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United States District Court  
Northern District of California

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

PACKET INTELLIGENCE LLC,  
Plaintiff,  
v.  
JUNIPER NETWORKS INC,  
Defendant.

Case No. [19-cv-04741-WHO](#)

**ORDER REGARDING MOTION TO  
DISQUALIFY**

Re: Dkt. No. 55

Defendant Juniper Networks Inc. (“Juniper”) moves to disqualify Dr. Kevin Almeroth, an expert witness retained by defendant Packet Intelligence LLC (“Packet”) in this action. Juniper previously retained Dr. Almeroth in connection with a patent dispute with a third party, Palo Alto Networks, LLC (“PAN”), that is also a party in a case related to this one. Juniper has provided evidence demonstrating that Dr. Almeroth’s prior work involved analysis of some of the accused products and patents at issue in this matter. Packet opposes disqualification largely based upon the content of Dr. Almeroth’s reports in the prior litigation, but does not dispute or substantively challenge Juniper’s evidence. I find that Juniper has satisfied its burden of showing that Dr. Almeroth received relevant privileged and confidential information from Juniper, and that it had a reasonable expectation of a confidential relationship with him. Juniper’s motion is GRANTED.

**BACKGROUND**

**I. DR. ALMEROOTH’S PRIOR WORK FOR JUNIPER**

Packet first filed this patent infringement lawsuit on August 13, 2019. Dkt. No. 1. Claim construction is currently set for August 14, 2020. *See* Dkt. No. 54. On May 29, 2020, Juniper filed this motion to disqualify Dr. Almeroth, which Packet opposes. Dkt. Nos. 55 (“Mot.”), 59 (“Oppo.”).

According to Juniper, it retained Dr. Almeroth in connection with litigation between

1 Juniper and PAN in 2013. Mot. at 4. This included two cases in district court and two *Inter*  
 2 *Partes* Review (“IPR”) proceedings (collectively, “PAN litigation”). *Id.* Dr. Almeroth signed an  
 3 engagement letter with Juniper’s outside counsel, Irell & Manella, on December 13, 2013. Dkt.  
 4 No. 55-1 (“McPhie Decl.”) ¶¶ 1-3. The retention letter states that in exchange for Dr. Almeroth’s  
 5 analysis and opinions as an independent consultant, he would be paid \$600 per hour. Dkt. No. 55-  
 6 2 at 1-2. It further provides that Juniper may need to disclose to Dr. Almeroth “legal theories,”  
 7 “confidential work product,” and “other privileged or confidential information” necessary for him  
 8 “to fully carry out [his] responsibilities under this agreement.” *Id.* Dr. Almeroth agreed not to  
 9 disclose confidential or privileged Juniper information “during and after” his engagement unless  
 10 authorized by Juniper’s attorneys, and to keep all Juniper information “in strict confidence.” *Id.* at  
 11 2. Dr. Almeroth agreed to immediately notify Juniper’s counsel if any unauthorized entity  
 12 attempted to obtain this information, and to take any “legal action ... as Irell deems necessary or  
 13 appropriate to resist or seek protection against disclosure.” *Id.*

14 With its motion, Juniper submitted a declaration of David McPhie, its counsel who worked  
 15 with Dr. Almeroth in the PAN litigation. McPhie asserts that in the course of Dr. Almeroth’s  
 16 employment with Juniper, Dr. Almeroth prepared and submitted two expert reports in the IPR  
 17 proceedings providing opinions on issues of claim construction, validity, and non-obviousness.  
 18 Mot. 6. These reports provided opinions on Juniper’s U.S. Patent No. 7,107,612 (the “612  
 19 Patent”) and U.S. Patent No. 7,734,752 (the “752 Patent”). McPhie Decl. ¶ 5. In addition, Dr.  
 20 Almeroth testified at deposition in one of the IPR proceedings and “consulted with Juniper on its  
 21 litigation strategies and the technologies, products, and prior art at issue in those matters.”  
 22 McPhie Decl. ¶ 6; Mot. 6.

23 According to Juniper, “[t]he technical subject matter of Dr. Almeroth’s work and  
 24 consultation with Juniper included flow/session technologies, intrusion and detection prevention,  
 25 Juniper’s ‘JUNOS’ operating system, and Juniper’s SRX and MX Series products,” and his reports  
 26 “provide opinions on issues of claim construction, invalidity, and non-obviousness, including  
 27 secondary considerations based on the SRX Series products.” Mot. 6. Outside counsel had

28 “multiple conversations” with Dr. Almeroth that “included litigation strategy as well as

1 substantive arguments regarding Juniper products and the prior art.” McPhie Decl. ¶ 8. This  
 2 included technical consultation on flow/session technologies, Juniper’s JUNOS operating system,  
 3 and Juniper’s SRX and MX Series products. *Id.* ¶ 8. Neither Juniper nor Dr. Almeroth have  
 4 served any notice to terminate Dr. Almeroth’s agreement set forth in the retention letter. *Id.* ¶ 4.  
 5 Dr. Almeroth was paid \$85,808.02 for his work for Juniper. *Id.* ¶ 9.

6 On December 17, 2019, Packet disclosed Dr. Almeroth as its claim construction expert in a  
 7 Joint Claim Construction Statement in the related matter against PAN that is pending before me.  
 8 *See Packet Intelligence v. Palo Alto Networks*, Case No. 19-cv-2471 (N.D. Cal.) (“*Packet I*”  
 9 litigation), Dkt. No. 46; Oppo. 12. On January 7, 2020, Juniper’s counsel in this matter attended a  
 10 Joint Case Management conference. *Packet I*, Dkt. No. 50. On March 20, 2020, Packet disclosed  
 11 Dr. Almeroth for purposes of extrinsic evidence in this case in its Patent Local Rule 4-2  
 12 disclosures to Juniper. Oppo. 12. On April 15, 2020, Packet served a draft of a Joint Claim  
 13 Construction Statement which disclosed Dr. Almeroth. Oppo. 12. On April 21, 2020, both parties  
 14 filed a Joint Claim Construction Statement that attached a declaration of Dr. Almeroth on behalf of  
 15 Packet. Dkt. No. 54 at 2. On April 30, 2020, Juniper notified Packet Intelligence of its objection  
 16 to Dr. Almeroth. Dkt. No. 55-6.

### 17 LEGAL STANDARD

18 Federal courts have the inherent power to disqualify expert witnesses to protect the  
 19 integrity of the adversarial process, protect privileges that otherwise may be breached, and  
 20 promote public confidence in the legal system. *See Campbell Indus. v. M/V Gemini*, 619 F.2d 24,  
 21 27 (9th Cir. 1980) (“A district court is vested with broad discretion to make discovery and  
 22 evidentiary rulings conducive to the conduct of a fair and orderly trial”). However,  
 23 disqualification is a “drastic measure that courts should impose only hesitantly, reluctantly, and  
 24 rarely.” *Hewlett-Packard Co. v. EMC Corp.*, 330 F. Supp.2d 1087, 1092 (N.D. Cal. 2004). In  
 25 *Hewlett-Packard*, the court set forth a two-factor test, in which “disqualification of an expert is  
 26 warranted based on a prior relationship with an adversary if (1) the adversary had a confidential  
 27 relationship with the expert and (2) the adversary disclosed confidential information to the expert  
 28 that is relevant to the current litigation.” *See* *Id.* at 1092–93 (internal citations omitted). I should

1 additionally consider whether disqualification would be fair to the affected party and would  
2 promote the integrity of the legal process. *Id.* at 1093.

### 3 DISCUSSION

#### 4 II. CONFIDENTIAL RELATIONSHIP

5 Juniper must show that it was “reasonable for it to believe that a confidential relationship  
6 existed” with Dr. Almeroth. *Id.* In evaluating the reasonableness of a party’s assumption on this  
7 point, courts may consider many factors, including:

8 whether the relationship was one of long standing and involved  
9 frequent contacts instead of a single interaction with the expert,  
10 whether the expert is to be called as a witness in the underlying case,  
11 whether alleged confidential communications were from expert to  
12 party or vice-versa, and whether the moving party funded or directed  
13 the formation of the opinion to be offered at trial.

14 *Id.* (citation omitted). Other factors include “whether the parties entered into a formal  
15 confidentiality agreement, whether the expert was retained to assist in the litigation, the number of  
16 meetings between the expert and the attorneys, whether work product was discussed or documents  
17 were provided to the expert, whether the expert was paid a fee, whether the expert was asked to  
18 agree not to discuss the case with the opposing parties or counsel, and whether the expert derived  
19 any of his specific ideas from work done under the direction of the retaining party.” *Id.*

20 There is no real dispute that Juniper and Dr. Almeroth were engaged in a confidential  
21 relationship since at least December 2013. Dr. Almeroth entered into a formal agreement to assist  
22 Juniper in its litigation against PAN and served as an expert in two prior district court proceedings  
23 and two IPR proceedings. He was paid a substantial amount for his services. I find that Juniper  
24 had a reasonable expectation of a confidential relationship with Dr. Almeroth.

#### 25 III. CONFIDENTIAL INFORMATION

26 The heart of the parties’ dispute concerns whether Juniper disclosed confidential  
27 information to Dr. Almeroth that is related to the current litigation. Confidential information is  
28 information “of either particular significance or [that] which can be readily identified as either  
29 attorney work product or within the scope of the attorney-client privilege.” *Id.* at 1094 (citation  
30 omitted). “It could include discussion of the party’s ‘strategy in the litigation, the kinds of experts

1 role of each of the [party's] experts to be hired and anticipated defenses.” *Id.* (citation omitted).

2 Packet first argues that the work that Dr. Almeroth performed for Juniper did not require  
3 Juniper’s confidential information and was based upon public information. *Oppo*. 3-4, 9-10. It  
4 asserts that “[t]he information about Dr. Almeroth’s activities on behalf of Juniper and the  
5 information disclosed to him by Juniper pertained only to two IPR proceedings over the validity of  
6 Juniper patents, redacted excerpts of a declaration that Dr. Almeroth executed in connection with  
7 one of the IPRs, and the declaration of Juniper’s outside counsel, David McPhie.” *Id.* at 3. The  
8 IPR proceedings related to nonobviousness and were based on publicly available information. *Id.*  
9 at 4. Packet also claims that Juniper has not described any infringement analysis conducted by Dr.  
10 Almeroth or provided any indication that the patents at issue in the prior litigation with PAN  
11 involved the patents at issue here. *Id.* at 3.

12 Packet’s arguments are contradicted by the evidence presented by Juniper. Juniper  
13 provided sworn testimony that Dr. Almeroth provided opinions related to Juniper’s products (a  
14 point that Packet acknowledges) and discussed litigation strategy. Packet’s assertions to the  
15 contrary are unsupported by any evidence. The fact that Dr. Almeroth’s earlier declarations  
16 discuss validity and could have been prepared without access to confidential information is not  
17 irreconcilable with Juniper’s assertions that Dr. Almeroth received confidential information  
18 regarding its products and had privileged communications with counsel regarding litigation  
19 strategy.

20 Second, Packet argues that Juniper’s description of Dr. Almeroth’s work is vague and  
21 conclusory. *Id.* at 4-5, 7-8. Juniper’s outside counsel, David McPhie, asserted that he had  
22 “multiple conversations . . . in person and over the phone in which we discussed privileged and  
23 confidential information belonging to Juniper.” McPhie Decl. ¶ 8. He further stated that the  
24 discussions “included litigation strategy as well as substantive arguments regarding Juniper’s  
25 products and the prior art, including the issues addressed in his expert reports.” *Id.* Although  
26 Packet contends that these statements are insufficiently specific to support disqualification, it does  
27 not contend that these statements are incorrect or provide evidence to contradict them.

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