

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION**

EVERLIGHT ELECTRONICS CO.,
LTD., and EMCORE CORPORATION,

Plaintiffs/Counter-
Defendants,

v.

Case No. 4:12-CV-11758 GAD-MKM
Hon. Gershwin A. Drain

NICHIA CORPORATION, and
NICHIA AMERICA CORPORATION,

Defendants/Counter-
Plaintiffs,

Jury Trial Demanded

v.

EVERLIGHT AMERICAS, INC.,

Defendant.

**EVERLIGHT'S OPPOSITION TO NICHIA'S MEMORANDUM
SEEKING TO ADMIT INTO EVIDENCE PROF. SCHUBERT'S
ANALYSIS CHARTS (DKT. # 494)**

Nichia's bench memorandum incorrectly asserts that Dr. Schubert's Analysis Chart (D-182) meets all of the requirements of FRE 1006 and thus should be admitted into evidence. The Analysis Chart is not merely a "summary, chart, or calculation to prove the content of voluminous writings, recordings, or photographs that cannot be conveniently examined in court," as required by FRE 1006. The Analysis Chart contains Dr. Schubert's expert opinions regarding infringement of each of the asserted claims. Indeed, Nichia's position in its most recent bench memorandum is directly contrary to the position it took just five days ago, when it admitted that the Analysis Chart did strictly fall within the scope of FRE 1006 but should nevertheless be admitted. Dkt. 488 at 1-2.

There is no reasonable dispute that Dr. Schubert's Chart is "integral to his expert opinion" (Dkt. 464 at 4) and that Dr. Schubert's infringement opinions are contained in both his expert report and his Analysis Chart, which Nichia has argued is designed to be "*used in conjunction with*" his expert report (Dkt. 326 at 16). Thus, the Analysis Chart is part of Dr. Schubert's expert report. Dr. Schubert's placing an "X" for each asserted claim of the '925 and '960 patents is outside the scope of the FRE 1006 because it is not being used to prove the content of any underlying document. The "X" is Dr. Schubert's opinion for any given product and this analysis cannot be admitted under FRE 1006.

It is black letter law that expert reports are not admissible as evidence. For example, the Sixth Circuit has explained that “Rule 702 permits the admission of expert opinion *testimony* not opinions contained in documents prepared out of court.” *Engbretsen v. Fairchild Aircraft Corp.*, 21 F.3d 721, 728 (6th Cir. 1994); *see also Blue Cross & Blue Shield United of Wisc. v. Marshfield Clinic*, 152 F.3d 588 (7th Cir. 1998) (Posner, J.) (holding that expert reports are not evidence but rather “merely discovery materials”); *Ake v. General Motors Corp.*, 942 F.Supp. 869, 877-78 (W.D.N.Y. 1996) (“[T]he [expert] report is not admissible as a basis for [the expert’s] expert opinion. The report *is* his opinion. [The expert] may testify about things in the report, but the report itself is inadmissible.”).

At a minimum, if Nichia wishes to admit the Analysis Chart into evidence, it needs to redact the columns regarding his opinions on infringement as well as the column labeled “Phosphor Distribution from Testing” because this column also represents Dr. Schubert’s subjective analysis. April 17 Trial Tr. at 89:2-91:9.

Moreover, Nichia is incorrect that it is established that the Analysis Chart is accurate. To be clear, Everlight has not identified only three errors in Dr. Schubert’s Analysis Chart. Everlight presented three exemplary errors to the jury in much the same way that Nichia presented only three “exemplary” infringement analyses to the jury. It is Nichia’s burden to show that the summary evidence is accurate. *Anderson v. Otis Elevator Co.*, 2012 U.S. Dist. LEXIS 161816, at *8-9

(E.D. Mich. Nov. 13, 2012) (Ex. A.). It is not Everlight's burden to disprove the accuracy of Dr. Schubert's Analysis Chart. Here, Dr. Schubert admitted that there were "inconsistencies" in Everlight's documents. April 16 Trial Tr. at 116:21-25. Yet, Nichia has not come forward with any explanation about how these "inconsistencies" were resolved. Nichia has therefore failed to show that the Analysis Chart is accurate, providing an independent reason for not admitting the Analysis Chart as substantive evidence.

Finally, Nichia's reliance on *BCCI Holdings (Lux.) S.A. v. Khalil*, 184 F.R.D. 3 (D.D.C. 1999) is misplaced. *BCCI* does not hold that an expert can incorporate his expert report into his trial testimony and thereby make his expert report admissible evidence, as Nichia alleges. Rather, *BCCI* deals with a situation where the witness gave an interview to the police which were recorded. *Id.* at 5. At a subsequent deposition, the witness confirmed that his tape recorded statements to the police were accurate. *Id.* at 5-6. The Court in *BCCI* noted that in certain circumstances, a prior statement can be incorporated into a witness' testimony such that it is admissible non-hearsay. However, it is clear in *BCCI* that this discussion relates prior *statements* regarding factual issues, not expert analyses set forth in a 9500 line spreadsheet. Indeed, the rule Nichia proposes would mean expert reports would be routinely admissible simply by having an expert take the stand and "adopt" the contents of her expert report. Such a rule is directly contrary

to Sixth Circuit law holding that expert reports are not admissible. *Engebretsen*, 21 F.3d at 728. The Court should deny Nichia's motion to admit Dr. Schubert's Analysis Chart as substantive evidence.

DATED: April 20, 2015

Respectfully submitted,

Raymond N. Nimrod
Matthew A. Traupman
QUINN EMANUEL URQUHART
& SULLIVAN, LLP
51 Madison Avenue, 22nd Floor
New York, NY 10010
(212) 849-7000
raynimrod@quinnemanuel.com

By: /s/ Matthew A. Traupman
A. Michael Palizzi (P47262)
MILLER, CANFIELD, PADDOCK
AND STONE, P.L.C.
150 West Jefferson, Ste. 2500
Detroit, Michigan 48226
(313) 963-4620
palizzi@millercanfield.com
Attorneys for Plaintiffs

Explore Litigation Insights

Docket Alarm provides insights to develop a more informed litigation strategy and the peace of mind of knowing you're on top of things.

Real-Time Litigation Alerts



Keep your litigation team up-to-date with **real-time alerts** and advanced team management tools built for the enterprise, all while greatly reducing PACER spend.

Our comprehensive service means we can handle Federal, State, and Administrative courts across the country.

Advanced Docket Research



With over 230 million records, Docket Alarm's cloud-native docket research platform finds what other services can't. Coverage includes Federal, State, plus PTAB, TTAB, ITC and NLRB decisions, all in one place.

Identify arguments that have been successful in the past with full text, pinpoint searching. Link to case law cited within any court document via Fastcase.

Analytics At Your Fingertips



Learn what happened the last time a particular judge, opposing counsel or company faced cases similar to yours.

Advanced out-of-the-box PTAB and TTAB analytics are always at your fingertips.

API

Docket Alarm offers a powerful API (application programming interface) to developers that want to integrate case filings into their apps.

LAW FIRMS

Build custom dashboards for your attorneys and clients with live data direct from the court.

Automate many repetitive legal tasks like conflict checks, document management, and marketing.

FINANCIAL INSTITUTIONS

Litigation and bankruptcy checks for companies and debtors.

E-DISCOVERY AND LEGAL VENDORS

Sync your system to PACER to automate legal marketing.