

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

MULTILAYER STRETCH CLING FILM)
HOLDINGS, INC.,)

Plaintiff,)

v.)

MSC MARKETING AND TECHNOLOGY,)
INC., D/B/A SIGMA STRETCH FILM, and)
ALPHA INDUSTRIES, INC.,)

Defendants.)

Civil Action No. 2:12-cv-02112

JURY DEMAND

**RESPONSE IN OPPOSITION TO SIGMA’S MOTION TO COMPEL
SUPPLEMENTATION OF MULTILAYER’S INFRINGEMENT CONTENTIONS**

Plaintiff Multilayer Stretch Cling Film Holdings, Inc. (“Multilayer”) submits this response in opposition to the Motion to Compel Supplementation of Multilayer’s Infringement Contentions (DE # 75) filed by Defendants MSC Marketing and Technology, Inc., d/b/a Sigma Stretch Film, and Alpha Industries, Inc. (collectively “Sigma”).

I. INTRODUCTION

Misery loves company. This Court recently granted a motion to compel filed by Multilayer and ordered Sigma to reconfigure its stretch film line to obtain samples of the allegedly infringing film, which Sigma had failed to preserve. *See* DE # 73. One week later, Sigma filed this baseless motion to compel in a transparent attempt to cast Multilayer in the same light as Sigma—as an obstructionist to discovery. Nevertheless, Multilayer’s Initial Infringement Contentions are not deficient, as there is no requirement that Multilayer include information from its privileged pre-filing investigation in such contentions. Further, Sigma’s suggestions that Multilayer may not have conducted an adequate pre-filing investigation are

undermined by Sigma's own actions—it reconfigured its Tulsa stretch film line mere months after Multilayer filed suit. Sigma's motion, which is nothing more than a diversionary tactic, should be denied.

II. RELEVANT FACTS

A. Multilayer's Pre-Filing Investigation

Multilayer conducted a thorough pre-filing investigation in advance of bringing suit against Sigma. Multilayer's Privilege Log reveals that Multilayer engaged in an in-depth investigation that took place over the course of several months leading up to the filing of the Complaint in this action on February 10, 2012. *See* Ex. A, Multilayer's Privilege Log. Multilayer's pre-filing investigation is privileged, and it does not intend to waive privilege over these analyses or utilize the analyses to prove infringement in this case. Multilayer is willing, however, to make the portions of its pre-filing testing that relate to Sigma's stretch films available to the Court for an *in camera* inspection.

B. Multilayer's Initial Infringement Contentions

Multilayer served its Initial Infringement Contentions on Sigma on April 27, 2012 in accordance with the deadlines contained in the Local Patent Rules. Multilayer's Initial Infringement Contentions are in full compliance with the requirements set forth in the Local Patent Rules. This inescapable conclusion is illustrated by the fact that Sigma did not complain about the substance of Multilayer's contentions for a full year after receipt of them. Indeed, Sigma was able to prepare and serve its Initial Non-Infringement Contentions on June 29, 2012¹ based on the information contained in Multilayer's Initial Infringement Contentions. As further evidence of the insincerity of Sigma's motion, Sigma recently alleged that it cannot supplement

¹ The parties mutually agreed to extend this deadline from May 29, 2012 to June 29, 2012, pending settlement negotiations.

its Initial Non-Infringement Contentions, which Multilayer has accused of being deficient since September 27, 2012 (*see* DE # 67-6 at pp. 6-7), because Multilayer's Initial Infringement Contentions are deficient. Ex. B, June 5, 2013 Letter, p. 3. Sigma's newly articulated theory is undermined by its own ability to prepare Initial Non-Infringement Contentions without a single complaint about Multilayer's contentions for an entire year.

Multilayer's Initial Infringement Contentions readily admit that the disclosure is as specific as possible given the early stage of the case. *See, e.g.*, DE # 78, p. 2; *id.* at p. 10. The Local Patent Rules provide that these initial contentions are due within seven (7) days after the Responsive Pleading is filed. LPR 3.1. While Multilayer served discovery requests on the first day permitted under the Local Patent Rules—the day Sigma filed its Responsive Pleading—Multilayer had not yet received any documents or responses from Sigma as of the date Multilayer served its Initial Infringement Contentions. The contentions plainly state, “The asserted claims include elements that relate specifically to the formulations of the Accused Film and the processing conditions used to manufacture the Accused Film, which is confidential information and not publicly available.” DE # 78 at p. 10. Although Multilayer had specifically requested this confidential information from Sigma, it had not yet received it. Thus, Multilayer's Initial Infringement Contentions are based on non-privileged information that is publicly available. Again, these contentions were perfectly suitable to Sigma until recently.

C. Sigma's Quest to Pry Into Multilayer's Privileged Information

At the Rule 30(b)(6) deposition of Multilayer, Sigma asked question upon question about Multilayer's pre-filing investigation. Each such improper question was met with an objection relating to privilege and an instruction that the corporate representative not answer to the extent doing so would reveal privileged information. Similarly, Sigma asked questions about the basis for Multilayer's Initial Infringement Contentions. Multilayer's counsel objected on the grounds

of privilege and instructed the corporate representative not to answer to the extent it would reveal privileged information. Multilayer's counsel made it clear that Multilayer was available to testify to non-privileged information relating to the Initial Infringement Contentions. Ex. C, Multilayer Deposition Transcript, p. 22:1-6. Moreover, Multilayer's counsel emphasized that the non-privileged information supporting Multilayer's contentions includes the exhibits to the Initial Infringement Contentions, which had not been shown to Multilayer's representative until Multilayer's counsel requested that they be utilized.

Once Sigma finally gave Multilayer's representative the exhibits to the Initial Infringement Contentions, Multilayer testified at length to the non-privileged bases for Multilayer's contentions. For instance, with respect to Exhibit B to Multilayer's Initial Infringement Contentions, Multilayer testified as follows:

Okay. Then on page 4 near the bottom before the bold print, non-stop, the one paragraph before that, "Sigma focuses on less-expensive commodity films with its nine-layer line. It's [sic] Battenfeld Gloucester system uses four extruders and a Cloeren die and feedblock. The subskin B, core C, and subskin D are split into alternating layers, A/B/C/B/C/D/C/D/A."

In my opinion, if you use butene in every one of those layers and configure it this way, it's a violating film.

Q So, based on the portions of Exhibit 61 that you just identified, is it your understanding that those -- that information contained in what you just identified, forms the factual basis for Multilayer's claim of infringement against Sigma?

MS. SMITH: Object to the form. And to the extent it requires you to reveal attorneys -- conversations that you've had -- information that you've gleaned from your attorneys, I caution you not to answer or disclose that information.

THE WITNESS: This could, at the very least, be the basis. Further information, I can't speak to, but this -- this is enough, in my opinion, to say I'm of the opinion that they are violating.

Ex. C, Multilayer Deposition, pp. 38:4-39:3. When asked if there were any other facts that support Multilayer's claim of infringement, Multilayer discussed a subpoena served on Sigma prior to commencement of the litigation referencing the patent-in-suit (*id.* at p. 39:15-22), a February 2003 article discussing a nine-layer stretch film line installed in Belleville, Ontario in 2000 (*id.* at pp. 61:24-64:10; *id.* at pp. 69:12-71:14; *id.* at p. 73:4-18), and a March 11, 2008 Sigma press release discussing a new nine-layer stretch film line that Sigma purchased and installed in its Tulsa, Oklahoma facility (*id.* at pp. 39:25-45:9). Multilayer also discussed Sigma's stretch film brochures and explained how they establish the requisite amount of cling in the outer layer or layers of the accused films. *Id.* at pp. 59:18-61:12; *id.* at pp. 75:4-76:8. Furthermore, Multilayer's corporate representative, Terry Jones, summarized a discussion he had with Peter Cloeren, owner of Cloeren Incorporated, regarding Cloeren's sale of a nine-layer selector plug to Sigma. *Id.* at pp. 138:3-139:20. Thus, Sigma's assertion that Multilayer "could not identify or explain what facts supported Multilayer's allegations of patent infringement" (DE # 76, p. 2) is demonstrably false.

Multilayer's corporate representative was also prepared to discuss information produced by Sigma in connection with its patent disclosures and discovery obligations, which support Multilayer's allegations of infringement. In particular, Sigma's interrogatory responses provide additional evidence that Sigma is infringing the patent-in-suit. Although Sigma designated the interrogatory responses as "Attorney's Eyes Only" under the Stipulated Protective Order, Sigma authorized Mr. Jones, Multilayer's corporate representative, to review such documents. As such, Mr. Jones was prepared to discuss Sigma's interrogatory responses and how they provide further evidence of infringement. *See* Ex. C, pp. 17:5-18:25, p. 22:1-6, and p. 26:1-10. Nevertheless, Sigma refused to ask any questions relating to Sigma's interrogatory responses. *Id.* at pp. 19:18-

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