

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No. SACV 14-00341 JVS (Anx)
consolidated with CV 15-02370 JVS

Date February 2, 2017

Title TCL Communications Technology Holdings Ltd v. Telefonaktenbologet LM Ericsson, et al.

Present: The Honorable James V. Selna

Karla J. Tunis

Not Present

Deputy Clerk

Court Reporter

Attorneys Present for Plaintiffs:

Attorneys Present for Defendants:

Not Present

Not Present

Proceedings: (IN CHAMBERS) Order Granting in Part and Denying in Part Plaintiff's Daubert Motions (Fld 12-30-17)
1) to Exclude Testimony of Ericsson Attorney Patricio Delgado (1261)
2) to Exclude the Report and Testimony of Michael Pellegrino Regarding the Value of Certain Patents (1264)
3) to Exclude Consumer Survey and Related Testimony and Evidence from David Kennedy (1267)
4) to Exclude the Testimony of Dr. David Teece and David Kennedy Regarding the Value of Cellular Connectivity (1270)

TCL Communications Technology Holdings, Ltd. ("TCL") presents four Daubert motions seeking to strike all or portions of certain expert testimony offered by Telefonaktienbolaget LM Ericsson and related entities ("Ericsson"). The Court now enters its rulings.

I. Legal Standards.

Federal Rule of Evidence 702 permits expert testimony from "[a] witness who is qualified as an expert by knowledge, skill, experience, training, or education," if:

(a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue; (b) the testimony is based on sufficient facts or data; (c) the testimony is the product of reliable principles and methods; and (d) the expert has reliably applied the principles and methods to the facts of the case.

(Fed. R. Evid. 702.)

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On this challenge, the Court is called to exercise its “gatekeeper” function to “ensur[e] that an expert’s testimony both rests on a reliable foundation and is relevant to the task at hand.” Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 597 (1993). A trial court’s “gatekeeping” obligation to admit only expert testimony that is both reliable and relevant is especially important “considering the aura of authority experts often exude.” Mukhtar v. Cal. State Univ., 299 F.3d 1053, 1063-64 (9th Cir. 2002). Nevertheless, “[s]haky but admissible evidence is to be attacked by cross examination, contrary evidence, and attention to the burden of proof, not exclusion.” Primiano v. Cook, 598 F.3d 558, 564 (9th Cir. 2010). Importantly, the Court’s gatekeeper role under Daubert is “not intended to supplant the adversary system or the role of the [trier of fact].” Quiet Tech. DC-8, Inc. v. Hurel-Dubois UK Ltd., 326 F.3d 1333, 1341 (11th Cir. 2003) (internal quotation marks and citation omitted). In other words, at this stage, the Court is not supposed “to make ultimate conclusions as to the persuasiveness of the proffered evidence.” (Id.)

The requirement that expert testimony “help the trier of fact to understand the evidence or to determine a fact in issue” goes primarily to relevance. Primiano, 598 F.3d at 564.

The Rule 702(c) and (d) reliability indicators are subject to a more flexible analysis. According to the Ninth Circuit,

[i]n Daubert, the Supreme Court gave a non-exhaustive list of factors for determining whether scientific testimony is sufficiently reliable to be admitted into evidence, including: (1) whether the scientific theory or technique can be (and has been) tested; (2) whether the theory or technique has been subjected to peer review and publication; (3) whether there is a known or potential error rate; and (4) whether the theory or technique is generally accepted in the relevant scientific community.

Domingo ex rel. Domingo v. T.K., 289 F.3d 600, 605 (9th Cir. 2002).

The trial court has “broad latitude” in deciding how to determine the reliability of an expert’s testimony and whether the testimony is in fact reliable. Mukhtar, 299 F.3d at 1064;

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see also Kumho Tire Co. v. Carmichael, 526 U.S. 137, 152 (1999). The “test of reliability is ‘flexible,’ and Daubert’s list of specific factors neither necessarily nor exclusively applies to all experts or in every case.” Kumho Tire, 526 U.S. at 141.

There is an additional gloss on the Daubert case law in the context of a bench trial. Here the Court is both the gatekeeper and trier of fact, making the gatekeeper role “less pressing.” AngioScore, Inc. v. TreReme Medical, Inc., 87 F. Supp. 3d 896, 1016 (N.D. Cal. 2015). While certainly not non-existent, the possibility that the Court will be confused or unduly impressed with an expert’s credentials is far less than in a jury trial. F.T.C. v. BurnLounge, Inc., 753 F. 3d 878, 888 (9th Cir. 2014); contrast Mukhtar, 299 F.3d at 1063-64. One court has concluded that the better approach under Daubert in a bench trial is to permit the contested expert testimony and “allow ‘[v]igorous cross-examination, presentation of contrary evidence’ and careful weighing of the burden of proof to test ‘shaky but admissible evidence.’” Fierro v. Gomez, 865 F.Supp. 1387, 1395 n. 7 (N.D. Cal.1994).¹ Nevertheless, the Court is mindful that any opinion which it receives and credits as fact finder must meet the Daubert standard.

With these standards in mind, the Court considers each Motion to Exclude.

II. Motion No. 1: Patricio Delgado.

TCL has moved to exclude the testimony of Patricio Delgado (“Delgado”), an in-house attorney for Ericsson. (Docket No. 1261.) Ericsson has filed an opposition (Docket No. 1292), and TCL has replied (Docket No. 1342).

Delgado is an in-house lawyer at Ericsson. He is currently director of the 5G program in Ericsson’s Intellectual Property Rights and Licencing group. He is presented as a rebuttal witness to TCL experts Drs. Apostolos Kakaes (“Dr. Kakaes”) and Nikil Jayant (“Dr. Jayant”). Although cast in different forms, TCL’s basic argument is that Delgado is an advocate, not a qualified expert.

As a starting point, the Court is not prepared to exclude Delgado wholesale for lack

¹Aff’d 77 F.3d 301 (9th Cir.1996), vacated and remanded on other grounds, 519 U.S. 918 (1996), modified on other grounds on remand, 147 F.3d 1158 (9th Cir.1998).

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of credentials. Although he has some technical expertise as part of his under graduate mechanical engineering education, his relevant qualifications here consist of his extensive experience in negotiating patent licenses. That is a legitimate basis for expertise. (Fed. R. Evid. 702(a).) Thus, the Court considers his qualifications with regard to the specific opinions which TCL challenges.

The Court has reviewed Delgado's initial report as well as his actual rebuttal report which was filed after this Motion was fully briefed. (Docket Nos. 1325, 1429.) His initial report draws on his patent licensing experience, including his valuation methodology opinions. To some extent, the same conceptual discussion is carried forward in the rebuttal report. He is qualified to address these topics:

- *Licensing Negotiations.* Delgado is qualified to testify how licensing negotiation are carried out, including motives and strategies. This includes Ericsson's internal processes for charting and assessing the essentiality of Ericsson's patent portfolios. (Rebuttal Report, Section V, ¶¶ 53-65)
- *3GPP.* Through his licensing experience, the Court believes that Delgado has a sufficient basis to testify on this topic. While being a delegate would give any opinion greater weight, the extent of his experience goes to the weight of his opinions.
- *ETSI IPR Policy.* He relies on his experience with ETSI to critique Dr. Kakaes' use of the "smallest saleable patent practicing unit." Testifying to practices in the industry does not necessarily amount to providing legal interpretation of a contract.
- *Valuation Approach re Contributions.* His experience allows him to testify concerning the valuation metrics used in the market place. (Rebuttal, Section III; Initial Testimony, generally.)

However, his technical work in the rebuttal report stands on a different footing. He is not one skilled in the art and is not qualified to advance the criticisms of Dr. Kakaes and others. Sundance, Inc. v. DeMonte Fabricating Ltd., 550 F.3d 1356, 1363 (Fed. Cir. 2008). His lack of knowledge is not cured by his reliance of Ericsson technical staff where "deep" knowledge is required. Plumley v. Mockett, 836 F. Supp. 2d 1053, 1065 (C.D. Cal. 2010).

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Reliance on others is not a surrogate for the expertise which the proffered expert must possess in the first instance. Delgado's past claims analysis and charting demonstrate proficiency for licensing purposes but do not confer the requisite technical expertise upon him. For that reason, the Court strikes Sections IV, V (except ¶¶ 53-64), VI, and VII of the rebuttal report and the associated summary and conclusion paragraphs.

At the hearing, Ericsson invited the Court to allow certain specific paragraphs to remain on the theory that they were intertwined with Delgado's licensing experience or were logical segues from the experience. Having reviewed the passages discussed at the hearing, the Court continues to find that Delgado's lack of technical expertise predominates.

Ericsson also invited the Court to consider Delgado's legal criticisms of Dr. Kakaes' work at paragraphs 70-75. No expert is need to advance those positions.

In addition, the Court finds that Delgado is not qualified to testify with regard to foreign law. Both side have designated well-credentialed foreign law experts, albeit in different areas of foreign law. Delgado's experience does not make up for a lack of similar credentials.

III. Motion No. 2: Pellegrino Valuation Opinions.

TCL has moved to exclude valuation opinions of Ericsson expert Michael Pellegrino ("Pellegrino") regarding certain patents. (Docket No. 1264.) Ericsson has filed an opposition (Docket No. 1296), and TCL has replied (Docket No. 1345).

This Motion focuses on Pellegrino's assessment of 8 non-essential patents held by LG Electronics ("LG"). The value of the LG patents is relevant because LG cross licensed those patents to Ericsson, and they formed part of the consideration for the Ericsson-licensed standard essential patents under its agreement with LG.² In other words, the value of the LG patents figures into the effective royalty rate LG is paying for its license. TCL's expert Dr. Matthew Lynde put the value at zero; Pellegrino puts the value at \$170 million or \$275 million depending on whether the patents are encumbered.

²There is a question whether all the patents are still held. But as Ericsson points out, the transfers were after the valuation date which Pellegrino used, July 7, 2014.

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TCL mounts a number of attacks on Pellegrino's work.

First, TCL challenges his technical credentials to conduct intellectual property valuations in the present field. He has more than 20 years experience in intellectual property valuation, and is the president of his own valuation firm. (Pellegrino Decl., Ex. A, p. 2 ["Pellegrino"].) He is the author of an intellectual property text, and has published extensively. (*Id.*, Ex. A, Appendix C.) He holds a bachelor's degree in computer science as well as an MBA. Focusing on valuation, his education and particularly his experience qualify him as an expert. TCL does not dispute this, and does not attack his use of the basic tools for analysis under an income approach, such as discounted cash flow, Monte Carlo simulations, or use of the Fisher-Frye curve for forecasting. The challenge to his industry specific credentials is met by his reliance on Ericsson employees and others.

Second, TCL attacks the assumption that the LG patents map to the existing devices in the market place. For this, he on the processes under taken by in-house engineers at Ericsson and third-party Parsa Wireless Communications, LLC. The Court finds this reliance arguably permissible. *Monsanto Co. v. David*, 516 F.3d 1009,1015 (Fed. Cir. 2008) ("reliance on scientific test results prepared by others may constitute the type of evidence that is reasonably relied upon by experts for purposes of Rule of Evidence 703"); *but see Dura Automotive Systems of Indiana, Inc. v. CTS Corp.*, 285 F.3d 609, 613 (7th Cir. 2002). But he did not examine the underlying work itself. (Pellegrino Depo., pp. 168-69.) The sufficiency of his actual reliance may well be "shaky" in that Ericsson likely cannot probe the underlying work. *Primiano*, 598 F.3d at 564; *Dura Automotive*, 285 F.3d at 613 . However, the Court's preference is to hear the testimony before coming to an ultimate conclusion.

Third, TCL challenges the assumption that LG patents would apply to 100 percent of the market. Ericsson points out that this is not true for all cases, specifically the unencumbered scenario. In any event, the assumption can be tested on cross examination.

Fourth, TCL contends that there is no basis for the assumed economic life of the LG patents, 18 years. Yet Pellegrino addresses product obsolescence and the lives of similar technologies. The methodology itself is a curb on excessive optimism given that the economic contribution for years late in the forecast is minimal under a discounted cash flow analysis.

Fifth, TCL claims a lack of support for the royalty rates which Pellegrino used.

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However, Pellegrino explained the selection process he used, including the public sources he examined. (Pellegrino, pp 91-92.) He engaged in the exercise because “[t]here is no established royalty rate for the assets” which he valued. (*Id.*, p. 91.)

By and large the criticisms which TCL advances go the weight of Pellegrino’s opinion, and when considered as whole do not support exclusion.

The Motion is denied.

IV. Motion No. 3: Kenney Survey Data.

TCL has moved to exclude portions of the testimony of David Kenney (“Kennedy”) which rely upon certain third-party surveys, blogs, polls, and studies (collectively “survey data”) to value certain features which Ericsson has contributed to the 4G telecommunications standard (“4G”). (Docket No. 1267.) Ericsson has filed an opposition (Docket No. 1299), and TCL has replied (Docket No. 1348).

Kennedy evaluated four so-called technical currencies: battery life, data rates, delays in connection time/latency of link, and system capacity network performance. (Kennedy Rebuttal Report, ¶ 223 [“Kennedy”]) For two of the four—battery life and increased data rates—he quantifies in dollars the value of the Ericsson contribution. For these two components, he relied upon a 2012 survey International Planning & Research, Smartphone Feature Analysis: An Application of ABYO (“IPR Study”) and a study published by Accenture PLC (“Accenture Study”). The other sources, blogs and articles, are offered only to demonstrate the contemporaneous awareness of the qualitative worth of these functions.

Key here is Federal Rule of Evidence 703:

An expert may base an opinion on facts or data in the case that the expert has been made aware of or personally observed. If experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion on the subject, they need not be admissible for the opinion to be admitted. But if the facts or data would otherwise be inadmissible, the proponent of the opinion may disclose them to the jury only if their probative value in helping the jury evaluate the opinion substantially outweighs their prejudicial effect.

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(Fed. R. Evid. 703; emphasis supplied.)

TCL advances a number of attacks on Kennedy's reliance on the survey data and the conclusions he draws.

First, Kennedy is not a survey expert. But the Federal Circuit has indicated that one need not be an expert in that field where the material may be properly relied upon. Summit 6, LLC v. Samsung Electronics Co., Ltd., 802 F.3d 1283, 1298-99 (Fed. Cir. 2015). Kennedy's education and experience in valuing and negotiating licenses for patent portfolios qualify him as an expert, notwithstanding his lack of survey expertise. Moreover, he is not a secondary expert of the type described in the Federal Judicial Center's Reference Manual on Scientific Evidence, but rather is a primary expert who is testifying to his own opinions and not in support of the surveys here. (See Gibson Decl., Ex. 2, p. .)

Second, TCL asserts that to evaluate the validity of the IPR and Accenture Studies one must know what questions were asked and how the respondents were selected. TCL raises the question, but only surmises that further analysis would affect the worth of the studies. At least as to the IPR Study, the questions are provided via a link.³ (Kennedy, ¶ 11; see Opposition, p. 19.) Given that IPR and Accenture are well-known and reliable research organizations, this criticism goes to the weight of the data relied upon.

Third, TCL argues that there is a gap between the value of the features which the surveys examined and the value of Ericsson's contribution to the 4G standard. In other words, is Kennedy relying upon relevant data? Pyramid Technologies, Inc. v. Hartford Cas. Ins. Co. 752 F.3d 807, 813 (9th Cir. 2014). To the extent TCL criticizes the data, the Court believes that such criticisms go to the weight of Kennedy's opinions. Summit 6, LLC, 802 F.3d at 1299. Cross examination will show whether there is a lack of sufficient fit to support Kennedy's use of the data. The Court cannot say that the IPR and Accenture Studies lack any relevance to the analysis.

Fourth, TCL criticizes reliance on the studies because they measure the consumer's

³TCL raised a question whether the link is currently available. (See Reply, pp. 9-10.) However, at the hearing, Ericsson demonstrated that the link was still live, and explained the likely reason for TCL's inability to access the link.

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willingness to pay (“WTP”) for a feature or improved feature, rather than the incremental value added which the patents add to the standard. While there are other surrogates for arriving at a reasonable royalty, the Court cannot say that WTP data lack all relevance. Moreover, the opinion here, focusing on specific features, is narrower than the opinion excluded in the unpublished opinion in Fractus, S.A. v Samsung, 2011 WL 7563820 at * 1 (E.D. Tex. Apr. 29, 2011) (all internal antennas rather than the value of the advantageous characteristics of the patent in suit).

Fifth, TCL challenges the methodology Kennedy used in the calculations themselves. To the feature values derived from the surveys, Kennedy applied Dr. Stefan Parkvall’s (“Parkvall”) finding that the Ericsson portfolio provided a 53% percent increase in battery life and greater than 80% higher data rates. (Kennedy, ¶¶ 223, 240.) Dr. Parkvall is the substantive source of these numbers, and like any expert making a damages or like calculations, Kennedy is permitted to state his assumptions. If the assumptions are wrong, TCL can bring that out in cross examination of Dr. Parkvall. The same is true with regard to Kennedy’s reliance on other Ericsson experts for using 6% and 14.6% as percentages for apportioning the value of these features to the overall standard. Whether there is a gap between a 6% figure for the overall contribution and the appropriate percentage contribution for the two specific feature which Kennedy considers is for cross examination.⁴

In its Reply, TCL places great weight on the criticisms which its expert Dr. Simonson raises with regard to the Accenture and IPR Studies and Kennedy’s work generally. (Reply, pp. 7-9.) Dr. Simonson’s views may prevail—once the Court moves to the role of fact finder. But at the present stage, it is not the Court’s role to resolve merits debates. Quiet Tech. DC-8, 326 F.3d at 1341.

In sum, the Court finds appropriate Kennedy’s reliance upon the all of the survey data, including the blogs and studies, in reaching an opinion that the four technological currencies are important to consumers. With regard to the quantitative opinions which rest only on the IPR and Accenture Studies, those studies have sufficiently reliability and relevance to justify Kennedy’s reliance. To the extent that there are potential gaps in moving through the steps of Kennedy’s analysis to reach the specific values which he calculates, those are matters

⁴The latter is clearly the appropriate and ultimate test. Ericsson, Inc. v. D-Link Systems, Inc., 773 F.3d 1201, 1233 (Fed. Cir. 2014).

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for cross examination. Summit 6, LLC, 802 F.3d at 1299.

The Motion is denied.

V. Motion No. 4: Value of Cellular Connectivity.

TCL has moved to exclude the testimony of Kennedy and Dr. David Teece (“Teece”) regarding the value of cellular interconnectivity in certain Apple devices. (Docket No. 1270.) Ericsson has filed an opposition (Docket No. 1289), and TCL has replied (Docket No. 1351). The Motion focuses on two analyses: Dr. Teece and Kennedy’s comparison of Apple iPhones which have cellular connectivity, and the Apple iPod Touch which does not; and Kennedy’s analysis of Mophie mobile phone cases which incorporate an external battery charger to estimate the value of each quantum of battery life measured in milliamp hours (“mAh”).

A. Apple Comparison.

TCL faults the comparison of Apple products on several grounds. First, Dr. Teece and Kennedy have not taken into account why a consumer might prefer one Apple device or another, and have not excluded factors other than connectivity which might explain preferences. While Dr. Teece characterizes these differences as “minor,” he concedes that he did not have the data to control for these differences. (Teece Expert Report, p. 52 n.179 [“Teece”]; pagination per report.) Among other things, he did not control for differences in weight, materials, battery life, the presence of GPS, or the inclusion of finger print sensors.⁵ (Teece Depo., pp. 290-93.) The adjustment which he does make for screen size is insufficient.⁶ (Teece, ¶¶ 195-97.)

Second, the value of 4G connectivity, which they put at \$251 per headset does not translate to the incremental value of which Ericsson’s patents add to the 4G standard. Given that this is twice the selling price of the average TCL hand set and approximately the entire

⁵Explicitly acknowledging these deficiencies does not overcome the effect of those deficiencies. (See Opposition, p. 5, n. 3.)

⁶TCL critiques this effort as well. (Motion, pp. 13-15.)

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selling price of others in the market, including Samsung, HTC, and Sharp, the opinion is implausible, and inherently unreliable.⁷ (See Kennedy, Exs. 3.3.1, 3.4.1.)

Third, the Apple analysis does not answer the question of the incremental value of Ericsson's patent portfolio to the 4G standard. Ericsson, 773 F.3d at 1232. The opinion simply does not fit the relevant inquiry. Moreover, even if one assume that the Apple analysis can be translated to TCL products, Kennedy and Dr. Teece have valued connectivity, in essence the standard, rather than the contribution.

The Court finds that the flaws here are not ones of degree going only to weight, but rather undermine the fundamental reliability of the analysis. Moreover, Kennedy's characterization of the Apple analysis as a "sanity check"⁸ diminishes its usefulness to the Court as the trier of fact. (Fed. R. Evid. 702(a).)

This portion the Motion is granted.

B. Mophie Analysis.

TCL challenges whether the cost per mAh is an appropriate metric for assessing the incremental value which the Ericsson portfolio adds because battery life is inherent in each device and not a function of the 4G standard. This undercuts the relevance of the analysis.

TCL notes that the reasons why a consumer purchases a Mophie battery case do not answer the question of the value of extended battery life in a device. Said differently, there is no evidence that the Mophie battery case is a surrogate for Sleep Mode Solutions in the 4G standard.

For his numeric calculations, Kennedy begins with the entire cost of a Mophie device, yet there is more to the device than simply a back up battery.

⁷Ericsson pointed out at the hearing, and the Court acknowledges, that a reasonable royalty is not necessarily limited by the market price of a particular product.

⁸Kennedy Witness Decl., p. 135.

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There are too many gaps in the analysis to meet the reliability threshold under Daubert. General Electric Co. v. Joiner, 522 U.S. 136, 146 (1997). Moreover, the Court takes notice that at most Kennedy offers the Mophie analysis a “cross check,” nor his primary analysis. (Kennedy Witness Decl., p. 122.)

This portion of the Motion is granted.

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