

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

OXBO INTERNATIONAL CORPORATION,

Plaintiff,

v.

FINAL PRETRIAL
CONFERENCE ORDER

H&S MANUFACTURING COMPANY, INC.,

15-cv-292-jdp

Defendant.

The court held a final pretrial conference on Wednesday, May 31, 2017, before United States District Judge James D. Peterson. Plaintiff Oxbo International Corporation appeared by counsel, Shane Brunner, Jeffrey Ward, Thomas Johnson, Stephen Howe, and Emily Wessels. Defendant H&S Manufacturing Company, Inc., appeared by counsel, Eric Chadwick, Aaron Davis, and Adam Szymanski.

GENERAL PRETRIAL INSTRUCTIONS

Counsel predicted that the case would take 5-10 days to try. The court will tell the jury 10. The jury will consist of 8 jurors to be selected from a qualified panel of 14. Each side will exercise three peremptory challenges against the panel. Trial days will begin at 9:00 a.m. and will run until 5:30 p.m., with at least an hour for lunch, a short break in the morning, and another in the afternoon. Counsel may be required to be in court earlier than 9:00 a.m. to address matters without the presence of the jury. On the first day of trial, counsel are directed to appear at 8:30 a.m.

Witnesses, with the exception of experts and corporate representatives, will be sequestered.

that Seitz's testimony will be relevant to the jury's consideration of non-infringing alternatives during the damages phase.

The court will allow Seitz to testify as a lay witness, to the extent he has relevant knowledge of hay rakes (including those made by Krone). But his testimony about non-infringing alternatives will come close to expert opinion, which he cannot offer because he has not been disclosed as an expert. H&S has not shown why or how the Krone documents would be admissible other than as support for an expert opinion about non-infringing alternatives. The motion is granted: the Krone documents are excluded.

10. To exclude certain references from being used as prior art against Oxbo's originally asserted claims

Oxbo asks the court to preclude H&S from arguing that claim 44 of the '929 patent, claim 1 of the '739 patent, claims 1 and 3-11 of the '488 patent, and claims 1, 4, 6, and 8 of the '052 patent are invalid based on CA Honey, van der Lely, Declementi, Lohrentz, US Honey, Pourchet, or any other undisclosed references, and from arguing that claim 1 of the '739 patent is invalid over the combination of Dow '757 in view of Zhavoronkin. The motion is based on an agreement the parties reached during discovery.

H&S agrees to the foregoing, with one exception. It contends that it properly disclosed its contention that claim 1 of the '739 patent is invalid over Dow '757 in view of Zhavoronkin, and, as a result, that combination is fair game at trial.

In June 2016, H&S agreed that it would not assert any references that it did not disclose in its January 8 and March 24, 2016 invalidity contentions against Oxbo's originally asserted claims. *See* Dkt. 376-33 ("H&S has agreed that the only references it may use against the originally asserted claims is that which was disclosed in its original and

supplemental invalidity contentions, served January 8, 2016 and March 24, 2016 respectively. To the extent H&S's expert reports cite additional references, H&S has agreed it will not use such references against the originally asserted claims in this litigation.”). The issue here is whether H&S disclosed the Dow/Zhavoronkin combination in either its January 8 or March 24 contentions.

Both disclosures identify the Zhavoronkin reference and the Dow reference. *See* Dkt. 376-26, at 13-15 and Dkt. 376-22, at 11. The January disclosure contends that claim 1 of the '739 patent is invalid over “one or more of the following patents individually or in combination,” and it includes the Zhavoronkin reference and the Dow reference in the list that follows. Dkt. 376-26, at 18. The March disclosure identifies specific prior art combinations—contending that claim 1 of the '739 patent is invalid over Schnittjer in view of Zhavoronkin, for example—but it never contends that claim 1 of the '739 patent is invalid over Dow in view of Zhavoronkin. Dkt. 376-22, at 13-14.

H&S's disclosure was not specific enough to put Oxbo on notice of the particular invalidity ground that H&S was asserting. Accordingly, the motion is granted in full.

11. To exclude reference to John Orr and Orrson Custom Farming

The motion is granted as unopposed.

12. To exclude evidence regarding an alleged hypothetical acceptable non-infringing alternative

This motion identifies two problems for H&S. First, H&S did not identify its WMCH30 merger as an acceptable non-infringing alternative in response to an Oxbo contention interrogatory. H&S disclosed “H&S Twin Mergers of all sorts” and “H&S Front Mount Mergers.” Dkt. 376-1, at 9. Cordray refers to the WMCH30 as a twin merger. But

ORDER

IT IS ORDERED that:

1. Plaintiff Oxbo International Corporation's motion for sanctions, Dkt. 260, is GRANTED in part and DENIED in part.
2. Defendant H&S Manufacturing Company, Inc.'s motion in limine no. 1, Dkt. 346, is GRANTED.
3. Defendant's motion in limine no. 2, Dkt. 347, is GRANTED.
4. Defendant's motion in limine no. 3, Dkt. 348, is DENIED.
5. Defendant's motion in limine no. 4, Dkt. 349, is GRANTED.
6. Defendant's motion in limine no. 5, Dkt. 350, is GRANTED, subject to the terms discussed herein.
7. Defendant's motion in limine no. 6, Dkt. 352, is DENIED, as discussed above.
8. Defendant's motion in limine no. 7, Dkt. 353, is GRANTED.
9. Defendant's motion in limine no. 8, Dkt. 354, is GRANTED
10. Defendant's motion in limine no. 9, Dkt. 355, is GRANTED.
11. Plaintiff's motions in limine, Dkt. 359, are GRANTED and DENIED as set forth herein.
12. Defendant's motion to exclude expert testimony regarding secondary considerations of nonobviousness, Dkt. 334, is GRANTED in part and DENIED in part.
13. Defendant's motion to exclude expert testimony regarding damages, Dkt. 336, is DENIED.
14. Defendant's motion for judicial notice, Dkt. 343, is DENIED as moot.

15. Defendant's motion to submit to jury, Dkt. 380, is DENIED.

Entered June 7, 2017.

BY THE COURT:

/s/

JAMES D. PETERSON
District Judge