

**IN THE UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION**

NXP B.V.,

Plaintiff,

v.

BlackBerry Limited and
BlackBerry Corporation,

Defendants.

6:12-CV-498-ACC-TBS

**BLACKBERRY'S OPPOSITION TO
PLAINTIFF NXP B.V.'S MOTIONS *IN LIMINE***



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NXP's Motions *in Limine* lack merit individually, and the Court should deny each for independent reasons. Still, several common themes recur. First, NXP frequently seeks protection from its own failures, *e.g.*, NXP had the source code it wanted, failed to analyze it, so NXP now seeks to preclude it. Second, NXP seeks relief based on (incorrect) complaints it never raised during discovery. And third, much of NXP's requested relief contradicts its written agreements with BlackBerry regarding the scope and manner of source code production, the scope of Rule 30(b)(6) deposition topics, and the breadth of interrogatories.

I. ARGUMENT

As a threshold matter, NXP's Motions should be denied because NXP has waived the right to challenge any purported discovery deficiencies. NXP argues that BlackBerry: (i) failed to respond suitably to certain document requests; (ii) inadequately responded to interrogatories; and (iii) failed to produce witnesses prepared to testify on its behalf.¹ Based on these purported deficiencies, NXP seeks an order precluding BlackBerry from offering evidence at trial. If NXP felt deficiencies existed, the Federal Rules provide a mechanism for NXP—a motion to compel. *See* FRCP 37. NXP did not, however, seek Court intervention during discovery on any of these purported deficits, and NXP therefore waived any objections it now raises,² and the Court should deny NXP's Motions.

A. NXP's Selective and Inadequate Review of BlackBerry Source Code Does Not Warrant Exclusion of Relevant Evidence.

¹ Doc. 218 at 3-4, 9; *id.* at 8-9, 11-13.; *id.* at 17-22.

² *See JOM, Inc. v. Adell Plastics, Inc.*, 193 F.3d 47, 52 (1st Cir. 1999) (denying motion to exclude evidence where plaintiff failed to move to compel during discovery); *Helpand v. Gerson*, 105 F.3d 530, 536 (9th Cir. 1997) ("By failing to bring a motion to compel, the plaintiffs waived their objection . . ."); *Hi Ltd. Partnership v. Winthouse of Florida, Inc.*, 2004 WL 5486964, 12 (M.D.Fla. 2004)(denying motion to exclude damages evidence where Plaintiff failed to file motion to compel 30(b)(6) damages testimony.)



NXP improperly asks this Court to extend NXP’s expert’s opinions to products he did not analyze in his report. Contrary to NXP’s Motion, NXP’s expert—Dr. Alpert—said he reviewed source code “across the entire product line” and he had all of the source code he needed to support his opinions. But Dr. Alpert admitted that his opening report includes *only* analysis for four types of products.³

NXP ignores its expert’s statements and ignores the other abundant evidence available on these other products (*e.g.*, schematics, bills of materials, specifications, deposition testimony, etc.), and instead NXP looks to excuse its missing analysis by pointing to the manner of BlackBerry’s source code production. But the Court should deny NXP’s Motion because BlackBerry produced the requested source code in the manner to which *NXP agreed*. Every “volume” that NXP now complains of was requested by NXP. And, according to deposition testimony, the code was even more accessible to NXP than it is to BlackBerry engineers.

1. NXP agreed to the source code production.

NXP’s discussion of when and how source code was produced is factually incorrect. While NXP has never filed a motion to compel against BlackBerry for any source code,⁴ BlackBerry already disputed NXP’s mischaracterization of the timing of the source code production in a third party Protective Order dispute.⁵ Regardless of whether the source code

³ Ex. 1 (Alpert Dep.) at 195:19-196:9 (“**Q.** Your report only analyzes four specific processors: [REDACTED] [REDACTED] **A.** That - The analysis that’s in here refers specifically to those. You know, of course, I did look at some other processors, like an [REDACTED] and I looked at source code that applied across the entire product line. **Q.** But that analysis is not in your report, correct? **A.** There’s nothing written about those other products, correct.”).

⁴ Of course, NXP filed a Motion to Compel on “damages-related documents.” *See* Doc. 110.

⁵ This is the second time NXP has misstated the facts on this topic. *See* Doc. 105 at 2-4.

[REDACTED]

was requested in late 2012 (as NXP contends) or early 2013 (as BlackBerry contends), the ultimate question is did NXP have the source code that it requested?

The answer is yes. Indeed, NXP's expert admitted that he was able to review, prior to serving his report, all of the source code he needed to support his opinions.⁶ Months before expert reports were due, the parties *agreed* that BlackBerry would limit source code production to all BlackBerry source code for each major OS software release for each accused product in the United States.⁷ [REDACTED]

[REDACTED]

[REDACTED] NXP agreed that it did not want a copy of this massive repository.⁹ Thus, to satisfy this agreement, BlackBerry's collection required four principal steps: (1) identifying which of the [REDACTED] of BlackBerry software bundles correspond to major OS releases for each of the thirty-five accused products (there were [REDACTED]); (2) generating, for each [REDACTED] lists of the included source code files— [REDACTED]

[REDACTED] (3) reviewing the [REDACTED]

[REDACTED] and

(4) transferring the files to a server for NXP's review.¹⁰ NXP inaccurately suggests that the [REDACTED]” describes only the fourth step (the literal copying of the identified files), as confirmed by the testimony NXP

⁶ Ex. 1 (Alpert Dep.) at 79:10-79:25, 80:20-25. Dr. Alpert is the only NXP expert that relied on source code. [REDACTED]

⁹ Ex. 2 (letter fr. Graubart to DeMory, 03-18-2013) at 1.

¹⁰ Ex. 3 (Omid Decl.) at ¶¶ 3-9.

withheld from the Court.¹¹ In contrast, the first two steps required [REDACTED]
[REDACTED].¹²

Indeed, BlackBerry explained to NXP the difficulties with collecting the agreed-upon source code.¹³ So NXP could begin its review while BlackBerry collected the agreed-upon code, BlackBerry offered (and NXP accepted) a previously-created “interim” server that contained [REDACTED]. BlackBerry provided that interim server on April 16, 2013 and continued completing the requested source code collection.¹⁴

As NXP admits in its Motion, BlackBerry provided the remaining requested source code to NXP by May 2, 2013—well over two months before NXP served its first expert reports. This production included “Volume 2” [REDACTED]

[REDACTED] and “Volume 3” [REDACTED]
[REDACTED]. To help NXP navigate the code, BlackBerry also provided “mapping” files, showing where to find each source code file for each bundle.¹⁶ With these files, NXP could easily match file paths in the “mapping” files to file paths on the server—just as BlackBerry’s witnesses did at depositions.¹⁷

After making the final production, “Volume 4” was also produced at NXP’s request.

¹¹ Doc. 217-9 (Serratt Dep. Tr.) at 118:10-120:16.

¹² Ex. 3 (Omidia Decl.) at ¶ 9.

¹³ Ex. 4 (letter fr Graubart to DeMory, 04-01-2013).

¹⁴ Ex. 5 (Apr. 14, 2013 Email from T. Reger to D. De Mory) at 2.
[REDACTED]

¹⁶ See Exs. 6-7 (sample pages from two “mapping” files, showing file paths to code files for one of the bundles).

¹⁷ See, e.g., Dkt. 212-99 (Drozdyuk Dep. Tr.) at 127:10-18, 140:6-146:2; Dkt. 212-96 (Narayanan Dep. Tr.) at 173:18-24, 184:2-185:21; Dkt. 212-91 (Nawrot Dep. Tr.) at 166:7-168:3, 170:3-18. NXP’s complaint that the file paths on the server did not “match” the file paths in the mapping files and in certain BlackBerry technical documentation is trivial, and NXP agreed that it did not hinder its review. Ex. 9 (DeMory to Graubart, May 20, 2013) (“We can navigate this problem . . .”).

Among the [REDACTED] of produced source code files, NXP identified select instances where [REDACTED]

[REDACTED]¹⁸ This affected only [REDACTED] files on the server—and NXP still identifies zero such files that impact its infringement claims.¹⁹ Still, the very next day, BlackBerry offered to correct those few instances and produced those additional files as a separate “Volume 4” on July 10.²⁰ NXP wrongly says that production [REDACTED] NXP knows better. At NXP’s request, BlackBerry copied the original [REDACTED] onto a new server, since the original one was having problems from being repeatedly shipped to NXP’s depositions.²¹

NXP also complains that BlackBerry did not provide metadata reflecting the produced source code’s revision history (*e.g.*, dates of changes, redlines, etc.).²² Again, NXP received exactly what it sought. NXP agreed that BlackBerry would produce only “released” code, *i.e.*, the code that is actually on the accused products.²³ NXP also agreed in July 2012 “that metadata, in general, is not discoverable absent a showing of good cause.”²⁴ NXP never asked for revision history, nor did NXP ever ask BlackBerry to provide tools to help it compare file versions, even though BlackBerry provided NXP with numerous requested

¹⁸ See Ex. 10 (June 2, 2013 Email from A. Hand to N. Graubart).

¹⁹ See Ex. 3 (Omidi Decl.) at ¶ 11.

²⁰ See Ex. 11 (June 3, 2013 Letter from N. Graubart to D. DeMory) at 2.

²¹ See Ex. 12 (N. Graubart email to C. Win, July 10, 2013); see Ex. 13 (Win email to Graubart, June 21, 2013).

²² See Dkt. 213 at 7-8.

²³ Ex. 2 (letter fr Graubart to DeMory, 03-18-2013) at 1; Ex. 16 (letter fr DeMory to Graubart, 03-20-2013) at 1.

²⁴ Doc. 57 at 8. The parties agreed to produce certain metadata (“to the extent it is available during document collection”) such as production number, custodian, date, etc. Source code revision history was never discussed.

[REDACTED]

software tools.²⁵ In short, NXP had access to all of the code it requested and agreed to.²⁶

2. *BlackBerry produced source code in a manner for convenient review.*

Because it cannot point to any missing files, NXP incorrectly argues that BlackBerry gave NXP less source code review capabilities than BlackBerry engineers have in the ordinary course of business. The *reverse* is true. Indeed, NXP brazenly misleads the Court by claiming [REDACTED]

[REDACTED] As NXP knows, one BlackBerry software developer testified [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

3. *NXP refused to propose “representative” bundles during discovery.*

NXP’s Motion asks the Court to declare that the source code NXP unilaterally chose to review applies “equally to every BlackBerry accused product.”³¹ NXP’s requested relief is unjustified since it refused to pursue a “representative” approach during discovery. On May 23, NXP proposed the parties agree to simplify the case by designating a subset of code as

²⁵ See Ex. 17 (Apr. 22, 2013 Email from C. Win to B. Boyd) at 1.

²⁶ NXP raises its Interrogatory No. 12, which objectionably asked BlackBerry to identify *all* differences in the [REDACTED] that are “potentially relevant to any infringement (or non-infringement) analysis.” BlackBerry answered pursuant to Rule 33(d), directing NXP to the source code files from which NXP could ascertain the differences. NXP never raised any concern with BlackBerry’s response until now.
[REDACTED]
[REDACTED]

²⁸ Dkt. 218 at 7 n.39; *But see* Dkt. 212-96 (Narayanan Dep. Tr.) at 235:7-10.

²⁹ Ex. 3 (Omid Decl.) at ¶ 10.

³⁰ *Id.*

³¹ Doc. 218 at 10.

“representative” of all accused products, and NXP said it would propose the “representative” bundles.³² NXP even asked BlackBerry to provide certain information for its review while crafting its proposal, to which BlackBerry promptly agreed.³³ But *NXP never responded with any proposal*, nor did it even respond to BlackBerry’s follow-up correspondence until filing the instant Motion.³⁴ NXP’s tactics, by which it seeks to immunize itself from its own failure to diligently review the available evidence,³⁵ should not be condoned. Accordingly, BlackBerry respectfully requests that the Court deny NXP’s request.

B, C, & D. BlackBerry Timely Disclosed Evidence on Which Its Experts Rely.

1. NXP contradicts its own arguments to this Court.

In its Motions *in Limine* B, C, and D, NXP seeks to exclude relevant evidence by alleging that BlackBerry violated its Rule 26 discovery obligations by disclosing facts in timely-served expert reports. NXP is estopped from making this argument, which contradicts its previous arguments to this Court. While NXP now claims that BlackBerry’s timely-served expert reports are not timely updates to its disclosures, NXP successfully argued the opposite to this Court. Thus, judicial estoppel bars NXP’s requested relief.

BlackBerry previously moved to exclude portions of NXP’s expert reports that were contrary to NXP’s interrogatory responses.³⁶ NXP responded that its new positions were timely “served during the discovery period in compliance with the Court’s Scheduling

³² Ex. 18 (N. Graubart letter to D. De Mory dated June 13, 2013).

³³ Ex. 19 (Email fr N. Graubart to A. Hand dated May 29, 2013).

³⁴ Ex 18 (N. Graubart letter to D. De Mory dated June 13, 2013).

³⁵ NXP only complains about the way certain source code was presented. NXP makes no argument that the Court should prevent BlackBerry from criticizing NXP’s analysis of other, *non-source code* documents.

³⁶ Doc. No. 118.

Order”³⁷ and a party meets its Rule 26 obligations “by making the other party aware of its positions in expert reports timely served before the close of discovery.”³⁸ The Court agreed:

The first notice plaintiff gave of the change in its claim for damages on the ’654 patent was in Mr. Weinstein’s expert witness report. The parties have not cited any legal authority holding this is not an appropriate means of disclosure. And the Court finds that this method satisfies Rule 26(e)(1)(A). Therefore, plaintiff was not required to also amend its answers to interrogatories. It also bears noting that plaintiff’s amended disclosure was made prior to the close of discovery.³⁹

NXP meekly argues that its positions are not inconsistent because NXP only argued “that its infringement theories and claims previously set forth in interrogatory responses that had evolved based on discovery could be disclosed in initial expert reports.”⁴⁰ To the contrary, the Court found that NXP “misled” BlackBerry in previous interrogatory responses that contradicted NXP’s expert reports.⁴¹ Setting aside the errors of its claims, NXP must be held to its earlier arguments that expert reports are timely supplements.⁴²

2. *B: BlackBerry properly disclosed various BlackBerry employees.*

In its Motion *in Limine* B, NXP seeks to preclude BlackBerry’s expert—Dr. Michalson—from relying on eight supposedly “Undisclosed Individuals” that were discussed in his rebuttal expert report.⁴³ Even if NXP’s account was accurate, NXP fails to demonstrate any prejudice it would suffer. Indeed, to avoid dispute, BlackBerry offered

³⁷ Doc. No. 134, at 1.

³⁸ *Id.* at 11.

³⁹ Doc. 157, at 18:5-15.

⁴⁰ Doc. 218 at 13 n.61.

⁴¹ Doc. 157 at 17:20-22.

⁴² Thus, judicial estoppel bars NXP’s motion. “The purpose of judicial estoppel is ‘to protect the integrity of the judicial process by prohibiting parties from changing positions according to the exigencies of the moment.’” *Robinson v. Tyson Foods, Inc.*, 595 F.3d 1269, 1273 (11th Cir. 2010) (citation omitted).

[REDACTED]

NXP the opportunity to depose the alleged “undisclosed” individuals, even after discovery closed. NXP *never responded*, meaning it cannot now claim prejudice.⁴⁴ NXP now claims that it is too late to take depositions given the impending trial date.⁴⁵ But that was not the case when, during discovery, these individuals were disclosed to NXP. NXP chose not to depose them and now improperly seeks to capitalize on its own failure to take discovery.

Moreover, the Court should deny this Motion also since BlackBerry timely disclosed the witnesses. Because NXP made new and unfounded allegations in its opening expert reports, BlackBerry investigated, identified, and disclosed select individuals with information to rebut those allegations. For example, NXP first accused [REDACTED] via its opening expert report, and two of the “Undisclosed Individuals” [REDACTED]

[REDACTED] were responsible for developing and managing the Travel app.⁴⁶ Also, while NXP complains that [REDACTED] is one of the “Undisclosed

Individuals,” BlackBerry’s Rule 30(b)(6) witness told NXP [REDACTED] And, with full knowledge that there are [REDACTED]

[REDACTED]

[REDACTED] As to the rest, BlackBerry promptly disclosed Dr.

Michalson’s minor reliance on them. For example, Dr. Michalson stated that [REDACTED]

[REDACTED]

⁴⁴ Ex. 22, N. Graubart letter to D. De Mory dated Sept. 13, 2013; *see also Washington v. Vogel*, 880 F. Supp. 1534, 1536 (M.D. Fla. 1995) (allowing testimony from witness disclosed shortly before the pretrial statement and noting “Defendants were able to depose Muriel. . . Defendants have failed to demonstrate that they have in fact been prejudiced.”).

⁴⁵ Doc. 218 at 64.

⁴⁶ Ex. 20 (Michalson Rebuttal Rpt.), ¶ 140.

⁴⁷ Doc. No. 212-96 (Narayanan Dep.) at 239:24-240:7.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

NXP also incorrectly argues that BlackBerry should be precluded from relying on discussions with the “Undisclosed Individuals” because these eight individuals were not disclosed in the response to NXP’s request for “the three (3) most knowledgeable people.” This assertion defies common sense. NXP asked for the “*three*” most knowledgeable people, and now complains that *eight* individuals were not identified. NXP further fails to inform the Court that the parties agreed that BlackBerry would identify “those individuals most knowledgeable regarding the focus of NXP’s infringement contentions.”⁵¹ BlackBerry honored that agreement, and NXP took multiple Rule 30(b)(6) depositions of witnesses that were the most knowledgeable.⁵² NXP cites to no questions about such “undisclosed” people that BlackBerry’s designees could not answer. If NXP sought to explore “all knowledgeable people,” it could have. In short, there was no failure to comply with Rule 26.

3. *C: BlackBerry properly disclosed printed publication evidence.*

NXP asks the Court to preclude alleged “new information” that “BlackBerry failed to timely disclose its intended reliance on,” but this information is not new.⁵³ First, BlackBerry disclosed the “Fischer, Cole and Choi” prior art references in October 2012.⁵⁴ Second, Dr.

⁴⁹ *Id.* at ¶ 61.

⁵⁰ *See* Ex 42, (Alpert Opening Rpt.) at 27 n.27; Ex, 20, (Michalson Rebuttal Rpt.) at 40 n.28.

⁵¹ Ex. 21, N. Graubart letter to D. De Mory dated Nov. 26, 2012.

⁵² For the '420 patent ([REDACTED])

⁵³ Doc. 218 at 15.

⁵⁴ Ex. 23 (Oct. 31, 2012 RIM Obj. and Resp. to NXP’s Contention Interrogatory No. 2 [Invalidity]).

Heegard's report [REDACTED]

(whom BlackBerry previously listed on its Rule 26 disclosures) as evidence of the public nature of the prior art references,⁵⁵ which NXP separately seeks to exclude in Motion *in Limine* D. Third, NXP complains that Dr. Heegard testified about his *personal* knowledge of the 802.11 committee's meetings, at which the prior art references were distributed, and the availability of the prior art references via the IEEE website—all of which he timely detailed in his report.⁵⁶ Next, NXP complains that Dr. Heegard was provided with “new information” at his deposition.⁵⁷ Wrong. At his deposition, Dr. Heegard acknowledged that there was an incorrect screenshot in his report, and used a corrected screenshot. Indeed, while NXP complains that “BlackBerry provided Dr. Heegard with new information at this deposition,” the NXP-cited testimony *is in response to NXP's opening questions*.⁵⁸ Thus, BlackBerry requests that the Court deny NXP's Motion *in Limine* C.

4. *D: BlackBerry timely disclosed* [REDACTED]

Finally, NXP complains that BlackBerry “ambush[ed]” NXP because [REDACTED] both of whose relevant knowledge was long-known to NXP. In an October 2012 interrogatory response, BlackBerry contended the '455 patent is invalid based on [REDACTED], in which he disclosed the claimed invention years

⁵⁵ Doc. 218 at 14 n.65 (citing Heegard Dep. at 115:8-20, 176:5-177:3).

⁵⁶ Doc. 218 at 14 n.65 (citing Heegard Dep. at 118:6-120:2, 122:9-124:5, 190:18-193:18); Doc. 212-71 (Heegard Opening Rep.) at ¶¶ 22-23, 26-58, 79-86, 151-55, 158-60, 164, 167, 173.

⁵⁷ NXP says “Dr. Heegard's deposition testimony” should be disregarded because it was “three months after his Invalidity Report and six weeks after the close of discovery.” Doc. 218 at 15. NXP agreed to take the deposition after discovery due to scheduling issues and even cancelled the first scheduled date because NXP's counsel fell ill. *See* Ex. 41, De Mory email to Graubart, Sept. 11, 2013.

⁵⁸ Doc. 218 at 14; *id.* at n.65. BlackBerry's questioning of Dr. Heegard begins at page 265.

[REDACTED]

before the '455 patent.⁵⁹ NXP is also intimately familiar with [REDACTED] who was the Chair of the 802.11 committee that created the 802.11g standard. NXP was a member of that same committee, and NXP bases its infringement allegations on the 802.11g standard (which lists Mr. Shoemake prominently).⁶⁰ In any event, BlackBerry listed [REDACTED] [REDACTED] on its supplemental Rule 26(a)(1) disclosures,⁶¹ and then Dr. Heegard again (six weeks before the close of discovery) identified them in his invalidity report.⁶² NXP chose not to seek their depositions. In short, BlackBerry timely disclosed them, and NXP has not demonstrated any alleged prejudice. NXP's Motion should therefore be denied.

E. NXP Must Be Held to Its Admitted RAND Obligations.

NXP admits [REDACTED]

[REDACTED]. First, NXP's infringement theories assume that the '455 and '654 patents are essential to the IEEE 802.11 and JEDEC eMMC standards (respectively).⁶³ Next, NXP's designee [REDACTED]

[REDACTED] And in responses to interrogatories, NXP [REDACTED]

[REDACTED]

⁵⁹ Ex. 23, (BlackBerry's Oct. 31, 2012 Resp. to NXP's Invalidity Contention Interrog.) at 15, 18, 19, 20, 21, 42 and accompanying exhibit C.

⁶⁰ Ex. 24, NXP's Infringement Contention Claim Chart for '455 patent, dated Sept. 6, 2012; Ex. 25, NXP_A-00014789 at 794 (NXP-produced copy of 802.11g standard listing Mr. Shoemake as Chair).

⁶¹ Ex. 26, (BlackBerry's First Supplemental Rule 26(a) Disclosure).

⁶² Ex. 27 (Invalidity Rep. of Dr. Heegard) at ¶ 24.

[REDACTED]

⁶⁴ Ex. 28 (Waxler Depo.) at 124:5-7; 129:21-130:4; 170:8-25; 181:7-14.

⁶⁵ Doc. 238-4 (Aug. 30, 2013 NXP Resp. to BlackBerry Rog. 19) at 10 [REDACTED]

[REDACTED]

BlackBerry timely pleaded and disclosed this theory. In its Answer, BlackBerry pleaded implied license and equitable estoppel defenses in accord with RAND caselaw. “Even though a RAND obligation does not act as an express license, it may nonetheless have some effect on the remedies available to a patent holder in an infringement action by providing defenses based on implied license, patent misuse, or equitable estoppel.”⁶⁶ Then, in discovery, BlackBerry explained these defenses in a two-page substantive response:

NXP has the affirmative obligation to offer RAND (or FRAND) terms based on NXP’s contentions that one or more of its patents are essential to the practice of any particular standard. . . .⁶⁷

This response further explains NXP’s misuse of its patents. Finally, under Rule 33(d), BlackBerry pointed to NXP’s infringement contentions, NXP’s Rule 30(b)(6) deposition testimony ██████████ NXP’s RAND assurance to IEEE, JEDEC’s RAND obligation policies, the parties’ expert reports, and JEDEC’s eMMC standard.⁶⁸

Because NXP is bound by these admissions to license these standards-essential patents on RAND terms, BlackBerry can properly argue that NXP must be held to its admitted obligations. Moreover, NXP’s Motion rests on the incorrect premise that BlackBerry did not meet its disclosure obligations, and it should therefore be denied.

F. BlackBerry’s Rule 30(b)(6) Testimony Provides No Basis for Precluding BlackBerry from Presenting any Evidence.

⁶⁶ *In re Innovation IP Ventures, LLC Patent Litig.*, 921 F. Supp. 2d 903, 915-916 (N.D. Ill. 2013) ; *see also Apple, Inc. v. Motorola Mobility, Inc.*, No. 11-cv-178-bbc, 2012 WL 5416941, at *16 (W.D. Wis. Oct. 29, 2012) (denying patentee’s motion to preclude evidence regarding its RAND obligations where accused infringer “pleaded claims for breach of contract, equitable estoppel and patent misuse”); *Intel Corp. v. Commonwealth Sci. & Indus. Research Org.*, No. 6:06-cv-551, 2008 WL 5378037, at *6 (E.D. Tex. Dec. 23, 2008) (noting relevance of RAND obligation to equitable estoppel defense).

⁶⁷ Ex. 29 (RIM Resp to NXP 3rd ROGs, 06-24-2013), resp to ROG 10 at 11-12.

⁶⁸ *Id.*

NXP's Motion to exclude BlackBerry from offering testimony outside the scope of its 30(b)(6) depositions should be denied because: (1) the request is vaguely stated and overbroad, (2) it is unfounded as the witnesses were not designated to testify on the topics as to which NXP complains, and (3) NXP did not seek to depose additional witnesses to address the "deficiencies" it now alleges.

1. *NXP's Motion is vague and overbroad.*

NXP's Motion to exclude BlackBerry from offering any testimony outside the scope of testimony given in its Rule 30(b)(6) depositions is a baseless, vague, and overbroad attempt to exclude relevant evidence. This vague and far-reaching request could encompass any variety of evidence. Moreover, NXP apparently seeks, without authority, to preclude *expert* testimony based on a supposed failure to provide corporate representative fact testimony. Accordingly, this overbroad Motion should be denied.

2. *NXP complains that BlackBerry witnesses could not answer questions outside their designated topics.*

NXP's complaints about BlackBerry's corporate testimony are unfounded. Each concerns either (a) Rule 30(b)(6) topics for which the specified witnesses were not designated or (b) topics to which BlackBerry objected as seeking privileged and/or expert testimony and that NXP then *agreed* BlackBerry need not provide.

(a) The witnesses were prepared on their designated topics.

Although BlackBerry objected to the scope of numerous topics, BlackBerry "agree[d] to place a reasonable construction on th[e] request[s]," and BlackBerry provided *nine* different corporate witnesses "to testify regarding facts related to" the topics for which each

[REDACTED]

witness was designated.⁶⁹ Satisfied, NXP never requested that BlackBerry provide additional corporate testimony, nor did it file a Motion to Compel additional testimony. Now, months after the fact, NXP complains that three BlackBerry witnesses were not adequately prepared.⁷⁰ These complaints are groundless.

First, [REDACTED]

[REDACTED] The only topic as to which NXP complains regarding these witnesses is no. 9, which covers “power saving features or strategies related to global positioning system (GPS) functionality.” On that topic, the witnesses repeatedly explained that [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] but those questions are not within the scope of the designated topics. Nor did NXP ask for a witness to answer whether “battery life is important to RIM.”⁷⁵ But, NXP can hardly claim BlackBerry did not

⁶⁹ See Ex. 30, BlackBerry’s Resp. and Objs. to NXP’s Rule 30(b)(6) Dep. Notice, dated May 10, 2013. BlackBerry’s designees were [REDACTED]

⁷⁰ See Doc. 218 at 18-21 [REDACTED]

⁷¹ See Ex. 31 (Apr. 29, 2013 email from N. Graubart to A. Hand) at 1; Ex. 32 (May 21, 2013 email from N. Graubart to A. Hand) at 1. The “technical topics” were topic nos. 2, 3, 9, 15, 34, and 35.

[REDACTED]

⁷³ See Doc. 218(NXP motion in limine) at 18-20.

⁷⁴ *Id.* at 18.

⁷⁵ Ex. 33, (NXP 30b6 Dep. Notice, 03-29-2013) at 8.

[REDACTED]

provide corporate testimony on this issue. NXP separately sought testimony on the accused products' "perceived advantages or benefits," on which BlackBerry designated [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

NXP's complaints regarding [REDACTED] testimony are equally misplaced.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] NXP also complains that he was unable to answer "why"

BlackBerry provides WiFi, a topic on which he was not designated.⁸⁰ [REDACTED]

[REDACTED] was designated on the only topic that might have called for that information.⁸¹

(b) NXP agreed not to seek testimony on legal or privileged topics.

In one conclusory paragraph, NXP also asks the Court to preclude BlackBerry from introducing certain unspecified non-infringement testimony at trial, including through its experts, because BlackBerry's witnesses were not prepared to offer that testimony at deposition. NXP's assertions are incorrect and contradict the parties' agreement. NXP's

⁷⁶ Ex. 34, Wierzbicki Dep. at 61:7-62:10.

⁷⁷ The relevant deposition testimony spans at least forty-eight pages, *id.* at 61-109, 132, 184.

⁷⁸ NXP complains that Mr. Montemurro was unprepared [REDACTED]

[REDACTED]

[REDACTED]

⁷⁹ Ex. 35 (Montemurro Dep.) at 28:17-30:23.

⁸⁰ If any doubt exists as to the scope of NXP's topics, that ambiguity must be resolved against NXP, *See* Fed. R. Civ. P. Rule 30(b)(6) (providing that the deposing party "must describe with reasonable particularity the matters for examination"); *QBE Ins. v. Jorda Enters.*, 277 F.R.D. 676, 688 (S.D. Fla. 2012) (same).

⁸¹ Ex. 34 (Wierzbicki Dep.) at 76:13-16.

Rule 30(b)(6) notice included two topics at issue here: topic 15 on BlackBerry's non-infringement positions and topic 35 on non-infringing alternatives.⁸² BlackBerry objected, because the topics sought privileged information and expert opinion. NXP lodged the exact same objections to similar topics.⁸³ Despite its objections, BlackBerry explained prior to and during the depositions that the witnesses could provide non-privileged *facts* relating to non-infringement and non-infringing alternatives. Thus, contrary to NXP's claims, BlackBerry never refused to allow witnesses to provide factual testimony on these topics.⁸⁴ Indeed, the parties agreed that "legal topics would be off the table across the board," including NXP's Topic No. 15 (related to non-infringement).⁸⁵ Thus, NXP previously agreed that BlackBerry need not provide the requested testimony, and NXP's Motion should be denied.

3. *NXP never requested additional depositions.*

NXP never asked BlackBerry to provide additional witnesses to address the "deficiencies" it now alleges. If NXP believes a witness' trial testimony may contradict deposition testimony, cross-examination is its remedy, not exclusion of evidence.⁸⁶

G. The Court Should Not Exclude Evidence of *Inter Partes* Reviews.

NXP urges the Court to preclude evidence of the *inter partes* review ("IPR") proceedings on the invalidity of the '697 and '420 patents, currently pending at the U.S.

⁸² See Ex. 30 (RIM's Response to NXP's First Rule 30(b)(6) Dep. Notice) at 24.

⁸³ See Ex. 37 (NXP's Responses and Objections to BlackBerry's First Rule 30(b)(6) Dep. Notice) at 4 (¶¶ 13, 17), Response(s) to Topics 1, 2, 3, 5-26, 30, 32-36, 38, 46, 49-55, 58 and 65.

⁸⁴ See Doc. 212-96 (Narayanan Dep. Tr.) at 95:14-94:24, 101:22-103:23 (allowing factual questions and object witness was not designated to provide privileged information and/or expert testimony); Ex. 35 (Montemurro Dep. Tr.) at 299:3-300:8 (same); Dkt. 212-91 (Nawrot Dep. Tr.) at 82:2-83:3 (same), 239-241:5 (same).

⁸⁵ See Ex. 38 (July 9, 2013 Email Exchange between N. Graubart and A. Hand).

⁸⁶ NXP's reliance on *Turner Const. Co. v. Nat'l Am. Ins. Co., Inc.* is misplaced. No. C-03-1227 SBA, 2004 WL 6066675, at *10 (N.D. Cal. Sept. 20, 2004). In *Turner*, a construction dispute, a witness was unable to testify on 17 of the topics for which he was designated.

[REDACTED]

Patent and Trademark Office (“PTO”). The Court has “very broad discretion” in determining whether to admit this evidence,⁸⁷ and NXP bears the burden under Rule 403 to show that prejudice or confusion substantially outweighs its probative value. Here, this evidence is probative of BlackBerry’s defenses, and excluding it would prejudice BlackBerry. The IPR proceedings on the patents’ validity are relevant to BlackBerry’s invalidity claims. To wit, the PTO determined that “there is a reasonable likelihood that the petitioner will prevail” in invalidating of the ’420 and ’697 patents.⁸⁸ “[C]ourts may ‘take cognizance of, and benefit from, the proceedings before the patent examiner—even reexamination proceedings.’”⁸⁹ And when, as here, the proffered evidence is probative of an issue in dispute, “any prejudicial effect on the jury could be alleviated by the appropriate jury instructions.”⁹⁰

H. NXP’s Motivation to File Suit Is Relevant to NXP’s Damages Claims

NXP’s request to exclude evidence of its motive for filing suit should be denied, because it would preclude BlackBerry from discussing the parties’ prior relationship, which is integral to, *inter alia*, damages. NXP admits [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] This motive is thus intimately entangled with the parties’ commercial relationship, which is a required factor in determining

⁸⁷ See *K-TEC, Inc. v. Vita-Mix Corp.*, 696 F.3d 1364, 1376 (Fed. Cir. 2012). IPR procedures are new, but courts have long considered admissibility of the prior patent office procedure of *inter partes* reexamination. *Id.*

⁸⁸ 35 U.S.C. § 314(a).

⁸⁹ *Fresenius Med. Care Holdings, Inc. v. Baxter Int’l, Inc.*, 2006 WL 1330003, *3 n.3 (N.D. Cal. 2006).

⁹⁰ *Id.* at 4.

⁹¹ See Dkt. No. 200-1 (Waxler Dep. Tr., excerpts) at 54:8-58:17.

[REDACTED]

[REDACTED]

a reasonable royalty.⁹³ Thus, precluding this evidence would impermissibly preclude the jury from hearing evidence critical to one of the required *Georgia-Pacific* factors. Nor do NXP's cited cases support its Motion. None of them are patent cases, meaning the parties' prior relationship relevant was not relevant to a reasonable royalty claim, unlike this case.⁹⁴

Finally, NXP's motivation will be relevant to the bias and credibility of any NXP witnesses.

I. BlackBerry's Financial Status Is Relevant to NXP's Damages Claims

NXP argues, without justification, that evidence regarding BlackBerry's current financial status would provoke "undue sympathy" from the jury. NXP's request would prevent BlackBerry's from presenting the general corporate background information routinely admitted as helpful to the jury's understanding of the case. Also, evidence of BlackBerry's recent performance may be necessary to explain the absence from trial of former employees.⁹⁵ [REDACTED]

[REDACTED]

[REDACTED] Thus, NXP's Motion should be denied.

J. NXP's Non-Practicing Entity Status and Licensing Agent Are Relevant

The undisputed fact that NXP does not practice some of its asserted patents is relevant and not unfairly prejudicial. First, "non-practicing entity" is not a disparaging description, as NXP alleges; it is widely used by courts.⁹⁶ Thus, courts have explicitly

⁹³ See Doc. 204-1 (Ugone Exp. Rpt.) at ¶¶ 58-61.

⁹⁴ *Haught v. U.S. Eng'g Contractors Corp.*, 2009 WL 36591, at *3 (S.D. Fla. 2009) (FLSA case); *Allstate Ins. Co. v. Nassiri*, 2013 WL 2394116 at *5 (D. Nev. 2013) (barring evidence of "wrongful intent" in bringing RICO claim); *Square D Co. v. Breakers Unlimited, Inc.*, No. 1:07-cv-806, 2009 WL 1625505, at *1 (S.D. Ind. June 4, 2009) (excluding evidence of plaintiff's intent to "damage" defendant via trademark counterfeiting suit).

⁹⁵ *Allstate*, 2013 WL 2394116 at *5 (allowing testimony on witnesses' health to explain their absence).

⁹⁶ See, e.g., *Eon-Net LP v. Flagstar Bancorp*, 653 F.3d 1314, 1327-1328 (Fed. Cir. 2011) ("As a non-practicing

recognized its difference from potentially disparaging terms like “patent troll,” and they allow “neutral” terms like “non-practicing entity.”⁹⁷ Here, [REDACTED] [REDACTED] which impacts NXP’s damages claim.⁹⁸ Second, NXP mischaracterizes its Motion as related only to its status as a “non-practicing entity,” but it seeks to exclude far more, including references to [REDACTED] [REDACTED] NXP cites no authority that would prevent reference to [REDACTED] (which appears on NXP’s initial disclosures), and that preclusion would highly prejudice BlackBerry. [REDACTED] is relevant, for example, to the reasonable royalty analysis under *Georgia-Pacific* and is discussed throughout the report of BlackBerry’s damages expert, Dr. Ugone.⁹⁹ Precluding references to IPValue would thus undermine Dr. Ugone’s ability to explain his opinions to the jury. Moreover, NXP claims it can prove infringement of the ’668 and ’697 patents by certain [REDACTED] [REDACTED] The probative value thus outweighs any risk of unfair prejudice, and NXP’s Motion should be denied.

II. CONCLUSION

For the foregoing reasons, BlackBerry respectfully requests an Order denying NXP’s Motions *in Limine*.

entity, Eon-Net was generally immune to counterclaims for patent infringement. . . .”); *Cradle IP, LLC v. Texas Instruments, Inc.*, 923 F. Supp. 2d 696, 699 (D. Del. 2013) (“The court declines to treat such non-practicing entities as anything less than holders of constitutionally protected property rights . . .”).

⁹⁷ See *DNT v. Sprint Spectrum*, 2009 WL 5842058, at *1 (E.D. Va. 2009) (excluding “patent troll” but allowing “non-practicing entity”); *HTC v. Tech. Props. Ltd.*, 2013 WL 4782598, at *4 (N.D. Cal. 2013) (“HTC may refer more generally to a ‘non-practicing entity,’ a ‘patent assertion entity,’ or neutral language to that effect.”).

⁹⁸ See *Georgia-Pacific Corp. v. U.S. Plywood Corp.*, 318 F. Supp. 1116, 1120 (S.D.N.Y. 1970) (including the parties’ “commercial relationship” “such as whether they are competitors” as factor in damages analysis).

⁹⁹ Dkt. No. 204-1 (Ugone Exp. Rpt.) at ¶¶ 10, 61, 65, 102.

Respectfully submitted this 22nd day of November, 2013.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 22nd day of November, 2013, I electronically filed the foregoing with the Clerk of the Courts by using the ECF system.

/s/ Noah C. Graubart _____
Noah C. Graubart

**EXHIBIT INDEX TO BLACKBERRY'S OPPOSITION TO
PLAINTIFF NXP B.V.'S MOTIONS *IN LIMINE***

Exhibits denoted by a "*" have been designated confidential (or higher designation) under the Protective Order (Dkt. No. 100). BlackBerry intends to promptly move the Court for permission to file these exhibits under seal.

Exhibit	CM/ECF Dkt. No.	Description
	250	Declaration of Noah Graubart in Support of BlackBerry's Opposition to Plaintiff NXP B.V.'s Motions <i>In Limine</i>
1*	250-1	Sept. 10, 2013 Deposition of Donald Alpert, Ph.D. – Volume I
2*	250-2	March 18, 2013 Letter fr Graubart to DeMory
3*	250-3	Nov. 22, 2013 Declaration of Babak Omid
4*	250-4	Apr. 1, 2013 letter fr Graubart to DeMory
5*	250-5	Apr. 14, 2013 Email from T. Reger to D. De Mory
6*	250-6	Sample page from Source Code Mapping File, software build 7.1.0-2508
7*	250-7	Sample page from Source Code Mapping File, software build 7.1.0-1996
8		[EXHIBIT NOT USED]
9*	250-8	May 20, 2013 Email from D. De Mory to N. Graubart
10*	250-9	June 2, 2013 Email from A. Hand to N. Graubart
11*	250-10	June 3, 2013 Letter from N. Graubart to D. DeMory
12*	250-11	July 10, 2013 email from N. Graubart to C. Win
13*	250-12	June 21, 2013 Email from C. Winn to N. Graubart
14	250-10	[EXHIBIT NOT USED]
15	250-10	[EXHIBIT NOT USED]
16*	250-13	March 20, 2013 Letter fr DeMory to Graubart
17*	250-14	Apr. 22, 2013 email fr C. Win to B. Boyd
18*	250-15	June 13, 2013 Letter fr Graubart to DeMory
19*	250-16	May 29, 2013 email fr Graubart to Hand
20*	250-17	Aug. 23, 2013 Rebuttal Expert Report of William R. Michalson

21*	250-18	Nov. 26, 2012 Letter fr N. Graubart to D. DeMory
22*	250-19	Sept. 13, 2013 letter fr N. Graubart to D. DeMory
23	250-20	Oct. 31, 2012 RIM Objections and Responses to Plaintiff's Contention Interrogatory No. 2 [Invalidity]
24	250-21	Sept. 6, 2012 Exhibit 1 to NXP Resp to RIM's Interrogatory No. 1 [Infringement Contention Claim Chart for '455 Patent]
25	250-22	Copy of IEEE 802.11g standard, produced at NXP_A-00014789
26	250-23	July 12, 2013 BlackBerry's First Supplemental Rule 26(a) Disclosure
27*	250-24	July 17, 2013 Initial Expert Report of Dr. Chris Heegard re Invalidity of '455 patent
28*	250-25	July 10, 2013 Deposition of Aaron Waxler
29*	250-26	June 24, 2013 RIM's Obj and Resp to NXP B.V.'s Third Set of Interrogatories Nos. 10-17
30	250-27	May 10, 2013 BlackBerry's Resp. and Objs. to NXP's Rule 30(b)(6) Dep. Notice
31*	250-28	Apr. 29, 2013 email fr Graubart to Hand
32*	250-29	May 21, 2013 email fr Graubart to Hand
33	250-30	March 29, 2013 NXP's Notice of 30b6 Deposition to BlackBerry
34*	250-31	June 12, 2013 Deposition of Karl Wierzbicki – Second Revised Transcript
35*	250-32	June 18, 2013 Deposition of Michael Montemurro
36	250-33	May 10, 2013 BlackBerry Response to NXP's First Notice of 30b6 Deposition
37	250-34	June 26, 2013 NXP Resp and Obj to Defendants' First Notice of 30b6 Deposition
38*	250-35	July 9, 2013 email exchange between N. Graubart and A. Hand
39		[EXHIBIT NOT USED]
40	250-36	May 20, 2013 Exhibit 3 to NXP's Revised Infringement Contentions (Infringement claim chart for '420 patent)
41*	250-37	Sept. 11, 2013, 4:36pm email from De Mory to Graubart
42*	250-38	July 17, 2013 Expert Report of Donald Alpert re Infringement of '420 Patent