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

MAXELL, LTD., *Plaintiff*, v. APPLE INC., *Defendant*.	Case No. 5:19-cv-00036-RWS **JURY TRIAL DEMANDED** PUBLIC VERSION

MAXELL'S SUR-REPLY IN OPPOSITION TO APPLE'S *DAUBERT* MOTION TO EXCLUDE CONCLUSORY TESTIMONY AND OPINIONS OF MAXELL'S EXPERTS RELATING TO DOCTRINE OF EQUIVALENTS AND SOURCE CODE

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I. INTRODUCTION

Like its underlying Motion, Apple's Reply mischaracterizes and/or ignores the vast majority of the content that it seeks to exclude. Maxell's Opposition addresses each of Apple's challenges head on, identifying the significant analyses and evidence—including technical documentation, deposition testimony from Apple witnesses, and unchallenged portions of the reports—provided by each expert for their equivalents and source code opinions. But Apple sweeps all of this aside, insisting in conclusory fashion that the challenged opinions are inherently improper and viewable only in isolation. Similarly, with respect to Dr. Brogioli's equivalents opinions, Apple continues to distort the scope of the alleged estoppel, and still ignores the conflicting characterization of the pertinent claim amendment proffered by its own expert. Apple's Motion (Dkt. 367) is not supported by the facts or the law, and should be denied.

II. ARGUMENT

A. Apple fails to analyze, much less address, the challenged DOE opinions

Apple does not cite a single case for the proposition it urges—that the doctrine of equivalents opinions of Maxell's experts must be read in a vacuum divorced from the literal infringement analyses that frame their context. Nor has Apple addressed the "particularized testimony and linking argument as to the insubstantiality of the differences between the claimed invention and the accused device or process on a limitation-by-limitation basis" provided by Maxell's experts, and as identified in Maxell's Opposition (Dkt. 405 at 2-5). *Fractus, S.A. v. Samsung Elecs. Co.*, No. 6:12CV421, 2012 U.S. Dist. LEXIS 90398, at *24 (E.D. Tex. June 28, 2012).

First, Apple sidesteps controlling precedent, which permits an expert to rely on and incorporate, implicitly or explicitly, prior testimony into a doctrine of equivalents analysis. *Id.* at *25 ("the expert is not required to 're-start his testimony at square one when transitioning to a

doctrine of equivalents analysis. Instead, an expert may explicitly or implicitly incorporate his earlier testimony into the DOE analysis.") (citing *Paice LLC v. Toyota Motor Corp.*, 504 F.3d 1293, 1305 (Fed. Cir. 2007)). That is precisely what Maxell's experts have done. The "literal" infringement opinions identified in Maxell's Opposition are part and parcel with the particularized testimony provided regarding the insubstantial differences between the claimed inventions and the accused products. They also provide the context through which the jury will hear Maxell's doctrine of equivalents arguments. Apple casts the entirety of these opinions aside.

That issue notwithstanding, Apple has failed to analyze the specific paragraphs that it asks this Court to exclude, much less the supporting opinions and evidence identified in Maxell's Opposition. For example, Apple ignores: (1) Dr. Madisetti's discussion of how "[redacted]" (¶¶ 587-590), and how he specifically refers back to section X.B.3 (¶¶ 578-636) in support of his equivalents analysis; (2) Dr. Vojcic's explanation of how [redacted] (¶¶ 818-835), relying on source code and other technical documentation; (3) Dr. Rosenberg's explanation of how the accused products include a [redacted] relying on Apple testimony, videos, source code, and other technical documentation (¶¶ 516-640, 660); and (4) Dr. Maher's reliance on product testing, Apple testimony, source code, and other technical documentation for the "ringing sound generator" limitation (¶¶ 104-130, 167-193). Apple's arguments are entirely conclusory and should be disregarded.

B. Apple misapplies the law on prosecution history estoppel

Apple misstates the scope of the alleged estoppel. "[W]hen a claim is rewritten from dependent into independent form and the original independent claim is cancelled . . . the

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