UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TEXAS
MARSHALL DIVISION

KEY ENERGY SERVICES, INC., and KEY ENERGY SERVICES, LLC	§	
Plaintiff,	§	
v.	§	**CIVIL ACTION NO. 2:08-cv-346**
C.C. FORBES, LLC and PETRON INDUSTRIES INC.	§	
Defendants.	§	**JURY**

DEFENDANT PETRON INDUSTRIES INC.'S *DAUBERT* MOTION TO EXCLUDE "EXPERT" TESTIMONY OF DR. WILLIAM W. FLECKENSTEIN, P.E.

I. Introduction

Plaintiff Key Energy Services, Inc.'s ("Key") validity infringement expert, Dr. William W. Fleckenstein, P.E., has submitted a Report[1] that offers only superficial and conclusory opinions regarding the validity of various claims in U.S. Patent No. 6,079,490 (the "'490 Patent") and U.S. Patent No. 7,006,920 (the "' 920 Patent"). Defendant Petron Industries, Inc. ("Petron") respectfully submits this *Daubert* Motion to Exclude the Testimony of Dr. William W. Fleckenstein.

[1] A copy of Fleckenstein's Report is attached as Exhibit A to this Motion.

II. Argument and Authorities

a. Law and Standards for Expert Testimony

Under *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 592-93 (1993), federal courts are to act as gatekeepers to determine "at the outset . . . whether [an] expert is proposing to testify to (1) scientific knowledge that (2) will assist the trier of fact to understand or determine a fact in issue. Federal Rule of Evidence 702 establishes that "a witness qualified as an expert by knowledge, skill, experience, training, or education" may provide expert testimony as long as "(1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) ***the witness has applied the principles and methods reliably to the facts of the case***." FED. R. EVID. 702 (emphasis added). "Nothing in either *Daubert* or the Federal Rules of Evidence requires a district court to admit opinion evidence that is connected to existing data only by the *ipse dixit* of the expert." *General Elec. Co. v. Joiner*, 522 U.S. 136, 146 (1997).

If the reasoning or methodology underlying the expert testimony is lacking, then the expert testimony is unreliable and can be excluded. *See Daubert*, 509 U.S. at 591-592, 113 S.Ct. at 2786-2796 (holding that the offering party must show a "reliable basis in the knowledge and experience of his discipline"). An expert witness cannot offer an opinion regarding an issue for which the expert is not qualified. *See, e.g., Barrett v. Atlantic Richfield Co.*, 95 F.3d 375, 382 (5th Cir. 1996). Similarly, an expert may not unjustifiably extrapolate from an accepted premise to an unfounded conclusion. See *General Elec. Co. v. Joiner*, 522 U.S. 136 [139 L. Ed. 2d 508], 146 (1997) (noting that in some cases a trial court "may conclude that there is simply too great an analytical gap between the data and the opinion proffered).

When an expert bases an opinion upon inadequate evidence, the opinion lacks a proper foundation and can be excluded. *See, e.g., Mac Sales, Inc. v. E.I. du Pont de Nemours & Co.*, 24 F.3d 747, 752 (5th Cir. 1994). "If an expert opinion is fundamentally unsupported, then it offers no expert assistance to the jury." *Edmonds v. Illinois Cent. Gulf R. Co.*, 910 F.2d 1284, 1287 (5th Cir. 1990) (*citing Viterbo v. Dow Chemical Co.*, 826 F.2d 420, 422 (5th Cir. 1987)). Case law precedent has found an expert's opinion to be excludable when he/she ignores relevant references in forming his/her opinions. *See Newton v. Roche Laboratories, Inc.*, 243 F.Supp.2d 672 (W.D. Tex. 2002); *Legier and Materne v. Great Plains Software, Inc.*, 2005 WL 2037346 (E.D. La. 2005). Furthermore, testimony that interprets the law or opines on ultimate legal issues is customarily excluded as unhelpful. *See e.g., Owen v. Kerr-McGee Corp.*, 698 F.2d 236, 240 (5th Cir. 1983)(cautioning that although FED. R. EVID. 704 allows expert testimony regarding ultimate questions of fact, it is not "intended to allow a witness to give legal conclusions") "With regard to procedural matters that are not unique to patent issues, courts shall apply the law of the particular regional circuit court where appeals from the district court would normally lie." *Marshall Packaging Co. v. Nestle Waters N. Am., Inc.*, 2006 U.S. Dist. LEXIS 13644, *8 (E.D. Tex. Mar. 24, 2006) (citing *Lab. Corp. of Am. Holding v. Chiron Corp.*, 384 F. 3d 1326, 1330 (Fed. Cir. 2004)).

b. The Patents-in-Suit and Petron's Accused Systems Data Acquisition Systems

Key is asserting against Petron claims 1, 4, 5 and 6 from the '490 Patent, and claims 24, 25, 26, and 27 from the '920 Patent. Both of these patents cover systems data acquisition systems that are designed to be installed on a mobile well service vehicle. Key retained Fleckenstein to determine whether certain alleged prior art and alleged prior sales invalidate the

asserted claims of these two patents. Fleckenstein articulates the basis for his opinions early in his Report:

> My opinions are based on my review of the material received and reviewed for this case, my training, experience in drilling, completion and workover operations on similar types of wells, and education. My opinions are also based on my training in the scientific method, research into the applicable physical phenomena, reasonable degree of engineering probability and experience in drilling, completions and workover operations on numerous wells. Fleckenstein Exp. Rep. at 3, ¶5.

Throughout his Report, Fleckenstein makes his disagreement with the opinions of other experts and of prior art publications well-known. While mere disagreement with Fleckenstein's opinion is not enough alone to exclude it under *Daubert*, Fleckenstein offers only superficial and conclusory opinions that are based in large part – if not exclusively – on his personal definitions of industry products and services. Because he disagrees with the definitions of industry products and services articulated in several leading publications, Fleckenstein decides that he can exclude them from his determination of whether a person of ordinary skill in the art would have found the inventions described in the '490 and '920 Patents to be obvious. In doing so, Fleckenstein's Report is not the product of reliable principles and methods. Accordingly, his testimony should be excluded.

III. Fleckenstein's Testimony should be excluded

In his Report, Fleckenstein comes to the convenient conclusion that the claims at issue in the '490 and '920 Patents were not obvious at the time of invention and have not been anticipated by prior sales and/or prior art.

Fleckenstein's opinion is flawed for two reasons.

First, Fleckenstein spends a significant portion of his report attempting to distinguish the differences in technology on workover rigs versus drilling rigs. Yet, the differences between a workover rig and a drilling rig appear to be fabricated and devised solely from Fleckenstein's own personal definitions of these terms:

> Q. What's the difference between a well service rig and a workover rig? Is there a difference?
> **A. It depends upon what the definition of a workover rig is.**
> Q. What is your definition of a workover rig?
> **A. My definition of a workover rig is the same as a well service rig, i.e., it would meet the, the capabilities that are described in the 490 and the 920 patent.**
> Q. So you are not saying that a well service rig is a subset of a workover or a workover is a subset of a well service. You are saying basically they are the same?
> **A. No, for me I would say that a workover rig is going to be the same as a well service rig which is going to be what has been defined through the 490 and the 920 patent.**
> Deposition of Dr. William W. Fleckenstein at 189-190.

When asked to explain the differences in his Report from the definitions used in a Primer published by the University of Texas, Fleckenstein offers no analysis or explanation why his definition of the term "workover rig" is superior to the Primer's definition of the same term:

> Q. Do you disagree with that Primer in front of you?
> **A. Do I disagree with it?**
> Q. Yes. Or do you agree? Do you agree or disagree with what you just read?
> **A. That somebody's definition of a workover rig may have that definition. I mean, I would have to agree. It's right there.**
> Q. But you don't have a problem with what that Primer says on that page?
> **A. It's not my definition of a workover rig. So I**

would disagree with it.
. . .

A. What some people call workover systems -- workover rigs may have -- may have circulation systems or rotary systems just not the way I would define it.
6 Q. No, my question is: Can workover rigs, many of them, have rotary systems?
A. If a workover rig is being defined as a well service rig in terms of a definition of the 490 and the 920 patent, it cannot have a circulation system or rotary system at least within these claims. It could be added to it. There's no question it could be added to it.
Q. I'm not talking about what the claims claim right now, sir. I'm just talking about what you think out there in industry a workover rig is and a well servicing rig is?
A. For me a well servicing rig does not have the capability of being able to drill or circulate.
Q. Okay. So you disagree with this claim?
A. Yes, I do.
Deposition of Dr. William W. Fleckenstein at 199, 201

Whether Fleckenstein personally thought something was obvious based on his own personal definitions is irrelevant. Fleckenstein is not the hypothetical person of ordinary skill in the art with complete knowledge of all relevant prior art and who is motivated to create new structures based upon the combined teachings of the various prior art references. *KSR Intern. Co. v. Teleflex, Inc.*, 550 U.S. 390 (2007); *Custom Accessories, Inc. v. Jeffrey-Allan Indust. Inc.*, 807 F.2d 955, 963 (Fed. Cir. 1986) ("The person of ordinary skill is a hypothetical person who is presumed to be aware of all the pertinent prior art"). Just because Fleckenstein disagrees with the definitions of terms such as "workover rig" in publications like the University of Texas Primers, Fleckenstein cannot unilaterally ignore them in determining the nonobviousness and anticipation of the claims at issue. Fleckenstein excluded this pertinent information; therefore, his testimony must also be excluded.

Second, Fleckenstein's leap from his premise (workover rigs and drilling rigs are completely different) to his conclusion (the subject matter of the inventions of the '490 and '920 Patents would not have been obvious to a person of ordinary skill in the art at the time of the invention) lacks the requisite connective reliability, and should therefore be excluded. *See* Judge Harvey Brown, Eight Gates for Expert Witnesses, 36 HOUS. L. REV. 743, 805 (1999) ("When the expert's logical analysis from premise to conclusion includes a leap of faith, the leap, if big enough, necessitates exclusion of the opinion as an improper extrapolation."); *see also, Joiner*, 522 U.S. at 146 ("A court may conclude that there is simply too great an analytical gap between the expert's methodology and the conclusion."). Because Fleckenstein does not perform a legally valid analysis, he should be precluded from offering testimony as to the validity of the '490 and the '920 Patents.

IV. CONCLUSION

For the foregoing reasons, Dr. Fleckenstein's testimony is personal, conclusory and insufficient to support an expert opinion that each and every claim of the '490 and the '920 Patents are valid, not-anticipated, and non-obvious. This Court should exercise its gatekeeping function and exclude all expert testimony by Dr. Fleckenstein. Defendant Petron respectfully requests that the Court GRANT this *Daubert* Motion to Exclude the testimony of Dr. William W. Fleckenstein, P.E.

Respectfully submitted,

Dated: April 22, 2011

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ATTORNEYS FOR DEFENDANT PETRON, INC.

Certificate of Service

I certify that on April 22, 2011, the foregoing document is being electronically served by this Court's electronic filing system on all counsel of record that have registered for electronic filing of documents with this Court.

Tim Headley

Certificate Of Authorization To File Under Seal

This is to certify that this motion and the exhibits accompanying this motion should be filed under seal because they contain material covered by the Protective Order approved and entered in this case on June 11, 2009 [document 57].

Tim Headley

Certificate Of Conference

On April 25, 2011, Heather Hoopingarner Thiel, counsel for Petron Industries, Inc. spoke with John Luman, counsel for Key Energy Services, Inc. regarding the content of this Motion, as required by Local Rule CV-7(h) and (i). Counsel for Key indicated they were opposed to this motion because they do not believe the testimony should be struck. Discussions have reached an impasse regarding this issue and there remains an open issue for the Court to resolve.

Tim Headley