

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

HUNTER FAN COMPANY,

Plaintiff,

v.

ORDER

18-cv-344-wmc

LUMINEX INTERNATIONAL CO., LTD.,

Defendant.

Consistent with this court's order reserving in part on plaintiff's motion to strike (dkt. #75), the parties have now briefed whether to allow portions of the expert report of Paul Hatch that addresses noise-based functionality. Defendant Luminex addresses the majority of its brief in support of retaining this portion of Hatch's expert report by emphasizing the lengthy delay between its first request for documents in early February 2019 pertaining to product development and testing related to the PERSEUS[®] ceiling fan and plaintiff's actual production of responsive documents bearing on the issue of design and functional controls related to noise reduction in early July 2019. Without disputing its own lengthy delay in producing actual documents responsive to defendant's repeated requests for production during a four-month period after production was due in early March, plaintiff's brief in opposition primarily criticizes defendant for waiting some 90 days from the July production to introduce the noise reduction issue for the first time in Hatch's expert report.

Even more troubling to the court than defendant's untimely introduction of the noise theory in the Hatch report is its introduction of a new claims construction for the first time in its motion for summary judgment, rather than in a timely supplement to its

interrogatory responses and/or claims construction disclosure. Indeed, there appears no good explanation for defendant, a company apparently involved in the design and manufacturing of fans itself, for failing to advance a construction based on noise-based function rather than pure design, especially when it had ample opportunity to amend its disclosure with or without the Hatch report. Indeed, it not only failed to do so despite having the time to file a strategic, early motion for summary judgment, but has *still* not done so. As this court has often observed, such “moving targets are highly disfavored; but late-presented moving targets are anathemas.” *ZTrim Holdings, Inc. v. Fiberstar, Inc.* 2007 West Law 5464414, at *2 (W.D. Wis. Sept. 26, 2007).

Although plaintiff must bear the consequences of its lengthy delay in producing documents that appear to have confirmed noise reduction was a concern in the design of the PERSEUS® ceiling fan, the court is concerned with the apparent games-playing that defendant engaged in, both in delaying any amendment to its claims construction and in devoting substantial time to a filing of a motion for summary judgment three weeks before the deadline, seeking to introduce noise reduction for the first time in that filing and effectively, quite unreasonably, putting plaintiff “on the clock” to respond. For these reasons, the court will strike the portions of ¶¶ 86-89 and 115-121 of the Hatch report opining on noise control as a functional feature.

ORDER

IT IS ORDERED that:

- 1) The previously reserved portion of plaintiff Hunter Fan Company’s motion to strike expert report of Paul Hatch (dkt. #42) is GRANTED.

- 2) The parties' joint stipulation on plaintiff's motion to strike the non-infringement portion of Hatch's report (dkt. #76) is ACCEPTED.

Entered this 26th day of November, 2019.

BY THE COURT:

/s/

WILLIAM M. CONLEY
District Judge