UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES – GENERAL

Case No.	ED CV17-00890 JAK (SHSx)	Date	April 7, 2020
Title	Eloqui Voice Sys., LLC v. Nuance Commc'ns., Inc.		

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Present: The Honorable	JOHN A. KRONSTADT, UNITED STATES DISTRICT JUDGE
Cheryl Wynn	Not Reported
Deputy Clerk	Court Reporter / Recorder
Attorneys Present for Plaintiffs:	Attorneys Present for Defendants:
Not Present	Not Present

Proceedings: **(IN CHAMBERS) MOTION TO EXCLUDE EXPERT TESTIMONY OF DR. ERIC FRUITS UNDER DAUBERT (DKT. 163); MOTION TO EXCLUDE EXPERT TESTIMONY OF DRS. WALTERS & CHASKI (DKT. 164); MOTION FOR PARTIAL SUMMARY JUDGMENT AS TO DAMAGES (DKT. 178); MOTION FOR SUMMARY JUDGMENT AS TO NON-INFRINGEMENT (DKT. 180); MOTION FOR SUMMARY JUDGMENT AS TO SECTION 112 INVALIDITY (DKT. 182); MOTION TO EXCLUDE EXPERT TESTIMONY OF DR. RICHARD ROBINS AND BENOIT DINELLO (DKT. 184); MOTION TO STRIKE NUANCE'S THIRD AFFIRMATIVE DEFENSE IN ANSWER TO COMPLAINT (DKT. 186)**

I. Introduction

Eloqui Voice Systems, LLC ("Plaintiff") brought this action against Nuance Communications, Inc. ("Defendant") alleging infringement of four patents. Complaint, Dkt. 1. On March 31, 2017, Plaintiff filed a First Amended Complaint ("FAC") that included claims of infringement as to three of the original asserted patents: U.S. Patent No. 6,144,938 ("the '938 Patent"), U.S. Patent No. 6,334,103 ("the '103 Patent"), and U.S. Patent No. 7,058,577 ("the '577 Patent") (collectively, "the Asserted Patents"). FAC, Dkt. 17.

This Order addresses seven pending motions: (i) Defendant's Motion to Exclude Expert Testimony of Dr. Eric Fruits Under Daubert (Dkt. 163); (ii) Defendant's Motion to Exclude Expert Testimony of Drs. Walters & Chaski (Dkt. 164); (iii) Defendant's Motion for Partial Summary Judgment as to Damages (Dkt. 178); (iv) Defendant's Motion for Summary Judgment as to Non-Infringement (Dkt. 180); (v) Defendant's Motion for Summary Judgment as to Section 112 Invalidity (Dkt. 182); (vi) Plaintiff's Motion to Exclude Expert Testimony of Dr. Richard Robins and Benoit Dinello (Dkt. 184); and (vii) Plaintiff's Motion to Strike Nuance's Third Affirmative Defense in Answer to Complaint (Dkt. 186).

For the reasons stated in this Order, Defendant's Motion to Exclude Expert Testimony of Drs. Walters & Chaski (Dkt. 164) is **GRANTED**, Defendant's Motion for Summary Judgment as to Non-Infringement (Dkt. 180) is **GRANTED**, and all remaining pending motions (Dkts. 163, 178, 182, 184, 186) are **MOOT**.

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II. Factual Background

A. The Asserted Patents

The Asserted Patents are all members of the same patent family. The '577 Patent is a continuation of the '103 Patent. '577 Patent at 1:7-11. The '103 Patent is a continuation of the '938 Patent. The Asserted Patents share the same title ("Voice User Interface with Personality"), identical inventors, substantially the same specifications, and all relate "to user interfaces and, more particularly, to a voice user interface with a personality."[1] '938 Patent at 1:15-17. Plaintiff represents that, through an assignment, it is the owner of the Asserted Patents. FAC, ¶¶ 8, 11, 14.

Plaintiff alleges that Defendant's Nina Virtual Assistant Platform "controls the voice user interface to provide the voice user interface with a verbal personality" and infringes Claim 43 of the '938 Patent, Claim 105 of the '103 Patent, and Claim 1 of the '577 Patent (collectively, "the Asserted Claims"). *Id.* at ¶¶ 39, 41, 53, 67. All of the Asserted Claims are independent claims.

Asserted Claim 43 of the '938 Patent is a method claim that recites:

> 43. A method for a voice user interface with personality, the method comprising:
> storing a recognition grammar in a memory, the recognition grammar comprising multiple phrases that a virtual assistant with a personality can recognize when spoken by a user, the recognition grammar being selected based on the personality of the virtual assistant;
> executing a voice user interface, the voice user interface outputting first voice signals, the voice user interface recognizing speech signals; and
> controlling the voice user interface to provide the voice user interface with a verbal personality.

'938 Patent at 46:28-39.

Asserted Claim 105 of the '103 Patent is an apparatus claim that recites:

> 105. A computer-readable medium having a computer program accessible therefrom, the computer program comprising instructions for:
> executing a voice user interface, the voice user interface outputting first voice signals; the voice user interface recognizing speech signals; and
> controlling the voice user interface to provide the voice user interface with a personality;
> wherein tie [sic] personality emulates human verbal behavior for a particular personality.

'103 Patent at 53:16-25.

[1] To facilitate the discussion in this Order, the '938 Patent is the one cited unless another patent is specifically referenced.

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Asserted Claim 1 of the '577 Patent is a method claim that recites:

> 1. A method for implementing a voice user interface with personality, comprising:
> selecting a personality from a plurality of personalities;
> defining a dialog based on the selected personality, wherein the dialog emulates human verbal behavior for the selected personality; and
> developing a recognition grammar, wherein the recognition grammar is developed to enable the voice user interface with personality to recognize user spoken commands.

'577 Patent at 45:2-11.

During claim construction, a single disputed term, "personality," was construed as "the totality of spoken language characteristics that simulate the collective character, behavioral, temperamental, emotional, and mental traits of human beings in a way that would be recognized by psychologists and social scientists as consistent and relevant to a particular personality type." Dkt. 154 at 1.

III. <u>Analysis</u>

A. Legal Standards

1. <u>*Daubert* Standard</u>

Fed. R. Evid. 702 states,

> A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise 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. "Rule 702's 'helpfulness' standard requires a valid scientific connection to the pertinent inquiry as a precondition to admissibility." *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 591-92 (1993). Trial courts must conduct a "preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts in issue." *Id.* at 592-93. *Daubert*'s gatekeeping obligation applies to all expert testimony, not just "scientific" testimony. *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 147 (1999). In making a reliability determination, courts "scrutinize not only the principles and methods used by the expert, but also whether those principles and methods have been properly applied to the facts of the case." Fed. R. Evid. 702 Advisory Committee's Note (2000 Amendment).

2. Summary Judgment

Summary judgment is appropriate where the record, read in the light most favorable to the non-moving party, shows that "there is no genuine dispute as to any material fact and the movant is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(a); *see Celotex Corp. v. Catrett*, 477 U.S. 317, 323-24 (1986). Material facts are those necessary to the proof or defense of a claim, as determined by reference to substantive law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A factual issue is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id.*

In deciding a motion for summary judgment, "[t]he evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor." *Id.* at 269. The burden initially is on the moving party to show an absence of a genuine issue of material fact or to show that the non-moving party will be unable to make a sufficient showing on an essential element of its case for which it has the burden of proof. *Celotex*, 477 U.S. at 323. Only if the moving party meets its burden must the non-moving party produce evidence to rebut the moving party's claim and demonstrate a genuine issue of material fact. *Id.* at 322-23. If the non-moving party meets this burden, then the motion must be denied. *Nissan Fire & Marine Ins. Co. v. Fritz Cos.,* 210 F.3d 1099, 1103 (9th Cir. 2000).

3. Direct Infringement

Determining patent infringement is a two-step process. *Cybor Corp. v. FAS Techs., Inc.*, 138 F.3d 1448, 1454 (Fed. Cir. 1998). "First, the court determines the scope and meaning of the patent claims asserted, and then the properly construed claims are compared to the allegedly infringing device." *Id.* (citations omitted). "Whether an accused device or method infringes a claim either literally or under the doctrine of equivalents is a question of fact." *Schoell v. Regal Marine Indus., Inc.*, 247 F.3d 1202, 1207 (Fed. Cir. 2001). Because the ultimate burden of proving infringement rests with the patentee, an accused infringer may establish that summary judgment is proper "either by providing evidence that would preclude a finding of infringement, or by showing that the evidence on file fails to establish a material issue of fact essential to the patentee's case." *Novartis Corp. v. Ben Venue Labs., Inc.*, 271 F.3d 1043, 1046 (Fed. Cir. 2001). If the moving party meets this initial burden, the burden shifts to the party asserting infringement to set forth, by affidavit or as otherwise permitted under Rule 56, "specific facts showing that there is a genuine issue for trial." *Anderson*, 477 U.S. at 248.

The patentee also bears the burden of proving infringement under the doctrine of equivalents. *Am. Calcar, Inc. v. Am. Honda Motor Co.,* 651 F.3d 1318, 1338-39 (Fed. Cir. 2011). The equivalence of a proposed substitute for a missing element is a question of fact. *See Warner-Jenkinson Co. v. Hilton Davis Chem. Co.*, 520 U.S. 17, 38–39 (1997).

B. Application

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1. Defendant's Motion to Exclude Testimony of Walters/Chaski

Defendant seeks to exclude the testimony of three of Plaintiff's experts: Dr. Keith Walters, Dr. Carole Chaski, and Dr. Eric Fruits. *See* Dkts. 163, 164. Walters and Chaski have offered opinions regarding whether it is possible to determine if Defendant's accused product has a personality as that term has been construed in the context of the asserted claims.

Walters is a professor in the Department of Applied Linguistics at Portland State University. He previously held tenure-track positions at the Ohio State University and the University of Texas at Austin. Infringement Expert Report of Dr. Keith Walters ("Walters Infringement Report"), Dkt. 164-3 at 5. Walters has taught courses in "sociolinguistics, discourse analysis, and rhetorical analysis," which he states are "all relevant to understanding questions in forensic linguistics generally and relevant to this case in particular." *Id.* at 6. Walters explains "sociolinguistics" as "concerned with variation, including stylistic variation, in language, particularly spoken language and the ways that people create identities for themselves as individuals and members of the various groups to which they belong (or to which they aspire to belong) through the use of language and other semiotic resources." *Id.* at 5.

Chaski is the CEO/President at ALIAS Technology LLC. Infringement Expert Report of Dr. Carole Chaski ("Chaski Report"), Dkt. 164-4 ¶ 3. Chaski states that her responsibilities "include developing ALIAS: Automated Linguistic Identification and Assessment System™, directing other coders, training users of ALIAS™, providing consultant services in forensic linguistics . . . and supervising staff support linguists." *Id.* Chaski has a Ph.D. in Linguistics with a specialization in Syntax, Computational Linguistics, and Language Change, as well as other degrees in Linguistics, Psychology of Reading, and Ancient Greek. *Id.* ¶ 2. Much of Chaski's experience relates to forensic linguistics, which is the application of linguistic principles to the forensic context of the law. *See generally id.* ¶¶ 2-8.

Plaintiff served the expert reports of Walters and Chaski on May 21, 2018. Each report focuses on whether the accused product infringes the Asserted Patents, and specifically whether the accused product is a voice user interface with a personality. Defendant served expert reports, including the expert report of Richard Robins regarding invalidity, on June 18, 2018. On July 16, 2018, Plaintiff served another report by Walters. Although the second Walters report is titled "Dr. Walters' Rebuttal Invalidity Report," it includes references to the legal standards for both infringement and invalidity. Dkt. 164-5 ("Walters Rebuttal Report"), ¶¶ 14-37. It also includes additional materials that Walters apparently considered with respect to infringement issues, but were not included in the Walters Infringement Report. *Compare id.* at 5-8 *with* Walters Infringement Report at 36-39. Walters refers to Robins' understanding of the term "personality" as construed in this matter, and the report then states, "I analyze the term 'personality' ***as applicable to the particular product in question***." Walters Rebuttal Report ¶ 40 (emphasis added). Therefore, the Walters Rebuttal Report addresses questions of patent infringement despite being titled "Rebuttal Invalidity Report." *See also* Dkt. 170 at 20 (Plaintiff's Opposition to Defendant's Motion to Exclude Walters and Chaski, stating, "Nuance correctly points out that Dr. Walters' opinions are tied solely to the issue of infringement; he does not address the issue of invalidity."); *but see* Dkt. 211 ¶ 8 (Plaintiff's Statement of Genuine Disputes of Material Facts Regarding Defendant's Motion for Summary Judgment of Invalidity, disputing that Walters' opinions are only related to infringement). Defendant took

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Walters' deposition on July 26, 2018. *See* Deposition of Keith Walters ("Walters Tr."), Dkt. 164-2. Defendant elected not to take Chaski's deposition.

Defendant argues that Walters and Chaski must be excluded from testifying for two reasons. *First*, they are not qualified to offer opinions on the relevant issue of whether the accused product has a "personality." *Second*, their opinions are not based on scientifically valid methodology. Defendant separately argues that the Walters Rebuttal Report must be excluded under Fed. R. Civ. P. 37 because it was not timely disclosed.

The opposition to the motion to exclude attaches additional declarations from Walters and Chaski. *See* Declaration of Dr. Keith Walters in Support of Plaintiff's Opposition ("Walters Decl."), Dkt. 170-1; Declaration of Dr. Carole Chaski in Support of Plaintiff's Opposition ("Chaski Decl."), Dkt. 170-2. The reply argues that these declarations must also be excluded under Fed. R. Civ. P. 37.

a) Chaski/Walters Declarations in Support of Opposition

The declarations of Chaski and Walters have been submitted in support of Plaintiff's opposition to the motion to exclude. They include extensive responses to the arguments that Defendant made in support of the motion. As Defendant observes, the Chaski Declaration is significantly longer than the Chaski Report. The Walters and Chaski declarations each includes references to the reports of the declarant. The declarations also include additional, previously undisclosed statements regarding the methodology that Walters and Chaski each undertook in preparing his or her report.

As Plaintiff acknowledges, Fed. R. Civ. P. 26(a)(2)(B) requires that an expert's report contain "a complete statement of all opinions the witness will express and the basis and reasons for them." Fed. R. Civ. P. 26(a)(2)(B); *see* Dkt. 170 at 19. Fed. R. Civ. P. 37(c)(1) provides that "[i]f a party fails to provide information . . . as required by Rule 26(a) . . . the party is not allowed to use that information . . . to supply evidence on a motion . . . unless the failure was substantially justified or is harmless." Fed. R. Civ. P. 37(c)(1).

Discovery in this matter has closed and the parties have filed certain dispositive motions. To the extent the declarations submit new expert opinion, they are not harmless. Defendant has not had the opportunity under the current schedule to conduct further discovery into the new opinions. It was also prejudiced because it could not take the declarations into consideration in filing its dispositive motions.

Plaintiff also fails to provide substantial justification as to why the opinions of Chaski and Walters that are stated in the declarations should be considered. Plaintiff suggests, with respect to later statements by Walters in the Walters Rebuttal Report, that Walters' statements are "not substantively different to testimony that was elicited from Dr. Walters at his deposition, or that which would be elicited at trial when he is asked to elaborate on his infringement opinion." Dkt. 170 at 20. Plaintiff does not make a similar representation as to the Chaski and Walters declarations.[2] To the extent the declarations provide new

[2] At the hearing, Plaintiff for the first time asserted that the declarations were "simply to address

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opinions not previously disclosed in the expert reports, they are **STRICKEN** and will not be considered for any purpose in this action.

b) The Walters Infringement Report and Walters Rebuttal Report

i. Meaning of the Term "personality"

The parties' core dispute regarding whether Walters should be permitted to testify in this matter relates to whether his testimony is consistent with the meaning of the term "personality" in the claims as construed.

"Personality" was construed in the Asserted Claims as "the totality of spoken language characteristics that simulate the collective, character, behavioral, temperamental, emotional, and mental traits of human beings ***in a way that would be recognized by psychologists and social scientists*** as consistent and relevant to a particular personality type." Dkt. 154 at 1 (emphasis added). Thus, for a voice user interface to have "personality" under this construction, a psychologist or social scientist[3] must recognize that the totality of spoken language characteristics of the voice user interface simulate traits of human beings in a way consistent and relevant to a particular personality type. Based on the construction, Defendant effectively argues that a professional in the area of psychology or social science must be able to establish a link between the language used by the voice user interface and a particular personality type.

In one brief, Plaintiff appears to agree with Defendant regarding this understanding of the term "personality":

> The Court's construction of the personality term is clear. Personality is defined to include "personality types," not just a particular personality. The phrase ("in a way that would be recognized by psychologists and social scientists as consistent and relevant to a particular personality type") within that definition of personality confirms that the phrase itself is premised on the understandings of psychologists and social scientists. Those understanding are based on the totality of spoken language characteristics. In no way does Eloqui read the Court's construction to allow the recognition of personality type(s) to be subjective, as Nuance contends.

Dkt. 208 at 8 (Plaintiff's Opposition to Defendant's Motion for Summary Judgment of Invalidity).

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mischaracterizations in the briefing process and not to supplement or further add to or add weight or change the testimony that was previously presented." Hearing Tr., Dkt. 243 at 23:4-8. This position is not fully supported by the extensive opinions provided in the Walter and Chaski declarations, and provides an insufficient basis for those declarations to be permitted.

[3] At the hearing, Defendant suggested that because the claim construction for the term "personality" uses the phrase "psychologists ***and*** social scientists," an individual must be qualified as both to opine regarding the term "personality" as used in the asserted claims. It is not necessary to decide this issue given the ruling on the present motion.

In another brief, however, Plaintiff states,

> Nuance misinterprets the Court's construction of the term "personality" by implying that an expert must be experts [sic] in the field of personality typing. On the contrary, the Court's construction requires an analysis of spoken language characteristics in a way that would be recognized as ***relevant to*** a particular personality type. The Court's construction does not require that NINA exhibit a "particular personality type", or that a CA-licensed psychologist (of which Dr. Robins is not) set forth a formal analysis finding. The Court's construction requires only that products infringing the Asserted Claims exhibit characteristics that could be ***consistent with and relevant to*** a particular personality type.
>
> Nuance's rationale for non-infringement, that the linguistic experts did not conduct a 'personality-type analysis', mischaracterizes the parameters of the Court's claim construction which talks about language characteristics that would be recognized by [. . .] social scientists as consistent and relevant to a particular personality type and does not require the 'identification' of a particular personality type.

Dkt. 198 at 6-7 (emphasis and alterations in original) (Plaintiff's Opposition to Defendant's Motion for Summary Judgment of Non-Infringement).

There is one consistent thread in Plaintiff's stated understanding of the term "personality." It is that, at a minimum, a social scientist must recognize language characteristics as consistent and relevant to a particular personality type. Plaintiff's assertion that a voice user interface is not required to have a "personality type," and instead need only have characteristics consistent with and relevant to a particular personality type, is supported by the language of the construction. However, it is not clear how an identification of characteristics consistent with and relevant to a particular personality type could be ascertained unless a personality type is first identified.

Immediately after introducing the definition of "personality," the specification of the Asserted Patents provides examples of personality types. '938 Patent at 3:30-33 ("For example, personality types include the following: friendly-dominant, friendly submissive, unfriendly-dominant, and unfriendly-submissive."). The Asserted Patents also explain that in one embodiment, the preliminary stages of creating a voice user interface with personality require defining the market requirements, defining the application requirements, and choosing a personality for the voice user interface. *See, e.g.*, '938 Patent, Fig. 3; *see also id.* 4:60-5:21 ("[i]n particular, those skilled in the art of, for example, social psychology review the application requirements, and they then determine which personality types best serve the delivery of a voice user interface for the functions or services included in the application requirements.").

ii. Walters' Opinions

The determination that Walters' opinions fail to meet the standards for admissibility under *Daubert* is the same even assuming the preliminary identification of a personality/personality type is not necessary under the construction for this term. Defendant has provided conclusive testimony from Walters

demonstrating that his opinions are not based on his own recognition of language characteristics consistent with and relevant to a personality type. Instead, Walters' opinions relate to whether a user would perceive the accused product as having a personality type (as well as whether Defendant had the goal of producing an accused product with a personality type):

> Q So if you were going to give advice to another linguist, another linguist calls you up and says, I heard you did this, I heard you assessed the personality of a virtual assistant, tell me how to do that? How would you advise him or her?
>
> A I'm uncomfortable with the way you phrase the question.
>
> Q Please rephrase it for me.
>
> A I don't perceive that I have assessed the personality of a virtual assistant. What I have done is analyze data of various kinds, empirical data that relates not -- well, there are some self-report data. Much of this data is empirical data, not self-report. So I'm not relying on questionnaires, for example. I'm looking at the data and I'm analyzing them and saying, here is what comes up. Okay. We repeatedly see references to -- if not the word "personality," the word "persona," personalized experience. All of these sorts of things that lead me to conclude that ***Nuance's goal*** was to create a voice user -- a virtual assistant that would fall into the category of a voice user interface with personality, as I understand that term, as constructed in the Markman order. ***And so I am not assessing personalities. I am talking about what Nuance has done or is doing***, I'm talking about their product, and I'm talking about responses to their product.
>
> Q I think that's fair. I remember reading your first report and repeatedly asking myself, well, what is it? What personality type --
>
> A Right.
>
> Q -- is Dr. Walters saying NINA has?
>
> A Right.
>
> Q And I think you're saying that's not what I was doing.
>
> A Right.
>
> Q I didn't come to the end and say, ah-ha, she's passive aggressive friendly, right?
>
> A Right. And I don't think that -- let me just stop there and say yes, I agree with you. It was not -- I am not a di- -- I am not a diagnostician and I'm certainly not a personality psychologist. ***So I am neither trained nor authorized to start attaching labels, certainly not clinical labels, in cases like this. Okay. <u>As a human being I see the</u>***

> ***NINA video and I have a response*. But that's different from a clinician who is authorized to, on the basis of whatever evidence they feel they might need, make an assessment**.
>
> Q I understand. And that's why you were, I think, talking about how the user interacts with NINA.
>
> A Right.
>
> Q So your opinion was not, I've identified a personality type in NINA and this is it.
>
> A Right.
>
> Q You didn't do that. Is that correct? You didn't do that?
>
> A That's a fair assessment, yes.
>
> Q ***You looked at all the evidence and you said it's clear to me that the users perceived NINA as having a personality***?
>
> A ***Yes***.
>
> Q And you also looked at marketing materials from Nuance where Nuance is saying hey, we built this thing with a persona. Maybe they didn't use --
>
> A Personality. Exactly. Sure.
>
> Q Correct. Okay.
>
> A Right.
>
> Q So you couldn't, then -- or you corrected me. ***You wouldn't, then, say to a colleague, here's how you assess the personality type of NINA***?
>
> A No. I don't assess anyone's personality, whether human or dead plants. I don't assess their personalities. Right.

Walters Tr. 72:17-75:19; *see also id.* 161:10-162:4, 181:22-182:3 ("Q. And really, what we're focused on is what's going on in the mind of the end user interacting with the virtual assistant. A. That's certainly a piece of it. And a piece of it also is what the folks at corporations like Nuance understand that whole process to be about."); 188:8-12.

Walters' methodology is not proper in light of the facts in issue because it is inconsistent with the construction of the term "personality." Under Walters' method, the primary focus is not on his own

identification of whether the overall spoken characteristics of the voice user interface are relevant to a particular personality type. Instead, he considers what he thinks would be the perceptions and expectations of others -- specifically, users -- in interacting with a voice user interface that has a personality. *See, e.g.*, Walters Infringement Report ¶ 63. This is inconsistent with the claim construction in this case. It requires, at a minimum, that a psychologist or social scientist evaluate a voice user interface with personality such that the psychologist or social scientist can determine whether the voice user interface has language characteristics consistent with and relevant to a personality type.

The outcome is also not changed even if Walters' approach based on user perception were deemed appropriate under the construction of the term "personality." Certain testimony by Walters suggests that, without performing a complex statistical survey considering many individuals and how they would perceive a particular voice user interface, it would not be possible to determine the personality type of a voice user interface with personality. *See* Walters Tr. 134:5-139:18; 161:10-162:4. Walters' testimony suggests that a complex statistical survey would also be required just to determine if users generally would perceive a voice user interface to have any personality. Walters acknowledges that he has not performed such an analysis. *See id.* at 162:25-163:2. Plaintiff does not sufficiently explain how Walters' methodology of simply reviewing materials relating to Defendant's accused product and hypothesizing as to how a user would perceive the accused product based on those materials is a scientifically valid methodology. Thus, it is not consistent with Walters' testimony regarding the subjective nature of this analysis and what would be required to conduct a more objective one.

At the hearing, Plaintiff argued that Walters' analysis involves "direct" or "indirect indexicality." This is a methodology that relies on studying language cues such as diction to assess whether certain of those cues may be relevant to assessing a personality type. Hearing Tr., Dkt. 243 at 19:19-20:2. According to Plaintiff, although Walters did not personally identify a personality type for NINA, his methodology would enable a fact finder to do so. Later in the hearing, Plaintiff suggested instead that its experts did indeed perform an analysis leading them to conclude that NINA has traits relevant to a particular personality type. *See, e.g.*, Hearing Tr. at 41:3-6 ("I think that a factfinder would recognize a personality type that the social scientists themselves recognized in their analysis."). These positions are inconsistent and also conflict with the evidence presented. Walters' deposition testimony shows that, rather than providing opinions on an method a fact finder could use to assess NINA's personality type, he was analyzing Defendant's marketing materials and customer responses to Defendant's product in reaching his opinion that a customer could find NINA has traits consistent with a personality type.[4]

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[4] Defendant also argues that Walters' analysis, which assesses whether a user would conclude NINA has traits consistent with a particular personality type, would effectively undermine the claim construction for the term "personality." It argues that it would convert the inquiry to one that applies the term "personality" in its commonly-understood sense. Defendant adds that, rather than attempting to determine and opine on the understanding of psychologists and social scientists about what traits are consistent and relevant to a particular personality type, Walters' analysis simply applied what a user considers a "personality" and concluded the user has identified a "personality" as required by the claims. Defendant argues that this approach is not appropriate because, as Walters testified, "a user will always anthropomorphize a VUI [["voice user interface")]. A user will always see a personality, as they're using it in the lay sense, in a VUI." Hearing Tr. at 44:7-10. Defendant also argues that under this interpretation of the term "personality," the asserted claims are indefinite. These matters provide added support for

Because Walters takes methodological approaches that are inconsistent with the claim construction for "personality" that apply, his testimony is not relevant or reliable in this matter. Accordingly, Defendant's motion to exclude is **GRANTED** as to Walters.[5]

c) The Chaski Report

The sole basis for the opinions included in the Chaski Report is the review of Defendant's marketing materials. Plaintiff has, in effect, acknowledged that the Chaski Report does not rely on the accused product itself. Dkt. 170 at 20-21. The Chaski Report includes 19 paragraphs. The first 13 are the introduction, and include Chaski's qualifications, the materials considered, and an identification of the construction of the term "personality" in this case. The final six paragraphs include quotations from Defendant's marketing materials and observations/conclusions based on them. Chaski concludes by stating, "[i]n sum, it is my conclusion, ***based on the statements of Nuance and its customers***, that Nuance's Nina is an embodiment of a virtual assistant with personality consistent with the claim's construction of personality[.]" Chaski Report ¶ 19 (emphasis added).

Although Chaski states that she has extensive knowledge in the field of forensic linguistics, her report does not state her qualifications to opine on whether the accused product has a personality as that term has been construed. Moreover, in opining that the accused product has a personality, Chaski does not refer to her education and experience or any form of scientific methodology. Instead, the conclusion in the Chaski Report is premised exclusively on the review of Defendant's marketing materials. The opinions provided in the Chaski Report are insufficient to meet the *Daubert* standard. As Defendant observes, and for the same reasons stated with respect to Walters, the proffered opinions are also insufficient to address the term "personality" in this case. It has been defined to require spoken language characteristics "that would be recognized by psychologists and social scientists as consistent and relevant to a particular personality type."

Plaintiff briefly addressed why the opinions in the Chaski Report (and Chaski Declaration) are appropriate. Dkt. 170 at 20. The core of that argument is:

> [w]hile Nuance may find it beneficial to attempt to cloud the record by attaching particular descriptor [sic] to evidence relied on in forming Eloqui's infringement opinion, it is notable that Nuance's own expert relied on similar material when forming his own opinion. Dr. Chaski further details her methodology and use of evidence in forming her opinion in her declaration.

Id. at 21.

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the conclusion that Walters' methodology is unreliable as applied to the matters at issue.

[5] Because all of Walters' opinions must be excluded on the basis of relevance, it is not necessary to address whether the Walters Rebuttal Report must be stricken under Fed. R. Civ. P. 37 as an untimely disclosure of expert opinion.

Plaintiff fails adequately to address the issues raised by Defendant regarding the Chaski Report. As previously stated, Plaintiff also has not provided a sufficient basis to rely on the untimely Chaski Declaration. Therefore, Defendant's motion to exclude is **GRANTED** as to Chaski.

2. Defendant's Motion for Summary Judgment of Non-infringement

Defendant also seeks summary judgment on the ground that the accused product does not infringe the relevant claims of the Asserted Patents. Dkt. 180. Through the arguments and evidence presented in support of its motion, Defendant met its initial burden of showing that the evidence is not sufficient to show that there is a genuine issue of fact as to certain required elements of Plaintiff's case. *See Novartis*, 271 F.3d at 1046. Therefore, the burden shifted to Plaintiff to provide evidence sufficient to show that such a genuine issue of fact remains as to the claimed infringement. Although the testimony of Chaski and Walters would not be admitted at trial for the reasons stated above, Plaintiff states that it has submitted publicly-available information from Defendant and other sources. Plaintiff contends that this is sufficient to show a triable issue as to the allegations of infringement. Plaintiff has also submitted testimony by two other experts "capable of reviewing the more technical aspects of Nuance's NINA." Dkt. 198 at 6. In the reply in support of the motion, Defendant states that neither is qualified to opine as to the term "personality." Dkt. 229 at 10-11.

Defendant argues that "Eloqui must rely on expert testimony in order to demonstrate infringement, but none of Eloqui's experts provide[s] any opinion on whether the Accused Product possesses 'the totality of spoken language characteristics that simulate the collective character, behavioral, temperamental, emotional, and mental traits of human beings'." Dkt. 229 at 5. Defendant adds that "personality" has been construed to require an assessment of the totality of spoken language characteristics "that would be recognized ***by psychologists and social scientists*** as consistent and relevant to a particular personality type." *Id.* at 9 (emphasis added). Defendant argues that, without presenting a qualified expert psychologist or social scientist who can opine about the meaning of the term "personality" as used in the claims, Plaintiff cannot demonstrate infringement.

It is not necessary to reach the issue whether expert testimony would be required for Plaintiff to prove infringement. The evidence submitted by Plaintiff other than the excluded testimony of Walters and Chaski is insufficient for Plaintiff to show a triable issue of fact in support of its claims.

In Plaintiff's Additional Material Facts in support of its opposition to Defendant's motion for summary judgment of non-infringement (Dkt. 205), Plaintiff relies on Exhibits 21 through 27 to its opposition (Dkts. 199-21 – 199-27) as evidence to support infringement. Exhibits 21 and 22 are excerpts from Plaintiff's responses to Defendant's requests for admissions. They admit that "the Nina Nuance Intelligent Virtual assistant product uses Nuance Vocalizer Expressive." *See* Dkt. 199-21 at 2, Dkt. 199-22 at 4. Exhibits 23 through 25 are single-page bates-numbered pages. There is no explanation of their source or authenticity. *See* Dkt. 199-23 – 199-25. On this basis alone, they are inadmissible and cannot provide the basis to show a triable issue of fact as to infringement.[6] *See* Fed. R. Evid. 901(a) ("To satisfy the

[6] Defendant's objections on this basis are **SUSTAINED**. *See* Dkt. 222 (Defendant's Responses to Plaintiff's

requirement of authenticating or identifying an item of evidence, the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is").

Further, Exhibits 23 through 25 do not refer to the accused product. Exhibit 23 refers to "Vocalizer Expressive" and Exhibit 25 refers to "The Modern Voice." Even setting aside these shortcomings, the language highlighted in these exhibits does not refer to a voice user interface with personality as required by the claims. At most, they refer to a voice sounding "natural" (Exhibits 23-24) and "human-like" (Exhibit 25). There is no evidence that supports the position that "natural" or "human-like" speech is the same as speech exhibiting characteristics that would be recognized by psychologists or social scientists as consistent with a personality type. Exhibits 26 and Exhibits 27 are excerpts of Walters' deposition transcript, and are excluded on the same basis as his expert report. Dkt. 199-26, Dkt. 199-27.

Plaintiff also states that there is a triable issue because "Nuance's materials cite NINA's implementation and expression of 'personality' and specific 'persona attributes', which could each be considered analogous to a 'personality type', and can be indirectly indexed to particular linguistic features or practices exhibited by the NINA system." Dkt. 202 ¶ 14. To support this position, Plaintiff cites only one page of the Walters Infringement Report. Plaintiff does not otherwise explain the relevance of evidence cited in the Chaski and Walters reports. Therefore, these materials, which relate only to inadmissible expert testimony, are not sufficient to show a triable issue of fact in support of Plaintiff's claim of infringement.

Finally, after expert disclosures were made in accordance with the Scheduling Order, Plaintiff for the first time states that Dr. Kal Toth, another one of its experts, is qualified to opine on whether the accused product includes a "personality" as that claim term has been interpreted. Dkt. 202 ¶ 4 (disputing that "Dr. Toth is not trained in assessing personality types" and stating, "Dr. Toth is a professional software engineer trained to assess the programmed functionality of a program architecture, including those programs designed to simulate verbal characteristics related to personality types through the development of a programmed 'persona profile' that 'defines the unique intonation, diction, phasing, duration, expression, and other verbal characteristics of the assistant.")

The opinions of Toth that Plaintiff has cited are not relevant to whether the accused product has a personality as required by the asserted claims. *See* Excerpts of Expert Report of Kal Toth, Dkt. 199-4. Although Toth refers to the virtual assistant as having a "personality builder," Toth does not state or opine that the "personality builder" has a personality. Nor does he identify spoken language characteristics that would be recognized by a psychologist or social scientist as consistent with and relevant to a particular personality type. *Id.* For these reasons, the proffer of the opinions of Toth, even if timely disclosed, is not sufficient to show genuine issue of material fact regarding the claim term "personality."

For these reasons, there is not a triable issue of fact as to infringement. Plaintiff has not submitted admissible evidence in response to Defendant's motion sufficient to show that there is triable issue as to whether the accused product has a "personality" as required by the claims. Accordingly, Defendant's motion for summary judgment of non-infringement is **GRANTED**.

Additional Facts regarding Defendant's motion for summary judgment of non-infringement). All other objections to evidence submitted with respect to Defendant's summary judgment motion or Plaintiff's opposition to it are **OVERRULED** to the extent the challenged evidence is considered and relied on in this Order.

3. Parties' Other Pending Motions

Defendant has filed an answer in this matter, which includes affirmative defenses of non-infringement, invalidity and unclean hands. *See* Dkt. 18 at 10-14. Defendant has not brought any counterclaims. Because no triable issues as to infringement have been shown, and Defendant's motion for summary judgment of non-infringement is granted, the remaining motions are **MOOT**.

One of the pending motions is to strike Defendant's affirmative defense of unclean hands. Dkt. 186. This motion is moot because summary judgment has been granted based on non-infringement. Moreover, the motion to strike was not timely filed. *See* Fed. R. Civ. P. 12(f).

Another pending motion addresses whether the Asserted Patents are invalid under 35 U.S.C. § 112. Dkt. 182. Once again, it is not necessary to address this issue because the motion for summary judgment on non-infringement has been granted. Therefore, the invalidity motion is moot. Also moot is Plaintiff's *Daubert* motion to exclude the testimony of Defendant's experts with respect to non-infringement and invalidity. Dkt. 184. The invalidity opinions of Defendant's expert need not be considered in light of the non-infringement. Plaintiff's *Daubert* motion also challenges the qualifications of Defendant's experts. Because the conclusions reached in this Order as to non-infringement do not rely on the opinions of Defendant's experts, the *Daubert* challenge is also moot.

Two the pending motions were brought by Defendant and address issues as to claimed damages. *See* Dkts. 163, 178. These are also moot, because without a showing of infringement, damages are unavailable.

For these reasons, the remaining motions are not addressed in this Order because they are **MOOT**.

IV. Conclusion

For the reasons stated in this Order, Defendant's Motion to Exclude Expert Testimony of Drs. Walters & Chaski is (Dkt. 164) is **GRANTED**, Defendant's Motion for Summary Judgment as to Non-Infringement (Dkt. 180) is **GRANTED**, and all remaining pending motions (Dkts. 163, 178, 182, 184, 186) are **MOOT**.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES – GENERAL

Case No.	ED CV17-00890 JAK (SHSx)	Date	April 7, 2020
Title	Eloqui Voice Sys., LLC v. Nuance Commc'ns., Inc.		

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On or before April 17, 2020, the parties shall meet and confer regarding the form of a proposed final judgment. The form of proposed judgment shall be lodged by Defendant on or before April 24, 2020. If Plaintiff agrees to the form of the proposed judgment, it shall sign the proposed judgment with that language placed adjacent to its signature. If Plaintiff disputes the form of the proposed judgment, it shall file any objections on or before May 1, 2020. The Court will then resolve any disputes and enter the corresponding judgment.

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