

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
WACO DIVISION

CPC PATENT TECHNOLOGIES PTY LTD.,)
Plaintiff,)
v.) Case No. 6:21-cv-00166-ADA
HMD GLOBAL OY,)
Defendant.)

**CPC PATENT TECHNOLOGIES PTY. LTD.'S MOTION TO EXCLUDE THE
TESTIMONY OF DR. CHRISTOPHER DAFT**

Plaintiff CPC Patent Technologies PTY. LTD.'S ("CPC") moves to exclude the rebuttal opinions and testimony of Defendant HMD Global OY's ("HMD") technical expert, Dr. Christopher Daft.

I. INTRODUCTION

Pursuant to Fed. R. Evid. 702, an expert may offer opinions when certain conditions are satisfied. The opinions expressed must be those of *the expert*. See Fed. R. Evid. 702(a). Further, the opinions must be "based on sufficient facts or data." Fed. R. Evid. 702(b). These requirements have resulted in corresponding limitations to the opinions that an expert can offer. First, an expert may not simply pass judgment upon the evidentiary sufficiency of what another expert has done, as such judgment does not comprise facts or data, and improperly supplants the role of the jury as fact finder. Secondly, an expert is not allowed to adopt as his own the opinions of another expert with a different expertise.

HMD has offered the "opinions" of Dr. Christopher Daft in rebuttal on the issue of infringement in this case. The bulk of Dr. Daft's report comprises his evaluation of the sufficiency of the evidence relied upon, and conclusion reached by, CPC's expert, Dr. Chuck Easttom. That

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Dr. Daft intentionally sought to limit the scope of his opinions in this fashion evidences the almost entire lack of any affirmative inquiry he made into the Accused Products themselves. Dr. Daft should not be allowed to offer unsupported opinions regarding legal conclusions that are reserved for the jury and/or judge. What's more, Dr. Daft should not be permitted to merely lecture the jury as to how to do its job in weighing evidence when he himself relied on little, if any, evidence for many limitations.

Instead, when stripped away of boilerplate verbiage, the few claim limitations which include evidentiary support in Dr. Daft's rebuttal report are merely a recounting of the work of another – an unnamed “software engineer” that performed the hands-on work with HMD's source code for the Accused Products. As discussed herein, there were myriad relevant topics regarding HMD's Accused Products about which Dr. Daft failed to make any inquiry of HMD. Dr. Daft should also not be allowed to take the stand to testify regarding what some other expert has done. Rather, the portions of his report intended to do any of the foregoing should be stricken, and any associated testimony should be excluded.

II. DISCUSSION

A. Dr. Daft Should Not Be Allowed To Usurp The Role Of The Jury

The law of this Court is that “expert testimony may not usurp the jury's authority to weigh conflicting evidence and make credibility determinations.” *Knudson v. Van Do*, 18-cv-237, 2019 WL 5026912 at *3 (W.D. Tex. June 30, 2019), citing *Skidmore v. Precision Printing & Pkg., Inc.*, 188 F.3d 606, 618 (5th Cir. 1999); and *Ray v. Iuka Special Mun. Separate Sch. Dist.*, 51 F.3d 1246, 1251 (5th Cir. 1995). Despite this prohibition, the majority of Dr. Daft's opinions expressed in his report do nothing more than pass judgment on the sufficiency of evidence relied upon by Dr.

Easttom. *See, e.g.*, Daft Rebuttal Report [Ex. C] at ¶¶ 75-78, 82, 84, 96-98, 100, 110, 112, 118, 131 and 141.

When asked at his deposition about the opinions set forth in these, and other, paragraphs in his rebuttal report, Dr. Daft doubles down on his purported role as evidentiary arbiter, as is evident from the following passages:

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Beyond these individual passages, Dr. Daft went so far as to label his testimony regarding his role as a rebuttal witness as a “refrain.” *See id.* at 61:24-62:9.

Consistent with his self-appointed role, Dr. Daft did not bother to make any independent inquiry into the following issues upon which he purported to render an opinion:

■ [REDACTED]

■ [REDACTED]

■ [REDACTED]

■ [REDACTED]

■ [REDACTED]

■ [REDACTED]

■ [REDACTED]

■ [REDACTED]

■ [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

As is clear from the foregoing, Dr. Daft eschewed performing his own affirmative analysis of the Accused Products – products which he had access through the party that retained him – in favor of offering commentary on the sufficiency of evidence upon which Dr. Easttom relies. This is the province of the jury, and it is not for Dr. Daft to usurp that role. *Knudson*, 2019 WL 5026912 at *3.

B. Dr. Daft Should Not Be Allowed to Parrot The Work Of Another Expert

Throughout his report, when the topic of source code arises, Dr. Daft refers to an unnamed “software engineer” that performed analyses of the source code for the Accused Products. Ex. C at ¶¶ 71, 80, 103, 104, 125, 126, 130 n.9, and 132; *see also* Ex. A at 9:15-18. As is clear from the general tenor of his report, Dr. Daft’s opinions relating to issues of source code result from another expert retained by HMD, who reviewed the code and generated log files of certain Accused Products. *See, e.g.*, Ex. C at ¶¶ 71, 80, 104, 125, 126, and 132. While “an expert may generally cite the conclusions of others in his field in offering his opinions, an expert may not parrot another expert’s opinions and offer them as his own.” *Escamilla v. C.R. Bard Inc.*, 19-CV-01103, 2021 WL 3761224 at *5 (W.D. Tex. Aug. 25, 2021), *citing* *Factory Mut. Ins. Co. v. Alon USA L.P.*, 705 F.3d 518, 524 (5th Cir. 2013) (an expert may not “simply parrot impermissible hearsay evidence, thereby allowing a party to circumvent the rules against hearsay”). Yet, when it comes to the

source code for the Accused Products, Dr. Daft repeatedly refers to what this source code engineer did. *See* Ex. C at ¶¶ 71, 80, 104, 125, 126, and 132.

During his deposition, Dr. Daft testified that the software engineer referenced in the rebuttal report, Bill Gatliff,¹ was retained by HMD counsel even before Dr. Daft was retained. Ex. A at 9:19-10:9. As Dr. Daft acknowledged, Mr. Gatliff has expertise in Android coding. *Id.* at 12:12-16. And, in fact, Mr. Gatliff possesses more expertise in that regard than Dr. Daft. *Id.* at 15:15-21.

Mr. Gatliff's analyses that Dr. Daft merely reiterated include: 1) reviewing the source code related to the [REDACTED] (Ex. C at ¶ 71); 2) searching the produced source code for the Accused Products for the [REDACTED] identified by Dr. Easttom (*id.* at ¶ 80); 3) checking the logs output from Accused Products during fingerprint enrollment and authentication for messages logged by the [REDACTED] (*id.*); 4) examining the [REDACTED] (*id.* at ¶ 103); 5) assisting with general source-code review (*id.* at ¶ 104); 6) examining the [REDACTED] (*id.* at ¶ 125); 7) inspecting the logs for the Nokia 8.3 5G (*id.* at ¶ 126); 8) generating a log for the accused G20 product (*id.* at ¶ 130, n.9); and 9) replicating Dr. Easttom's TKDN process using multiple Accused Products (*id.* at ¶ 132).

As to the integral nature of the work performed by Mr. Gatliff to his opinions, Dr. Daft testified "[w]hat Bill Gatliff and I did fully supports what the -- the opinions I'm expressing in this report," and Dr. Daft therefore "never felt a need to contact anyone at HMD." Ex. A at 103:14-20 (emphasis added). In other words, Dr. Daft took Bill Gatliff's word as truth, without exploring whether Mr. Gatliff's conclusions were supported by the knowledge of HMD. Dr. Daft further testified that "the exact class" he reviewed himself was [REDACTED]. *Id.* at 28:3-9. Put

¹ Dr. Daft did not disclose the identity of the software engineer during his expert report.

differently, the only example of code Dr. Daft could recall reviewing was this single class. This assertion, however, contradicts his rebuttal report, in which Dr. Daft states that he merely “worked with” Mr. Gatliff “to examine [REDACTED]” Ex. C at ¶ 103; *see also* Ex. A at 28:10-29:1. Looking at Dr. Daft’s report and testimony holistically, it is clear he improperly parrots Mr. Gatliff’s analyses and conclusions as his own. *Escamilla*, 2021 WL 3761224 at *5.

Further, the description of Mr. Gatliff’s analyses contained in Dr. Daft’s rebuttal report does not allow any determination of the reliability thereof. For example, [REDACTED] is a supplier of fingerprint biometric technology to HMD, and generally identifies the source code it produces with the software string [REDACTED] Ex. A at 55:7-11; Ex. C at ¶ 79. In reviewing the source code for the Accused Products, Mr. Gatliff found the [REDACTED] string in the source code for six Accused Products: [REDACTED] [REDACTED]. Ex. C at ¶ 80. Mr. Gatliff then “logged the enrollment and user-verification processes for those [accused] products,” but found the “[REDACTED] string in the source code for a single product – the [REDACTED], implying that such product was the only one loaded with [REDACTED] [REDACTED]. *See id.* at ¶ 80.

When asked why Mr. Gatliff’s logging failed to identify the other five Accused Products as having [REDACTED], Dr. Daft offered up the following hypothetical explanation:

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

Ex. A at 55:18-56:2 (emphasis added).

Then, pressed as to whether he [REDACTED]
[REDACTED]

██████████,” Dr. Daft responded that “I have not communicated with HMD on that point, but my experience in software development does not cause me to think that this is unusual.” *Id.* at 56:15-18. In other words, Dr. Daft explained away an obvious disconnect between the results of two analyses performed by Mr. Gatliff as being unsurprising and not unusual, having failed himself to inquire into the reasons for such disconnection.

On a related note, Dr. Daft lists in his expert report the logs supposedly generated by Mr. Gatliff. *Id.* at 53:13-20; Daft Rebuttal Report, Ex. B [Ex. B] at 3. However, when asked why Mr. Gatliff’s log files for certain Accused Products were missing from this list, Dr. Daft responded “I’m not sure of the reason for that.” Ex. A at 54:16-21. This omission and the inconsistency in Mr. Gatliff’s results evidence the reasoning behind prohibiting an expert from merely parroting the work of another. *See Escamilla*, 2021 WL 3761224 at *5. Dr. Daft’s “opinions” regarding source code and review of log files should, therefore, be excluded with the exception of his opinion regarding ██████████ the “exact class” and indeed only class Dr. Daft could recall reviewing himself. Ex. A at 28:3-9.

III. CONCLUSION

For the foregoing reasons, Dr. Daft’s rebuttal report, which improperly usurps the role of the factfinder, and merely expresses the opinions of another, should be stricken, and any associated testimony should be excluded.

Dated: March 2, 2023

Respectfully,

/s/ Darlene F. Ghavimi

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on March 2, 2023, pursuant to Local Rule CV-5, a true and correct copy of the foregoing was filed under seal with the Clerk of the Court via CM/ECF and served via electronic mail to all counsel of record.

/s/ Darlene F. Ghavimi
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