

UNITED STATES INTERNATIONAL TRADE COMMISSION
WASHINGTON, DC

In The Matter Of

CERTAIN SILICON MICROPHONE
PACKAGES AND PRODUCTS
CONTAINING SAME

337-TA-825

ORDER NO. 14: REGARDING RESPONDENTS' MOTIONS IN LIMINE NO. 6
(September 24, 2012)

On September 7, 2012, Analog Devices, Inc., (ADI) Amkor Technology, Inc. (Amkor), and Avnet, Inc. (Arvnet) (collectively, "Respondents") filed Motion in Limine No. 6 (MiL 6) to exclude the Rebuttal Witness Statement of Mr. Phillip Green, a witness of Complainant Knowles Electronics, LLC (Knowles). (Motion Docket No. 825-021.) Respondents allege Mr. Green's opinion of the commercial success of the asserted claims of the patents-in-suit and the commercial success of Knowles products is outside the scope of his expertise and thus lacks foundation. Hence, Respondents assert Mr. Green fails to provide any evidence to support the nexus between the asserted patents and the commercial success of the Knowles MEMS products and cannot do so because he is not qualified to opine on what features resulted in their commercial success.

Essentially, Respondents argue that under *Daubert* (*Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 597 (1993) and *Kumho* (*Kumho Tire Company, Ltd. V. Carmichael*, 525 U.S. 137, 141 (1999)), I should act as gatekeeper and consider Mr. Green's opinions to be unreliable because they will not help me as trier of fact, even though the matter is not before a jury. Respondents argue Mr. Greens testimony should be excluded under Rule 702 (Fed. R. Evid) because it is valueless. They assert he has no experience in the market relevant to the products at

issue or the technology at issue. Instead, he is a CPA with experience in damages evaluation offering opinions on technical matters. Despite this, Respondents assert Mr. Green is offering opinions that Complainant's MEMS microphones were successful primarily due to their patented packaging. Respondents also offer other criticisms of Mr. Green's testimony and raise the collateral estoppel issue that was the subject of Respondents' Mil 5. Regardless, the core of Respondents' arguments is that Mr. Green is unqualified to offer the opinions he has offered on commercial success.

On September 13, 2012, Complainant filed its Opposition to Mil 6. Complainant immediately asserts:

Respondents seek to exclude the testimony of Knowles's commercial success expert, Mr. Peter Green, *in its entirety*, on grounds that Mr. Green is unqualified and his testimony unreliable because he allegedly conceded that he lacks a "technical background" and "did not analyze the impact on commercial success" of other features Knowles's MEMS microphones. MIL #6 at 3. Both contentions rest on selective quotations and mischaracterizations of the record. In fact, Mr. Green is eminently qualified to render the opinions he offers in this investigation. His background in financial analysis, asset valuation, and intellectual property dispute consulting are more than sufficient background to opine on the commercial success of Knowles's MEMS microphone products as well as the relevant drivers of that success.

Complainant concedes Mr. Green opines that Knowles's SiSonic MEMS microphone packages are commercially successful and that success is due to the patented technology.

Complainant then details Mr. Green's extensive experience in valuation, economic consulting and offers that his opinions could prove of value as discussed in *Medtronic, Inc. v. Daig Corp.*, 780 F.2d 903, 906-07 (Fed. Cir. 1986) and other cases.

Complainant explains that Mr. Green's opinion on the nexus between the commercial success of Knowles's MEMS and the patented claims is based, in part, on the technical opinion of Complainant's other witnesses, which informed his understanding of the technology at issue

and his statement clearly supports that assertion. Still, Complainant argues Mr. Green does not need to have technical experience to be able to offer an opinion about, based upon his financial and economic analysis of the record, which features were responsible for the success of the MEMS. Regardless, Mr. Green did rely on the technical experts to offer his opinion, which is permissible.

Complainant also alleges Respondents' argument is inappropriate since it really goes to weight and not admissibility. Complainant avers that *Daubert* concerns are diminished in a hearing where the ALJ is the fact finder. In addition, Complainant provides examples of testimony that it alleges Respondents' "cherry picked" to bolster their arguments and shows that Mr. Green usually did fully answer all questions asked of him. In addition, Complaint cites several examples of where Respondents arguably attempted to mislead the undersigned concerning what Mr. Green had said relevant to Respondents' contentions.

After examining and analyzing the submissions of the parties and Mr. Green's proffered rebuttal testimony, I find that MiL 6 is not well founded. It is my opinion that Respondents have crafted a convoluted argument addressing admissibility when the real issue is weight. In addition, I do have some concerns that Mr. Green's testimony was not fully represented to me by Respondents.

Finally, I note the obvious. I know Mr. Green is not an engineer nor is he an expert on the MEMS device. He does not pretend to be. Therefore, it is patent to me he must be relying on the testimony of others to give an opinion on economic success as he admitted in his

deposition. This kind of reliance is very easy to establish during cross-examination and does not merit a motion that expends the resources of the ITC and the parties.

Respondent's MiL 6 is DENIED.

SO ORDERED.

A handwritten signature in black ink, appearing to read "Thomas B. Pender", written over a horizontal line.

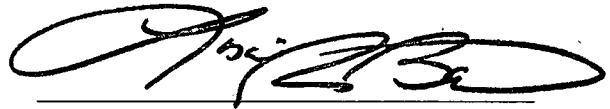
Thomas B. Pender
Administrative Law Judge

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CERTIFICATE OF SERVICE

I, Lisa R. Barton, hereby certify that the attached **PUBLIC ORDER NO. 14** has been served upon the following parties via first class mail and air mail where necessary on September 24, 2012.



Lisa R. Barton, Acting Secretary
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