

**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA**

CIVIL MINUTES – GENERAL

Case No.	CV 14-00438 BRO (MRWx)	Date	January 29, 2015
Title	SPORT DIMENSION, INC. V. THE COLEMAN COMPANY, INC.		

Present: The Honorable **BEVERLY REID O’CONNELL, United States District Judge**

Renee A. Fisher

Not Present

N/A

Deputy Clerk

Court Reporter

Tape No.

Attorneys Present for Plaintiffs:

Attorneys Present for Defendants:

Not Present

Not Present

Proceedings: (IN CHAMBERS)

ORDER GRANTING MOTION TO STRIKE EXPERT OPINION [66]

I. INTRODUCTION

Pending before the Court is Plaintiff Sport Dimension, Inc.’s motion to strike and exclude the opinions of Peter Bressler, the expert witness hired by Defendant The Coleman Company, Inc. to opine on the issue of functionality. (Dkt. No. 66.) After consideration of the papers filed in support of and in opposition to the instant motion, the Court deems this matter appropriate for decision without oral argument of counsel. *See* Fed. R. Civ. P. 78; C.D. Cal. L.R. 7-15. For the following reasons, Plaintiff’s motion is **GRANTED**.

II. BACKGROUND

Plaintiff Sport Dimension, Inc. (“Sport Dimension”) is a sports equipment and apparel company that has been operating in Southern California for sixteen years. (Compl. ¶ 6.) Sport Dimension develops, manufactures, sells, and distributes water-sports-related equipment, including wet suits, personal floatation devices (“PFDs”), body boards, sea scooters, masks, and fins. (Compl. ¶ 7.) Sport Dimension sells many of its products under the Body Glove brand. (Compl. ¶ 7.)

Defendant The Coleman Company, Inc. (“Coleman”) is a Delaware corporation that sells and distributes outdoor sporting equipment, including camping equipment and PFDs. (Answer ¶¶ 2, 8.) Coleman is the owner of all rights, title, and interest in the D’714 patent, which is titled “Personal Flotation Device.” (Answer ¶ 9; Compl. Ex. A.)

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Among other products, Coleman sells a child PFD called the “Puddle Jumper,” which it asserts is covered by the D’714 patent. (Answer ¶¶ 10, 12.)

On August 9, 2013, Coleman sent Sport Dimension a letter accusing one of Sport Dimension’s PFDs designed for children (the “Body Glove PFD”) of infringing Coleman’s D’714 patent and demanding that Sport Dimension cease and desist all “manufacturing, importing, distributing, selling and/or offering for sale in the United States” of the Body Glove PFD. (Compl. ¶¶ 13, 14.) Sport Dimension and Coleman then exchanged correspondence regarding Sport Dimension’s alleged infringement between August 2013 and December 2013. (Compl. ¶ 16.)

On January 21, 2014, Sport Dimension filed this lawsuit against Coleman seeking declaratory relief. (Compl.) Specifically, Sport Dimension requests declaratory judgment establishing (1) that Sport Dimension is not infringing the D’714 patent, and (2) that the D’714 patent is invalid. (Compl. ¶¶ 19–28.) On October 10, 2014, the parties jointly requested a claim construction hearing pursuant to *Markman v. Westview Instruments, Inc.*, 517 U.S. 370 (1996). (Dkt. No. 35.) Following briefing on the matter and a claim construction hearing, however, the Court found that it was premature to construe the D’714 patent because discovery had not yet concluded on the issue of functionality. (Dkt. No. 59 at 17–18.) In anticipation for the parties’ supplemental claim construction, which is currently set for hearing on February 3, 2015, (*see* Dkt. No. 72 at 2), the parties conducted discovery on the issue of functionality, including the retention of expert witnesses. On January 5, 2015, Sport Dimension deposed Coleman’s expert witness, Peter Bressler, and concluded based on his testimony that he was not qualified to testify as an expert. (Mot. at 1.) Accordingly, Sport Dimension filed this motion on January 12, 2015 to strike Mr. Bressler’s testimony. (Dkt. No. 66.) Pursuant to a modified briefing schedule issued by the Court, Coleman opposed the motion on January 23, 2015, (Dkt. No. 74), and Sport Dimension replied on January 28, 2015, (Dkt. No. 78).

III. LEGAL STANDARD

The proponent of the expert testimony has the burden of proving that the proposed expert testimony is admissible under Federal Rule of Evidence 702, *Daubert*, and its progeny. *Lust ex rel. Lust v. Merrell Dow Pharm., Inc.*, 89 F.3d 594, 598 (9th Cir. 1996). The pertinent admissibility requirements must be met by a preponderance of the

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evidence, pursuant to Federal Rule of Evidence 104(a). *Bourjaily v. United States*, 483 U.S. 171, 175 (1987). Federal Rule of Evidence Rule 702 provides,

A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:

- (a) the expert’s scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or 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. The Supreme Court in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), announced that the key inquiry in evaluating expert scientific testimony centers on reliability; trial judges are to act as gatekeepers in excluding unreliable expert scientific testimony. Six years later, in *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999), the Supreme Court extended this reliability analysis to all expert testimony, rather than just scientific testimony.

The Supreme Court in *Daubert* sought to guide trial courts by offering several nonexclusive, nondispositive factors that a trial court may consider in evaluating expert testimony: (1) whether the expert’s technique or theory can be or has been tested; (2) whether the technique or theory has been subjected to peer review and publication; (3) the technique or theory’s rate of error; (4) the existence and maintenance of standards and controls; and (5) the technique or theory’s general acceptance. *See Daubert*, 509 U.S. at 593–94. Further, “[t]he inquiry envisioned by Rule 702 . . . is a flexible one.” *Id.* at 594. In fact, the Supreme Court in *Daubert* emphasized that, in making this inquiry into reliability of expert testimony, trial judges are accorded significant discretion. *Id.*; *see also Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 141 (1997) (holding that the trial court’s decision in admitting or excluding expert testimony will be reviewed for abuse of discretion). *See generally Datalex (Ir.) Ltd. v. PSA, Inc.*, CV01-06482DDPVBKX, 2003

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WL 25667620 (C.D. Cal. Jan. 30, 2003) (denying a motion to exclude expert testimony after applying the nondispositive factors from *Daubert*).

Technical experts routinely testify in patent cases. But the Federal Circuit “has explained that only one of ordinary skill in the art who is qualified as a technical expert under Rule 702 of the Federal Rules of Evidence may offer expert testimony on technical matters.” *Byrne v. Wood, Herron & Evans, LLP*, 450 F. App’x 956, 962–63 (Fed. Cir. 2011) (citing *Sundance, Inc. v. DeMonte Fabricating Ltd.*, 550 F.3d 1356, 1363 (Fed. Cir. 2008)). Indeed, “it is an abuse of discretion to permit a witness to testify as an expert on the issues of noninfringement or invalidity unless that witness is qualified as an expert in the pertinent art.” *Sundance*, 550 F.3d at 1363. As the Federal Circuit has explained, “[a]dmitting testimony from a person . . . with no skill in the pertinent art[] serves only to cause mischief and confuse the factfinder.” *Id.* at 1362.

IV. DISCUSSION

In its motion, Sport Dimension argues that the Court should strike or exclude all testimony of and argument relating to the opinions of Coleman’s expert, Peter Bressler, on the basis that Mr. Bressler is not qualified. Sport Dimension does not dispute Mr. Bressler’s credentials, nor that he appears to possess substantial experience in the field of industrial design, generally. Similarly, Coleman does not dispute—and Mr. Bressler’s deposition testimony makes it quite clear—that Mr. Bressler has no substantive experience in the narrower field of *personal flotation device* design. Yet Coleman argues that such experience is not required to render Mr. Bressler qualified to opine on the functionality of the design at issue because he has sufficient industrial design experience in the related fields of marine and soft goods.¹

¹ Mr. Bressler summarizes his experiences in these industries in his report. (See Bressler Report ¶ 7 (“Though I have not specifically designed a personal flotation device (PFD), I do have many years of related experience in various applicable materials and technologies and related markets. These include projects in the marine industry such as boat design projects for Palmer Yachts and Trojan Yachts; scuba equipment design for Biomarine Industries; and EPIRB (Emergency Position Indicating Radio Beacon) buoys for the Clifton Precision Division of Litton Industries. In the ‘softgoods’ industry, a categorization that is applicable to PFDs, I’ve been involved in tool accessory bag designs for DeWalt

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A. The Pertinent Art

Because, as discussed above, Mr. Bressler cannot testify as an expert witness unless he “is qualified as an expert *in the pertinent art*,” *Sundance*, 550 F.3d at 1363 (emphasis added), the predominant issue becomes how to characterize “the pertinent art,”² *see Ormco Corp. v. Align Tech., Inc.*, No. SACV0316CAS(ANX), 2009 WL 764670, at *1 (C.D. Cal. Mar. 18, 2009) (rejecting the argument that the court should not have determined what “the pertinent art” was on a motion to strike expert testimony because resolution of the issue required the court “to address the issue of what the ‘pertinent art’ is”). If the pertinent art here is merely “industrial design,” or industrial design in the “marine and soft good industries,”³ then Mr. Bressler appears to be undisputedly qualified, although Sport Dimension also argues that the opinions he has provided in this case are unreliable for other reasons. If, however, the pertinent art is more specifically the industrial design of personal flotation devices, then Mr. Bressler is likely *not* qualified because he has no experience with such devices.⁴

Sport Dimension’s argument for interpreting the pertinent art more narrowly hinges upon its interpretation of the Federal Circuit’s opinion in *Sundance, Inc. v. DeMonte Fabricating Ltd.*, 550 F.3d 1356 (Fed. Cir. 2008). In *Sundance*, the Federal Circuit reviewed a district court decision under Federal Rule of Evidence 702 to permit a

and Black & Decker; bulletproof vest designs for Harvey Baskin, Inc., escape harness designs for Research and Trading Company and infant slings for Graco, Inc.”.)

² Although the expert in *Sundance* sought to testify regarding noninfringement and invalidity, the court’s holding applies equally to other matters of expert testimony, such as the issue of functionality that is currently disputed in the parties’ claim construction briefs. As the court reasoned, “where an issue calls for consideration of evidence from the perspective of one of ordinary skill in the art, it is contradictory to Rule 702 to allow a witness to testify on the issue who is not qualified as a technical expert in that art.” *Sundance*, 550 F.3d at 1363; *accord id.* (“Nor may a witness not qualified in the pertinent art testify as an expert on obviousness, or any of the underlying technical questions, such as the nature of the claimed invention, the scope and content of prior art, the differences between the claimed invention and the prior art, or the motivation of one of ordinary skill in the art to combine these references to achieve the claimed invention.” (footnote omitted)).

³ (Opp. at 1 & n.1.)

⁴ In fact, Mr. Bressler conceded during his deposition that he is “not an expert in personal flotation devices.” (Mikulka Decl. Ex. B at 151:14–15.)

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patent attorney to testify as an expert on issues of claim construction, infringement, validity, and inequitable conduct, based on his experience in “patent law and procedure.” *Id.* at 1360. The Federal Circuit determined that, in so doing, the district court had abused its discretion by allowing the witness to testify on issues of infringement and validity. Since the patent attorney had no “relevant technical expertise” in the area of the patent, the court found that he was “not ‘qualified as an expert by knowledge, skill, experience, training, or education’ in the pertinent art” and thus could not “see how he could ‘assist the trier of fact to understand the evidence or to determine a fact in issue.’” *Id.* at 1362 (quoting Fed. R. Evid. 702). Sport Dimension argues that here, as in *Sundance*, Mr. Bressler has no relevant technical expertise in the art of personal flotation device design, making him unqualified to testify as an expert in this matter.

In support of this position, Sport Dimension relies on the District of New Hampshire’s decision in *Hypertherm, Inc. v. American Torch Tip Co.*, No. 05-cv-373-JD, 2009 WL 530064 (D.N.H. Feb. 27, 2009). In *Hypertherm*, the court applied *Sundance* to determine that an expert witness was not qualified to give opinions on infringement or obviousness because his background in mechanical engineering and in “designing air springs, conveyor belting, racing tires, testing equipment, and manufacturing machines” was insufficient to render him qualified to testify on the pertinent art at hand, which it defined as “plasma arc torch systems and processes.” *Id.* at *2–4. The expert in *Hypertherm* acknowledged that he had “no experience or training in plasma arc technology.” *Id.* at *2. Rather, he “based his opinions on patent infringement and invalidity by gaining an understanding of the patents through reading and studying them, which was informed by his background in basic mechanical engineering principles, such as geometry, fluid flow, and heat transfer.” *Id.*

In *Hypertherm*, as here, the issue of the expert’s qualification centered upon the court’s determination of the “pertinent art” implicated by the patents at issue. Specifically, the defendant argued that the pertinent art was “the consumable parts that are the subject matter of the patents in suit and that the relevant technological field is mechanical engineering as it relates to the design and manufacture of consumable parts,” whereas the plaintiff contended that it should be defined more narrowly as “plasma arc torch and consumable technology and plasma arc cutting technology.” *Id.* at *4. In adopting the plaintiff’s much narrower characterization, the court reasoned:

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In *Sundance*, the Federal Circuit described the pertinent art as tarps or covers and cover systems, based on the subject of the patent claims. In [*Centricut, LLC v. Esab Group, LLC*, 390 F.3d 1361 (Fed. Cir. 2004), a case involving infringement of a patent pertaining to a plasma arc torch electrode], the pertinent art was the work function of electrode components, as claimed in the patent. Here, the patents describe the field of the invention generally, as “plasma arc torch systems and processes,” “plasma arc cutting torches,” or “plasma arc torches.” The patents also describe the pertinent art more specifically as “liquid cooled electrodes and coolant tubes for use in a plasma arc torch,” “an improved electrode and insert cooling method for use in low current, high definition torches,” “an improved nozzle for use in plasma arc torches,” and “plasma arc torches having a torch tip designed to produce a substantially columnar shield flow that surrounds the plasma arc without substantially interfering with the plasma arc.”

Therefore, based on the patents themselves, the pertinent art is liquid cooled electrodes used in plasma arc torches, an insert cooling method used in low current, high definition plasma arc torches, nozzles for plasma arc torches, and plasma arc torch tip design. More generally, the pertinent art is plasma arc torch systems and processes.

Id. at *3 n.3, 4. As Sport Dimension argues, the *Hypotherm* court’s interpretation of *Sundance* provides persuasive reasoning that the pertinent art should be informed primarily by the language in the patent. And here, the claim for the D’714 patent is titled “Personal Flotation Device,” and the patent is described in the patent claim as “[t]he ornamental design for a personal flotation device, as shown and described.” (Compl. Ex. A.) Accordingly, following *Sundance* and *Hypotherm* would lead the Court to determine that “the pertinent art” is the design of personal flotation devices.⁵

⁵ See also *Precision Fabrics Grp., Inc. v. Tietex Int’l, Ltd.*, No. 1:13CV645, 2015 WL 224942, at *3 (M.D.N.C. Jan. 15, 2015) (“The pertinent art, as disclosed by the patents in their ‘Field of the Invention’ descriptions, is flame retardant fabrics.”); *Degelman Indus. Ltd. v. Pro-Tech Welding & Fabrication, Inc.*, No. 06-CV-6346T, 2011 WL 6752565, at *6 (W.D.N.Y. May 27, 2011) (“[B]ecause the proposed experts lack experience in the field of the relevant art, they may not testify on the issue of validity. . . . In the instant case, the record reveals that neither Godici or [sic] Douglas have [sic]

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Coleman attempts to distinguish *Hypotherm* by noting that the court emphasized the “complex technology” at issue in that case.⁶ (Opp. at 9.) Indeed, the court in *Hypotherm* observed that:

The complexity of the technology of plasma arc torches and their consumable parts is apparent from the patents themselves, from examination of a cutaway view of a torch, and from the component parts provided by ATTC and described by Sprague at the hearing. Given the complex technology, ATTC has not shown that Sprague’s general mechanical engineering background qualifies him as one who is skilled in the pertinent art of plasma arc torches and their consumable parts.

Hypertherm, 2009 WL 530064, at *4. At the outset, the Court notes that the apparent greater complexity involved in *Hypotherm* alone is not enough to distinguish this case. “Even where the technology is simple, ‘it is an abuse of discretion to permit a witness to testify as an expert on the issues of noninfringement or invalidity unless that witness is qualified as an expert in the pertinent art.’” *Synthes USA, LLC v. Spinal Kinetics, Inc.*, No. C-09-01201 RMW, 2011 WL 11709387, at *6 (N.D. Cal. Aug. 19, 2011) (quoting *Sundance*, 550 F.3d at 1363).

Yet the final sentence from the above quote from *Hypotherm* nevertheless implies a belief by the court that a general background in mechanical engineering *could* have qualified the expert in the pertinent art, but that the challenged expert had merely failed to demonstrate that he was so qualified. Such reasoning is in line with the court’s holding in *Sundance*. In coming to its conclusion, the court in *Sundance* noted that the patent lawyer who sought to be an expert, a man named Mr. Bliss, had no technical expertise related to tarp covers for trucks, which was the subject matter of the patent. 550 F.3d at

experience in the art of material moving blades or snow moving apparatus, the subjects of the patents in suit, and therefore, it is clear that neither can be considered experts qualified to render an opinion on whether or not prior art renders any of the asserted patents invalid.”).

⁶ Coleman also makes much of the court’s observation in *Hypotherm* that the expert demonstrated a “lack of familiarity with his own opinions.” 2009 WL 530064, at *5. But a cursory review of the court’s reasoning makes it clear that this was a secondary reason for finding the expert unqualified. The court’s analysis depended on whether the expert was actually qualified in the pertinent art. *See id.*

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1361. Consequently, the court reasoned that the proponent of the expert, DeMonte, had “failed to explain how Mr. Bliss possesses the relevant expertise in the pertinent art. Mr. Bliss has no experience whatsoever in ‘the field of tarps or covers.’ *Nor does DeMonte purport that Mr. Bliss’s experience with engines and the like is sufficiently related to covers.*” *Id.* at 1362 (emphasis added). As in *Hypotherm*, this final sentence indicates that a more general background could be sufficient if the proponent of the expert demonstrates how his background is sufficiently related to the pertinent art.⁷ The Court therefore concludes that an expert need not have an expertise in the specific pertinent art to be qualified as an expert, but the expert must nevertheless demonstrate that his or her technical background is sufficiently related to that pertinent art.

B. Mr. Bressler Is Not Sufficiently Qualified in the Pertinent Art

Applying this framework to the facts at hand, Coleman must demonstrate that Mr. Bressler’s background in industrial design is sufficiently related to the pertinent art of personal flotation device design. In support of this notion, Coleman argues that Mr. Bressler’s forty-four years of experience in industrial product design has endowed him with “extensive expertise relating to how ordinary consumers see, recognize, and understand the industrial design of products.” (Opp. at 6.) Moreover, Coleman points out that Mr. Bressler’s many product design and development projects have included “related projects designing buoys and buoyant devices within the marine industry, as well as ‘softgoods’ design projects, a category that is equally applicable to personal flotation devices.” (Opp. at 6.) Yet Mr. Bressler’s deposition testimony makes it clear that while he may have some experience designing buoyant devices, he does not have “any work

⁷ In addition to distinguishing cases cited by Sport Dimension, Coleman relies principally on *Nordock Inc. v. Systems Inc.*, 927 F. Supp. 2d 577, 584–87 (E.D. Wis. 2013), in which the court found an expert witness qualified to testify on the issue of functionality despite having “no special knowledge or experience as to product design or dock levelers,” the subjects of the patent. Yet the court in *Nordock* never discussed the holding from *Sundance*, which is binding on this Court. *See, e.g., Wright Asphalt Prods. Co., LLC v. Pelican Ref. Co., LLC*, No. CIV.A. H-09-1145, 2012 WL 1936416, at *8 (S.D. Tex. May 29, 2012) (observing that the Federal Circuit’s application of Federal Rule of Evidence 702 in *Sundance* is binding on district courts). And the vast majority of the court’s analysis of the expert’s qualifications in *Nordock* was in the context of his opinion on functionality with regard to the plaintiff’s trade dress and unfair competition claims. The Court finds more compelling the analysis from *Hypotherm*, particularly as it accords with this Court’s interpretation of *Sundance*.

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experience in connection with *wearable* buoyant devices.” (Mikulka Decl. Ex. B at 89:23–90:2 (emphasis added).) This is an important distinction. As discussed further below, Mr. Bressler’s ability to testify regarding the functionality of elements of a device requires him to understand the overall function of the device, and the function of a *wearable* buoyant device such as a personal flotation device is markedly different than the function of other buoyant devices. Indeed, Mr. Bressler’s own testimony demonstrates that he has no better than a lay opinion as to the function of a wearable buoyant device.⁸

The application of alternative approaches counsels the same result. In *Ormco Corp. v. Align Technology, Inc.*, for example, the court employed a slightly different approach to determining the pertinent art under the *Sundance* analysis. No. SACV 03-16 CAS ANX, 2009 WL 9294893 (C.D. Cal. Feb. 23, 2009). After noting that “the relevant ‘art’ is the same in evaluating an expert witness and in determining the person of ordinary skill for obviousness purposes,” the court reasoned that “in determining ‘the relevant art’ ‘the court must look to the nature of the problem confronting the inventor.’” *Id.* at *5, 6 (quoting *Bancorp Servs., L.L.C. v. Hartford Life Ins. Co.*, 359 F.3d 1367, 1375 (Fed. Cir. 2004)).⁹ Applying this approach, the problem confronting the inventor of the D’714 patent was twofold: it involved both developing a buoyant device to keep the device afloat and ensuring that the device could be safely worn by a person. As the court in *Ormco* reasoned after similarly finding two fields related to the patent, “knowledge from both . . . fields . . . are [sic] needed.” *Id.* at *7.

Here, Mr. Bressler has sufficient knowledge regarding the first of these fields—the development of buoyant devices—but not the second field—designing wearable devices. Ordinarily, expertise in any relevant field would render Mr. Bressler qualified to testify

⁸ (See, e.g., Mikulka Decl. Ex. B at 97:22–98:2 (“Q: What is the purpose of a personal flotation device? A: In my lay understanding, not legal understanding, the purpose is to provide flotation.”), 99:10–12 (“Q: Do you have any expert opinion on the intended use of a personal flotation device? A: No.”).)

⁹ The court also observed, however, that “‘the law does not require an expert opinion from the perspective of ‘one of ordinary skill in the art’ to have the same qualifications as the inventor,’ as long as they are ‘sufficiently qualified to construe the patent and understand the design and components of the claimed invention’ and the relevant prior art.” *Ormco*, 2009 WL 9294893, at *6 (quoting *Neutrino Dev. Corp. v. Sonosite, Inc.*, 410 F. Supp. 2d 529, 536 (S.D. Tex. 2006)).

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as an expert on that matter.¹⁰ Yet Mr. Bressler has been retained to testify regarding the functionality of the D’714 patent. That is, Mr. Bressler will testify as to “whether the claimed design is dictated by the utilitarian purpose of the article.”¹¹ *L.A. Gear, Inc. v. Thom McAn Shoe Co.*, 988 F.2d 1117, 1123 (Fed. Cir. 1993). And as Mr. Bressler acknowledges in his report, “[i]n determining whether a design is primarily functional or primarily ornamental the claimed design is viewed in its entirety, for the ultimate question is not the functional or decorative aspect of each separate feature, but the overall appearance of the article, in determining whether the claimed design is dictated by the utilitarian purpose of the article.” *Id.* With that analysis in mind, it is impossible for Mr. Bressler to testify competently about the functionality of the design if he is not qualified to testify about the design “in its entirety.”¹² As he is qualified only to testify about the design’s functionality as a buoyant device, and not as a *wearable* device, he cannot adequately testify about the design’s functionality as a whole. Stated differently, Mr. Bressler cannot testify about whether the design “is dictated by the utilitarian purpose of the article” because the utilitarian purpose of the article is not just to keep the article afloat but to keep it afloat while it is worn by a person. *Id.*

Based on Mr. Bressler’s admitted lack of expertise in this field, the Court must conclude, as the Federal Circuit did in *Sundance*, that Mr. Bressler’s industrial design

¹⁰ See, e.g., *Birchwood Labs., Inc. v. Battenfeld Techs., Inc.*, No. CIV. 09-3555 MJD/JJK, 2012 WL 2045757, at *8 (D. Minn. May 21, 2012) (“Sime is an expert in one pertinent aspect of the relevant field of art—printing. Because Sime is an expert in a pertinent aspect of the relevant art, although not an expert in the entire field art, which necessarily includes shooting targets, his testimony will be relevant and useful.”); *Ormco*, 2009 WL 764670, at *1 (“‘Pertinent’ is defined as ‘pertaining to the issue at hand; relevant.’ There is no genuine issue of material fact as to whether both orthodontics and computer programming/biomedical engineering meet this low threshold, and the positions of both parties as to the expert witnesses made that abundantly clear.” (quoting Black’s Law Dictionary 1165 (7th ed. 1999))).

¹¹ (See Mikulka Decl. Ex. A at 5.)

¹² This is not to say, of course, that the functionality analysis encompasses only a holistic approach to determining the utility of the patent. See *Z Produx, Inc. v. Make-Up Art Cosmetics, Inc.*, No. CV 13-00734 DDP RZX, 2013 WL 5941049, at *4 (C.D. Cal. Nov. 5, 2013) (“Z Produx’s argument is unavailing because it mistakenly assumes that it is the functionality of the device as a whole, rather than the functionality of the elements at issue, that matters for the construction of a design patent.”). But an expert must be able to testify competently about the “utilitarian purpose of the article” in order to determine whether certain elements are “dictated” by that purpose. *L.A. Gear*, 988 F.2d 1117, 1123.

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experience with buoyant devices and the like is not sufficiently related to personal flotation devices to render him qualified as an expert. 550 F.3d at 1362; *see also Sun-Mate Corp. v. Koolatron Corp.*, No. CV 10-4735-JST JCGX, 2011 WL 3322597, at *6 (C.D. Cal. Aug. 1, 2011) (finding an expert unqualified despite over thirty years of experience in the “general[]” “relevant discipline [of] product design” because she lacked any experience in the “more specific[]” subject of the patents, which was “design of the prior art—1950s refrigerators and soda cans”). Accordingly, the Court finds that Mr. Bressler is not qualified in the pertinent art of personal flotation device design, and that his testimony must therefore be stricken. *See Ormco*, 2009 WL 9294893, at *4 (“[I]f any of the challenged witnesses fail to qualify as an expert in the pertinent art, the Court must strike his testimony.”).

V. CONCLUSION

For the reasons discussed above, Plaintiff’s motion is **GRANTED**. The Court hereby **STRIKES** the expert report and any testimony of Defendant’s expert witness, Peter Bressler.

The hearing set for February 2, 2015 is **VACATED**.

IT IS SO ORDERED.

Initials of Preparer

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