

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

PARKERVISION, INC.,

Plaintiff,

v.

QUALCOMM INCORPORATED,  
QUALCOMM ATHEROS, INC.,

Defendants.

CASE NO.: 6:14-CV-00687-PGB-LRH

**PARKERVISION'S MOTION FOR EXTENSION OF TIME TO DESIGNATE A  
SUBSTITUTE TESTIFYING EXPERT FOR THE ASSERTED RECEIVER CLAIMS**

Plaintiff, ParkerVision, respectfully moves the Court for an Order permitting it to designate a substitute expert on two of the four patents-in-suit (the “receiver patents”). As set forth herein, one of ParkerVision’s testifying experts has indicated his intention to resign based on certain memory and other infirmities that hinder his ability to continue serving as a testifying expert in this matter. If the Court will permit the substitution requested herein, ParkerVision also respectfully moves the Court to extend the expert discovery deadline and dispositive motion deadline until January 29, 2021 and February 15, 2021, respectively, for the limited purposed of conducting discovery and a deposition related to the substitute receiver patent expert only. The remainder of the expert discovery in this matter—including the depositions of the other technical and economic experts—has been completed and no extension is being requested related thereto. In support thereof, ParkerVision states as follows:

1. On March 3, 2015, the Court set initial deadlines for the disclosure of experts, the disclosure of initial and rebuttal expert reports, the expert discovery deadline, and the deadline for filing dispositive motions. *See* Dkt. 92. On February 4, 2016, the case was stayed after Qualcomm initiated IPR proceedings. Dkt. 250. Following the IPRs, and a second stay due to the COVID-19 pandemic, the Court issued a revised scheduling order setting the deadlines for: (1) opening expert reports as October 9, 2020; (2) rebuttal expert reports as November 23, 2020; and (3) the closing of expert discovery as December 11, 2020. *See* Dkts. 384 at 6; 447 at 2; 451. The Court further ordered that dispositive motions were due by December 30, 2020. Dkt. 447; 451.

2. The Asserted Patents encompass both receiver and transmitter functionality. The accused transceiver products in this case contain both receiver and transmitter components. Pursuant to the scheduling order, ParkerVision identified [REDACTED] as a testifying

expert for the Asserted Receiver Claims of the two receiver patents in 2015.<sup>1</sup> At the same time, ParkerVision also designated [REDACTED] as a testifying expert for the remaining Asserted Transmitter Claims of the two transmitter patents.<sup>2</sup>

3. On October 9, 2020, along with its other opening expert reports, ParkerVision served [REDACTED] On November 23, 2020, along with its other rebuttal expert reports, ParkerVision served [REDACTED]

4. Despite having drafted both of his reports, on December 9, 2020, following part of his deposition, [REDACTED] offered his resignation and asked to be released from this case. Declaration of Mitch Verboncoeur (“Verboncoeur Decl.”) at ¶ 15; Declaration of [REDACTED] (“[REDACTED] Decl.”) at ¶ 4; Ex. 1 ([REDACTED] Resignation Letter). In his resignation, [REDACTED] stated that when he signed on as an expert with ParkerVision in 2015, he “did not believe he would have any difficulty filling the role.” [REDACTED] Decl. at ¶ 2. However, now nearly six years have passed and at the age of [REDACTED] the demands and stress of the role are too much for him, and it has become apparent that his memory is faltering. *See Id.* In light of these infirmities, [REDACTED] has decided that he will no longer work as a testifying expert and has indicated his intention to resign from this case. *Id.* at ¶ 3.

5. [REDACTED] stated that he wishes to resign now because he does “not believe [his] memory and ability to parse questions on examination is reliable enough to provide consistent and accurate testimony under examination” now and at trial. *Id.* at ¶¶ 4, 5. That his infirmities limited his ability to testify was solidified to him during his recent deposition, where he honestly testified that he could not remember certain topics (including recent events) and later admitted he

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<sup>1</sup> U.S. Patent Nos. 7,218,907 and 7,865,177

<sup>2</sup> U.S. Patent Nos. 6,091,940 and 7,039,372

was unable to parse out the words in the questions so that he could fully understand what he was being asked and offer testimony in response. *Id.* at ¶ 7; Ex. 1 (“While it pains me to say it, my memory has slipped at times, and it was also difficult for me to parse out the words of questions in my recent deposition.”); Verboncoeur Decl. at ¶ 6 (“I believe that [REDACTED] was telling the truth when he testified that he had difficulty remembering details related to this case.”); *see also* Ex. 2 at 3-4 (following the first day of [REDACTED] deposition, ParkerVision requested that the second day be limited and that the periods for questioning be shortened because [REDACTED] “capacity to focus and even to speak deteriorate over the course of the day ([REDACTED] [REDACTED]).”).

6. [REDACTED] acknowledges that his memory lapses and general forgetfulness go beyond the technical details of this case. [REDACTED] at ¶ 8. For example, [REDACTED] testified in his deposition when he was “asked about a February 2020 trip that [he] took to Qualcomm’s facilities in San Diego, [that he] was not able to recall [going to San Diego].” *Id.* After his deposition, he was able to confirm “with the help of [his] calendar” that he did in fact board an airplane, fly across the country, and visit San Diego within the last ten months—despite not remembering this trip when asked about it in his deposition. *Id.*

7. Noting the significant stress that being an expert in this case places on him, [REDACTED] believes that it would be in his and ParkerVision’s best interest to substitute a different testifying expert. *Id.* at ¶ 13, 14; *See also* Verboncoeur Decl. at ¶ 6, 13, 14 (agreeing that he does not believe at this point that [REDACTED] can give “consistent, reliable, and accurate testimony,” and that substitution would be in the best interests of both [REDACTED] and ParkerVision).

8. Upon learning of [REDACTED] intent to resign, ParkerVision immediately notified Qualcomm’s counsel of the issue. *See* Ex. 2 at 2 (December 10, 2020, email from J. Budwin to

Qualcomm's counsel requesting a time to discuss the issue); *see also Id.* at 2 (December 14, 2020, email from J. Budwin again notifying Qualcomm of the issue and noting that "time is of the essence" and that ParkerVision is trying to "move as quickly as possible."). ParkerVision was able to discuss the issue with Qualcomm and thereafter requested Qualcomm's consent to ParkerVision substituting another expert. *Id.* at 1. Despite observing ██████████ memory lapses during the deposition,<sup>3</sup> Qualcomm's counsel responded during the discussion on December 14, 2020, that due to the speed at which this issue has developed it was not able to provide a response at this time, and reserved its right to take a position after ParkerVision filed this Motion.

9. ParkerVision is now respectfully requesting that the Court grant its Motion for Extension of Time to Designate an Alternative Testifying Expert for the Asserted Receiver Claims to replace ██████████ with a substitute expert. Contingent upon the Court's granting of this Motion, ParkerVision will designate either ██████████ to replace ██████████. ██████████ has already been designated as ParkerVision's expert for the Asserted Transmitter Claims and has been deposed by Qualcomm. And, ██████████ was first disclosed as a potential expert to Qualcomm in 2015 and has been recently re-engaged for the possibility of offering opinions in substitution for ██████████. Lastly, ParkerVision is requesting that the expert discovery deadline and dispositive motions—for the two receiver patents and the Asserted Receiver Claims only (*i.e.* the issues addressed by ██████████) be extended to January

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<sup>3</sup> *See, generally*, Ex. 3 at 240:6-18 (██████████ Tr. (Dec. 7, 2020)) (Qualcomm's attorney to ██████████: "You can't remember if in February of 2020 you were at Qualcomm able to run simulation in their design environment? . . . And the fact that you stated in your expert report that you signed under oath, that's not enough to verify that to you?"); Ex. 4 at 344:1-20 (██████████ Tr. (Dec. 8, 2020)) (Qualcomm's counsel noticing that ██████████ forgot things from the previous day and reminding ██████████ that he had asked ██████████ the same question the day prior and that he had thought that they "were on the same page.")

29, 2021 and February 15, 2021, respectively, for the limited purpose of conducting discovery and a deposition related to the receiver patent substitute expert.

10. ParkerVision is not requesting that the deadline for all expert reports or all of expert discovery be extended. Instead, ParkerVision requests sufficient time to permit the substitute expert—either [REDACTED] or [REDACTED]—to adopt [REDACTED]'s initial and rebuttal reports. ParkerVision also agrees that the substitute expert will provide testimony within the scope of [REDACTED]'s reports, and will sit for deposition as soon as practical.

11. ParkerVision will also agree to reimburse Qualcomm's reasonable costs related to the conducting the additional deposition of the substitute expert. The depositions are being conducted remotely, via Zoom, which lessens the burden on Qualcomm of having to conduct an additional examination of the substitute expert.

12. With the trial date for this matter currently set for May 2021, ParkerVision is providing sufficient notice in advance of the beginning of the scheduled trial date and does not believe that the trial date needs to be modified. *See* Dkt. 384.

13. ParkerVision has acted diligently regarding this issue, filing this motion less than a week after [REDACTED]'s deposition and within days of when he indicated his intent to resign from this case. This Motion is not being made for purposes of delay or any other improper purpose.

#### **MEMORANDUM**

14. The sudden, unexpected resignation of [REDACTED], based on the infirmities discussed herein and in the supporting declarations, constitutes excusable neglect for requesting the extension of the deadline to disclose a substitute expert witness.

15. “There is little published law on the question of what standard governs substitution of expert witnesses.” *Leibel v. NCL (Bahamas) Ltd.*, 185 F. Supp. 3d 1354, 1355 (S.D. Fla. 2016). This Court has held that under Rules 6 and 16 of the Federal Rules of Civil Procedure a party must demonstrate both good cause and excusable neglect for filing an untimely motion to designate an alternate expert. *PK Studios, Inc. v. R.L.R. Investments, LLC*, 2017 WL 495497, at \*2 (M.D.Fla., 2017) (granting the plaintiff’s motion for an extension of time to designate an alternate damage expert). “The good cause standard precludes modification unless the schedule cannot be met despite the diligence of the party seeking the extension.” *Id.* (quoting *Sosa v. Airprint Sys., Inc.*, 133 F.3d 1417, 1418 (11th Cir. 1998)).

16. Further, “[w]hen evaluating whether a party has shown excusable neglect, the Court considers the danger of prejudice to the nonmovant, the length of the delay and its potential impact on judicial proceedings, the reasons for the delay, including whether it was within the reasonable control of the movant, and whether the movant acted in good faith.” *Id.* (quoting *Advanced Estimating Sys., Inc. v. Riney*, 130 F.3d. 996, 997–98 (11th Cir. 1997)) (internal quotations omitted); *Demint v. NationsBank Corp.*, 208 F.R.D. 639, 642 (M.D. Fla. 2002).

17. The starting point in the analysis of excusable neglect is an explanation of the reason for delay. *Demint*, 208 F.R.D. at 642. Here, the reason for ParkerVision’s request for the extension of time is because ParkerVision’s previously designated expert on the asserted claims of the receiver patents unexpectedly resigned due to his deteriorating memory [REDACTED]. See Ex. 1; [REDACTED] Decl. at ¶ 4. Prior to [REDACTED] deposition, which occurred less than a week ago, ParkerVision and its attorneys were unaware that [REDACTED] was suffering these issues which would materially impact his ability to serve as a testifying expert in this matter.

Verboncoeur Decl. at ¶ 5. Under similar circumstances, “[c]ourts have *consistently* allowed the substitution of expert witnesses when unexpected events prevent the designated expert from testifying at trial.” *Leibel v. NCL (Bahamas) Ltd.*, 185 F. Supp. 3d 1354, 1356-1357 (S.D. Fla. 2016) (summarizing cases where good cause was found to substitute experts) (emphasis added); *see also Park v. CAS Enterprises, Inc.*, 2009 WL 4057888, at \*1–2 (S.D. Cal. 2009) (finding good cause—even in the absence of a court ordered doctor’s note—to amend the scheduling order to designate a new expert where the plaintiff’s expert resigned due to “memory problems.”); *Jung v. Neschis*, No. 01 Civ. 6993, 2007 WL 5256966, at \*4, \*16–17 (S.D.N.Y. Oct. 23, 2007) (finding good cause to amend the expert discovery deadline where party sought to introduce a substituted expert because the original expert developed Alzheimer’s disease during course of litigation). This Court has found good cause and excusable neglect to grant a plaintiff’s motion for extension to designate an alternative expert even when the “[p]laintiff [did] not sufficiently explain the reason for the [expert’s] resignation” because “harsh prejudice might result” to the plaintiff if they were forced to continue without an expert witness. *PK Studios*, 2017 WL 495497 at \*4; *Avant Garde Eng’g and Res. Ltd. v. Nationwide Equip. Co., Inc.*, 2013 WL 12153534, at \*2 (M.D. Fla. 2013) (granting the plaintiff’s motion to substitute its expert witness after the expert refused to continue his participation in the case).

18. [REDACTED] difficulties and resignation were unexpected and could not have been foreseen by ParkerVision. Prior to [REDACTED] resignation, [REDACTED] wrote the nearly 350 pages contained in both of his expert reports and personally investigated the products and prior art and provided his own independent analysis. Verboncoeur Decl. at ¶ 4. Additionally, [REDACTED] history as a competent expert witness in other cases indicates just how unexpected his resignation is. *See Ex. 3 at 11:18-22* ([REDACTED] Tr. (Dec. 7, 2020)).

19. However, despite his subject matter expertise and significant work in this case, during his deposition, ██████ began exhibiting difficulty remembering simple details related to this case. *See, e.g.*, Verboncoeur Decl. at ¶ 8 (“█████ had difficulty recalling the names of the products that he analyzed despite months of work on this case and his authorship of an infringement report analyzing the accused products. ██████ Tr. (Dec. 7, 2020) at 181:16-181:25.”); *see also* Ex. 2 at 3-4 (ParkerVision’s counsel requested that the second day of ██████ deposition be limited because ██████ was losing focus and ██████ during the first day). ██████ lapses in memory and deteriorating ability to concentrate are exemplified by the following exchange between ██████ and Qualcomm’s counsel during ██████ deposition:

Q: So when you stated that you ran the simulations in your expert report that just wasn’t an accurate statement; correct? . . .

A: I have no idea. I might have consulted with the people who were doing it. I don’t think I sat down at the console and ran the simulations, but I was probably there and was probably giving advice on what was done, but I can’t recall that.

Q: You remember being there to perform the simulations; correct?

A: To be honest with you, I cannot even remember that. I have to go in and check my calendar.

Q: Well, during the break you talked about remembering talking to Byron when you were there to do the simulations; correct?

. . .

A: That’s not true. We were doing infringement analysis, going to through the computers and looking at the various cadence blots. Brian was helping us access the different libraries, and we would go through that looking for schematics that would be pertinent.

Q: But you can’t remember if in February of 2020 you were at Qualcomm able to run simulations in their design environment?

A: Not until you let me go back and look at my calendar to see where I was at the time.

Q: Okay. And the fact that you stated that in your expert report that you signed under oath, that's not enough to verify that to you?

A: Well, you're wanting me to say - - I'm sorry. I simply just don't know, and you need to let me be able to go back and check my own records so that I can confirm or deny was I there physically or was I not there physically.

Ex. 3 at 239:5-240:18 (██████ Tr. (Dec. 7, 2020)); *see also* Ex. 5 at 4:39 (video clip of the exchange above). In this one exchange, ████████ forgot: (1) physically boarding an airplane, flying cross country, and visiting Qualcomm's San Diego facilities ten months ago; (2) running simulations—that he in fact did conduct—while in San Diego; and (3) that he discussed during the deposition break immediately prior to the quoted exchange talking to “Byron”—who ████████ mistakenly refers to as “Brian”—while he was in San Diego to do the simulations.<sup>4</sup> Ex. 3; Ex. 5. ████████ is not confusing only small details of receiver technology. Instead, ████████ also forgot taking a cross country trip and being physically present and conducting simulations in San Diego some ten months ago. As this trip occurred in the last week of February 2020, it was almost certainly the *last* trip ████████ took before the COVID “lock downs” began in mid-March 2020—making his inability to remember it even more concerning.

20. In another exchange on the first day of his deposition, ████████ testified that he was not aware of the first case between ParkerVision and Qualcomm when he prepared his report and testified that he “did not look at it” “in any way, shape, or form.” Ex. 3 at 116:4-15 (██████ Tr. (Dec. 7, 2020)). But on the second day of his deposition, ████████ was not able to recall whether his report provided an analysis of the first case. Ex. 4 at 344:1-20 (██████ Tr. (Dec.

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<sup>4</sup> *See* Verboncoeur Decl. at ¶ 9 (“Despite not remembering the trip—which occurred roughly 10 months ago and involved a cross country flight—██████ was able to confirm that he must have made this trip by consulting his calendar.”).

8, 2020)). Qualcomm’s counsel asked about the discrepancy between ██████ testimony from the first and second days. ██████ then testified that he did review “some things” from the first case between the parties, which is inconsistent with what ██████ said the day prior about not remembering the first case at all “in any way, shape, or form.” *Id.*

21. These exchanges are evidence of a larger trend of ██████ growing forgetfulness ██████ that in combination with the stress of examination as an ██████ year-old expert led ██████ to unexpectedly resign. *See* Ex. 1.

22. The memory issues and circumstances regarding ██████ resignation and the present Motion are similar to the issues presented by the expert in *Park*. *Park*, 2009 WL 4057888. In *Park*, the plaintiff moved to substitute its damages expert, after the expert withdrew because he did not believe he could “serve as a competent expert witness” due to his “deteriorating memory.” *Id.* at 1. Similarly, ██████ has also requested that he be allowed to withdraw from the case citing his memory and inability to serve as a competent witness. ██████ Decl. at ¶ 4, 5, 7, 8, 9; Ex. 1 (“While it pains me to say it, my memory has slipped at times, and it was also difficult for me to parse out the words of questions in my recent deposition.”).

23. ParkerVision has acted more diligently than the plaintiff in *Park*. The court in *Park* noted that the plaintiff did not act as diligently as he could have and ignored early warning signs that the expert might not be competent, but nonetheless the court allowed the plaintiff to substitute a new witness. *Park*, 2009 WL 4057888 at 3. Unlike the plaintiff in *Park*, ParkerVision did not ignore early warnings of ██████ memory and ██████ difficulties. As described above, ParkerVision and its attorneys did not notice that ██████ exhibited memory or ██████ issues prior to his deposition. The ██████ difficulties ██████ exhibited at this deposition surprised ParkerVision and its attorneys. *See* Ex. 2 at 3-4 (ParkerVision’s counsel

requesting that the second day of [REDACTED] deposition be limited because [REDACTED] was losing focus and [REDACTED]). ParkerVision has also acted diligently through every step of this issue. ParkerVision notified Qualcomm of the issue within days, identified potential replacements for [REDACTED], and filed this Motion within less than a week of learning of [REDACTED] intent to resign. Consequently, ParkerVision has gone beyond what was required of the plaintiff in *Park*, where the substitution was permitted.

24. [REDACTED] memory lapses and [REDACTED] concerns, in addition to the stress of examination placed on him as an [REDACTED] year-old, explain [REDACTED] unexpected resignation. That said, this Court has not previously required a sufficient explanation from the plaintiff in order to obtain relief. *PK Studios*, 2017 WL495497 at 3 (“conced[ing] that the Plaintiff does not sufficiently explain the reason for [the expert’s] resignation”). Even without a “sufficient explanation” for an expert’s resignation, this Court has allowed expert witness substitution because of the “admittedly harsh result that may result.” *Id.* That is particularly true in this case, where [REDACTED] was expected to teach and inform the jury on a set of very technical patents. It would be immensely prejudicial and against the “interest of justice” for ParkerVision to have to try this case without an expert for two of the four patents-in-suit, as the issues of invalidity and infringement are still unresolved. *Id.* at 4; *Avant Garde Eng’g and Res.*, 2013 WL 12153534, at 2; *Southern Gardens Citrus Processing Corp. v. Barnes Richardson & Colburn*, 2013 WL 2711961, at \*2 (M.D.Fla., 2013).

25. While ParkerVision would be greatly prejudiced by having to proceed without a receiver patent expert on two of the four patents-in-suit, ParkerVision has gone out of its way to minimize the delay on the proceedings and eliminate “the danger of prejudice” to Qualcomm. *See PK Studios*, 2017 WL 495497 at \*2; *see also Park*, 2009 WL 4057888 at 3 (“the prejudice to

[the defendants] in having to reopen expert discovery to proceed with an expert deposition pales in comparison to the prejudice [the plaintiff] would face in having to proceed without a damages expert.”). ParkerVision promptly notified Qualcomm and filed this Motion within less than a week of receiving ██████ resignation. *See PK Studios*, 2017 WL 495497 at \*4 (this Court noted the promptness of the plaintiff’s motion to substitute that was filled within *nine* days of receiving the expert’s resignation). ParkerVision has also exercised diligence in locating a new receiver expert and intends to designate one of ██████ or ██████ to replace ██████ upon the granting of this Motion.

26. Further alleviating any prejudice or delay, ParkerVision’s substitute expert will adopt ██████ initial and rebuttal expert reports and will provide testimony within the scope of those reports. ParkerVision agrees that it would be unfairly prejudicial to Qualcomm to allow the substitute expert to submit entirely new expert reports. *See Park*, 2009 WL 4057888 at 4; *S. Gardens Processing Corp.*, 2013 WL 2711961 at 2 (noting that the “Court is concerned though about the prejudice that Plaintiffs will suffer if [the new expert] offers opinions that are wholly different and new from the opinions offered by [previous expert].”); *but see PK Studios*, 2017 WL 495497 at 5 (this Court allowed a party to substitute its expert and file a new expert report). ParkerVision will also agree to reimburse Qualcomm’s reasonable costs related to the additional deposition of the substitute expert (which, given that the depositions are being conducted remotely via Zoom, should be modest). *See Jung*, 2007 WL 5256966 at \*16 (“inasmuch as Defendants argue that it would be prejudicial to allow Plaintiffs to essentially begin expert discovery all over again, the prejudice can be mitigated by requiring Plaintiffs to compensate Defendants for the costs and fees associated with their prior expert discovery efforts”).

27. Finally, ParkerVision is only requesting that this Court grant an Order extending the time to designate an alternate receiver patent expert on two of the four patents-in-suit, the deadline for expert discovery related to those two patents, and the dispositive motion deadline related to those two patents. ParkerVision is not requesting that the trial date also be delayed and this Motion should not have a significant impact on the remainder of the judicial proceedings. This action commenced over five years ago and now with just over six months to go before trial, ParkerVision does not intend to delay the resolution of this case further.

28. ParkerVision is filing this Motion in good faith and not for any improper purpose.

WHEREFORE, ParkerVision respectfully requests that the Court enter an Order extending the time for ParkerVision to designate an alternate receiver expert, at which point ParkerVision will designate one of [REDACTED] or [REDACTED] as the new receiver expert in this matter, in replacement of [REDACTED]. ParkerVision does not request further extension of the deadline to file expert reports and agrees that the substitute expert will adopt [REDACTED] [REDACTED] initial and rebuttal reports, and that the opinions offered by the substitute expert will fall within the scope of the opinions expressed in [REDACTED] reports. Finally, ParkerVision requests that the deadline for expert discovery related to the two receiver patents and dispositive motions related to those two patents be extended to January 29, 2021 and February 15, 2021, respectively, for the limited purposed of conducting discovery and a deposition of the substitute expert.

**CERTIFICATION PURSUANT TO LOCAL RULE 3.01(G)**

The parties have conferred about the substance of this Motion. Due to the speed at which this issue has developed, Qualcomm has not taken a position on the issue and reserves the right to state its position after it has had a chance to review the substance of this Motion.

December 14, 2020

Respectfully submitted,

**McKOOL SMITH, P.C.**

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***ATTORNEYS FOR PLAINTIFF  
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**CERTIFICATE OF SERVICE**

I certify that on December 14, 2020, I electronically filed the foregoing with the Clerk of Court by using the CM/ECF system. I further certify that I mailed the foregoing document and the notice of electronic filing by first-class mail to the following non-CM/ECF participants:  
none.

*/s/ Josh Budwin*  
\_\_\_\_\_  
Josh Budwin