

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

WATSON INDUSTRIES, INC.,

Plaintiff,

v.

MURATA ELECTRONICS NORTH
AMERICA, INC. and MURATA
MANUFACTURING CO., LTD.,

Defendants.

ORDER

02-C-524-C

Defendants have filed a motion to bar plaintiff's potential expert witness Robert Carter from attending or testifying at the August 29, 2003 *Markman* hearing, claiming that plaintiff violated this court's scheduling and disclosure orders. *See* dkt. 67. Plaintiff responds that it is in full compliance with the applicable orders, and that in any event defendants haven't complied fully either. For the reasons stated below, I am denying the motion to strike.

First, let's clarify the nature of the scheduling and disclosure orders in dispute. At the outset of this lawsuit, the parties agreed between themselves to be governed by the patent local rules of the Northern District of California. *See* Joint Report for Preliminary Pretrial Conference and Proposed Discovery Plan, Dkt. 11 at 3-4. Because this court takes a *laissez faire* approach to discovery, it allowed the parties to self-govern their pretrial conduct as they

wished. For the same reason, the court signed without comment the parties' amended joint report regarding claim construction and discovery deadlines. *See* Dkt. 22. In other words, up until now this court merely has acquiesced to the discovery plan and written procedures suggested by the parties. The court would not have imposed such rigid requirements on the parties had they asked it to impose its own rules. Therefore, now that the parties are asking this court to referee their dispute as to what *their* discovery procedures require of them, this court is going interpret those procedures consistent with its own discovery philosophy.

The Northern District patent rules required the parties to file a joint claim construction and pre-hearing statement in which they were to identify expert witnesses and summarize their opinions. *See* N.D. Cal. Patent Local Rule 4-3(d). On July 11, 2003, seven weeks before the *Markman* hearing, the parties filed such a statement with the court. *See* Dkt. 63. In it, plaintiff named no actual experts, but did warn that it

may also present expert testimony to rebut any affirmative claim construction testimony offered by any expert on behalf of [defendants]. Watson is unable to presently identify any such rebuttal testimony or evidence since the substance of [defendant's] affirmative extrinsic evidence has not yet been disclosed.

Id. at 2-3.

That same day defendants identified Dr. Craig A. Rogers as an expert and filed his report (although according to plaintiff it was not complete until 11 days later). Two weeks later on July 25, 2003—still five weeks before the hearing—plaintiff filed a “rebuttal” report by expert Robert Carter, aimed at Rogers’ report. *See* Dkt. 66. Defendants promptly filed

the instant motion to strike, claiming that the rules did not provide for rebuttal witnesses, Carter was not really a rebuttal witness, and that he had been identified too late.

I agree that plaintiff is tweaking the rule, which does not provide for the disclosure of rebuttal witnesses on some later date. But plaintiff did announce its intent to reserve the right to name a rebuttal expert and defendant did not cry foul at the time. Then plaintiff followed up within two weeks with an actual name and a report.

So how thinly should the court slice this one? I'm going with substance over form. In the absence of actual prejudice to defendants, striking plaintiff's witness would be a disproportionately harsh sanction. The five weeks between plaintiff's July 25 disclosure and the August 29 hearing are enough time for defendants to digest and respond to Carter's report. Further, defendants may depose Carter any time they want up to the evening before the hearing, and if they wish to name a surrebuttal witness they may do so until August 22, 2003.

Accordingly, defendants' motion to strike is DENIED.

Entered this 7th day of August, 2003.

BY THE COURT:

STEPHEN L. CROCKER
Magistrate Judge