

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
MARSHALL DIVISION**

BRIGHT DATA LTD.,

Plaintiff,

v.

TESO LT, UAB, METACLUSTER LT,
UAB, OXYSALES, UAB,

Defendants.

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CIVIL ACTION NO. 2:19-CV-00395-JRG

ORDER ON PRETRIAL MOTIONS AND MOTIONS *IN LIMINE*

The Court held a Pretrial Conference in the above-captioned matter on Tuesday, August 31, 2021 regarding pending pretrial motions and motions *in limine* (“MILs”) filed by Plaintiff Bright Data Ltd. (“Plaintiff” or “Bright Data”) and Defendants Teso LT, UAB, Metacluster LT, UAB, and Oxysales, UAB (collectively, “Defendants” or “Oxylabs”) (together with Bright Data, the “Parties”). (Dkt. Nos. 244, 242, 277, 237, 276, 241, 269, 240, 236, 239, 425, 371, 364, 362, 363, 464, 467). This Order memorializes the Court’s rulings on the aforementioned pretrial motions and MILs as announced from the bench into the record, including additional instructions that were given to the Parties. While this Order summarizes the Court’s rulings as announced into the record during the pretrial hearing, this Order in no way limits or constrains such rulings from the bench. Accordingly, it is hereby **ORDERED** as follows:

PRETRIAL MOTIONS

1. Bright Data’s Motion to Strike Invalidation Opinions of Expert Michael Freedman (Dkt. No. 244)

The motion was **DENIED**. (Dkt. No. 469 at 63:11–13).

The Court was persuaded that Dr. Freedman did not disregard the Court’s claim construction and noted that the other matters raised in Bright Data’s motion are adequately addressed through cross examination. (*Id.* at 63:8–11).

2. Bright Data’s Motion for Partial Summary Judgment of No Invalidation of ’319 and ’510 Patent Claims (Dkt. No. 242)

The Motion was **DENIED**. (*Id.* at 63:14–17).

The Court noted that this motion was effectively controlled by the ruling on Bright Data’s Motion to Strike Invalidation Opinions of Expert Michael Freedman (Dkt. No. 244). Given that the Court declined to strike Dr. Freedman’s invalidation opinions, a fact issue remained regarding the validity of the ’319 and ’510 Patent claims. (*See id.* at 63:8–14).

3. Oxylabs’ Motion for Summary Judgment of Invalidation (Dkt. No. 277)

The Motion was **DENIED**. (*Id.* at 63:18–64:2).

The Court was persuaded that Dr. Rhyne put forth sufficient opinions to create a genuine issue of material fact regarding the issue of validity. To the extent that Defendants’ Motion for Summary Judgment of invalidation was in essence a motion to reconsider the Court’s Section 101 ruling, the Court reaffirmed its prior denial of Defendants’ Motion for Judgment on the Pleadings Under Fed. R. Civ. P. 12(c) and 35 U.S.C. § 101 (Dkt. No. 210). (*Id.*; *see also* Dkt. No. 303).

4. Oxylabs’ Motion to Strike Expert Opinions of Dr. V. Thomas Rhyne (Dkt. No. 237)

The motion was **GRANTED-IN-PART** and **DENIED-IN-PART**.

For part (A) of the motion requesting the Court to preclude Dr. Rhyne from offering a conclusion on contributory infringement, the motion was **GRANTED**. (Dkt. No. 469 at 82:21–22).

The Court found that Dr. Rhyne’s report merely puts forward boilerplate language from Bright Data’s infringement contentions and failed to sufficiently opine in a reliable and specific manner to support a conclusion of contributory infringement. (*Id.* at 82:23–83:1). However, the Court noted that Dr. Rhyne may testify regarding whether an allegedly infringing component constitutes a material part of the invention but may not go beyond that limited discussion in his report. (*Id.* at 83:1–4).

For part (B) of the motion requesting the Court to preclude Dr. Rhyne from opining on induced infringement, the Motion was **DENIED**. (*Id.* at 83:9–10). The Court found that Dr. Rhyne’s conclusion of induced infringement and his discussion of third parties utilizing Defendants’ software was reliably sufficient to support testimony on induced infringement. (*Id.* at 83:8–15; Dkt. No. 237-2 at ¶¶ 3, 111–14, 163).

For part (C) of the motion requesting the Court to strike Dr. Rhyne’s opinions based on Oxylabs’ copying, the motion was **DENIED**. (Dkt No. 469 at 84:12–13). However, the Court noted that testimony regarding copying shall be limited to secondary considerations of non-obviousness and may not be used to support infringement theories. (*Id.* at 83:14–21); *Allen Eng’g Corp. v. Bartell Indus., Inc.*, 299 F.3d 1336, 1351 (Fed. Cir. 2002) (noting that “[w]hile copying may be relevant to obviousness, it is of no import on the question of whether the claims of an issued patent are infringed”).

For part (D) of the motion requesting the Court to preclude Dr. Rhyne from testifying that the patents-in-suit cover residential proxies, the motion was **DENIED**. (Dkt. No. 469 at 83:16–17). However, the Court instructed that Dr. Rhyne is not to opine that the claims of the patents-in-suit are *limited* to residential proxies. The Court further rejected and precluded any testimony as to “client device” and “server” being limited to only “residential devices.” (*Id.* at 83:18–84:3).

For part (E) of the motion requesting the Court to preclude Dr. Rhyne from testifying regarding secondary considerations of non-obviousness, the motion was **DENIED**. (*Id.* at 84:4–11). The Court found that Dr. Rhyne established a sufficient nexus between the secondary considerations and the claimed invention. (*Id.* at 84:7–11).

For part (F) of the motion requesting the Court to strike Dr. Rhyne’s opinion that “a client device is specifically not a server,” the motion was **DENIED**. (*Id.* at 64:3–12). The Court found that Dr. Rhyne does not specifically argue that a “client device is specifically not a server” in his report, but rather offered the opinion in his deposition. (*Id.* at 64:5–8; Dkt. No. 281-2 at 69:8–12). Consistent with his report, the Court instructed that Dr. Rhyne was not to testify before the jury that a client device cannot be a server. (Dkt. No. 469 at 64:10–13).

For part (G) of the motion requesting the Court to preclude Dr. Rhyne’s opinions based on Bright Data’s infringement contentions, the motion was **DENIED**. (*Id.* at 84:22–85:12). The Court noted that while all experts must testify within the four corners of their reports, where a voluminous appendix is attached, but not discussed or analyzed in the body of the report, such cannot be used to open the door to expert testimony about the appendix before the jury. (*Id.* at 85:2–12).

5. Oxylabs’ Motion for Summary Judgment of Non-Infringement (Dkt. No. 276)

The motion was **DENIED**. (*Id.* at 105:22–23). The Court found that Dr. Rhyne’s testimony was sufficient to raise a genuine issue of material fact such that summary judgment was improper. (*Id.* at 105:23–106:3).

6. Bright Data’s Motion to Strike Expert Testimony of Kevin Almeroth, PH.D. (Dkt. No. 241)

The motion was **DENIED**. (*Id.* at 133:12).

The Court noted that these disputes merely present a situation of dueling experts who have differing opinions. The expert opinions were not sufficiently erroneous or improper to warrant

exclusion. The jury, as factfinder, will determine which expert is more persuasive and credible. (*Id.* at 132:4–133:11).

7. Oxylabs’ Motion for Summary Judgment of No Indirect Infringement, Willfulness, or Exceptional Case (Dkt. No. 269)

The motion was **GRANTED-IN-PART** and **DENIED-IN-PART**.

Regarding contributory infringement, the motion was **GRANTED** in light of the Court’s prior ruling precluding Dr. Rhyne from opining on the necessary elements of contributory infringement. (*Id.* at 133:17–19).

As to the remaining issues, the motion was **DENIED**. For induced infringement, the motion to strike was denied because the motion to strike Dr. Rhyne’s opinion on induced infringement was also denied. (*Id.* at 133:20–23). For willfulness, the inquiry is a matter of culpability and is determined by considering the totality of the circumstances. *Halo Elecs., Inc. v. Pulse Elecs., Inc.*, 136 S. Ct. 1923, 1933 (2016); *Gustafson, Inc. v. Intersystem Indus. Prods., Inc.*, 897 F.2d 508, 510 (Fed. Cir. 1990). There remain facts and circumstances yet to be decided by a jury that could support a willfulness finding, thus the Court declines to grant summary judgment declaring no willfulness. (Dkt. No. 469 at 134:1–5). Finally, the Court noted that one factor to consider in the inquiry for an exceptional case under 28 U.S.C. § 285 is the manner the case was litigated through trial. *Octane Fitness, LLC v. ICON Health & Fitness, Inc.*, 572 U.S. 545, 554 (2014). The Court found that the determination of whether all the conduct, considering the actions of both sides, rises to the level of being truly exceptional is not ripe for review in advance of the trial. (Dkt. No. 469 at 134:9–19). Accordingly, the Court denied the motion for summary judgment on exceptional case status.

8. Bright Data’s Motion for Summary Judgment on Defendants’ Counterclaim and Defense of Inequitable Conduct (Dkt. No. 240)

The motion was **CARRED** until after the jury trial. (*Id.* at 135:17–18).

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