

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

PARKERVISION, INC.,

Plaintiff,

v.

QUALCOMM INCORPORATED, QUALCOMM
ATHEROS, INC., HTC CORPORATION, AND
HTC AMERICA, INC.,

Defendants.

CASE No.: 6:14-CV-00687-PGB-KRS

**PARKERVISION'S RESPONSE TO DEFENDANTS' MOTION FOR
PARTIAL SUMMARY JUDGMENT OF NONINFRINGEMENT BASED ON
*PARKERVISION I***

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INTRODUCTION

Qualcomm asks this Court to dismiss ParkerVision’s receiver patents before a jury can consider their claim language and decide whether Qualcomm’s products infringe. It argues that noninfringement was predetermined by an earlier case, *ParkerVision I*. But that case involved different patents claiming different inventions using different language.

Qualcomm cannot prove the asserted claims raise identical infringement issues. First, it urges a novel standard giving a noninfringement finding preclusive effect on different claims so long as they claim “the same concept” or “substantially the same invention.” The Federal Circuit has never endorsed that standard. To the contrary, claims must have the same limitation in the same context as the earlier court found dispositive. The claims asserted here lack the dispositive “generating” limitation from *ParkerVision I*.

Second, Qualcomm’s motion fails even under its errant “substantially the same” standard. Qualcomm builds its argument on a broad—and inaccurate—abstraction of the asserted claims. In fact, they materially differ from the *ParkerVision I* claims. The USPTO confirmed as much by allowing the claims to issue without terminal disclaimers. What is more, the claim language itself confirms that the claims materially differ and, in fact, track the *ParkerVision I* courts’ description of the accused circuitry as involving switches that generate a down-converted signal.

Last, issue preclusion applies only if Qualcomm proves the accused products are essentially the same as the *ParkerVision I* products. But here, ParkerVision accuses products using a design not at issue in *ParkerVision I*. Qualcomm submits almost no evidence that these products are essentially the same as the *ParkerVision I* products, nor has it produced the documents needed for ParkerVision to assess similarity. Qualcomm cannot carry its burden on these products.

BACKGROUND

I. The district court granted JMOL in *ParkerVision I*.

In 2006, ParkerVision sued Qualcomm for infringing several patents claiming receivers that down-convert RF signals by energy sampling. *See Parkervision, Inc. v. Qualcomm Inc.*, 27 F. Supp. 3d 1266, 1269–70 (M.D. Fla. 2014). In 2013, a jury found that Qualcomm’s Magellan

product (and others) infringed four ParkerVision patents: the '551, '518, '371, and '342 patents. *Id.* at 1271. All the asserted claims shared a key feature, which the district court termed the “generating” limitation. Each claim required “generating” (or some variant of “generate”) a down-converted or baseband signal from energy transferred to a storage device (like a capacitor). *Id.* at 1272–74. The court did not construe “generating,” “finding that no construction of these terms is necessary in view of the terms’ use of plain and direct language.” *Id.* at 1275 (quotation marks omitted).

Qualcomm sought JMOL, arguing that the accused products did not meet the “generating” limitation. *Id.* at 1278. The accused circuitry involved a so-called double-balanced mixer followed by a capacitor Qualcomm calls a “Tx filter.” *Id.* at 1281. ParkerVision’s infringement theory, as the court understood it, required the storage capacitors following the sampling switches to “generate” the baseband by charging and discharging.” *Id.* at 1283. Thus, the court applied the “generating” limitation as precluding infringement if “the baseband signal is created in the Qualcomm products before the storage capacitors.” *Id.* at 1284.

In June 2014, the court granted Qualcomm’s motion for JMOL of noninfringement. ParkerVision’s expert had testified that “the double balanced mixers create the baseband before the lower frequency signal reaches the capacitors in the TX filter.” *Id.* at 1283. He “further testified that the ‘output’ of the double balanced mixers in the accused products ‘is the baseband.’” *Id.* The court determined that the “generating” limitation required the storage device (capacitor) to bring about the down-converted (baseband) signal for the first time and thus ruled that the expert’s testimony defeated ParkerVision’s infringement theory. *Id.* at 1283–84.

II. ParkerVision filed this suit asserting six receiver patents.

Some six weeks before the district court’s JMOL order in *ParkerVision I*, ParkerVision filed this suit. *See generally* D1. Its (live) first-amended complaint alleges patent infringement by Qualcomm, HTC, and Samsung entities. *See generally* D26.¹ ParkerVision asserted six receiver

¹ ParkerVision and the Samsung defendants have since stipulated to dismissal of their claims against each other. *See* D255.

patents (the '902, '836, '246, '907, '177, and '116 patents), four transmitter patents (the '940, '549, '372, and '508 patents), and one protocol-conversion patent (the '012 patent). *See id.* at 8–11.²

Like the asserted patents in *ParkerVision I*, the '902, '836, '246, and '116 receiver patents contain a “generating” limitation. *See, e.g.*, '902 patent (claim 1: “a down-converted signal being generated from said sampled energy”); '836 patent (claim 1: “wherein a second EM signal is generated from said stored energy”); '246 patent (claim 1: “a down-converted signal being generated from said sampled energy”); '116 patent (claim 1: “the lower frequency output signal being generated from the transferred energy”). The asserted claims of the '907 and '177 receiver patents, however, do not.

The parties first briefed claim construction in June and July 2015. *See generally* D148; D171. No party sought to construe any term in the '907 patent. The parties disputed the meaning of “matched filtering/correlating module” in the '177 patent. *Compare* D148 at 27–28 (ParkerVision brief seeking the construction: “operating on an EM (electromagnetic) signal with a matched filtering and/or correlating process or processor to produce an enhanced signal to noise ratio for the processed signal”), *with* D171 at 6–9 (defendants’ brief seeking the construction: “a multiplier, that multiplies the input signal by a time-delayed version of itself, followed by a switch and an integrator”). But neither side’s proposed construction used the term “generating,” or any variant of that word, much less sought to read the “generating” limitation from the *ParkerVision I* patents into the '177 patent claims.

III. The Federal Circuit affirmed the *ParkerVision I* judgment.

In July 2015, the Federal Circuit affirmed the district court’s JMOL ruling of noninfringement in *ParkerVision I*. *See ParkerVision, Inc. v. Qualcomm Inc.*, 621 F. App’x 1009, 1013–16 (Fed. Cir. 2015). Like the district court, the Federal Circuit understood the “generating” limitation in the asserted patents to require “that the baseband signal is generated from the energy

² Page references in the docket for this case refer to the ECF pagination, not the document’s internal pagination.

stored in” the capacitors immediately downstream of the double-balanced mixers, so that the baseband signal cannot already exist when the signal reaches the capacitors. *Id.* at 1013; *see also id.* at 1016 (“The testimony of ParkerVision’s witnesses makes clear that, in order to generate the baseband signal according to ParkerVision’s invention, electric current from the carrier signal first flows into the storage capacitor and is accumulated there as energy. When that energy is discharged to the rest of the circuit, a baseband signal ‘following the capacitor’ is created.”).

Also like the district court, the Federal Circuit held that ParkerVision’s expert’s testimony that “‘the baseband’” exists “‘upstream’” of the capacitors in Qualcomm’s products defeated the jury’s infringement finding. *Id.* at 1014, 1016. It explained that because “the baseband current is created by the double-balanced mixer before the current reaches the capacitors,” the district court correctly granted JMOL. *Id.* at 1016.

ParkerVision sought rehearing in the Federal Circuit. *See ParkerVision, Inc. v. Qualcomm Inc.*, 627 F. App’x 921, 921 (Fed. Cir. 2015).

IV. ParkerVision sought to streamline this suit pending the *ParkerVision I* appeals.

In September 2015, ParkerVision moved to sever and stay the asserted receiver patents (the ’902, ’836, ’246, ’907, ’177, and ’116 patents). *See generally* D217. It noted the defendants’ argument that the *ParkerVision I* judgment, once final, would bar suit on the receiver claims asserted here because all of ParkerVision’s receiver patents “recite the same ‘energy sample’ concept.” *Id.* at 2. ParkerVision explained: “Assuming, arguendo, that Defendants’ assertion is true, at most appellate finality in its current form would resolve ParkerVision’s infringement claims as to the Receiver Patents and the accused Qualcomm products....” *Id.* at 3–4 (emphasis added).³ Thus, to reduce potential waste and redundancy, ParkerVision urged this Court to halt litigation of the receiver patents until the *ParkerVision I* appeals resolved. *See id.* at 5.

³ Three times in its motion, Qualcomm quotes this sentence of ParkerVision’s motion, omitting the emphasized text. *See Mot.* at 1, 11, 22. It thus argues that ParkerVision “admitted” and “recognized” that the *ParkerVision I* judgment, once final, would bar suit on all receiver patents and claims asserted here. *See id.* at 1, 22. The context confirms that ParkerVision made no such “admission.”

In October 2015, the Federal Circuit denied ParkerVision’s rehearing petition. *See ParkerVision*, 627 F. App’x at 924. And in March 2016, the Supreme Court denied ParkerVision’s petition for writ of certiorari. *See ParkerVision, Inc. v. Qualcomm Inc.*, 136 S. Ct. 1507 (2016).

V. ParkerVision appropriately narrowed its case.

While ParkerVision’s certiorari petition was pending, it dismissed several patents. *See* D228 at 1–2. Relevant here, it dismissed the ’902, ’836, ’246 patents—most of the asserted receiver patents containing a “generating” limitation similar to the asserted claims in *ParkerVision I*. *See id.* Soon after, this Court granted the parties’ joint motion to stay the case pending an ITC investigation and, later, IPR proceedings. *See* D250 at 1–2.

This Court lifted the stay in January 2019, and ParkerVision told Qualcomm that it elected to move forward with two receiver patents (the ’907 and ’177 patents) and two transmitter patents (the ’940 and ’372 patents). *See* D280; D284 at 2–3. ParkerVision’s election thus eliminated from the case the last remaining receiver patent with a “generating” limitation (the ’116 patent). The defendants objected to ParkerVision’s moving forward with some of its elected claims, but this Court overruled the objections. D297 at 6–7.

This Court also ruled that, by the parties’ agreement, ParkerVision could amend its infringement contentions to accuse new products that “were introduced after the stay was put in place” (but could not raise “new theories”). *Id.* at 6. The Court contemplated a new schedule allowing “time for discovery” on the new products. *Id.* ParkerVision’s amended infringement contentions are due February 12, 2020, and fact discovery ends March 3. *See* D322 at 3; D323.

In September and October, the parties filed additional claim-construction briefing. *See generally* D317; D324. Still, the only term of the patents addressed in Qualcomm’s summary-judgment motion that either side has sought to construe is “matched filtering/correlating module” in the ’177 patent, and neither party’s proposed construction includes a “generating” limitation. *Compare* D317 at 24–31, *with* D324 at 17–26.

ARGUMENT

Qualcomm has the burden of proving all the elements of issue preclusion, an affirmative defense. *See RF Delaware, Inc. v. Pac. Keystone Techs., Inc.*, 326 F.3d 1255, 1261 (Fed. Cir. 2003) (applying Eleventh Circuit law). Securing summary judgment based on an affirmative defense is no easy task. Summary judgment is proper only if Qualcomm shows “that there is no genuine dispute as to any material fact and [it] is entitled to judgment as a matter of law.” *See* Fed. R. Civ. P. 56(a). The court must draw all reasonable inferences for the nonmovant and view all evidence in the light most favorable to it. *Great Am. All. Ins. Co. v. Anderson*, 847 F.3d 1327, 1331 (11th Cir. 2017). And when, as here, the *movant* has the ultimate burden, “that party must show *affirmatively* the absence of a genuine issue of material fact: it must support its motion with credible evidence that would entitle it to a directed verdict if not controverted at trial.” *See Rich v. Sec’y, Fla. Dep’t of Corr.*, 716 F.3d 525, 530 (11th Cir. 2013) (emphasis supplied by the court) (quotation marks omitted).

In patent cases, regional circuit precedent generally governs issue preclusion. *Voter Verified, Inc. v. Election Sys. & Software LLC*, 887 F.3d 1376, 1382 (Fed. Cir. 2018). But Federal Circuit precedent governs “any aspects that may have special or unique application to patent cases.” *Id.* (quotation marks omitted). In the Eleventh Circuit, a party asserting issue preclusion must show four elements:

- (1) the issue at stake must be identical to the one involved in the prior litigation;
- (2) the issue must have been actually litigated in the prior suit;
- (3) the determination of the issue in the prior litigation must have been a critical and necessary part of the judgment in that action; and
- (4) the party against whom the earlier decision is asserted must have had a full and fair opportunity to litigate the issue in the earlier proceeding.

Id. (emphasis omitted) (applying Eleventh Circuit law).

- I. **The ’907 and ’177 patents do not raise the same noninfringement issue as the parties litigated in *ParkerVision I*.**
 - A. **Different claims raise the same noninfringement issue as claims asserted in an earlier case only if the dispositive limitations are the same.**
 1. The Federal Circuit has long acknowledged “that separate patents describe ‘sepa-

rate and distinct inventions.” *Comair Rotron, Inc. v. Nippon Sensan Corp.*, 49 F.3d 1535, 1539 (Fed. Cir. 1995) (brackets omitted) (quoting 35 U.S.C. § 121). So issue preclusion generally does not bar a patentee from litigating infringement of patents not asserted in an earlier case. In *Comair Rotron*, a court had found that the defendant’s products did not infringe plaintiff’s ’028 patent. *Id.* at 1537–38. In a later suit, the defendant obtained summary judgment of noninfringement of the plaintiff’s ’069 patent, “explaining that the patents were related and that since [the defendant] did not infringe the ’028 patent it could not infringe the ’069 patent.” *Id.* at 1539. Because the patentee had not asserted the ’069 patent before, however, the Federal Circuit reversed, holding that “the issue for which estoppel is sought” was not raised, litigated, or decided in the earlier case. *Id.*⁴

Of course, when a product does not meet a specific limitation in one claim, it cannot meet the same limitation in other claims of the same patent. So the Federal Circuit has carved out an exception to the general rule for when an asserted claim has *the same limitation in the same context* as a court previously found dispositive. See *Aspex Eyewear, Inc. v. Zenni Optical Inc.*, 713 F.3d 1377, 1381–82 (Fed. Cir. 2013). Aspex had previously asserted two patents related to clip-on sunglasses. *Id.* at 1379. The asserted claims required “two retaining mechanisms for supporting a pair of lenses.” *Id.* The court had construed “retaining mechanisms” as requiring rims around the lenses. *Id.* And it had granted summary judgment because the accused products were rimless. *Id.* at 1379–80. The plaintiff later asserted the same two patents and mostly the same claims against “materially indistinguishable” products. *Id.* at 1380. The court held that the new claims did not create a new “issue” because they all had “the same ‘retaining mechanism’ limitation, in the same context, that the Federal Circuit in [the earlier suit] found dispositive of non-infringement.” *Id.* at 1381. The court explained that “[t]he selection of additional claims for liti-

⁴ See also *Brain Life, LLC v. Elekta Inc.*, 746 F.3d 1045, 1050 (Fed. Cir. 2014) (holding that a judgment of noninfringement of apparatus claims did not bar the plaintiff’s successor from accusing the same products of infringing method claims of the same patent); *SpeedTrack, Inc. v. Amazon.com, Inc.*, No. 09-CV-04479-JSW, 2017 WL 5598679, at *5 (N.D. Cal. Nov. 21, 2017) (ruling that “prior law suits ha[d] no bearing on” infringement of “an independent system claim, discrete from the method claims” of the same patent asserted in earlier cases).

gation or additional terms of ‘construction’ does not override the holding of non-infringement.” *Id.* at 1382.

Qualcomm urges a much broader exception, giving a noninfringement finding preclusive effect for any other claim covering “the same concept” or “substantially the same invention,” no matter the claim language defining the invention. *See* Mot. at 23. But *Aspex* does not apply issue preclusion so broadly. The plaintiff there did not try to avoid preclusion by arguing that the asserted claims lacked the specific limitation dispositive in the earlier case. It instead relied on “limitations that were not previously construed and applied.” *See Aspex*, 713 F.3d at 1381. The court thus reached the narrow—and logical—conclusion that when the asserted claim has *the same limitation in the same context* as a court previously found dispositive, then the claim’s *other limitations* do not matter.

Qualcomm relies mainly on an obviousness case, *Ohio Willow Wood Co. v. Alps South, LLC*, 735 F.3d 1333 (Fed. Cir. 2013). There, the Federal Circuit had previously invalidated Ohio Willow’s ’182 patent as obvious. *Id.* at 1341. The court then held that the earlier judgment barred Ohio Willow from asserting a related patent, the ’237. *Id.* at 1342–43. The parties did not dispute “that the asserted claims of the ’237 patent [were] substantially similar to the invalidated claims of the ’182 patent.” *Id.* at 1342. The court explained: “If the differences between the unadjudicated patent claims and adjudicated patent claims do not materially alter the question of invalidity, collateral estoppel [i.e., issue preclusion] applies.” *Id.* And it held that the asserted claims of the ’237 patent raised no new invalidity issue just because they “use[d] slightly different language to describe substantially the same invention.” *Id.*

Contrary to Qualcomm’s suggestion, the Federal Circuit has never given noninfringement findings such broad preclusive effect as obviousness findings. And for good reason: obviousness involves a different kind of analysis. It poses a question of *law* asking whether “the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art.” *Purdue Pharma L.P. v. Epic Pharma, LLC*, 811 F.3d 1345, 1351 (Fed. Cir.

2016) (quoting 35 U.S.C. § 103(a)). The prior art need not teach each claim limitation so long as “there is a showing of a suggestion or motivation to modify the teachings of the prior art to the claimed invention.” *Ormco Corp. v. Align Tech., Inc.*, 463 F.3d 1299, 1307 (Fed. Cir. 2006) (cleaned up). It follows, then, that if one claim is obvious, then so too are others claiming “substantially the same invention,” even if by “slightly different language.” *See Ohio Willow*, 735 F.3d at 1342.

One cannot so generalize across claim limitations to assess infringement. Infringement poses a question of *fact* asking whether the accused device contains each claim limitation exactly. *KCJ Corp. v. Kinetic Concepts, Inc.*, 223 F.3d 1351, 1355, 1358 (Fed. Cir. 2000). The jury must decide infringement of each claim by comparing the accused device to the claim’s limitations. *Convolve, Inc. v. Compaq Computer Corp.*, 812 F.3d 1313, 1317 (Fed. Cir. 2016). And unless the court construes a limitation, the jury must also decide how a person of ordinary skill in the art would understand it—a matter on which the parties can offer competing evidence. *Mediatek inc. v. Freescale Semiconductor, Inc.*, No. 11-cv-5341 YGR, 2014 WL 971765, at *4 (N.D. Cal. Mar. 5, 2014). So even “slightly different language” can “materially alter” whether the jury thinks the accused product meets a given limitation. *See Ohio Willow*, 735 F.3d at 1342.⁵

Qualcomm also cites *Molinaro v. Fannon/Courier Corp.*, which applied issue preclusion to a noninfringement finding. *See* 745 F.3d 651, 655 (Fed. Cir. 1984). But *Molinaro* involved a second suit asserting the *same claim* as the first. *See id.* (noting “that the claim asserted here is the same as that” asserted before). Thus, it does not support extending issue preclusion to previously unasserted claims, much less claims lacking the dispositive limitation from the first suit.

⁵ Qualcomm’s relies on two other invalidity cases. It cites *Soverain Software LLC v. Victoria’s Secret Direct Brand Mgmt., LLC*, 778 F.3d 1311, 1319 (Fed. Cir. 2015). There, the court had previously invalidated one of Soverain’s patent as obvious. The court then held that the earlier judgment barred a suit on another claim, which depended from the first, because the additional limitation did not change the validity analysis. Similarly, in *Swartz v. United States Patent & Trademark Office*, the court had previously affirmed the PTO’s rejection of two patent applications for failure of utility and enablement. *See* 743 F. App’x 426, 428 (Fed. Cir. 2018) (per curiam). The patentee filed a third application that differed from the first two in some respects, but the patentee pointed to no differences in the representative claims. The court applied issue preclusion because the differences did not change the validity analysis. Like *Ohio Willow*, *Soverain* and *Swartz* do not require broad preclusive effect for noninfringement findings.

2. The asserted claims of the '907 and '177 patents lack the “generating” limitation of the asserted claims in *ParkerVision I*. The key language in each “generating” limitation required energy transferred to a storage device to “generate” a down-converted signal. *See Parkervision*, 27 F. Supp. 3d at 1272–74. The district court did not construe “generate,” instead giving it its plain and ordinary meaning. *Id.* at 1275. Yet that term was key to the *ParkerVision I* judgment. With the benefit of a full trial record, the district court and Federal Circuit understood the “generating” limitation as requiring the energy transferred to the storage devices (capacitors) in Qualcomm’s products to bring about the down-converted (baseband) signal for the first time. *See ParkerVision*, 621 F. App’x at 1013, 1016; *Parkervision*, 27 F. Supp. 3d 1283–84. That energy could not “generate” the baseband if the signal that reached the capacitors was already “the baseband.” *See id.*

One need only glance at the asserted claims of the '907 and '177 patents to confirm that they lack “generating” limitations. None of those claims uses the word “generate,” or any variant, in any context. Qualcomm argues that the independent asserted claims of the '907 patent claim the “same concept” by claiming a down-conversion method requiring “providing ... energy from the energy storage device to the load,” “whereby the energy provided to the load forms a down-converted signal.” But the quoted language differs from the “generating” limitations in *ParkerVision I*. No party sought to construe any term of the '907 patent. So the jury must decide on a trial record how a POSITA would understand the claims’ plain and ordinary meaning. *See MediaTek*, 2014 WL 971765, at *4.

The independent asserted claims of the '177 patent also use no language like the “generating” limitations in *ParkerVision I*. They instead claim a down-conversion system and method, respectively, requiring (1) a first and second “matched filtering/correlating module,” each receiving an input signal and outputting a down-converted signal; and (2) combining the two down-converted signals to output “a first channel down-converted signal.” Qualcomm suggests that “down-conversion using a ‘matched filtering/correlating module’” is the same as the “generating” limitation. *See Mot.* at 24–25. But again, no party urges a construction of this term requiring

“generating” a down-converted signal from energy transferred to a storage device. So again, the jury must decide infringement of the ’177 patent by comparing its specific claims to the accused products. *See Convolve*, 812 F.3d at 1317.

B. Anyway, Qualcomm cannot show that the asserted claims of the ’907 and ’177 patents are “substantially” the same as the claims asserted in *ParkerVision I*.

Not only do the asserted claims of the ’907 and ’177 patents differ from the *ParkerVision I* claims, but those differences matter. Thus, even if this Court applies an invalidity-type preclusion analysis to the *ParkerVision I* noninfringement finding, Qualcomm’s motion fails.

1. The PTO allowed the ’907 and ’177 patent claims without terminal disclaimers, thus finding them patentably distinct from *ParkerVision*’s other patents.

The PTO has already determined that the ’907 and ’177 patents claim different inventions than the earlier-expiring patents asserted in *ParkerVision I*. The Patent Act “forbids an individual from obtaining more than one patent on the same invention, i.e., double patenting.” *Abbvie Inc. v. Mathilda & Terence Kennedy Inst. of Rheumatology Tr.*, 764 F.3d 1366, 1372 (Fed. Cir. 2014). “Thus, if [a] later expiring patent is merely an obvious variation of an invention disclosed and claimed in the reference patent, the later expiring patent is invalid for obviousness-type double patenting.” *Id.* “[T]he doctrine of obviousness-type double patenting was developed to prevent a patent owner from extending his exclusive right to an invention through claims in a later-filed patent that are not patentably distinct from the earlier filed patent.” *SimpleAir, Inc. v. Google LLC*, 884 F.3d 1169, 1167 (Fed. Cir. 2018).

Thus, on examination, an examiner may issue an obviousness-type double patenting rejection if an application is not patentably distinct from earlier patents or applications owned by the applicant. But even then, “a terminal disclaimer may obviate an obviousness-type double patenting rejection ... in exchange for limiting the patent term and alienability of the resulting continuation patent.” *Id.* “[A] terminal disclaimer filed to obviate judicially created double patenting in a patent application must include a provision that any patent granted on that application shall be enforceable only for and during such period that said patent is commonly owned with the ap-

plication or patent which formed the basis for the judicially created double patenting.” *In re Hubbell*, 709 F.3d 1140, 1148 (Fed. Cir. 2013) (cleaned up) (quoting 37 C.F.R. § 1.321(c)(3)).

While both the ’907 and ’177 patents descend from the ’551 patent, one of the patents asserted in *ParkerVision I*, both issued without obviousness-type double patenting rejections in view of the ’551 patent. Burke Dec. ¶ 5. The examiners, including a common examiner for both applications, issued the ’907 patent with no double-patenting rejection. *Id.* The examiners rejected some—but not all—claims of the ’177 patent for provisional double patenting under 25 U.S.C. § 101 in view of a co-pending application. *Id.* Yet ParkerVision mooted that rejection by canceling those claims. *Id.* The examiners thus found all the issued ’907 and ’177 patent claims patentably distinct from those of the earlier ParkerVision patents. *See SimpleAir*, 884 F.3d at 1167. So the ’907 and ’177 patents are presumptively not mere obvious variations of the *ParkerVision I* patents but claim patentably distinct inventions. *See* 35 U.S.C. § 282(a); *Abbvie*, 764 F.3d at 1372.

2. The summary-judgment record shows that the ’907 and ’177 patent differ from the *ParkerVision I* patents in ways material to the infringement analysis.

a. Qualcomm urges a standard like the Federal Circuit applied in *Ohio Willow*, under which patent claims raise “identical issues” if they are “substantially similar” although they use “slightly different language to claim the same invention.” *See* 735 F.3d at 1342. Even if that standard applies to a noninfringement finding, however, claims are “substantial similar” only if “the differences between the unadjudicated patent claims and adjudicated patent claims do not materially alter the question of [noninfringement].” *Id.* That standard was easily enough met in *Ohio Willow* because substantial similarity was “without dispute.” *Id.*; *see also Soverain Software*, 778 F.3d at 1319–20 (holding that an additional limitation did not affect the invalidity analysis because it merely substituted the Internet for a “generic network,” reflecting a routine incorporation of Internet technology into an existing process).

Yet showing substantial similarity requires more than generalizing across claims to express some common themes or concepts. Thus, in *Nichia Corp. v. VIZIO, Inc.*, another invalidity

case, the court refused to apply issue preclusion despite recognizing that “the asserted claims *as a whole* are substantially similar in structure and language to the invalidated claims.” *See* No. CV1600545SJOMRW, 2018 WL 1942413, at *7 (C.D. Cal. Mar. 29, 2018) (emphasis supplied by the court). The court emphasized that the question was “not whether the additional limitation renders the claim non-obvious, but whether the addition of the new limitation would alter the obviousness *analysis*.” *Id.* at *8 (emphasis supplied by the court). The question here, then, is not whether Qualcomm’s products infringe the asserted claims of the ’907 and ’177 patents. It is instead whether the differences between those claims and the *ParkerVision I* claims change the infringement *analysis*.

b. The infringement analysis differs here. To show that the infringement analysis is unchanged, Qualcomm would have to compare the *ParkerVision I* analysis to the ’907 and ’177 claim language to show that the former bars infringement of the latter. But it does not even try.

Qualcomm bases its motion on the district court’s and Federal Circuit’s finding in *ParkerVision I* that “the double-balanced mixers in the accused Qualcomm products create the baseband signal, before the signal reaches the accused capacitors.” Mot. at 3 ¶ 8. But rather than apply that finding to the language of the ’907 and ’177 patent claims, Qualcomm builds its argument on a mischaracterization of the “invention at issue in the ’907 and ’177 patents” that abstracts away claim language fatal to Qualcomm’s motion: “Parkervision’s alleged invention at issue in the ’907 and ’177 patents uses an energy storage device to down-convert a high-frequency signal into a low-frequency baseband signal” *Id.* at 3 ¶ 7.

Qualcomm’s abstraction is not an undisputed material fact, because the plain language of the asserted claims, which defines the “invention at issue in the ’907 and ’177 patents,” differs substantially. Claim 1 of the ’907 patent requires that “energy provided to the load forms a down-converted signal.” D318–25 at 22–23 (’907 patent, claim 1). Not only does the claim not require a baseband signal, but also it does not require any signal to be generated “us[ing] an energy storage device to down-convert a high-frequency signal.” *Id.*; Mot. at 3 ¶ 7. The language of the as-

sented claims of the '177 patent, each of which requires one or more “matched filtering/correlating modules,” is even farther afield.

Comparing the claim language with the *ParkerVision I* finding confirms that judgment does not bar infringement here. In *ParkerVision I*, the Federal Circuit stated that “baseband current is created by the double-balanced mixer *before* the current reaches the capacitors.” Mot. at 3 ¶ 5 (quoting 621 F. App’x at 1016) (typeface Qualcomm’s). The court found that dispositive because “the accused products do not require an electric current from the carrier signal to go in and out of the storage capacitors in order to create the baseband signal.” *Id.* The district court thought the same, holding that ParkerVision’s expert testified on cross-examination that the capacitors in Qualcomm’s accused products do not “‘generate’ the baseband by charging and discharging.” *Parkervision*, 27 F. Supp. 2d at 1283. Thus, both the district court and Federal Circuit understood the “generating” limitations of the *ParkerVision I* claims to require capacitors in Qualcomm’s product to create, in the first instance, the baseband signal by charging and discharging. The perceived disagreement between that requirement and the testimony of ParkerVision’s expert was the sole basis for overturning the jury’s verdict. *See ParkerVision*, 621 F. App’x at 1014; *Parkervision*, 27 F. Supp. 3d 1283–84.

The claims asserted here materially differ. There is no tension between the '907 and '177 claims and the *ParkerVision I* finding, because the claims asserted here have neither “generating” limitations nor any other limitations that specify where “the baseband signal” must be created in the first instance. Instead, they require only that “a down-converted signal” be formed in a load (e.g., '907 Patent, claim 1) or output by a matched filtering/correlating module (e.g., '177 Patent, claim 1). Neither requires that “the baseband signal” (or any other signal) be generated by the charging and discharging of a capacitor or energy storage device.

To the contrary, the '907 claims require that the “energy provided to the load,” which “forms a down-converted signal,” come not only from an energy storage device *but also from the electromagnetic signal itself*. Allen Dec. ¶ 12. Thus, far from requiring that “the baseband signal” be “generated” by the charging and discharging of a capacitor, the claims require “a down-

converted signal” be formed in a load using energy taken directly from the electromagnetic signal, without charging and discharging a capacitor. D318–25 at 22–23 (’907 patent, claim 1); Allen Dec. ¶ 12.

The claims asserted here, therefore, could still infringe under the *ParkerVision I* analysis. They track the *ParkerVision I* explanation of the accused circuitry as involving switches that can themselves generate a down-converted signal.⁶ For example, Figure 126A, “an embodiment of a switch module,” shows that the output of the switches (i.e., circuit node SP2, labeled 12644), before the energy storage device (i.e., capacitor C1) and load (i.e., resistor R2) is a down-converted signal: “Fig. 126E illustrates a down-converted signal at point 12644 of Fig. 126A, which is generated by the down-conversion process.” D319–25 at 13 (’907 patent, 111:11, 111:31–33). Thus, the patent shows that the switches themselves generate a down-converted signal (“switch-down-converted signal”), which the Federal Circuit found is also true of the mixers in the Qualcomm products accused in *ParkerVision I*. Allen Dec. ¶¶ 14–15, 18; see *ParkerVision*, 621 F. App’x at 1013–15.

Of course, a signal does not disappear after being down-converted. A switch-down-converted signal is typically processed on the way to extracting the information it bears, shaping the down-converted signal at different points in the receiving circuitry. Allen Dec. ¶ 16. The patents have many examples, such as the signals shown in Figures 57E and 57F:

In FIG. 57F, a demodulated baseband signal 5716 represents a *filtered version* of the demodulated baseband signal 5712, on a compressed time scale. The demodulated baseband signal 5716 ... *can be further processed* using any signal processing technique(s) without further down-conversion or demodulation.

The present invention can output the *unfiltered* demodulated baseband signal 5712, the *filtered* demodulated baseband signal 5716, a *partially filtered* demodulated baseband signal, a *stair step* output signal, etc.

D318–23 at 82 (’907 patent, Figs. 57E, 57F) D318–24 at 52 (87:28–38) (emphasis added); Allen Dec. ¶ 16.

⁶ The “baseband signal” required by the *ParkerVision I* finding is a “down-converted signal.” Allen Dec. ¶ 15.

The asserted claims of the '907 patent are directed to this type of post-down-conversion processing. The load receives energy from two sources—(i) directly from the electromagnetic signal during the periodic couplings and (ii) from the energy storage device between the periodic couplings ['907 Patent, claim 1]—both of which emanate from the switch-down-converted signal generated by periodically coupling and uncoupling an electromagnetic signal at a frequency less than twice that of the carrier signal. Allen Dec. ¶¶ 13, 17. Both sources of energy delivered to the load in the '907 claims emanate from the switch-downconverted-signal, as shown, for example, in Figure 126A. *Id.* ¶ 17. When switches M1, M2, . . . , M20 are closed (i.e., during periodic couplings), energy from switch-down-converted signal SP2 is provided directly to the load R2 and also to capacitor C1. *Id.* When the switches are open (i.e., between periodic couplings), the energy provided to capacitor C2 while the switch was closed is provided to the load R2. *Id.* Within the load, these two sources of energy, both previously down-converted, form a down-converted signal by shaping switch-downconverted-signal SP2. *Id.* Thus, *ParkerVision I* cannot bar infringement of the '907 claims, because they contemplate systems that generate switch-down-converted signals, like the embodiment of Figure 126A and Qualcomm's accused products. *Id.* ¶¶ 18–19.

Contrary to Qualcomm's argument, the presence of a switch-down-converted signal in Qualcomm's accused products, as the *ParkerVision I* courts found,⁷ does not suggest non-infringement. Indeed, it compels the *opposite* conclusion. Because the switch-down-converted signal generated by Qualcomm's so-called “double-balanced mixer” is a down-converted signal, so too is the signal formed in the load. *Id.* ¶ 18. Thus, as required by the '907 claims, each of Qualcomm's accused products forms a down-converted signal in its load. *Id.*

Qualcomm fares no better against the asserted claims of the '177 patent. Qualcomm bases its argument on the parties' proposed constructions of the “matched filtering/correlating module”

⁷ Qualcomm admits that “the trial evidence undisputedly established that the output of the earlier, upstream ‘*double balanced mixers*’ in the accused products ‘is *the baseband*.’” Mot. at 6 (emphasis in original).

term. Mot. at 24–25. Qualcomm argues that “both parties’ proposed constructions require an energy storage device to be part of the circuitry that performs the down-conversion and outputs the down-converted signal.” *Id.* at 24. But like the ’907 claims that expressly require an “energy storage device,” neither the ’177 claims themselves nor the parties’ proposed constructions of “matched filtering/correlating module” require an energy storage device to generate a down-converted signal. D318–29 at 23 (’177 patent, claim 1); *compare* D317 at 24–31, *with* D324 at 17–26. Instead, the pertinent part of ParkerVision’s proposed construction⁸ tracks the ’907 claims discussed above. Allen Dec. ¶ 20. When the switch is closed, energy is both (i) transferred to a load directly from an electromagnetic signal (i.e., a modulated RF carrier signal) and (ii) accumulated. D303 at 3. When the switch is open, energy accumulated while the switch was closed is provided to (i.e., discharged through) the load. *Id.* Like the ’907 claims, ParkerVision’s proposed construction of “matched filtering/correlating module” contemplates a switch-down-converted signal generated by a switch sampling the electromagnetic signal at an aliasing rate. Allen Dec. ¶ 20. The result is a down-converted signal in the load, because all the energy transferred to the load is drawn from the switch-down-converted signal. *Id.* Thus, like the ’907 claims, the ’177 claims square with the *ParkerVision I* description of Qualcomm’s products.

C. The ITC case has no bearing on the issues here.

Qualcomm repeatedly discusses the ITC case ParkerVision brought against Qualcomm and others asserting different patents than either this suit or *ParkerVision I (In re Certain RF Capable Integrated Circuits & Prods. Containing the Same*, No. 337-TA-982 (U.S.I.T.C.)). *See, e.g.*, Mot. at 7–9, 12, 14–15, 21–22. Qualcomm’s discussion of the ITC case is misplaced.

First, the ITC case produced no potentially preclusive decision. *See Block v. U.S. Int’l Trade Comm’n*, 777 F.2d 1568, 1571 (Fed. Cir. 1985) (holding that an ALJ’s initial decision would not have preclusive effect where the ITC vacated the decision and terminated the investi-

⁸ Qualcomm’s construction says nothing of a down-converted signal, let alone how it is generated. D324 at 17-26.

gation, because “a dismissal in an ITC proceeding without a finding is not a final determination” (cleaned up)). Instead, the ITC terminated the investigation before even an initial ALJ decision.

Second, ParkerVision’s motion to terminate the ITC case was unrelated to issue preclusion, and Qualcomm’s suggestion that the *ParkerVision I* judgment forced ParkerVision to “surrender” in the ITC is simply false. *See* Mot. at 9. ParkerVision instead sought to terminate the investigation because, one business day before the hearing, the ALJ granted a motion by the respondents to strike key parts of ParkerVision’s expert report disclosing what ParkerVision called the “TIA Capacitor Feedback” theory. *See* Burke Dec., Ex. A (ITC Order No. 26 at 9–10). The respondents had argued that the theory was untimely because ParkerVision had omitted it from its infringement contentions. *Id.* at 9. In contrast, ParkerVision had argued that any prejudice to the respondents was “of their own making” because they had not timely provided discovery. *Id.* Because the excluded theory was ParkerVision’s “primary theory of infringement,” the ALJ’s procedural ruling prompted ParkerVision to “reluctantly” withdraw its petition. *See* Burke Dec., Ex. B (Mot. to Terminate at 4–5); Burke Dec., Ex. C (ITC Hrg. at 8:7–14).

Third, while Qualcomm repeatedly cites the OUII staff’s brief arguing that *ParkerVision I* barred litigation of the receiver patents in the ITC case, that brief warrants no weight here. To start, the OUII is like a litigant, and the ITC was free to reject its arguments. *See In re Qimonda AG*, No. 09-14766-RGM, 2009 WL 2210771, at *6 (Bankr. E.D. Va. July 16, 2009) (noting that the OUII “is separate from the Commission itself” and “appears before the Commission just as the United States Trustee appears before” a bankruptcy court). And there was good reason for the ITC to disagree with the OUII. To repeat, that case, like this one, involved different patents than *ParkerVision I*. And, like Qualcomm here, the OUII sought to apply issue preclusion far too broadly, asserting that the *ParkerVision I* judgment was preclusive even though the ITC patents lacked the “generating” limitation.⁹

⁹ Qualcomm also discusses a suit ParkerVision filed against Qualcomm and others in the Jacksonville Division asserting the same patents as it asserted in the ITC. *See, e.g.,* Mot. at 9-10, 12 (citing *ParkerVision, Inc. v. Apple Inc., et al.*, No. 3:15-cv-1477-J-39-JRK (M.D. Fla.)). But the Jacksonville suit has no bearing on the issues here, and

II. Qualcomm fails to prove that the Flying Dutchman design is essentially the same as the accused products in *ParkerVision I*.

Nor has Qualcomm shown that all the accused products here raise identical issues to the accused products in *ParkerVision I*. As Qualcomm acknowledges, ParkerVision accuses models using a design not at issue in *ParkerVision I*: the Flying Dutchman. *See* Mot. at 20–21. Qualcomm has not carried its summary-judgment burden of proving that the Flying Dutchman design raises identical infringement issues to the accused products in *ParkerVision I*.

Issue preclusion extends to new products only if the defendant shows “a close identity” between the accused and previously adjudicated devices, so “that they are essentially the same.” *ArcelorMittal Atlantique et Lorraine v. AK Steel Corp.*, 908 F.3d 1267, 1274 (Fed. Cir. 2018) (quotation marks omitted). “Accused devices are essentially the same where the differences between them are merely colorable or unrelated to the limitations in the claim of the patent.” *Id.* (quotation marks omitted). Qualcomm has the burden of showing that the Flying Dutchman design is essentially the same as the Magellan design. *See id.* (reversing summary judgment because the defendant “failed to meet its burden that the ULTRALUME products in the present action are materially the same as the AXN products in the 2010 action, especially when the facts are viewed in the light most favorable to the non-movant”).

Qualcomm cannot meet its summary-judgment burden here. To start, Qualcomm insists that “the structure of the Flying Dutchman design was fully litigated by ParkerVision through fact and expert discovery in the ITC action.” Mot. at 21. But the ITC case could not conclusively establish that the Magellan and Flying Dutchman designs are essentially the same because, again, it produced no decision. *See Block*, 777 F.2d at 1571.

Qualcomm also argues that the ITC evidentiary record shows that the Flying Dutchman design uses the same architecture as the Magellan design. But Qualcomm submits little of the purported evidence. It first cites an excerpt from *its own prehearing brief* in the ITC case (“Gardener Ex. 7”). *See Creative Compounds, LLC v. Starmark Labs.*, 651 F.3d 1303, 1311 (Fed. Cir.

Qualcomm does not argue otherwise.

2011) (discrediting “conclusory attorney arguments” as summary-judgment evidence). While the excerpt cites some exhibits, it identifies them only by number, and Qualcomm has not submitted them here. Qualcomm also cites excerpts from the ITC rebuttal witness statements of its expert, Behzad Razavi (“Gardener Ex. 17”), and a Qualcomm employee, James Jaffee (“Gardener Ex. 18”). But these self-serving statements from another case—which ParkerVision has had no chance to cross-examine here—are also not enough to conclusively prove that the Flying Dutchman design is essentially the same as the Magellan design. Indeed, the witness statements show no sign that they were even under the penalty of perjury. *See Scaff-Martinez v. Fed. Bureau of Prisons*, 160 F. App’x 955, 957 (11th Cir. 2005) (discussing requirements of a valid summary-judgment affidavit or declaration, including that “it was made under the penalty of perjury”).

Nor has Qualcomm provided the discovery needed for ParkerVision to fully rebut the allegation that the Flying Dutchman design is essentially the same as the Magellan design. For example, it has produced no schematics for chip models using the Flying Dutchman design. The parties have until March 3, 2020, to complete fact discovery on products Qualcomm introduced during the three-year stay of this case, including models based on the Flying Dutchman design, and ParkerVision has until February 12 to amend its infringement contentions to address those products. D322 at 3; D323. As ParkerVision and its experts have not yet been able to analyze those products, the Court cannot now make a summary-judgment finding that they are essentially the same as models using the Magellan design. *See ArcelorMittal*, 908 F.3d at 1277 (reversing summary judgment and holding that additional discovery was warranted on whether accused products were the same as those found noninfringing in an earlier case).

CONCLUSION

This Court should deny Qualcomm’s motion for partial summary judgment of noninfringement based on *ParkerVision I*.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that, on October 25, 2019, I filed this document with the Court's ECF system, which will serve all counsel of record via email.

/s/ Douglas A. Cawley
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