

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

Blitzsafe Texas, LLC,

*Plaintiff,*

v.

Honda Motor Co., Ltd., et al.,

*Defendants.*

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Case No. 2:15-cv-1274-JRG-RSP

**ORDER**

Before the Court is the Motion to Exclude Certain Testimony Under *Daubert* And To Strike Portions of the Report of Dr. Stephen Becker (Dkt. No. 235) (the “Motion”) filed by Volkswagen Group of America, Inc. and Volkswagen Group of America Chattanooga Operations, LLC’s (“Volkswagen”). Having considered the Motion, the Court is of the opinion that the Motion should be **DENIED**.

**APPLICABLE LAW**

Rule 702 provides that an expert witness may offer 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. “The inquiry envisioned by Rule 702 is . . . a flexible one,” but, in *Daubert*, the Supreme Court held that the Rules also “assign to the trial judge the task of ensuring that an expert’s testimony both rests on a reliable foundation and is relevant to the task at hand.” *Daubert v. Merrell Dow Pharms. Inc.*, 509 U.S. 579, 594, 597 (1993). “The proponent need not prove to the judge that the expert’s testimony is correct, but she must prove by a preponderance of the evidence that the testimony is reliable.”

*Johnson*, 685 F.3d at 459 (quoting *Moore v. Ashland Chem., Inc.*, 151 F.3d 269, 276 (5th Cir. 1998) (en banc)). At base, “the question of whether the expert is credible or the opinion is correct is generally a question for the fact finder, not the court.” *Summit 6, LLC v. Samsung Elecs. Co., Ltd.*, 802 F.3d 1283, 1296 (Fed. Cir. 2015).

## ANALYSIS

### I. Dr. Becker’s Reliance on Mr. McAlexander’s Opinion

Volkswagen argues that Dr. Becker relies on undisclosed and unexplained opinions of Blitzsafe’s technical expert, Mr. McAlexander, to conclude that: (1) the Affinity Patents are narrower in scope than the patents-in-suit (and therefore, in Dr. Becker’s view, less valuable); and (2) there are no commercially-acceptable non-infringing alternatives. (Dkt. No. 235 at 5.) Dr. Becker is not a person of ordinary of skill in the art and hence, he is not qualified to opine on the scope of the Affinity Labs Patents compared to the patents-in-suit or the availability of non-infringing alternatives. Accordingly, Dr. Becker relies on Mr. McAlexander’s opinion instead.

Volkswagen does not dispute that Dr. Becker may rely on Mr. McAlexander’s expertise and opinion. Rather, it argues that if Dr. Becker does, Mr. McAlexander’s opinions should be separately disclosed pursuant to Fed. R. Civ. P. 26(a)(2). The Court agrees. While Blitzsafe correctly asserts that “[e]xperts routinely rely upon other experts hired by the party they represent for expertise outside of their field,” (Dkt. No. 265 at 4 (quoting *Apple, Inc. v. Motorola, Inc.*, 757 F.3d 1286, 1321 (Fed. Cir. 2014))), the critical issue is not that Dr. Becker relied on Mr. McAlexander’s opinion, but rather that Mr. McAlexander has not disclosed said opinions. For that reason, the authority cited by Blitzsafe—which mostly stands for the proposition that an expert may base his or her opinion on another’s expertise—is unavailing.

In *EMC Corp.*, an authority cited by Blitzsafe, the Court stated that the expert disclosed “enough detail to permit . . . meaningful cross examination and other discovery.” *EMC Corp. v. Pure Storage, Inc.*, 154 F. Supp. 3d 81, 116 (D. Del. 2016). Here, based on the submissions, this

Court cannot draw the same conclusion. Neither party has cited to or attached any portion of Mr. McAlexander's report with an opinion on the scope of the Affinity Patents or non-infringing alternatives, which suggests to the Court that Mr. McAlexander's disclosure is either insufficient or that no such disclosure exists.

Accordingly, Blitzsafe shall have until **January 16, 2017** to serve a supplemental report disclosing Mr. McAlexander's opinions on the scope of the Affinity Patents and non-infringing alternatives in sufficient to detail. Should Blitzsafe fail to do so, the Court may strike portions of Dr. Becker's damages report based on Mr. McAlexander's undisclosed opinions. *See GPNE Corp. v. Apple, Inc.*, 2014 WL 3870256, at \*7 (N.D. Cal. Aug. 6, 2014) (“[T]o the extent that Mr. Dansky relies on technical analysis, those opinions must be separately disclosed by GPNE's technical expert.”); *Alaman v. Life Ins. Co. of N. Am.*, 2011 WL 2160242, at \*2 (D. Mont. June 1, 2011) (“Rule 703 does not allow for the use of hearsay opinions on the pretense that it is the basis for their own expert opinion”).

## **II. Dr. Becker's Reliance on Mr. McAlexander's Opinion**

Volkswagen argues that Dr. Becker does not properly apportion the amount arrived at in Affinity Labs to only the value of the interface. Specifically, Volkswagen argues that although Dr. Becker notes that “the patents-in-suit cover only the interface, his reliance on the Affinity Labs-Hyundai/Kia verdict fails to account for this limitation because in that case the asserted claims covered the vehicle head unit and the interface and in this case it covers the interface only.” (Dkt. No. 235 at 10.) (internal quotations omitted.)

The fact that the experts disagree as to the breadth of the Affinity Labs patents does not mean that Dr. Becker's opinions are unreliable. Once Blitzsafe discloses Mr. McAlexander's opinion on the scope of the Affinity Labs patents, Volkswagen's complaint should become an issue that goes more to credibility and not reliability. At trial, Volkswagen should be able to explore through cross-examination, “the traditional and appropriate means of attacking shaky but

admissible evidence,” *Daubert*, 509 U.S. at 596, whether Dr. Becker should have discounted the \$11 per unit royalty to account for unpatented features.

### **III. Dr. Becker’s Per Unit Running Royalty Opinion**

Volkswagen argues that Dr. Becker’s opinion concerning a running royalty is arbitrary and untethered to the facts. Volkswagen points out that the majority of the licenses of record for the patents-in-suit are structured as a lump sums and further that the remaining licenses require a running royalty applied to sales only as a penalty for exceeding certain sales caps, and do not support a running royalty structure. (Dkt. No. 235 at 11.) Volkswagen argues that while Blitzsafe claims that Dr. Becker points to evidence that Blitzsafe would prefer a running royalty, the only evidence that Dr. Becker cites is undisclosed discussions with Ira Marlowe. (Dkt. No. 302 at 7.) Further, Volkswagen argues that Blitzsafe’s argument that a running royalty structure “would make sense” is contrary to evidence in record. (*Id.* at 7–8.)

Blitzsafe responds that Dr. Becker fully explains the basis for his opinion and how his opinion is tied to the facts. Specifically, Blitzsafe argues that Dr. Becker explains that the lump-sum settlement agreements are not comparable for a number of reasons, including that (1) Blitzsafe’s preferred licensing approach outside the context of litigation would be a running royalty, (2) that a running royalty structure would make economic sense for the parties because, at the time of the hypothetical negotiation, OEM car manufacturers were just beginning to introduce USB and Bluetooth connectivity for portable devices and (3) a per-unit royalty would have been preferred over a percentage of revenue royalty because “over time the infringing interface capability would have been bundled with other features and capabilities into an overall ‘package’ price” and “[e]vidence from Volkswagen indicates that the patented features have become standard.” (*See* Dkt. No. 265 at 7–9.)

The Court finds that Dr. Becker provided an adequate basis for his opinion that a running royalty is the appropriate structure. The fact that Volkswagen disagrees with Dr. Becker’s

interpretation of the facts does not make his opinion unreliable under *Daubert*. Accordingly, the Court will not strike Dr. Becker's opinion on the appropriate structure of a royalty between Blitzsafe and Volkswagen.

### CONCLUSION

For the reasons stated above, Volkswagen's Motion to Exclude Certain Testimony Under *Daubert* And To Strike Portions of the Report of Dr. Stephen Becker (Dkt. No. 235) is **DENIED**.

Blitzsafe has leave to serve a supplemental report disclosing Mr. McAlexander's opinion concerning the scope of the Affinity Labs patents and non-infringing alternatives no later than **January 16, 2017**. Upon service, the parties are **ORDERED** to meet-and-confer to discuss whether a short, additional deposition of Mr. McAlexander is needed and if so, the logistics of such deposition. Should Blitzsafe fail to supplement Mr. McAlexander's report, Volkswagen may reurge its motion to strike, and upon consideration, the Court may strike portions of Dr. Becker's damages to the extent he relies on Mr. McAlexander's undisclosed opinions.

**SIGNED this 10th day of January, 2017.**

  
ROY S. PAYNE  
UNITED STATES MAGISTRATE JUDGE