

UNITED STATES INTERNATIONAL TRADE COMMISSION

Washington, D.C.

In the Matter of

**CERTAIN ACTIVE MATRIX
ORGANIC LIGHT-EMITTING DIODE
DISPLAY PANELS AND MODULES
FOR MOBILE DEVICES, AND
COMPONENTS THEREOF**

Inv. No. 337-TA-1351

ORDER NO. 60: GRANTING COMPLAINANT’S MOTION *IN LIMINE* NO. 1

(July 2, 2024)

On January 5, 2023,¹ Complainant Samsung Display Co., Ltd. (“Complainant”) moved (Mot. No. 1351-023) to exclude the testimony of Respondent Mianyang BOE Optoelectronic Technology Co., Ltd.’s (“BOE”) technical expert, Dr. Daniel Foty. Mot. at 1. According to Complainant, Dr. Foty does not qualify as a person of ordinary skill in the art under the definition I adopted in Order No. 28 and his testimony must therefore be excluded under *Kyocera Senco Indus. Tools Inc. v. Int’l Trade Comm’n*, 22 F. 4th 1369 (Fed. Cir. 2022). *Id.* BOE opposed the motion on June 28, 2024. The Commission Investigative Staff (“Staff”) also filed a response opposing the motion.

I. Parties’ Arguments

Complainant asserts that Dr. Foty fails to meet the definition of a person of ordinary skill in the art because he lacks experience in active matrix display design. Mot. at 1. Complainant

¹ On January 9, 2024, I issued an Initial Determination granting Respondents’ motion for summary determination due to lack of standing. Order No. 44. On April 24, 2024, the Commission vacated that determination and remanded the investigation for further proceedings “consistent with this opinion.” EDIS Doc. ID 819556.

therefore argues that, under the Federal Circuit’s decision in *Kyocera*, Dr. Foty’s testimony must be excluded. *Id.*

BOE makes three arguments for why Complainant’s motion should be denied. First, BOE argues that “Dr. Foty meets the definition of a POSITA because he has the requisite education and experience designing the type of circuits used in active matrix displays and electroluminescence.” Opp. at 1. Second, BOE argues that *Kyocera* “is inapplicable because in that case the parties agreed on the POSITA standard and agreed the witness in question was not a POSITA.” *Id.* Finally, BOE argues that “[Complainant’s] motion overreaches” and that Complainant failed to demonstrate that “the testimony is impacted in any way by what [Complainant] contends is Dr. Foty’s lack of experience.” *Id.* at 1-2.

Staff argues that Complainant “has waived any argument that Dr. Foty’s testimony should be excluded.” Staff Resp. at 3. Staff asserts that “[t]here is no dispute that the opinions . . . were timely disclosed in Dr. Foty’s opening and rebuttal expert reports.” *Id.* Staff notes that, while Complainant moved to strike other opinions offered by Dr. Foty, Complainant “did not seek to exclude any portion of the opening report on the basis that Dr. Foty was not one of ordinary skill.” *Id.* at 3-4. Staff therefore argues that Complainant “should not be allowed to raise an objection in a prehearing motion that could have been raised in a motion to strike the expert reports.” *Id.* at 4.

II. Background and *Kyocera*

This dispute involves the level of ordinary skill in the art with respect to U.S. Patent Nos. 7,414,599 (“the ’599 Patent”) and 9,330,593 (“the ’593 patent”). I previously defined the level of skill in the art for those two patents in the order construing certain claim terms. Order No. 28 (Sept. 11, 2023). In that order, I noted that Complainant proposed definitions for one of skill in its briefs, but Respondents did not. Order No. 28 at 12, 13. I further noted, however, that Dr. Foty provided opinions on the level of skill in his expert report. *Id.* After considering the proposals, I adopted the

definitions set forth by Complainant. *Id.* Specifically, for both patents, I found that “a person of ordinary skill in the art would have had a relevant degree in Electrical Engineering, Computer Engineering, Materials Science, Physics, or the like, and experience in active matrix display design and electroluminescence.” *Id.* In reaching this conclusion I stated:

As [Complainant’s] expert, Dr. Miltiadis Hatalis, explained: “The ’599 and ’593 Patents are directed to active matrix display technologies for organic light-emitting diode displays.” CMIB Ex. A at ¶ 20. It is therefore reasonable to expect one of skill to have specific experience with active matrix display circuitry and electroluminescence.

Id. at 12. Respondents never sought reconsideration or clarification of this order.

The facts at issue here bear a striking similarity to those at issue in *Kyocera*. In that investigation, respondent’s counsel filed a motion in limine to exclude the complainant’s technical expert, Dr. Pratt, on the grounds that Dr. Pratt did not qualify as a person of ordinary skill in the art. *Certain Gas Spring Nailer Prods. & Components Thereof* (“*Gas Spring Nailer*”), Inv. No. 337-TA-1082, Respondents’ Motion *in Limine* No. 1 (Oct. 9, 2019), EDIS Doc. ID 659014. The respondent noted that the ALJ had adopted a definition of a person of ordinary skill in the art that specifically required experience in powered nailer design. *Id.* at 2. Because Dr. Pratt did not have experience in power nailers, the respondent argued that his testimony should be excluded. *Id.*

In its opposition, the complainant argued that the level of ordinary skill in the art was disputed. EDIS Doc. ID 659970 at 4. The complainant further argued that Dr. Pratt was qualified to testify regardless of the definition of level of skill because, while he did not have specific experience in gas spring nailers, he had “decades of experience designing handheld power tools and fastener driving systems.” *Id.* at 5.

The ALJ granted-in-part the motion in limine. EDIS Doc. ID 667465. He found that “Dr. Pratt does not qualify as a person of ordinary skill in the art under the standard set forth in the *Markman* order.” *Id.* at 3. The ALJ noted that the complainant “had the opportunity to argue for a

different finding, but chose not to do so.” *Id.* After considering the relevant Federal Circuit cases, the ALJ found that it would be error to rely on Dr. Pratt’s testimony to support a finding of infringement based on the doctrine of equivalents. *Id.* at 4. The ALJ admitted Dr. Pratt’s testimony on other issues in the investigation. *Id.*

The decision was ultimately appealed to the Federal Circuit. There, the court reversed and held: “Because Dr. Pratt lacked ordinary skill in the art, the ALJ abused his discretion by admitting any of Dr. Pratt’s testimony.” *Kyocera*, 22 F.4th at 1376.

III. Whether Dr. Foty is a Person of Ordinary Skill in the Art

Complainant asserts that Dr. Foty does not meet the definition of a person of ordinary skill in the art because he lacks experience in active matrix display design. Mot. at 1. Staff appears to agree. Staff Resp. at 2 (“While having the relevant degrees, Dr. Foty does not have experience in active matrix design and electroluminescence.”); *id.* at 4 (“It was also clear from his reports that Dr. Foty did not have experience in active matrix design and electroluminescence as required under the definition of ordinary skill adopted in this investigation.”).

BOE argues that Dr. Foty does, in fact, qualify as a person of ordinary skill in the art. Tellingly, however, BOE does not argue that Dr. Foty specifically has experience in active matrix design and electroluminescence.² Instead, Respondents’ argument boils down to a contention that

² Dr. Foty admitted at his deposition that, while he had experience in general circuit design, he did not have experience in active matrix display design and electroluminescence. *See, e.g.*, Mot. Ex. E (Foty Dep. Tr.) at 62:17–22 (“Q. Have you ever worked on the design of circuitry for an active matrix display? A. I’ve worked on the same type of circuitry, which are general. I have worked on the LEDs. ***I have not specifically worked on displays***, but it’s the circuitry is general.”); *id.* at 63:1–4 (“Q. Okay, So just to be clear, you have not worked on circuitry for an active matrix display? A. ***Not one that is specifically tied to an active matrix display***.”); *id.* at 64:3–8 (“Q. Dr. Foty, do you have experience in active matrix display design? A. I have experience, as I said, with the circuitry behind it, ***not specifically with an active matrix display itself***.”); *id.* at 68:19–22 (“Q. Have you ever written articles or book chapters about active matrix displays? A. I’ve written a lot of things ***but not on that particular topic***.”); *id.* at 69:1–4 (Q. Have you been an invited speaker about active matrix displays? A. I’ve been an invited speaker numerous times ***but not on that particular topic***.”) (emphasis added).

such a fact is irrelevant, as Dr. Foty has equivalent experience. BOE asserts, for example, that Dr. Foty has “more than 30 years of experience [in] device design” and that, “his work has given him a deep understanding of the types of scan driver and pixel circuits at issue.” Opp. at 3. BOE further explains that Dr. Foty “has extensive experience with the types of circuits used in [active matrix] displays” and that “the type of transistor and circuit experience Dr. Foty has is directly relevant to the asserted patents.” *Id.* at 3, 4. BOE also contends that Dr. Foty’s “circuit and transistor expertise is directly applicable to active matrix display design.” *Id.* at 5. The fact that Dr. Foty has experience in related areas, however, is not the question. Rather, the question is whether Dr. Foty specifically has experience in active matrix design and electroluminescence. It is clear that he does not. To allow his testimony despite this fact would essentially require me to rewrite the definition of a person of ordinary skill in the art to include the language “or equivalent experience.” I decline to do so. As explained by the ALJ in the *Kyocera* investigation,

[T]he issue of the level of ordinary skill has already been ruled upon. [BOE] had the opportunity to argue for a different finding, but chose not to do so. Permitting [BOE] to re-litigate this issue would be unfair to [Complainant] and would also undermine the finality of such rulings in future investigations. [I] cannot accept a practice in which litigants are free to make additional arguments that they had the opportunity to make previously, but neglected to do so.

Order at 3-4.³

I therefore find that Dr. Foty does not meet the level of ordinary skill in the art for the ’599 and ’593 patents that I adopted in this investigation.

IV. Applicability of *Kyocera*

BOE argues that *Kyocera* is inapplicable because the parties did not dispute: (1) the level of ordinary skill in the art and (2) that Dr. Pratt did not meet that standard. Opp. at 5. While the

³ Nor am I persuaded by the argument that “in the ’599 patent’s *Inter Partes* Review proceeding, [Complainant’s] expert agreed a POSITA would have two to three years of circuit design and/or analysis experience.” Opp. at 4. The fact a different definition is used there does not alter the definition already adopted in this investigation.

complainant in *Kyocera* did not challenge those findings on appeal, it disputed the level of ordinary skill in the art before the ALJ and also argued that its expert had the relevant experience, even if he did not meet the precise definition set forth by the ALJ. *See* EDIS Doc. ID 69970 at 4, 5. Thus, the arguments made before the ALJ in *Kyocera* were similar to the arguments made here.

More importantly, however, the Federal Circuit did not provide any indication that its holding would change if *Kyocera* had disputed these issues. The Federal Circuit made it very clear that, if an ALJ finds that an expert does not meet the level of skill in the art he adopts in an investigation, it is an abuse of discretion for the ALJ to admit his testimony. *Kyocera*, 22 F.4th at 1376. There are no caveats for if the parties disagree with respect to the adopted standard.⁴

BOE also argues that “precedent applying *Kyocera* makes it clear that exclusion is not appropriate.” *Opp.* at 1. BOE cites to *Certain Polycrystalline Diamond Compacts & Articles Containing Same*, Inv. No. 337-TA-1236, ID, 2022 WL 897722, at *33 (Mar. 3, 2022), *relevant part unrev’d by Comm’n*, 2022 WL 15792877, at *3 (Oct. 26, 2022) (“*Polycrystalline*”). *Id.* at 6. According to BOE, “despite some mismatch with the POSITA definition, the ALJ found the expert ‘met the required level of skill.’” *Id.* In *Polycrystalline*, the ALJ adopted a level of skill that specified that “relevant experience [can] substitut[e] for education and vice versa.” *Id.* at * 33. The ALJ therefore held that, because the expert’s education exceeded the minimum, “it can substitute for experience.” *Id.* The definition I adopted here does not include such language and thus *Polycrystalline* is not applicable.

BOE also cites to *Certain Outdoor & Semi-Outdoor Elec. Displays*, Inv. No. 337-TA-1331, Order No. 17, 2023 WL 4145878 (June 9, 2023) (“*Outdoor*”). *Opp.* at 6. BOE explains that the ALJ denied the motion to exclude the technical expert. *Id.* at 6-7. In that case, however, the ALJ

⁴ Additionally, the parties’ disagreement as to whether Dr. Foty qualifies as a person of ordinary skill in the art has been resolved in this order. Even though BOE disagrees with this finding, *Kyocera* requires that I exclude the testimony.

clarified the definition of one of skill and determined that the expert qualified as one of skill under the clarified standard.⁵ *Outdoor*, 2023 WL 4145878, at *3 (“Taken as a whole, the current evidence of record indicates that Dr. Neikirk’s education and experience qualifies him as a person of ordinary skill in the art.”). Here, I decline to modify the standard I previously adopted.

BOE has not cited to any post-*Kyocera* cases in which a judge has concluded that an expert did not qualify as one of skill yet admitted his testimony anyway. Thus, the cited cases do not change my understanding that *Kyocera* held that it is an abuse of discretion to admit the testimony of an expert who is not qualified as a person of ordinary skill in the art.

V. Timing of Complainant’s Argument

Staff argues that Complainant waived this argument by failing to raise it earlier in the investigation. Staff Resp. at 3. It is at best unclear that I am free to admit the testimony, even if I were to find that Complainant’s failed to timely raise the issue. Additionally, the application of waiver is at my discretion, and, given the facts, context, and procedural posture specific to this investigation, I would not apply waiver even if the *Kyocera* precedent allowed me to do so.⁶ As noted above, the Federal Circuit found it to be an abuse of discretion to admit the testimony of an expert who did not meet the standard of a person of ordinary skill in the art. I will follow this holding, even if the timing of when the issue was raised is less than ideal.

VI. Scope of Testimony

Finally, BOE argues that Complainant can only seek to strike testimony on an “issue that is analyzed through the lens of an ordinarily skilled artisan.” Opp. at 8 (quoting *Kyocera*, 22 F.4th

⁵ The ALJ specifically noted that the “clarification is consistent with Complainant’s ‘alternative’ definition of one of ordinary skill in the art. . . , which was also adopted by the undersigned, and is further consistent with Respondents’ proposed definition.” *Id.* at * 3.

⁶ When examining whether waiver should apply, the Commission has stated that “[g]enerally, an ALJ has discretion to establish and enforce ground rules” *Certain Flash Memory Controllers, Drives, Memory Cards, & Media Players & Prod. Containing Same*, Comm’n Op., Inv. No. 337-TA-619, 2009 WL 4087136, at *13 (Nov. 24, 2009).

at 1377-1378). The Federal Circuit has explained that claim construction, validity, and infringement are all issues in which “a witness must at least have ordinary skill in the art.” *Kyocera*, 22 F.4th at 1377. The court specifically noted:

Without that skill, the witness’ opinions are neither relevant nor reliable. The opinions would not be based on any specialized knowledge, training, or experience that would be helpful to the factfinder. In fact, “[a]dmitting testimony from a person . . . with no skill in the pertinent art serves only to cause mischief and confuse the factfinder.” [*Sundance, Inc. v. DeMonte Fabricating Ltd.*, 550 F.3d 1356,1362 (Fed. Cir. 2008)]. That testimony would “amount[] to nothing more than advocacy from the witness stand.” *Id.* at 1364-65.

Id. With this in mind, I decline to admit Dr. Foty’s testimony.⁷ Even with respect to the limited portions of his testimony which do not bear on infringement or invalidity (such as the background of the invention), his testimony has limited relevance.

For these reasons, Complainant’s motion (1351-023) is GRANTED. The following portions of Dr. Foty’s Opening Witness Statement (RX-0003C) are hereby struck: Q/A 9-12 and 15-422. Additionally, the following portions of Dr. Foty’s Rebuttal Witness Statement (RX-1083C-NCT) are struck: at Q/A 3-7 and 10-160.

Within seven days of the date of this document, the parties shall submit to the Office of the Administrative Law Judges a joint statement as to whether they seek to have any portion of this document deleted from the public version. If the parties do seek to have portions of this document deleted from the public version, they must submit to this office a copy of this document with red brackets indicating the portion or portions asserted to contain confidential business information. The submission should be emailed by the aforementioned date and need not be filed with the Commission Secretary.

⁷ Complainant does not seek to exclude all of Dr. Foty’s testimony. The testimony that remains relates to Dr. Foty’s background, qualifications, the scope of his assignment, and compensation. See Mot. Ex. F. at Q/A 1-8, 13-14, 423-424; Mot. Ex. H at 1-2, 8-9, 161-162.

SO ORDERED.



Bryan F. Moore
Administrative Law Judge