

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

SANDISK CORP.,

Plaintiff,

v.

KINGSTON TECHNOLOGY CO., INC and
KINGSTON TECHNOLOGY CORP.,

Defendants.

OPINION AND ORDER

10-cv-243-bbc

Now before the court are plaintiff Sandisk Corp.'s motions to exclude the expert testimony of Russell W. Mangum III, dkt. # 341, and to exclude untimely opinions in Mangum's supplemental expert report. Dkt. # 343. I will deny the motion to exclude Mangum's expert opinions because plaintiff has not shown that the opinions are unreliable. I will also deny the motion to exclude Mangum's testimony about information in the supplemental expert report because plaintiff has not identified any unfair prejudice it will suffer if I allow the testimony.

A. Motion to Exclude Testimony of Dr. Russell Mangum

Plaintiff argues that Mangum's methodology does not meet the standards of reliability

and usefulness demanded by Fed. R. Evid. 702 and Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993). First, plaintiff argues that Mangum used an incorrect legal standard for defining the relevant geographic market and his definition does not fit the facts of this case. Mangum defines the market to include “all manufacturers, regardless of where located, with the legal right to sell flash memory products in the United States.” Mangum Rep., dkt. #341-1, at 31. Plaintiff argues that he defines the market by the location of sales rather than, as precedent dictates, by the region in which consumers are able and willing to purchase substitutes. Tunis Brothers Co., Inc. v. Ford Motor Co. 952 F.2d 715, 726 (3rd Cir. 1991). However, Mangum describes the test accurately and reasons plausibly that consumers can purchase only from suppliers with the right to sell in the United States. Mangum Rep., dkt. #34-1, at 24, 31. Contrary to plaintiff’s assertions, this definition does not exclude foreign competitors who may divert products into the United States or competitors without a license from plaintiff. I will not exclude Mangum’s testimony about the appropriate market definition.

Second, plaintiff argues that Mangum’s opinions that plaintiff’s worldwide royalties and its fields of use are anticompetitive should be excluded because they are conclusory and lacking in economic analysis. Plaintiff argues that Mangum’s analysis of worldwide licenses disregards their various economic benefits. This may be persuasive on cross-examination but it is not a basis on which to exclude his testimony. Mangum does reach a legal conclusion

when he says that plaintiff's fields of use impose a "double-royalty" but he also says that the licenses charge twice their value. He bases the latter conclusion on the relative cost of the technology and on the form of plaintiff's past licenses. I will disregard any legal conclusions, such as that the licenses charge a "double-royalty," but Mangum may testify about his economic analysis.

Last, plaintiff argues that Mangum's opinions about the market effects of plaintiff's licenses are unreliable for three reasons: (1) his conclusion that plaintiff has market power is contrary to controlling law because plaintiff's share of the market for USB flash drives is below the legal threshold; (2) his analysis of the effects of the licenses is unreliable because he concentrates on the injury to competitors rather than to competition generally and because raising rivals' costs is not a recognized antitrust theory; and (3) his analysis is unreliable because he never assesses current output and prices for USB flash drives or what output and price would be in a world absent plaintiff's licenses.

Plaintiff's first and second arguments rely on factual disputes that were not resolved on summary judgment, such as whether plaintiff's actions indicate market power in addition to their market share and the likelihood that consumer prices will increase if plaintiff excludes aggregators or raises their prices. Moreover, defendants' claim is that plaintiff uses its market power in the market for flash memory technology (which plaintiffs do not challenge on this motion) to restrain competition in the downstream USB flash drive market.

Mangum is qualified to testify about these matters, and his report addresses explicitly many of plaintiff's methodological concerns. The third argument has the most merit, but Mangum does argue that plaintiff's licenses would raise prices by excluding competitors. If he did not take into consideration evidence about what the cost, output or price of USB flash drives would be in a world without aggregators, then plaintiff may use this failing to challenge his conclusions at trial. I will not exclude Mangum's opinions about plaintiff's market power or the effect of plaintiff's licenses on the market.

B. Motion to Exclude the Supplemental Expert Report

Plaintiff filed a motion to exclude any testimony by Mangum citing the depositions of Edge Tech and Buffalo because Mangum discussed these depositions only in a supplemental report filed after the court's scheduled deadline. Initial expert reports were due on August 12, 2011, but that deadline was extended until August 26, 2011. Plaintiff waited until August 9 and 10, 2011, to subpoena depositions from Edge Tech and Buffalo. After the court granted summary judgment for defendants on infringement on August 12, 2011, dkt. #312, the expert deadline was extended until September 23, 2011 to facilitate settlement negotiations. Plaintiff delayed the depositions of Edge Tech and Buffalo but pursued them again in earnest when the negotiations failed. Before completing the depositions, plaintiff served Mangum's expert report on September 23, 2011. The

depositions were taken on September 26 and October 3, 2011. Without moving for leave of court, defendants served a three and one-half page supplemental expert report on October 12, 2011, three weeks past the deadline and nine days prior to the deadline for plaintiff's rebuttal report. In the supplemental report, Mangum identifies testimony from Edge Tech and Buffalo that supports the opinions in his previous report. The final discovery deadline is October 28, 2011.

A party must disclose the opinions to which an expert will testify at trial, Fed. R. Civ. P. 26(a), and expert reports that fail to comply with disclosure requirements should be excluded unless the violation is justified or harmless. Fed. R. Civ. P. 37(c)(1). Expert reports should be "detailed and complete," identifying "the substance of the testimony which an expert is expected to give on direct examination together with the reasons therefor." Salgado by Salgado v. GMC, 150 F.3d 735, 742 n.6 (7th Cir. 1998) (citations omitted). The goal of complete reports is to eliminate ambush at trial, avoid unnecessary expert depositions and reduce costs. Id.

The supplemental report includes information that Mangum could have considered in his original report if defendants had not delayed the depositions of Buffalo and Edge Tech unnecessarily. Their failure to heed the disclosure deadline is not excused by Rule 26(e)(1), which requires a party to "supplement or correct its disclosures if the party learns that in some material respect disclosure or response is incomplete or incorrect, and if the additional

or corrective information has not otherwise been made known to the other parties during the discovery process or in writing." Fed. R. Civ. P. 26(e)(1). However, as the court has explained previously, Rule 26(e) is "intended to provide parties an opportunity to correct mistakes and oversights, not to include new examples and illustrations that could have been included in an original expert report." Innogenetics N.V. v. Abbott Laboratories, 2006 WL 6000791, *2 (W.D. Wis. 2006).

However, exclusion of Mangum's testimony is not warranted under Rule 37 because the failure to make timely disclosures was harmless. The supplemental report does not supply new evidence, arguments or theories; it identifies only witness testimony that should be otherwise available at trial. Plaintiff cannot claim to be surprised by the testimony, as plaintiff was present at the depositions. Plaintiff's expert had ample time to evaluate this testimony for its rebuttal report, and more than a month remained for additional discovery. Because the untimely filing caused no identifiable prejudice, I will not exclude Mangum's testimony regarding the depositions of Buffalo and Edge Tech.

ORDER

IT IS ORDERED that

1. Plaintiff Sandisk Corp.'s motion to exclude the expert report of Russell W. Mangum III, dkt. # 341, is DENIED.

2. Plaintiff's motion to exclude untimely opinions in the supplemental expert report of Russell W. Mangum III, dkt. # 343, is DENIED.

Entered this 27th day of October, 2011.

BY THE COURT:
/s/
BARBARA B. CRABB
District Judge