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

CONTENTGUARD HOLDINGS, INC.,	§	
	§	
Plaintiff,	§	
	§	
v.	§	Case No. 2:13-CV-1112-JRG
	§	
AMAZON.COM, INC., et al.,	§	
	§	
Defendants.	§	
	§	
	§	
CONTENTGUARD HOLDINGS, INC.,	§	
	§	
Plaintiff,	§	
	§	
v.	§	Case No. 2:14-CV-61-JRG
	§	
GOOGLE, INC.,	§	
	§	
Defendant.	§	

MEMORANDUM OPINION AND ORDER

 Before the Court are a number of motions concerning technical expert testimony: (1) Motion to Exclude Portions of the Reports and Testimony of Jean Renard Ward (Dkt. No. 679); (2) Motion to Exclude Portions of the Reports and Testimony of Dr. Brian Noble (Dkt. No. 683); (3) Motion to Exclude Portions of the Reports and Testimony of Dr. Steve White (Dkt. No. 684), (4) Motion to Exclude Portions of the Reports and Testimony of Atul Prakash (Dkt. No. 685), (5) Motion to Exclude Portions of the Noninfringement Reports and Testimony of Paul Clark, Brian Noble, John Kelly, and Gene Tsudik (Dkt. No. 688), (6) Motion to Exclude Portions of the Reports and Testimony of Dr. Paul Clark (Dkt. No. 690), (7) Motion to Exclude Portions of the Reports and Testimony of Dr. John P.J. Kelly (Dkt. No. 692), all filed by Plaintiff ContentGuard Holdings, Inc. Also before the Court is (8) Defendants' Combined Motion to Strike Portions of the Expert Reports

and Testimony of Michael T. Goodrich and David Martin (Dkt. No. 721). At the Court's request, the Defendants consolidated the separate motions filed by various defendants on June 26, 2015, at docket number 232 in Case No. 2:14-cv-61, and docket numbers 665, 668, 673, 675, 677, 687, and 691 in Case No. 2:13-cv-1112 into the Combined Motion to Strike Portions of the Expert Reports and Testimony of Michael T. Goodrich and David Martin (Dkt. No. 721). The Court requested that the parties submit copies of each expert report in dispute, (Dkt. No. 782), which have subsequently been reviewed by the Court. The Court held a hearing on these motions on August 5, 2015. (Dkt. No. 827.) For the reasons set forth below, the motions to strike are **GRANTED** to the extent specified below, and are otherwise **DENIED**.

I. Background

On December 18, 2013, ContentGuard filed suit against Amazon, Apple, BlackBerry, Huawei, and Motorola Mobility asserting claims of patent infringement of the patents in this suit. (Dkt. No. 1). On January 17, 2014, ContentGuard filed an amended complaint asserting the same patents against HTC and Samsung. (Dkt. No. 22).

ContentGuard has asserted the following twenty claims from six related patents issued to Mark Stefik: Claims 1, 3, 6, 8, 11, and 13 from U.S. Patent No. 8,393,007 ("the '007 patent"); Claims 1, 7, and 13 from U.S. Patent No. 8,370,956 ("the '956 patent"); Claims 1 and 8 from U.S. Patent No. 7,523,072 ("the '072 patent"); Claims 18, 21, and 34 from U.S. Patent No. 7,269,576 ("the '576 patent"); and Claims 1, 21, and 58 from U.S. Patent No. 6,963,859 ("the '859 patent") (collectively, the "Stefik patents"). ContentGuard has also asserted the following five claims from two related patents issued to Mai Nguyen: Claims 1 and 5 of U.S. Patent No. 7,774,280 ("the '280 patent"); and Claims 1, 3, and 5 from U.S. Patent No. 8,001,053 ("the '053 patent") (collectively, the "Nguyen patents").

II. LEGAL STANDARD

An expert witness may provide opinion testimony 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.

Rule 702 requires a district court to make a preliminary determination, when requested, as to whether the requirements of the rule are satisfied with regard to a particular expert's proposed testimony. *See Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 149 (1999); *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 592–93 (1993). District courts are accorded broad discretion in making Rule 702 determinations. *Kumho Tire*, 526 U.S. at 152 ("[T]he trial judge must have considerable leeway in deciding in a particular case how to go about determining whether particular expert testimony is reliable."). Although the Fifth Circuit and other courts have identified various factors that the district court may consider in determining whether an expert's testimony should be admitted, the common nature of these factors direct the trial court to consider as its ultimate inquiry whether the expert's testimony is sufficiently reliable and relevant to be helpful to the finder of fact and thus to warrant admission at trial. *United States v. Valencia*, 600 F.3d 389, 424 (5th Cir. 2010).

Importantly, in a jury trial setting, the Court's role under *Daubert* is not to weigh the expert testimony to the point of supplanting the jury's fact-finding role. *See Micro Chem., Inc. v. Lextron, Inc.*, 317 F.3d 1387, 1391–92 (Fed. Cir. 2003) (applying Fifth Circuit law) ("When, as here, the parties' experts rely on conflicting sets of facts, it is not the role of the trial court to evaluate the correctness of facts underlying one expert's testimony."); *Pipitone v. Biomatrix, Inc.*, 288 F.3d 239, 249–50 (5th Cir. 2002) ("'[t]he trial court's role as gatekeeper [under

Daubert] is not intended to serve as a replacement for the adversary system.' . . . Thus, while exercising its role as a [gatekeeper], a trial court must take care not to transform a *Daubert* hearing into a trial on the merits") (quoting FED. R. EVID. 702 advisory committee note). Instead, the Court's role is limited to that of a gatekeeper, ensuring that the evidence in dispute is at least sufficiently reliable and relevant to the issue before the jury so as to be appropriate for the jury's consideration. *See Pipitone*, 288 F.3d at 249–50. As the Supreme Court explained in *Daubert*, 509 U.S. at 596, "[v]igorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence." *See Mathis v. Exxon Corp.*, 302 F.3d 448, 461 (5th Cir. 2002).

III.   DISCUSSION

A.   Prior Art Related Grounds for the Motions to Strike

1.   Pfleeger References

The Court previously excluded the Pfleeger references from Defendants' invalidity contentions because the Court found that Defendants had not shown good cause sufficient to add a reference to their invalidity contentions late in the litigation when they had previously known about the reference but not asserted it for over a year. (June 23, 2015, H'rg Tr., Dkt. No. 660, at 35:8–13.) Plaintiff argues that Defendants Apple, Google, HTC, Huawei, Motorola, and Samsung are now attempting to maneuver around the Court's previous order by including Pfleeger as a state-of-the-art reference, rather than an invalidity reference. (Dkt. No. 679, at 11–12.) Defendants argue that even though the Court excluded Pfleeger as an invalidity reference, Pfleeger can still be used to show the state of the art, particularly as it was known to the inventor, at the time the patent was filed. (Dkt. No. 749, at 15.) Further, Defendants explicitly affirmed that they would not attempt to show Pfleeger as an anticipation or obviousness reference. (*Id.*); *see also* (Aug. 5, 2015, H'rg Tr., Dkt. No. 827, at 9:23–10:2.)

The Court is sympathetic to Defendants' position regarding the need to show the state of the prior art and accepts counsel's representation that Defendants would not overtly use Pfleeger as a *per se* invalidity reference. However, the Court, after considering the briefing and oral argument, finds that the portions of Mr. Ward's report containing discussion of the substance of Pfleeger must be stricken in view of the Court's previous order, including at least from Paragraphs 113, 121, 132, 134, 139, 140, 141, 178, 195, 391-94, 402-05, 511-524, 580, 615-16, 627-28, 641-42, 655-56, 669-70, 683-84, 702-03, 716-17, 739-40, and 746 of Mr. Ward's report. After examining the paragraphs in question, including the paragraphs that Defendants expressly identified as only touching on the state of the prior art, the Court finds it difficult to completely separate the use of Pfleeger as a state-of-the-art reference from the use of Pfleeger as an invalidity reference: the use for one purpose unavoidably bleeds into the other. Accordingly, the Court **GRANTS** Plaintiff's motion (Dkt. No. 679) as it pertains to the Pfleeger references in the above cited paragraphs.

2. VDE References

The Court previously denied Apple's request to amend its invalidity contentions with any VDE references other than U.S. Patent. No. 5,892,900 ("Ginter"), because the Court found that Apple had not shown an adequate basis to overcome the prejudice to ContentGuard of adding the VDE references this late in litigation. (April 28, 2015, H'rg Tr., Dkt. No. 577, at 44:5–16.) The Court also granted a subsequent motion to exclude based on its earlier order. (Dkt. No. 820.) Plaintiff argues that Defendant Apple has never asserted the "VDE system" against the Nguyen patents and is now attempting to circumvent the Court's previous order by "recit[ing] contentions (including two figures) about 'the VDE system' that are based not on anything in the public Ginter patent reference, but on deposition testimony from Mr. Ginter regarding the operation of the precluded VDE system." (Dkt. No. 685, at 14.) Apple argues that Ginter was

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