

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

THE FIRST YEARS, INC., and
LEARNING CURVE BRANDS, INC.,

Plaintiff,

v.

MUNCHKIN, INC.,

Defendant.

PRETRIAL CONFERENCE
ORDER

07-cv-558-bbc

A final pretrial conference was held in this case on September 11, 2008, before United States District Judge Barbara B. Crabb. Plaintiffs appeared by Thomas Heneghan and Wendy Ward. Defendant appeared by John Knoble, James Cole and Josephine Benkers.

Counsel predicted that the case would take no more than 4½ days to try. They understand that trial days will begin at 9:00 and will run until 5:30, with at least an hour for lunch, a short break in the morning and another in the afternoon.

Counsel agreed that with the exception of experts, all witnesses would be sequestered. Counsel are either familiar with the court's visual presentation system or will make arrangements with the clerk for some instruction on the system.

No later than noon on the Friday before trial, plaintiff's counsel will advise defendant's counsel of the witnesses plaintiff will be calling on Monday and the order in which they will be called. Counsel should give similar advice at the end of each trial day; defendant's counsel shall have the same responsibility in advance of defendant's case. Also, no later than noon on the Friday before trial, counsel shall meet to agree on any exhibits that either side wishes to use in opening statements. Any disputes over the use of exhibits are to be raised with the court before the start of opening statements.

Counsel should use the microphones at all times and address the bench with all objections. If counsel need to consult with one another, they should ask for permission to do so. Only the lawyer questioning a particular witness may raise objections to questions put to the witness by the opposing party and argue the objection at any bench conference.

Counsel are to provide the court with copies of documentary evidence before the start of the first day of trial.

Counsel agreed to the voir dire questions in the form distributed to them at the conference. The jury will consist of eight jurors to be selected from a qualified panel of fourteen. Each side will exercise three peremptory challenges against the panel. Before counsel give their opening statements, the court will give the jury the introductory instructions on the way in which the trial will proceed and their responsibilities during the trial.

Counsel agreed to submit new proposed verdict forms and instructions reflecting the issues remaining for trial and to do so no later than September 16, 2008. Final decisions on the instructions and form of the liability verdict will be made at the instruction conference once all the evidence on liability is in.

The parties will try the remaining liability issues first. Because defendant bears the burden of proof in establishing whether any of its products do not infringe, it will go first in this phase of the trial. Once the jury has retired to deliberate, the court will take up the inequitable conduct issue, on which, once again, defendant will bear the burden of proof.

Plaintiffs have moved to compel additional discovery from defendant relating to sales. This discovery is relevant to their claim that they are entitled to damages from the day on which they notified defendant of their patent application. Given the imminence of trial, the parties agreed to put off the discovery and instead, obtain a judicial determination whether the letter sent to defendant was sufficient to constitute notice under 35 U.S.C. § 154(d), assuming that it was sent by plaintiffs and received by defendant. Briefs on that one issue are to be filed no later than September 16, 2008. The court will make every effort to have a decision on the issue no later than September 18, 2008. If the determination is that the letter was adequate, then the jury will be asked to decide whether the letter was sent and received. If it was, the parties will complete their discovery after trial and compute damages for the additional years based on the sales figures provided by defendant and the jury's

determination of damages for the later years.

The following rulings were made on the parties' motions in limine.

Plaintiffs' Motions in Limine

1. Plaintiffs' motions regarding prior art testing, dkt. #162; practicing the prior art, dkt. #163; reference to foreign counterparts, dkt. #164; and the testimony of Knoble, Johnson and Shedd are DENIED as moot;
2. Plaintiff's motion to deem certain facts admitted, dkt. #165, is GRANTED.
3. Plaintiffs' motion to exclude evidence related to changes in tooling, dkt. #167, is DENIED.
4. Plaintiff's motion to strike individuals (Tebbe, Keimach and Shlosky) not previously disclosed, dkt. #191, is DENIED.

Defendant's Motions in Limine

1. Defendant's motions regarding the doctrine of equivalents, dkt. #172, and previously undisclosed literal infringement arguments, dkt. #173, are DENIED as moot.
2. Defendant's motion to preclude plaintiffs' claim for lost profits, dkt. #170, is DENIED as to plaintiff Learning Curve and GRANTED as to plaintiff First Years.
3. Defendant's motion to exclude opinions that container with newer molds infringes, dkt. #171, is DENIED as moot.

4. Defendant's motion to hold plaintiffs to the testimony of their Rule 30(b)(6) witness, dkt. #175, is DENIED.

5. Defendant's motion to exclude Osswald's report, dkt. #117, is DENIED as moot except with respect to §§ III.B and IV.B, which is DENIED on the merits.

6. Defendant's motion to exclude claim for lost profit damages and related expert testimony, dk5. #174, is DENIED.

7. Defendant's motion to preclude plaintiffs from seeking a reasonable royalty for provisional rights under 35 U.S.C. § 154(d), dkt. #246, is DENIED at this time, subject to further rulings.

Entered this 12th day of September, 2008.

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