

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

PARKERVISION, INC.,

PLAINTIFF,

v.

CASE NO.: 6:14-cv-687-PGB-LRH

**QUALCOMM INCORPORATED and
QUALCOMM ATHEROS, INC.,**

DEFENDANTS.

**PARKERVISION’S RESPONSE TO QUALCOMM’S MOTION (DKT. 470) FOR
RECONSIDERATION OF ENDORSED ORDER (DKT. 469) GRANTING
PARKERVISION’S MOTION TO DESIGNATE A SUBSTITUTE TESTIFYING
EXPERT FOR THE ASSERTED RECEIVER CLAIMS (DKT. 465)**

On December 9, 2020, ParkerVision’s testifying expert for the asserted receiver claims, [REDACTED], unexpectedly resigned from the case due to concerns about his health, his [REDACTED], and his ability to testify accurately in this case. Dkt. 465. The Court granted ParkerVision’s Motion to Designate a Substitute Expert and ParkerVision thereafter informed [REDACTED] that he was released from the case. Dkt. 469. Qualcomm, in its Motion for Reconsideration seeks to “undo” the Court’s Order and seeks to leverage this unfortunate situation to manufacture a tactical advantage for itself. Qualcomm’s Motion for Reconsideration should be denied.

ParkerVision regrets the situation where an expert witness it invested significant time and money into over the course of many years unexpectedly resigned because of personal hardships that affect his ability to participate in the case. Yet the case should move forward in a reasonable way and Qualcomm should not seek to leverage this unfortunate situation to manufacture a tactical advantage for itself. To that end, ParkerVision has acted diligently and in the manner least prejudicial to Qualcomm.

ParkerVision reiterates that it (1) does not contest that [REDACTED] deposition remains of record and can be used just like any other deposition in the case; (2) will not be filing new reports or offering opinions outside the scope of the [REDACTED] reports; and (3) is willing to pay reasonable costs and fees for the deposition of the replacement expert. This is consistent with the case law cited in both ParkerVision’s Motion to Designate a Substitute Expert and Qualcomm’s Motion for Reconsideration. *See, e.g., Oyster Optics v. Alcatel-Lucent USA*, No. 18-478, Dkt. 28 (E.D. Tex. June 8, 2020) (Ex. 1) (allowing expert substitution after the original expert had already been deposed and ordering deposition of substitute expert); *Seven Networks v. Google*, No. 17-442, Dkt. 603 (E.D. Tex. Jan. 16, 2019) (Ex. 2) (same).

Consistent with the Federal Rules of Evidence and any pretrial rulings from the Court (*e.g.* on *Daubert* or *motions in limine*) Qualcomm may use [REDACTED] deposition testimony (as well as any deposition testimony from the substitute expert) to impeach ParkerVision’s witnesses—just as it (and any other party in any other case) would do in normal circumstances. But this not what Qualcomm seeks. Rather, and with *no* case law or other authority in support, Qualcomm is now attempting to leverage this difficult situation to its tactical advantage by claiming that the substitute expert must swear under oath to “be bound” by every single word and statement made by [REDACTED] in his deposition—presumably including the situations where he [REDACTED], where he was “[REDACTED]” the questions, and where it was clear his [REDACTED]. *See, e.g., Qualcomm Mot.* at 18 (Dkt. 470); *but see* [REDACTED] Decl. (Dkt. 465-2), ¶¶ 5, 7, 9, 10 ([REDACTED] stating he is “concerned about [REDACTED]” and that he was unable to “[parse] out the words” and “fully understand questions that [he]

was asked”). As in more normal circumstances, deposition testimony may be used to impeach witnesses, but witnesses are also able to explain that they made mistakes, misunderstood a question, or misremembered facts—and the fact finder will weigh the credibility of each witnesses’ testimony.

Much of Qualcomm’s Motion, including its allegations about what is or is not in [REDACTED] reports, is outlining what should be in *Daubert* motions, *motions in limine*, or motions for summary judgment. *See, e.g.*, Qualcomm Mot. at 9. If Qualcomm elects to make those arguments at the proper time under the schedule being negotiated between the parties (*see* dkt. 469), ParkerVision will respond to those arguments at that time.

I. LEGAL STANDARD

A motion for reconsideration is not the proper forum for a party to vent dissatisfaction with the Court’s reasoning. *United States v. Okonkwo*, 2020 WL 5264914, at *1 (M.D. Fla., 2020) (denying reconsideration). Instead, “a motion for reconsideration must demonstrate why the court should reconsider its past decision and set forth facts or law of a strongly convincing nature to induce the court to reverse its prior decision.” *Roberts v. I.R.S.*, 2014 WL 103881, at *1 (M.D. Fla., 2014) (citations omitted); *Estate of Jennings v. Gulfshore Private Home Care, LLC*, 2020 WL 5816931, at *1 (M.D. Fla., 2020) (denying reconsideration). Further, “in the interests of finality and conservation of scarce judicial resources, reconsideration is an extraordinary remedy to be employed sparingly.” *Lamar Adver. of Mobile, Inc. v. City of Lakeland*, 189 F.R.D. 480, 489 (M.D. Fla., 1999). “The burden is on the movant to establish the extraordinary circumstances supporting reconsideration.” *Estate of Jennings*, 2020 WL 5816931, at *1.

II. ARGUMENT

A. Reconsideration is not warranted.

First, as illustrated by ParkerVision's Motion to Substitute (Dkt. 465) and this Court's Order granting the motion (Dkt. 469), ParkerVision has shown good cause and excusable neglect to replace [REDACTED]. ParkerVision acted with diligence. ParkerVision identified a new expert and filed its motion for substitution within one week of receiving [REDACTED] intent to resign. *See* Dkt. 465 at 4-5. This is in contrast to cases such as *Leibel v. NCL*, where a party did not request to substitute an expert for "two months after expert discovery was complete; and one week after dispositive motions were due." 185 F. Supp. 3d 1354, 1356 (S.D. Fla. 2016); *see also Smith v. Reynolds Transp. Co.*, 2013 WL 247714, at *2 (D.S.C. Jan. 23, 2013) (denying motion to substitute where a party waited for roughly six months after receiving notice of the expert's unwillingness or inability to testify before requesting substitution).

Second, Qualcomm attempts to shift the focus of whether [REDACTED] resignation was foreseeable onto [REDACTED] age alone rather than his unexpected failing [REDACTED], inability to [REDACTED], and concerns for his wellbeing. Qualcomm Mot. at 11-13. While Qualcomm is correct that "age may affect stamina or memory," Qualcomm Mot. at 12, as explained in ParkerVision's Motion, ParkerVision had no reason to assume this would be true so starkly for [REDACTED] or that this would be a cause for [REDACTED] resignation. Qualcomm cites statements from [REDACTED] regarding his age, including an offhand remark [REDACTED] made over five years ago about his "[REDACTED]." *Id.* at 12 (citing Aug. 14, 2015 Hr'g. Tr. at 158:17-18, Qualcomm Mot. Ex. 2. ("[REDACTED] [REDACTED]")). Qualcomm calls attention to the fact that "ParkerVision's counsel and [REDACTED] also spent days

together in person at the Qualcomm review computer in San Diego” and therefore ParkerVision should have foreseen [REDACTED] age becoming an issue. Qualcomm Mot. at 13. But, Qualcomm fails to acknowledge that, at the time of his deposition, [REDACTED] failed to remember this event—which took place some ten months before his deposition and required him to board an airplane and fly across the country. Dkt. 465 at 3, 8-9. But ultimately, Qualcomm’s focus on the foreseeability of age is a red herring: The issue is that [REDACTED] unexpectedly submitted his resignation after he became concerned with his wellbeing and ability to testify accurately.¹ This was unexpected, and ParkerVision acted diligently once this occurred.

Next, Qualcomm alleges that ParkerVision’s Motion was nothing more than buyer’s remorse and a litigation tactic to avoid [REDACTED] opinions. *See* Qualcomm Mot. at 14-15 (citing *Morales v. Palomar Health*, No. 14-164, 2016 WL 3763070 at *2 (S.D. Cal. July 14, 2016); *Commonwealth Sci. & Indust. Rsch. Org. v. Buffalo Tech.*, No. 06-324, 2009 WL 260953 at *1-2 (E.D. Tex. Feb. 3, 2009); and *Crandall v. Hartford Casualty*, No. 10-127, 2012 WL 6086598 (D. Idaho Dec. 6, 2012)). But ParkerVision is not attempting to avoid [REDACTED] opinions. The cases that Qualcomm cites involved parties attempting to submit *new expert reports* that would offer *new opinions*. Here, ParkerVision’s substitute expert will not be issuing a new report or offering new

¹ Qualcomm cites *Park v. CAS Enterprises, Inc.* to argue that the Court should request medical documentation from [REDACTED] and order an additional deposition as to [REDACTED] condition. Qualcomm Mot. at 11, n. 31 (citing *Park v. CAS Enterprises*, 2009 WL 4057888 (S.D. Cal. Nov. 19, 2009)). But the *Park* court permitted an expert substitution where the original expert had memory concerns *without* medical documentation where—as is the case here—the requesting party agreed that the substitute expert would only testify within the scope of the original expert’s reports. *Park*, 2009 WL 4057888 at *2-3.

opinions. Instead, the substitute expert will adopt the reports of [REDACTED] and sit for a deposition at ParkerVision's expense (if Qualcomm so elects).²

Morales and *Crandall* involved parties' attempts to submit new expert reports. In *Morales*, the court held that good cause had not been shown because the substitute expert would "prepare a new report...with the benefit of reviewing the reports of Defendants' experts." *Morales*, 2016 WL 3763070, at *2. In *Crandall*, the court denied the plaintiff's motion to substitute its expert for a second time. *Crandall*, 2012 WL 6086598 at *2 (acknowledging that the plaintiff had already changed its expert once and "essentially seeks an extension of time to disclose a third expert witness"). The court noted that good cause did not exist to substitute the expert because the plaintiff sought to replace its expert only after the defendant "expressed an intent to move for summary judgment" on the basis of the opinions expressed in the expert's opening report. *Id.* at *3. The court added the facts suggested that the plaintiff was dissatisfied with the opinions in the expert's opening report. *Id.* at *2 (noting the expert's report was produced "presumably without Plaintiff's or Plaintiff's counsel's full review and/or substantive input").

Buffalo Technology addressed a party's "motion to submit a supplemental expert report and to identify an additional expert" after intervening case law issued. *Buffalo Tech.*, 2009 WL 260953 at *1-2. In *Buffalo Technology*, the court allowed a supplemental report but did not allow an *additional* expert witness where the party had "not ruled out the possibility of calling [the first expert] as a witness." *Id.* at *2.

² ParkerVision is willing to have the substitute expert sit for a fourteen-hour deposition, which—if Qualcomm chooses to depose the substitute expert—would constitute evidence "of record" *in addition* to the ten hours of deposition testimony already provided by [REDACTED]. Qualcomm will, if it so chooses, have up to 24 hours "of record" testimony related to the substance of [REDACTED] reports.

This situation is different. Unlike in *Morales* and *Crandall*, ParkerVision's substitute expert will not be issuing a new report or offering new opinions.³ Unlike in *Buffalo Technology*, ParkerVision is not using a supplemental expert report in an attempt to potentially call an *additional* expert witness to testify. *Id.* at *2. Following the Court's Order allowing ParkerVision to substitute, ParkerVision informed ██████ that he was released from the case and ParkerVision began preparing the substitute expert. ParkerVision has ruled out the possibility of calling ██████ as a witness to testify in this case.

Qualcomm also argues that ParkerVision should not be allowed to substitute for ██████ after he has "sat for a multi-day deposition." Qualcomm Mot. at 16. Yet the very orders Qualcomm cites in its Motion permitted a substitute expert *after* the deposition of the previous expert had already occurred. *Oyster Optics v. Alcatel-Lucent USA*, No. 18-478, Dkt. 28 (E.D. Tex. June 8, 2020) (Ex. 1) ("During trial, Oyster may, where appropriate, attempt to impeach [the substitute expert] using [the substitute expert]'s deposition testimony, [the previous expert]'s reports, *and [the previous expert]'s depositions* in this case.") (emphasis added); *Seven Networks v. Google*, No. 17-442, Dkt. 603 (E.D. Tex. Jan. 16, 2019) (Ex. 2) ("During trial, Defendant Google may, where appropriate, attempt to impeach [the substitute expert] using the depositions of [the substitute expert] *and [the previous expert].*") (emphasis added).

Qualcomm has not set forth facts or law of a strongly convincing nature for the Court to reverse its prior decision. Reconsideration is not warranted.

³ Much of Qualcomm's Motion emphasizes alleged deficiencies in the opinions provided in ██████ reports. *See, e.g.*, Qualcomm Mot. at 9. Because ParkerVision will not submit any new reports or have a substitute expert offer any opinions beyond the scope of those reports, Qualcomm remains able to file Daubert or summary judgment motions on the basis of the analysis in ██████ reports if it so chooses.

B. Qualcomm’s request that the substitute expert be “bound” by [REDACTED] testimony is unprecedented and lacks any legal support.

ParkerVision agrees that, subject to the Federal Rules of Evidence and any pretrial rulings from the Court, “[REDACTED] reports and deposition testimony should be admissible, including to impeach the new expert.” Qualcomm Mot. at 17 (citing *Oyster Optics*, No. 18-478, Dkt. 28 (granting substitution) and *Seven Networks*, No. 17-442, Dkt. 603 (same)). But ParkerVision does not agree with Qualcomm’s unsupported request that “the new expert should be bound by exactly what [REDACTED] said under oath.” *Id.* at 18. Requiring the new expert to be “bound” by [REDACTED] deposition testimony is an unprecedented, not supported by any law Qualcomm cites, and ambiguous request that goes beyond curing any prejudice to Qualcomm. Had [REDACTED] remained in the case, he would not have been “bound” by his deposition. For example, had [REDACTED] said something inconsistent with his deposition at trial, Qualcomm could have attempted to impeach [REDACTED] with his deposition testimony, and [REDACTED] would have the opportunity to explain any mistakes he may have made during the deposition. Indeed, this is true for all witnesses in the case, including Qualcomm’s own expert witnesses. And, Qualcomm’s request that the substitute expert be “bound” in all respects to every utterance from [REDACTED] deposition also unfairly fails to account for the fact that [REDACTED] key facts or opinions, where he was “[REDACTED]” the questions being asked in the Zoom deposition, and where it was clear his [REDACTED] (e.g. [REDACTED] his visit to Qualcomm in February shortly before pandemic related travel restrictions were imposed). *See, e.g.*, Qualcomm Mot. at 18 (Dkt. 470); *but see* [REDACTED] Decl. (Dkt. 465-2), ¶¶ 5, 7, 9, 10 ([REDACTED] stating he is “concerned

about [REDACTED]” and that he was unable to “[parse] out the words” and “fully understand questions that [he] was asked”).

Qualcomm fails to cite any legal support for its position. Indeed, both *Oyster Optics* and *Seven Networks*—which Qualcomm cites in its Motion—contradict Qualcomm’s position. See Qualcomm’s Mot. at 17. For example, in *Oyster Optics*, the court permitted the expert substitution and required the same conditions that ParkerVision requests here, namely that the substitute expert adopt the original expert’s reports and sit for a deposition:

1. Dr. Lance E. Gunderson shall serve as a substitute expert in lieu of Mr. J. Donald Fancher;
2. Dr. Gunderson will adopt in its entirety Mr. Fancher’s expert reports in this case. Dr. Gunderson will not offer opinions that either limit or expand the parameters, analysis or scope of Mr. Fancher’s reports. Dr. Gunderson shall be a replacement of Mr. Fancher, not an additional expert witness;
3. ALU shall make Dr. Gunderson available for a seven-hour deposition concerning Mr. Fancher’s reports as well as Dr. Gunderson’s credentials;
4. During trial, Oyster may, where appropriate, attempt to impeach Dr. Gunderson using Dr. Gunderson’s deposition testimony, Mr. Fancher’s reports, and Mr. Fancher’s depositions in this case.
5. The Court will provide an informative instruction to the jury explaining Dr. Gunderson’s role as a substitute for Mr. Fancher at the time Dr. Gunderson is called as a witness.

Oyster Optics, No. 18-478, Dkt. 28 (Ex. 1).

Likewise, in *Seven Networks*, the court again permitted the substitution and required similar conditions:

1. Dr. Robert Peterson . . . shall serve as a substitute expert in lieu of Dr. David Stewart;
2. Dr. Peterson will adopt in their entirety the expert report(s) of Dr. Stewart and will not offer opinions that go beyond the parameters and scope of such

- aforementioned expert report(s). Dr. Peterson shall be a replacement for Dr. Stewart, not an additional expert witness;
3. Plaintiff SEVEN shall make Dr. Peterson available for a three-hour deposition . . . shall bear the costs of the deposition . . . ;
 4. The scope of Dr. Peterson's deposition is limited to (i) Dr. Peterson's qualifications in the relevant field; (ii) confirming Dr. Peterson's adoption of Dr. Stewart's opinions as contained within the existing expert report(s); and (iii) exploring any topics on which Dr. Peterson equivocates in his adoption thereof, but only as to areas where Dr. Peterson expresses less than complete adoption of Dr. Stewart's expert report(s);
 5. If Dr. Peterson adopts Dr. Stewart's expert report(s) in their entirety, Defendant Google, LLC ("Google") shall not, either at deposition or at trial, inquire as to how Dr. Peterson would or could have done things differently;
 6. Dr. Peterson shall be presented as a live witness in Plaintiff SEVEN's case-in-chief at trial and may be examined by Plaintiff SEVEN to the extent he has adopted the opinions set forth in Dr. Stewart's expert report(s);
 7. During trial, Defendant Google may, where appropriate, attempt to impeach Dr. Peterson using the depositions of Dr. Peterson and Dr. Stewart;
 8. Defendant Google is prohibited from presenting testimony from Dr. Stewart's deposition in its case-in-chief at trial, as Dr. Peterson will be both present and available at trial;
 9. All of Defendant Google's Daubert objections as to Dr. Stewart are preserved for appeal without limitation; and
 10. The Court will provide an informative instruction to the jury explaining Dr. Peterson's role as a substitute for Dr. Stewart at the time he is called as a witness.

Seven Networks, No. 17-442, Dkt. 603 (Ex. 2). Notably, neither *Oyster Optics* nor *Seven Networks* required that the substitute expert be "bound" by every single utterance in the previous expert's deposition.⁴ Instead, both orders require that (1) the new expert adopt

⁴ Qualcomm does not cite, and ParkerVision is not aware of, any legal authority "binding" a substitute witness to the deposition testimony of a previous witness. Nor is ParkerVision aware of any legal authority for a procedure of "binding" a witness to testimony generally (including the witness's own deposition testimony).

the reports of the previous expert and not issue new reports; and (2) the previous expert's deposition remains of record such that the substitute expert can be impeached by both their deposition and the previous expert's deposition.⁵

The relief granted in *Oyster Optics* and *Seven Networks* is similar to what ParkerVision proposed in its Motion to Substitute and reiterated during a meet and confer with Qualcomm. Dkt. 465 at ¶¶ 9-11, 26-27. In the Motion to Substitute, ParkerVision proposed that the substitute expert will “adopt ██████ initial and rebuttal reports[,]” “provide testimony within the scope of ██████ reports, and will sit for deposition as soon as practical.” *Id.* at ¶9. Further, ParkerVision has reiterated multiple times to Qualcomm that ██████ deposition will remain of record and that the substitute expert (and any other witness) can be impeached by it. *See* Qualcomm Mot. at 17-18. Finally, ParkerVision has also offered to “reimburse Qualcomm’s reasonable costs related to the conducting the additional deposition of the substitute expert.” Dkt. 465 at ¶11.

III. CONCLUSION

ParkerVision’s proposal—which the Court has already endorsed—is entirely consistent with the case law, including *Oyster Optics* and *Seven Networks*, which Qualcomm cites in its Motion for Reconsideration. Qualcomm has failed to establish extraordinary circumstances warranting the Court to change its mind and require a person facing ██████ and personal issues to continue with this case after having been released from his role. The Court should deny Qualcomm’s Motion for Reconsideration.

CERTIFICATION PURSUANT TO LOCAL RULE 3.01(g)

The parties have conferred about the substance of this response. Defendants do not agree with the relief requested herein.

January 4, 2021

Respectfully submitted,

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***ATTORNEYS FOR PLAINTIFF
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CERTIFICATE OF SERVICE

I certify that on January 4, 2021, 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/ Joshua W. Budwin
Joshua W. Budwin