

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

BETTER MOUSE COMPANY, LLC,	§	
	§	
Plaintiff,	§	
	§	
v.	§	Case No. 2:14-cv-198-RSP
	§	
STEELSERIES APS, ET AL.,	§	
	§	
Defendants.	§	

DAUBERT ORDER

Pending before the Court is Plaintiff Better Mouse Company’s Motion to Strike Portions of the Rebuttal Expert Report and Exclude Testimony of Richard Eichmann. (Dkt. No. 226.) Mr. Eichmann is Defendant SteelSeries’s damages expert, and Plaintiff asserts that the Court should exclude Mr. Eichmann’s testimony stating that he determined the value of U.S. Patent No. 7,532,200 (the Asserted Patent or ’200 patent) using forward citation analysis. Plaintiff contends that Mr. Eichmann’s forward citation analysis is flawed because (1) “he failed to count citations to counterpart patents and applications, which share an identical or very similar disclosure” (Dkt. No. 226 at 1); and (2) “he failed to account for patent families, which are linked either directly or indirectly by a priority document and thus may also disclose the same idea as the related ‘Comparable Patent’” (Dkt. No. 226 at 2). For the following reasons, the Court will not exclude Mr. Eichmann’s testimony.

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); *see also Apple Inc. v. Motorola, Inc.*, 757 F.3d 1286, 1321 (Fed. Cir. 2014) (“Experts routinely rely upon other experts hired by the party they represent for expertise outside of their field.”); *TQP Dev. LLC v. 1-800-Flowers.com, Inc.*, Case No. 2:11-cv-248-JRG, 2015 WL 6694116, at *4 (E.D. Tex. Nov. 3, 2015) (“Dr. Becker was entitled to rely upon Dr. Jager’s technical analysis when constructing his damages model and presenting it to the jury.”).

“The relevance prong [of *Daubert*] requires the proponent [of the expert testimony] to demonstrate that the expert’s ‘reasoning or methodology can be properly applied to the facts in issue.’” *Johnson v. Arkema, Inc.*, 685 F.3d 452, 459 (5th Cir. 2012) (quoting *Curtis v. M & S Petroleum, Inc.*, 174 F.3d 661, 668 (5th Cir. 1999)). “The reliability prong [of *Daubert*] mandates that expert opinion ‘be grounded in the methods and procedures of science and . . . be more than unsupported speculation or subjective belief.’” *Johnson*, 685 F.3d at 459 (quoting *Curtis*, 174 F.3d at 668).

In assessing the “reliability” of an expert’s opinion, the trial court may consider a list of factors including: “whether a theory or technique . . . can be (and has been) tested,” “whether the theory or technique has been subjected to peer review and publication,” “the known or potential rate of error,” “the existence and maintenance of standards,” and “general acceptance” of a theory in the “relevant scientific community.” *Daubert*, 509 U.S. at 593–94; *see also Kumho Tire*

Co., Ltd. v. Carmichael, 526 U.S. 137, 150 (1999) (“*Daubert* makes clear that the factors it mentions do *not* constitute a ‘definitive checklist or test.’”); *U.S. v. Valencia*, 600 F.3d 389, 424 (5th Cir. 2010).

“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

1. Failure to count similar disclosures

Plaintiff asserts that “[t]he Court should strike Mr. Eichmann’s forward citation count because it ignores citations to related patents that disclose the same technology, thereby grossly undercounting the number of relevant forward citations.” (Dkt. No. 226 at 4.) Plaintiff states that the Court should follow *Oracle*, where the Northern District of California held “that failing to include citation counts to patents (in that case, predecessors to a reissue patent) that have ‘the same specification and drawings’ was a fatal flaw in [an] expert’s forward citation count.” (Dkt. No. 226 at 4 (citing *Oracle Am., Inc. v. Google, Inc.*, No. C 10–03561 WHA, 2012 WL 877125 (N.D. Cal. Mar. 15, 2012).)

SteelSeries responds with two points. First, SteelSeries states that “[t]he use of forward citation analysis as an indicator of patent value has wide acceptance in the economic literature spanning over twenty five years.” (Dkt. No. 248 at 4.) Second, SteelSeries argues that contrary to Plaintiff’s attempts to frame this case as *Oracle*, Mr. Eichmann conducted his analysis in a

manner that is consistent with the academic literature. (*See* Dkt. No. 248 at 8 (“[A]cademic literature focuses on forward citation of individual patents, not patents and counterparts or patent families or other related patents, and thus, citations to a patent are compared to the citations to those patents in its peer group.”).)

The Court finds that Mr. Eichmann’s testimony clears *Daubert* because it is sufficiently relevant and reliable. SteelSeries has shown that Mr. Eichmann’s testimony is relevant because he has tied the 2009 Immersion License (the 2009 License) to the ’200 patent using technological analysis from Plaintiff’s infringement expert Dr. Samuel Russ. (Dkt. No. 248-6 ¶52.) Dr. Russ states that the ’200 patent is technologically comparable to four patents in the 2009 License, and he established their comparability to the ’200 patent on four independent grounds. (Dkt. No. 226-4 ¶¶42, 46, 51, 52.) Mr. Eichmann agrees with Dr. Russ’ analysis. (Dkt. No. 272 at 3 (“As required in a rebuttal report, Mr. Eichmann assumed for the sake of argument that Dr. Russ correctly identified comparable patents.”).)

To the extent Plaintiff claims that forward citation analysis is never relevant for patent valuation, the Court rejects that claim. No binding authority states that forward citation analysis is per se not relevant to the facts of any case. Instead, the Federal Circuit has said that “damages models are fact-dependent,” *Commonwealth Sci. & Indus. Research Org. v. Cisco Sys., Inc.*, 2015-1066, 2015 WL 7783669, slip. op., at 11 (Fed. Cir. Dec. 3, 2015), and that it is the duty of the party offering a model to sufficiently tie the model to the facts of the case in which the model is being applied, *Summit 6*, 802 F.3d at 1296. Here, SteelSeries has submitted publications which show that citation numbers correlate with patent value in several fields. (*See* Dkt. No. 248-6 ¶54 n.112.) That at least provides some indication that the basic premises necessary for a forward citation analysis to apply are present in this case. *But cf. VirnetX, Inc. v. Cisco Sys., Inc.*, 767

F.3d 1308, 1332 (Fed. Cir. 2014) (“Anyone seeking to invoke the theorem as applicable to a particular situation must establish that fit, because the 50/50 profit-split result is proven by the theorem only on those premises. Weinstein did not do so. This was an essential failing to invoking the Solution.”).

Finally, SteelSeries has shown that Mr. Eichmann’s methodology is reasonably reliable. Mr. Eichmann described how he implemented his forward citation analysis. He states that he estimated the value of the four patents in the 2009 License relative to the remaining 278 patents in the 2009 License by finding, in the 2009 License, “other patents that were comparable to the [four patents in the 2009 License] [] on the basis of similarity of technology and age.” (Dkt. No. 248-6 ¶55.) He “then compared the number of times that these comparable patents were cited to the number of times that the [four patents in the 2009 License] were being cited to get an indication of their value.” (Dkt. No. 248-6 ¶55.) SteelSeries has provided the data that Mr. Eichmann relied on in Exhibit 6 of his report and has listed the criteria by which Mr. Eichmann analyzed that data. (*See* Dkt. No. 248-6 ¶55 ex.6.) Plaintiff can use this information to challenge any perceived weaknesses in Mr. Eichmann’s analysis on cross-examination. *See Daubert*, 509 U.S. at 569 (“Vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence.”).¹

¹ The Court notes that Mr. Eichmann’s failure to count cites to related patents is analogous to the issue raised in *Oracle*. The Court finds, however, that the plaintiff in *Oracle* made a showing, not made here, that the difference in outcomes was so significant as to render the analysis unreliable on those facts. Forward citation analysis can be both relevant and reliable. So, when an expert establishes that forward citation analysis applies and that she has implemented it in a testable manner, whether she has implemented it in the best manner should be raised at trial. The Court does not read *Oracle* to propose a blanket rule that in every forward citation analysis cites to related patents must always be counted.

2. Failure to perform independent analysis

Plaintiff asserts that Mr. Eichmann's analysis is not reliable because he "cherry picked four patents" from the 2009 License and treated them as the only patents in the License comparable to the '200 patent. (Dkt. No. 226 at 7.) Plaintiff claims that Mr. Eichmann should have confirmed that these patents constituted "a fair analogy to the patent-in-suit." (Dkt. No. 226 at 7.) SteelSeries points out that Mr. Eichmann "merely assumed that [Plaintiff's] experts were correct for the sake of rebuttal, and pointed out further flaws in their analysis regarding the value of these patents." (Dkt. No. 248 at 11.)

The Court has consistently said that the Federal Rules of Evidence prevent an expert from relying on testimony that she believes is wrong. The Court has found this type of reliance barred because "Rule 703 [] allows an expert to rely on information [s]he has been made aware of [only] 'if experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion on the subject.'" *Apple*, 757 F.3d at 1321; *see TQP Dev.*, 2015 WL 6694116, at *4; *ZiiLabs Inc., Ltd. v. Samsung Elecs. Co. Ltd.*, Case No. 2:14-cv-203-JRG-RSP, Dkt. No. 506 at 7 (E.D. Tex. Dec. 3, 2015). Regardless of field, the Court has noted that it is unreasonable for an expert to rely on an expert that she deems wrong.

The Court, however, finds that principle does not apply here. Mr. Eichmann critiques the way in which Plaintiff's damages expert, Justin Blok assigns values to the patents in the 2009 License. Mr. Eichmann cannot critique Mr. Blok's method without accepting, as true, at least some of the premises on which his analysis is based. Furthermore, the Court notes it can be reasonable for an expert to selectively disagree with another expert.²

² The issue of improper expert reliance arises when two experts disagree on the same issue and one expert draws an ultimate conclusion based on the testimony of the expert that she disagrees

CONCLUSION

SteelSeries has shown that Mr. Eichmann's testimony is relevant and reliable. Plaintiff Better Mouse Company Motion to Strike Portions of the Rebuttal Expert Report and Exclude Testimony of Richard Eichmann (Dkt. No. 226) is **DENIED**.

SIGNED this 4th day of January, 2016.



ROY S. PAYNE
UNITED STATES MAGISTRATE JUDGE

with. For example, when an alleged infringer's expert relies on the patentee's expert's testimony on the contested plain and ordinary meaning of a term to show that an asserted patent is invalid.