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

Z TRIM HOLDINGS, INC. and
FIBERGEL TECHNOLOGIES, INC.,

Plaintiffs,

v.

FIBERSTAR, INC.,

Defendant.

ORDER

07-C-161-C

Before the court is plaintiffs' motion for leave to file a supplemental expert report from James N. BeMiller, Ph.D. *See* dkts. 50-51 and 55-56. Defendant violently opposes plaintiffs' motion. I am denying plaintiffs' motion because the September 13, 2007 report is not a genuine supplement and it is late.

Both plaintiffs have their roots in Illinois, but they chose to file their patent lawsuit against a Minnesota company in the Western District of Wisconsin; the only logical explanation for this venue decision is that plaintiffs were attracted by the notorious alacrity with which this court dispatches patent lawsuits. One reason this court is so speedy is because it enforces its deadlines and it enforces its rules. The May 9, 2007 preliminary pretrial conference order (dkt. 17) commemorates the dates it set in telephonic consultation with the parties that morning. Worth noting is that across the board, the court gave the parties about 30 days more time than they requested. *Compare* dkt. 13 *with* dkt. 17.

With regard to expert disclosures, the court imposed its usual–and therefore totally predictable–restrictions:

> All disclosures mandated by this paragraph must comply with the requirements of Rule 26(a)(2)(A), (B) and (C). There shall be no third round of rebuttal expert reports. Supplementation pursuant to Rule 26(e)(1) is limited to matters raised in an expert's first report, must be in writing and must be served not later than five calendar days before the expert's deposition, or before the general discovery cutoff if no one deposes the expert. Any employee of a party who will be offering expert opinions during any phase of this case must comply with all of these disclosure requirements.
>
> Failure to comply with these deadlines and procedures could result in the court striking the testimony of a party's experts pursuant to Rule 37. The parties may modify these deadlines and procedures only by unanimous agreement or by court order.

Dkt. 17 at 2.

The court held its claims construction hearing on August 10, 2007 and James BeMiller testified on behalf of plaintiffs. The court construed the claims from the bench, *see* Transcript of Aug. 10, 2007 hearing, dkt. 48, at 105-06, and commemorated its ruling in an August 13, 2007 written order, *see* dkt. 47.

Three weeks later, on August 31, plaintiffs timely served BeMiller's expert report on defendant. Although defendant protests in its opposition to the instant motion that BeMiller presented new, unexpected opinions, this is of no concern to the court, at least not today: the early expert disclosure and response deadlines ameliorate any actual effect from alleged sandbagging. Once the experts are named, there is enough time for depositions, additional document exchanges, *Daubert* challenges, *etc*. Put another way, defendant cannot challenge

BeMiller's timely report in a response to plaintiffs' motion for leave to file a supplement. Defendant will have to file its own motion requesting relief from the court.

But of course, for this process to work–given the quick, firm deadlines for summary judgment motions and for trial–expert reports must be complete and timely. Although the court allows the parties by mutual agreement to relax their expert witness discovery, it does not require this; in fact, one of the standard oral admonitions I provide at preliminary pretrial conferences is that, in the interests of fairness and predictability, absent the parties' agreement to the contrary, the court strictly will enforce the expert disclosure deadlines and the disclosure requirements of Rule 26(a)(2).

So, from the court's perspective, an untimely expert report is a nullity. A timely *supplemental* expert report is allowable, but it must be an actual supplement, not a new and different set of opinions. In patent lawsuits filed in this court, moving targets are highly disfavored, late-presented moving targets are anathemas.

BeMiller's second report veers from his first report into new territory in a highly substantive manner. Even so, plaintiffs contend that they did not unreasonably delay in revising their infringement contentions to conform to the court's claim construction, and defendant is not prejudiced by the 13-day delay in receiving plaintiffs' supplemental report. *See* Reply, dkt. 55, at 2. Plaintiffs are incorrect on both counts. In a tightly-scheduled patent case in which the court has provided early, pellucid warnings about its stringent procedures, the court's construction of the terms "unreasonably delay" and "not prejudiced" is much tighter than plaintiffs'. At the outset this court gave both sides more time than they asked for in order to

give them a realistic chance to meet their deadlines. Therefore, from the court's perspective, any unconsented delay is presumptively unnecessary, unreasonable and prejudicial. (As an equitable matter, the presumption is rebuttable, but there are no compelling equities in plaintiffs' favor here).

In past IP cases this court has had to clean up messes involving supplemental expert disclosure and it has determined that the only fair, predictable and efficient path to timely resolution is to enforce the federal rules and its own procedures stringently. So it is here, so it will be in future cases. BeMiller's second report is not a true supplement and it is late. Therefore, it is a nullity.

ORDER

It is ORDERED that Plaintiffs' Motion for Leave To Submit Supplemental Expert Report is DENIED.

Entered this 26th day of September 2007.

BY THE COURT:

/s/

STEPHEN L. CROCKER
Magistrate Judge