

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2022-051638

01/19/2024

HONORABLE CHRISTOPHER COURY

CLERK OF THE COURT
S. Ortega
Deputy

BLACKHAWK NETWORK INC

DAVID A SELDEN

v.

S L CARD COMPANY INC

WILLIAM D FURNISH

ISAAC S CRUM
JUDGE COURY

**ORDER GRANTING IN-PART AND DENYING IN-PART MOTIONS TO EXCLUDE
TESTIMONY OF ROBERT STOLL, TIMOTHY NEWHOLM, AND STACY
FRIEDMAN**

The Court has reviewed and considered the following:

- A. Plaintiff's *Motion to Exclude Testimony of Robert Stoll*, filed November 17, 2023;
- B. *SL Card Company Inc.'s Opposition to Blackhawk Network Inc.'s Motion to Exclude Testimony of Robert Stoll*, filed December 18, 2023;
- C. Plaintiff's *Reply in Support of Motion to Exclude Testimony of Robert Stoll*, filed January 5, 2024;
- D. *Defendant-Counterclaimant SL Card Company Inc.'s Motion to Exclude Testimony and Opinions of Timothy E. Newholm*, filed November 14, 2023;
- E. *Blackhawk's Opposition to SL Card Company Inc. d/b/a Linq3's Motion to Exclude Testimony and Opinions of Timothy E. Newholm*, filed December 18, 2023;

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F. *SL Card Company Inc. 's Reply in Support of Its Motion to Exclude Testimony and Opinions of Timothy E. Newholm*, filed January 5, 2024;

G. *Defendant-Counterclaimant SL Card Company Inc. 's Daubert Motion to Exclude Testimony of Stacy Friedman*, filed November 17, 2023;

H. *Blackhawk's Opposition to SL Card Company Inc. d/b/a Linq3's Motion to Exclude Testimony of Stacy Friedman*, filed December 18, 2023; and

I. *SL Card Company Inc. 's Reply in Support of Its Motion to Exclude of Stacy Friedman*, filed January 5, 2024.

Although oral argument was requested, this Court does not believe it would be helpful.

THE COURT FINDS that Robert Stoll, Timothy Newholm and Stacy Friedman each have done a skillful job of weaving-in improper and prejudicial testimony with their legitimate opinions. Each of these proffered experts has skills and expertise that qualifies each to serve as an expert witness. However, each of the parties has attempted, at times, to use their proffered expert to offer testimony and opinions beyond their areas of expertise.

THE COURT FURTHER FINDS that there are objectionable opinions offered by each expert. There are also proper, helpful opinions offered by each expert. Recognizing each expert's lengthy report, the voluminous motions,¹ and the decisions of each party to not provide an exhaustive list of the particular paragraphs and sentences in each report they desire to have excluded (with each party, instead, opting to seek exclusion of the expert opinion in its entirety), the pending motions must be decided with general statements of law.² In rare instances, the Court will address individual paragraphs.

THE COURT FURTHER FINDS that the value and helpfulness of the testimony of the three experts is limited. Rather than untangling the permitted and prohibited opinions of each expert, justice will best be served by entering rulings of a general nature, and limiting the time each expert will be permitted to testify pursuant to the Court's authority pursuant to Rule 611, *Arizona Rules of Evidence*. Even though each expert will have a limited window of time to testify, the testimony of each expert still will be subject to objections (such as that the testimony is cumulative).

¹ The Court notes that, when printed, the three motions, the three expert reports, and the exhibits to the motion are over 6 inches thick.

²The Court is willing to appoint a Special Master to specifically implement this Court's rulings *infra* to specific paragraphs of each expert's Report and Rebuttal Report.

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THE COURT FURTHER FINDS that no attorneys' fees will be awarded to either party based on the arguments raised in these motions.

Good cause appearing,

IT IS ORDERED granting in-part and denying in-part Plaintiff's *Motion to Exclude Testimony of Robert Stoll*, filed November 17, 2023.

IT IS FURTHER ORDERED granting in-part and denying in-part Defendant-Counterclaimant *SL Card Company Inc.*'s *Motion to Exclude Testimony and Opinions of Timothy E. Newholm*, filed November 14, 2023.

IT IS FURTHER ORDERED granting in-part and denying in-part Defendant-Counterclaimant *SL Card Company Inc.*'s *Daubert Motion to Exclude Testimony of Stacy Friedman*, filed November 17, 2023.

IT IS FURTHER ORDERED denying all requests for attorneys' fees relating to these motions.

IT IS FURTHER ORDERED as follows with respect to all experts:

1. No expert shall be permitted to opine about the interpretation of any contract under Delaware law. This will not be helpful to the factfinder. Rule 702(a)-(c), *Arizona Rules of Evidence*. This prohibition includes opining about the interpretation and effect of the PDA. Those are issues for the Court to decide.
2. Experts may testify about the anatomy of a patent and patent application, what rights they do and do not provide, and the concepts and relationship between continuation / continuation-in-part application and their parent applications.
3. Experts may testify concerning the filing and prosecutions of patent applications by one or more parties in this case.
4. Experts shall not testify whether injunctive relief is available under the PDA.
5. Experts shall not testify about any person or party's state of mind, intent, and/or motive as that testimony is speculative and inadmissible.

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6. Experts shall not offer legal opinions, including opinions on patent law and trade secret law.
7. Consistent with Arizona law, experts will be permitted to rely on anything upon which they base their respective opinions. However, if a proper request has been made for the production of the documents an expert relied upon, and if such documents were not produced or timely disclosed, sanctions pursuant to Rule 37, *Arizona Rules of Civil Procedure* may be warranted. One such sanction is the exclusion of opinions based on the undisclosed or non-produced documents. This is not, however, an issue for this Rule 702 motion.
8. Having now reviewed the pending motions and exhibits attached thereto, and pursuant to Rule 611, *Arizona Rules of Evidence*, and based on the limited usefulness of the testimony of each expert, reasonable limits shall be imposed on the testimony of each expert. Each expert shall be permitted to testify for a maximum of 90 minutes – 40 minutes for direct examination and re-direct examination, 40 minutes for cross-examination, and 10 minutes for questioning from the factfinder.
9. If the parties desire a ruling on specific paragraphs of the various expert reports based on this ruling, the Court is willing to appoint a special master to consider objections to specific opinions.

IT IS FURTHER ORDERED as follows with respect to Mr. Stoll:

10. Even assuming *arguendo* that contract interpretation was an appropriate area for expert testimony in this case, Mr. Stoll is not qualified to opine about contract interpretation under Delaware law.
11. Mr. Stoll is qualified to, and may, testify concerning general practices and procedures employed by the United States Patent and Trademark Office in examining or reexamining patents.
12. Mr. Stoll shall not offer any testimony about whether any patent is a derivation or modification of “Preexisting Intellectual Property” as such term is defined in the PDA.
13. Mr. Stoll shall not testify whether injunctive relief is available at law.

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14. Mr. Stoll shall not testify concerning the sufficiency of the evidence on the issue of patent invalidity. He may testify about elements of the patent application that are sufficient and deficient, but shall offer no opinion on the ultimate question about whether a patent is valid.
15. Mr. Stoll may not offer legal conclusions and may not analyze technical evidence.
16. To assist the parties, a non-exhaustive list of some of Mr. Stoll's opinions that expressly are excluded, and are not excluded, are as follows:
 - a. Opinions Excluded: ¶¶ 27, 33, 49, 98, 127, 135, 155, 162-165, 17
 - b. Rebuttal Opinions Excluded: ¶¶ 31, 49
 - c. Opinions NOT Excluded: ¶¶ 25, 67, 68, 69, 108, 110, 121, 126, 132, 139-140, 147-153
 - d. Rebuttal Opinion NOT Excluded: ¶ 66

IT IS FURTHER ORDERED as follows with respect to Mr. Newholm:

17. The descriptions of the contents of Blackhawk's, L3's and e2's patents, applications, and their families (Report ¶¶ 77-185 and Rebuttal Report ¶¶ 18-21) are mostly factual. These are not opinions. Rather these are summaries that may be helpful to the factfinder, subject to Rule 403 and other objections. Both parties will have limited time with their respective experts at trial, so whether providing a "quick reference" is a judicious use of limited time is a matter left to the sound discretion of counsel.
18. Mr. Newholm's Report ¶ 174 is an opinion that is not relevant to this case.
19. Given that this will be a bench trial, the Court can disregard irrelevant information. However, the Court will be imposing reasonable limits on the time for all parties, and will not be expanding time to permit cumulative expert testimony.
20. To assist the parties, a non-exhaustive list of some of Mr. Newholm's opinions that expressly are excluded are as follows: Report ¶¶ 160, 174, 177

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IT IS FURTHER ORDERED as follows with respect to Mr. Friedman:

21. Mr. Friedman's technical background and expertise are unnecessary to explain non-technical documents.
22. After eliminating legal opinions, opinions on the meaning of the PDA, opinions on state of mind, intent and motivation – all of which are excluded for Mr. Friedman and all experts in this case – very few areas remain for Mr. Friedman to opine upon.
23. Mr. Friedman's narrative might be helpful to the factfinder. Explanations and definitions of technical terms in the industry (OLG Quick Ticket, QuickTicket V2, the Minutaglio concept, the Play Now product, and the Play at the Pump product) may be helpful to the factfinder. Mr. Friedman is qualified to testify about the comparison and contrasting of non-technical product feature descriptions, although this discussion may have limited-to-no helpfulness to the factfinder, depending on the nature of the testimony proffered.
24. Mr. Friedman is unqualified to offer opinions on rights provided by pending patent applications, what information qualifies as confidential, the effect L3's trademark application had on Blackhawk's branding, the economic value of alleged trade secrets, the effect a patent invalidity ruling has on IP rights, the relationship between contracts and IP, what information qualifies as a trade secret, the secrecy efforts sufficient to qualify something as a trade secret, the duty of candor owed to the PTO, the relevancy of the Szrek Patent to Blackhawks IP rights, and the relationship between a patent's claims and specifications.
25. The methodology used by Mr. Friedman does not meet the necessary reliability standard to satisfy Rule 702. His opinions based on this methodology, therefore, are unreliable and are excluded.