

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

COZY, INC.,)	
)	
Plaintiff,)	
)	
v.)	CIVIL ACTION NO. 21-10134-JGD
)	
DOREL JUVENILE GROUP, INC.,)	
)	
Defendant.)	

**MEMORANDUM OF DECISION AND ORDER ON
DOREL’S MOTION TO STRIKE PORTIONS OF THE KENT REPORT**

November 6, 2023

DEIN, U.S.M.J.

I. INTRODUCTION

This matter is before the court on “Defendant Dorel Juvenile Group, Inc.’s Motion to Strike Portions of the Kent Report” (Docket No. 331). By its motion, Dorel is seeking an order striking paragraphs 13-17, 31-42, 72-124, 130-153, and 156-159 of the Expert Report of Richard Kent, Ph.D. (the “Kent Report”), as well as the infringement charts attached thereto. It is also seeking an order striking the expert report of Jason Forman, Ph.D., on which Dr. Kent relies in forming certain of his opinions. Dorel argues that these materials must be stricken because they contain numerous new infringement theories that were not disclosed in Cozy’s Second Supplemental Preliminary Infringement Contentions. It also argues that Dr. Kent’s infringement charts should be stricken because Cozy did not previously establish “representativeness.” In other words, Dorel contends that Cozy never fulfilled its obligation to conduct a claim-by-claim,

element-by-element analysis showing how each version of Dorel's Air Protect® technology, which is used in numerous different products, allegedly infringes upon the Asserted Patents. In opposing Dorel's motion, Cozy contends that Dr. Kent has relied on the same infringement theories that Cozy has disclosed since the beginning of the litigation, and that the Kent Report permissibly elaborates upon those theories and provides additional evidence to demonstrate infringement. With respect to representativeness, Cozy argues that it is entitled to present evidence on this issue at trial, and that Dr. Kent's report provides a basis for his proposed testimony on that matter.

After careful consideration of the parties' written submissions and oral arguments, and for the reasons described below, Dorel's motion is ALLOWED. However, this ruling is WITHOUT PREJUDICE to Cozy's ability to present a new expert report from Dr. Kent that more closely aligns with the plaintiff's Second Supplemental Preliminary Infringement Contentions ("SSPI Contentions").

II. DISCUSSION

Rule 16.6 of this District's Local Rules requires the parties to disclose their infringement and validity contentions at an early stage in the case. See L.R. 16.6(d). In particular, the Rule provides that the patentee must "disclose its infringement claims and theories, including claim charts that identify 'each accused product' and provide 'an element-by-element description of where and how each element of each asserted claim is found in each accused product or method.'" Philips No. Am. LLC v. Fitbit LLC, Civil Action No. 19-11586-FDS, 2021 WL 5417103, at *3 (D. Mass. Nov. 19, 2021) (quoting L.R. 16.6(d)(1)(A)). "Mandating such disclosures is intended to 'require parties to crystallize their theories of the case early in the litigation and to

adhere to those theories once they have been disclosed.” Id. (quoting O2 Micro Int’l Ltd. v. Monolithic Power Sys., Inc., 467 F.3d 1355, 1366 n.12 (Fed. Cir. 2006)) (additional citation omitted). “Once served, the contentions constitute the universe of the parties’ respective theories[.]” LoganTree LP v. Garmin Int’l, Inc., Case No. 17-1217-EFM-ADM, 2021 WL 5998293, at *6 (D. Kan. Dec. 20, 2021). They “can be ‘amended and supplemented only by leave of court upon a timely showing of good cause.’” Philips No. Am., 2021 WL 5417103, at *3 (quoting L.R. 16.6(d)(5)).

“Expert reports are similarly bound by the propositions advanced in the Final Contentions. ‘Expert infringement reports may not introduce theories not previously set forth in infringement contentions.’” Baxter Int’l, Inc. v. CareFusion Corp., No. 15 C 9986, 2020 WL 10486005, at *1 (N.D. Ill. Aug. 12, 2020) (quoting Trading Techs. Int’l, Inc. v. CQG, Inc., Case No. 05-cv-4811, 2014 WL 4477932, at *2 (N.D. Ill. Sept. 10, 2014)). See also Apple Inc. v. Samsung Elecs. Co., Ltd., Case No.: 5:12-cv-0630-LHK-PSG, 2014 WL 12917334, at *1 (N.D. Cal. Jan. 9, 2014) (same). On the other hand, “[t]he scope of contentions and expert reports are not . . . coextensive.” Apple, 2014 WL 12917334, at *1 (quoting Fenner Invs., Ltd. v. Hewlett-Packard Co., No. 6:08-cv-273, 2010 WL 786606, at *2 (E.D. Tex. Feb. 26, 2010)). “Contentions need not disclose specific evidence, whereas expert reports must include a complete statement of the expert’s opinions, the basis and reasons for them, and any data or other information considered when forming them.” Id. (footnotes omitted). Where, as here, an expert report is challenged on the grounds that it advances new theories of infringement, “the question thus becomes, has the expert permissibly specified the application of a disclosed theory, or has the expert impermissibly substituted a new theory altogether?” Id. This is the fundamental

question that has been raised by the parties in connection with Dorel's present motion to strike.

Changes to Cozy's Infringement Theories

As shown in the exhibits filed in support of Dorel's motion to strike, Dr. Kent has not merely flushed out Cozy's disclosed infringement theories. Instead, he has rewritten Cozy's contentions so that they bear little resemblance to the SSPI Contentions. (See Def. Exs. 3-7).¹ Moreover, as shown in Exhibit 7, Dr. Kent has redefined the claim limitations of the Asserted Patents in a manner that changes the nature of Cozy's infringement theories. For example, but without limitation, in its SSPI Contentions, Cozy asserted that Dorel's Air Protect® technology released air at a "controlled rate" or "metered rate" by restricting "the size of the holes" used to vent air from its airbags. (See Def. Ex. 7 at 9).² However, in his Report, Dr. Kent notes that the court construed the terms "controlled rate" and "metered rate" "to mean, 'such that the velocity of the flow of air and/or liquid out of the airbag is regulated.'" (Id. (citation omitted)).

He then opines that

[t]he velocity at which air flows from the porous filling material, through the vents, into the micro air-cushion, and through the air-permeable fabric is regulated by several features of the Air Protect system. In the filling material, the size of the voids within the material, the stiffness of material itself, and the size and shape of the airbag regulate the velocity of flow of air through the filling material and out of the airbag. Dorel used different filling materials, different sizes, and different shapes depending on the impact response characteristics they desired in specific Air Protect seats and impact conditions.

¹ "Def. Exs." refers to the exhibits attached to the Declaration of Alison C. Casey in Support of Defendant Dorel Juvenile Group Inc.'s Memorandum to Strike Portions of the Kent Report (Docket No. 333).

² Unless otherwise indicated, citations to page numbers refer to the original page numbers on the exhibits rather than the court's CM/ECF numbering system.

(Id. at 9-10 (citation omitted)). This constitutes a new theory as to how Dorel's technology functions and allegedly infringes upon Cozy's Asserted Patents. Such significant departures from Cozy's SSPI Contentions are present throughout the Kent Report. (See, e.g., Def. Ex. 7 at 5-6 (re-defining "air cushion" and "micro air-cushion" as "[t]he chamber bounded by the outer surface of the airbag skin, the fabric seat covering, and the shell of the seat" rather than "the porous textile outer cushion" as described in the SSPI Contentions); Def. Ex. 7 at 22-23 (describing "the filling material" in the airbag, "the number of vents in the airbag skin, and the Young's modulus of the filling material" as features of Dorel's Air Protect® system that "enable adjustment of the compression characteristics of the airbag," rather than "air and foam within the airbags," as asserted in the SSPI Contentions)). As Cozy argued (successfully) in connection with its motion to amend its infringement contentions in order to assert the SSPI Contentions, "[a]t the end of the day, the goal is that when we arrive at expert discovery, we do not want the expert reports to read completely different from the contentions served during discovery." (Docket No. 101 at 32). Because the Kent Report does just that, Dorel's motion to strike must be allowed. See LoganTree, 2021 WL 5998293, at *15 (granting motion to strike plaintiff's infringement expert report where expert advanced new theories that plaintiff failed to disclose in its infringement contentions); Baxter Int'l, 2020 WL 10486005, at *2 (striking portions of expert report expressing theories that were not included in plaintiff's final infringement contentions).

Cozy argues that Dorel's motion should be denied because Dr. Kent was legally required to incorporate the court's claim construction rulings into his opinions and because "Dorel had *actual* notice of Cozy's infringement theories 89 days before Dr. Kent's report" was completed.

(Pl. Mem. at 1 (emphasis in original)).³ Neither argument is persuasive. While there is no dispute that this court’s claim constructions are controlling (see Def. Reply Mem. at 3),⁴ they do not give the plaintiff license to alter its infringement theories without court approval of amendments to its infringement contentions. See Atmel Corp. v. Info. Storage Devices, Inc., No. C 95-1987 FMS, 1998 WL 775115, at *2 (N.D. Cal. Nov. 5, 1998) (explaining why claim construction rulings do not provide a basis for amending a party’s claim charts). Similarly, Cozy may not rely on this court’s claim constructions “to introduce new infringement theories [or] new infringing instrumentalities” through its expert that were “not disclosed in [its] infringement contentions[.]” LoganTree, 2021 WL 5998293, at *14 (quoting Huawei Techs., Co, Ltd v. Samsung Elecs. Co, Ltd., 340 F. Supp. 3d 934, 946 (N.D. Cal. 2018)).

With respect to Cozy’s assertion that Dorel had notice of its theories based on amended contentions that Cozy provided to Dorel 89 days prior to the Kent Report, its argument lacks merit. Cozy’s motion for leave to serve those contentions was expressly denied by the court. (Docket No. 278). Accordingly, Cozy’s SSPI Contentions constitute its final infringement contentions for purposes of this litigation. To the extent Dr. Kent purports to address infringement theories which were not allowed by the court, his Report is improper.

To the extent the Kent Report merely flushes out theories that Cozy did disclose in its SSPI Contentions, it should not be up to the court to parse through Dr. Kent’s radical re-write of Cozy’s infringement contentions in an attempt to determine what is simply detail and what

³ “Pl. Mem.” refers to Plaintiff Cozy, Inc.’s Response to Defendant Dorel Juvenile Group, Inc.’s Motion to Strike Portions of the Kent Report (Docket No. 348).

⁴ “Def. Reply Mem.” refers to Defendant Dorel Juvenile Group, Inc.’s Reply Memorandum in Support of Motion to Strike Expert Report of Dr. Richard Kent (Docket No. 355).

constitutes a new theory of infringement. See In re Rosuvastatin Calcium Patent Litig., MDL No. 08-1949, 2009 WL 4800702, at *9 (D. Del. Dec. 11, 2009) (“While it might be possible to parse through [expert’s] 98-paragraph report and find something not excludable, this is not a task the Court should have to undertake in the first instance.”). Accordingly, Dorel’s motion to strike will be allowed in its entirety but Cozy may have an opportunity to submit a new report that more closely aligns with its SSPI Contentions.

Representativeness

Dorel also argues that Dr. Kent’s claim charts should be stricken because Cozy failed to disclose, at any time prior to its production of the Kent Report, a claim-by-claim and element-by-element theory as to why each separate version of Dorel’s Air Protect® technology allegedly infringes upon Cozy’s Asserted Patents. (Def. Mem. (Docket No. 332) at 18-19). This court will not strike the Kent Report on this basis. However, this court expects that any revised expert infringement report will contain these details.

III. ORDER

For all the reasons detailed above, “Defendant Dorel Juvenile Group, Inc.’s Motion to Strike Portions of the Kent Report” (Docket No. 331) is ALLOWED. However, this ruling is WITHOUT PREJUDICE to Cozy’s ability to present a new expert report from Dr. Kent that more closely aligns with the plaintiff’s SSPI Contentions. Cozy shall inform the court and Dorel, **within 1 week** from the date of this Memorandum of Decision and Order, whether it intends to

produce a new report. The parties shall meet and confer and provide a joint schedule for the production of the report and further expert discovery.

/s/ Judith Gail Dein
Judith Gail Dein
United States Magistrate Judge