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UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

BLAST MOTION, INC., a California corporation,  Plaintiff,  v. ZEPP LABS, INC., a Delaware corporation,  Defendant.
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Case No.: 15-CV-700 JLS (NLS)

**ORDER DENYING PLAINTIFF  
BLAST MOTION, INC.’S RENEWED  
MOTION TO PRECLUDE EXPERT  
TESTIMONY**

(ECF No. 68)

Presently before the Court is Plaintiff Blast Motion, Inc.’s Renewed Motion to Preclude Claim Construction Expert Testimony. (“Mot.,” ECF No. 68.) Also before the Court are Defendant Zepp Labs, Inc.’s Response in Opposition to, (“Opp’n,” ECF No. 75), and Plaintiff’s Reply in Support of Plaintiff’s Motion, (“Reply,” ECF No. 76). The Court vacated the hearing on the matter and took it under submission pursuant to Civil Local Rule 7.1(d)(1). (ECF No. 72.) After considering the parties’ arguments and the law, the Court **DENIES** Plaintiff’s Renewed Motion to Preclude Expert Testimony.

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## BACKGROUND

The Court set the following claim construction schedule pursuant to the Court's Scheduling Order, (ECF Nos. 28, 42):

Action	Due Date
Exchange List of Proposed Claim Terms	November 16, 2015
Exchange Preliminary Constructions (Patent L.R. 4.1(a)) and Identify Extrinsic Evidence (Patent L.R. 4.1(b))	November 20, 2015
Exchange Responsive Constructions (Patent L.R. 4.1(c)) and Identify Extrinsic Evidence (Patent L.R. 4.1(d))	December 11, 2015
Complete and File Joint Claim Construction Chart, Joint Claim Construction Worksheet, Joint Hearing Statement (Patent L.R. 4.2)	December 21, 2015
Close of Claim Construction Discovery	January 25, 2016
Opening Claim Construction Briefs	March 10, 2016
Responsive Claim Construction Briefs	March 24, 2016

On November 20, 2015, the parties exchanged Preliminary Claim Constructions and identified extrinsic evidence. (Mot. 5,<sup>1</sup> ECF No. 68-1.) At that juncture, Defendant provided a preliminary list of extrinsic evidence on which it would rely, including that it intended to rely on testimony from its expert, Dr. Steven Nesbit, to support Defendant's claim construction positions. (*Id.*) Defendant also provided the following summary of the substance of Dr. Nesbit's testimony:

Dr. Nesbit will opine as to the level of understanding of a person of ordinary skill in the art at the relevant time, and how such a person would understand the meaning and scope of the claim terms identified in the charts above. Dr. Nesbit will also opine as to whether any terms

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<sup>1</sup> Pin citations to docketed material refer to the CM/ECF numbers electronically stamped at the top of each page.

1 would not have been understood by a person of ordinary skill in the art  
2 as of the priority dates of the asserted patents and whether the  
3 specification is inadequate or fails to teach one of ordinary skill in the  
4 art to make and use the claimed invention.

5 (Opp'n 7, ECF No. 75 (citing Declaration of Lauren E. Whittemore ("Whittemore Decl."),  
6 Ex. A, at 6).)

7 On December 11, 2015, the parties exchanged responsive claim construction  
8 positions, including their identifications of extrinsic evidence. (Mot. 5, ECF No. 68-1.) In  
9 connection with these disclosures, Defendant stated that it intended to use additional  
10 testimony from Dr. Nesbit regarding the disputed terms and content of Defendant's  
11 asserted patents. (Opp'n 7, ECF No. 75 (citing Whittemore Decl., Ex. B, at 7-8).) That  
12 statement read:

13  
14 Dr. Nesbit will opine as to the level of understanding of a person of  
15 ordinary skill in the art at the relevant time, and how such a person  
16 would understand the meaning and scope of the claim terms identified  
17 in the charts above. Dr. Nesbit will also opine as to whether the terms  
18 would be understandable to a person of ordinary skill in the art as of the  
19 priority dates of the '441 Patent and the '610 Patent, respectively, and  
20 whether the specification teaches one of ordinary skill in the art to make  
21 and use the claimed invention.

22 (*Id.*)

23 At no point during these preliminary exchanges did Plaintiff object to the substance  
24 of Defendant's above statements. To the contrary, Plaintiff acknowledged Defendant's  
25 disclosure and stated that "[w]hile [Plaintiff] does not believe any expert testimony is  
26 needed, [Plaintiff] hereby reserves the right to offer rebuttal expert testimony to rebut any  
27 [Defendant] expert testimony, to the extent [Plaintiff] finds such rebuttal testimony  
28 necessary." (*Id.* (citing Ex. C, at 29).) On December 18, 2015, Plaintiff emailed Defendant  
disclosing Dr. Kenneth A. Zeger as an expert and stated that "[w]hile [Plaintiff] maintains

1 the position that expert testimony is not necessary for these claim construction proceedings,  
2 [Plaintiff] would reserve the right to use Dr. Zeger for rebuttal expert testimony to the  
3 extent [Defendant] intends to introduce any such testimony.” (Opp’n 8, ECF No. 75.)

4 The parties met and conferred to finalize the Joint Claim Construction Worksheet,  
5 Sheets and Hearing Statement, which they filed on December 21, 2015. (Mot. 5, ECF No.  
6 68-1.) In the Joint Hearing Statement, Defendant again indicated that it would rely on the  
7 expert testimony of Dr. Nesbit in connection with its claim construction positions. (*Id.*)  
8 That statement read:

9  
10 Zepp proposes to call Dr. Steve Nesbit to provide testimony regarding  
11 the understanding of one of ordinary skill in the art as to the meaning  
12 of the proposed terms for construction. Dr. Nesbit will testify that based  
13 on teachings in U.S. Pat. No. 8,989,441 and knowledge of one of  
14 ordinary skill in the art, he understands what the “modules” are as well  
15 as the scope of claims including the “module” terms. Dr. Nesbit will  
16 also testify that the use of “said data” in U.S. Pat. Nos. 8,944,928,  
17 8,905,855, 8,941,723, and 8,903,521 is indefinite due to a lack of a clear  
18 antecedent basis. Specifically, Dr. Nesbit will testify that based on the  
19 disclosures in the Blast Motion patents as well as the language of the  
20 claims, it would not be clear to one of ordinary skill in the art what “said  
21 data” refers to in the claims. Dr. Nesbit will also testify as to the  
22 meaning of the terms “avatar” and “virtual reality display/virtual reality  
23 system” to one of ordinary skill in the art based on the teachings in the  
24 ’928 and ’855 patents and the statements made during prosecution of  
25 those patents. Finally, Dr. Nesbit will also testify that based on the  
26 disclosures and knowledge of one of ordinary skill in the art he does  
27 not understand the scope of the claims including the term “slow motion  
28 display...at normal speed.” Zepp reserves the right to call Dr. Nesbit to  
the stand to provide rebuttal testimony, if required.

(ECF No. 38, at 8–9.)

In a draft prior to filing the Joint Hearing Statement, Plaintiff officially objected to  
Defendant’s use of Dr. Nesbit’s testimony on the grounds that the Patent Local Rules  
require a more substantive disclosure so that Plaintiff could determine if it disputed Dr.

1 Nesbit's positions and/or whether it needed a rebuttal expert. (Mot. 6, ECF No. 68-1 (citing  
2 ECF No. 38, at 9); Opp'n 8-9, ECF No. 75.) Thus, Plaintiff requested that there be no  
3 expert testimony at the claim construction hearing and alternatively reserved its right to  
4 provide rebuttal expert testimony. (Mot. 6, ECF No. 68-1.) At no point during this time  
5 did Defendant supplement its statements regarding Dr. Nesbit's testimony, nor did  
6 Defendant provide Plaintiff with Dr. Nesbit's CV. (*Id.*) Claim construction discovery  
7 concluded on January 25, 2016. (ECF No. 28.) Plaintiff never issued a notice of deposition  
8 or propounded any discovery relating to Dr. Nesbit or his testimony. (Opp'n 9, ECF No.  
9 75.)

10 On March 21, 2016, Plaintiff filed its original Motion to Preclude Claim  
11 Construction Expert Testimony. (ECF No. 56.) The Court denied as moot Plaintiff's  
12 original motion after it issued a stay of the case on March 29, 2016. (ECF No. 62.) On  
13 October 4, 2016, roughly a month after the Court lifted the stay, (ECF No. 66), Plaintiff  
14 filed the instant Renewed Motion to Preclude Claim Construction Expert Testimony. (ECF  
15 No. 68.)

### 16 LEGAL STANDARD

17 Federal Rule of Civil Procedure 12(f) permits a court to "strike from a pleading an  
18 insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." Fed.  
19 R. Civ. P. 12(f).<sup>2</sup> The function of a motion to strike is to avoid the unnecessary  
20 expenditures that arise throughout litigation by dispensing of any spurious issues prior to  
21 trial. *Sidney-Vinsein v. A.H. Robins Co.*, 697 F.2d 880, 885 (9th Cir. 1983). However,  
22 courts generally disfavor motions to strike "because of the limited importance of pleading  
23 in federal practice, and because they are often used as a delaying tactic." *Neilson v. Union*  
24 *Bank of Cal., N.A.*, 290 F. Supp. 2d 1101, 1152 (C.D. Cal. 2003); *see also State of Cal. ex*  
25 *rel State Lands Comm'n v. United States*, 512 F. Supp. 36, 38 (N.D. Cal. 1981) ("Motions  
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28 <sup>2</sup> Plaintiff characterizes its motion as a motion to strike. (Mot. 4 n.1, ECF No. 68-1.) Accordingly, the Court considers Plaintiff's arguments with this standard in mind.

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