded for failure to apply the Court's claim construction. *See*, *e.g.*, *Cook Inc. v. Endologix, Inc.*, No. 1:09-cv-01248-TWP-DKL, 2012 WL 3886204, at *3 (S.D. Ind. Sept. 6, 2012) (excluding expert's testimony concerning infringement explaining that the defendant "did not succeed with its argument at claim construction and cannot seek to reargue its point at trial through expert testimony."); *see also Marctec*, 2010 WL 680490, at *4 (noting that the Court excluded expert testimony that was "premised on this mischaracterization of the claim construction"); *Saffran v. Johnson & Johnson*, Civil Action No. 2:07-CV-451, 2011 WL 197871, at *3–4 (E.D. Tex. Jan. 20, 2011) (excluding expert testimony under *Daubert* that was contrary to the court's claim construction); *Insight Technology, Inc. v. SureFire, LLC*, 2009 WL 3242557, *1–2 (D.N.H. 2009) (excluding non-infringement theory that was contrary to claim construction).

B. The Court Should Exclude Dr. Fox's Opinions That Disregard The Court's Claim Construction.

1. Dr. Fox's Opinions Regarding "User Model Specific To The User" And "User-Specific Learning Machine" Should Be Excluded.

During the claim construction process, the Court rejected Google's argument that each user must have his/her own personal User Model and learning machine. (D.I. 347 at 18, 24–27). Characterizing the crux of the parties' dispute to be what the patent means when it says "specific" or "specific to the user," the Court rejected Google's attempt to define "User Model specific to the user" and "user-specific learning machine" as "unique" to the user or "restricted" to the user based on the specification's teaching. *Id.* at 24–27. Undeterred, Google now improperly attempts to advance the same theory through expert testimony. These opinions should be excluded.

Dr. Fox, in his non-infringement opinion regarding the "User Model specific to the user" and "user-specific learning machine" elements, repeatedly advances the opinion that the Court's construction requires that for a User Model or learning machine to be "specific to the user," each user must have his/her own User Model or learning machine:

[redacted]

* * *

[redacted]

* * *

[redacted]

The Court has already heard and rejected these arguments.[5] Google's construction—"model unique to the user, that is created and updated by the learning machine and stored in a data structure"[6]— would mean "that each user have his or her own personal learning machine/user model potentially resulting in millions and millions of learning machines/models with tens of millions of variables." (D.I. 347 at 25 (the Court describing Google's argument)). "Resolution of this dispute turns on whether a User Model is specific because it has completely different ***variables*** than other User Models, or if, instead, a User Model is specific because it has completely different ***numerical values*** than other User Models." *Id.* at 25–26. (emphasis original). "[T]he Court agrees with PUM that the fundamental issue is the construction of parameters, which the Court addressed earlier." *Id.* at 26. With respect to "parameters," the Court noted that "[u]nder Google's construction, as PUM points out, 'each user would have a separate model made up of hundreds of thousands of words and all these other things'" and thus "[t]he Court will adopt PUM's proposal." *Id.* at 18.

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[4] Fox Report at ¶¶ 317–319. Dr. Fox repeats these arguments in numerous other paragraphs for numerous accused products. *See, e.g.*, Fox at ¶¶ 67, 313, 324, 326–27, 330, 336, 384–85, 406, 437, 465, 489, 522, 548, 562, 579, 657, 706, 783, and 791.

[5] The parties devoted a significant portion of the claim construction argument on this issue. *See, e.g.*, Transcript, D.I. 170 at 10:2–12:6, 26:1–28:22, 29;20–30:11, 116:23–119:23, 123:2–125:19 (Plaintiff's argument) and 59:18–73:11, 130:10–132:11 (Defendant's argument). The cited portions of the claim construction hearing transcript are collected at Exhibit 3 of the Bennett Decl. Dr. Fox admits that he did not consider the transcript of the claim construction argument in formulating his opinions. Fox Depo. at 21:11–22:12.

[6] Google's proposed a similar construction for "user-specific learning machine" (*i.e.*, "learning machine unique to the user"). (D.I. 116 at 12).

Based on these principles, the Court construed "User Model specific to the user" to mean "an i*mplementation* of a learning machine updated in part by *data specific to the user*" and "user-specific learning machine" to mean "a learning machine [as construed] specific to the user" thus rejecting Google's "unique to the user" and "restricted to the user" arguments in favor of PUM's position. (D.I. 347 at 28).[7] Google's attempt to reargue this lost claim construction position through expert testimony should be rejected. Dr. Fox's opinions for "User Model specific to the user" and "user-specific learning machine," in at least paragraphs 67, 313, 317–19, 324, 326–27, 330, 336, 384–85, 406, 437, 465, 489, 522, 548, 562, 579, 657, 706, 783, and 791, should be stricken and excluded from trial.

2. Dr. Fox's Opinions Regarding "Estimating" Should Be Excluded.

In both the '040 and '276 patents, claim 1 recites "estimating parameters of a [user-specific] learning" and "estimat[ing] a probability." During claim construction, Google argued "estimating" should be construed as "calculating." (D.I. 116 at 16.) PUM argued "estimating" should be construed as "approximating or *roughly calculating*." The Court agreed. (D.I. 347 at 31–32.) The Court explained that "estimating was generally understood by one of ordinary skill in the art at the relevant time as a measurement that is not entirely precise." (*Id*. at 32–33). In his report, Dr. Fox mischaracterizes this explanation, [redacted]

[7] Dr. Fox's deposition testimony further confirms that he is relying on a rejected claim construction. [redacted]

[redacted]

Fox at ¶ 290. The Court never found that "estimating" excluded calculations. (D.I. 347 at 32–33).[8]

Dr. Fox attempts to read "roughly calculating" out of the Court's construction to avoid infringement. [redacted]

Dr. Fox's opinions do not follow the Court's construction of "estimating." In fact, they ignore that the Court's construction of "estimating" includes "approximating or roughly

[8] Indeed, [redacted] 137:23–138:19; 139:13–15; 140:4–20.

[redacted]

[redacted] [redacted]

[redacted]

[redacted]

> [redacted]
>
> [redacted]
>
> [redacted] Fox at ¶ 304.

During his deposition, [redacted]

[redacted]

The Court, therefore, should exclude Dr. Fox's opinions in his report, including at least the opinions in paragraphs 303–305, that a "probability" must be a number between 0 and 1.

CONCLUSION

For the foregoing reasons, PUM respectfully requests that the above-referenced portions of Dr. Fox's non-infringement opinions be excluded.

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