UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

SOUTHERN DIVISION

HON. DOUGLAS F. McCORMICK, U.S. MAGISTRATE JUDGE

Tentative Ruling on Law & Motion Matter

DATE: May 18, 2020

CASE: Fisher and Paykel Healthcare Ltd. v. Flexicare Inc., Case No. SA CV 19-00835-JVS (DFMx)

RE: FPH's Motion to Compel (Dkt. 123)

This is a patent infringement lawsuit relating to respiratory care products. Before the Court is Plaintiff Fisher & Paykel Healthcare Limited ("FPH") and Defendants' Flexicare Incorporated, Flexicare Medical Limited, and Flexicare (Group) Limited ("Flexicare") Joint Stipulation in connection with FPH's motion to compel Flexicare to provide supplemental responses to FPH's Interrogatory Nos. 7 and 11 and Requests for Production ("RFP") Nos. 3, 5-7, 9-13, 15-23, 25-27, 29-31, and 33. See Dkts. 123 ("Motion"), 124 ("JS"). FPH also filed a supplemental memorandum. See Dkt. 127 ("Supp."). Having reviewed the papers and considered the arguments of counsel, the Court GRANTS FPH's Motion.

FPH wants Flexicare to supplement its responses to several damages-related discovery requests, including Flexicare's unit sales, revenues, costs, and profits associated with sales of the accused products (Interrogatory No. 7, RFP Nos. 7, 9-13, 15-22, 29, 30), Flexicare's annual projected sales and forecasts for the accused products (Interrogatory No. 11, RFP Nos. 25-27, 31), and the entities involved in Flexicare's alleged infringement (RFP Nos. 3, 5, 6, 23, 33). See JS at 12. Flexicare opposes on three primary grounds: (1) FPH failed to comply with Northern District of California Patent Local Rule 3-8, (2) FPH failed to comply with Central District of California Local Rule 37-1, and (3) FPH's motion is premature. See JS at 17-18.

Rule 26 provides that parties may obtain discovery regarding "any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case." Fed. R. Civ. P. 26(b)(1). Relevant information "need not be admissible in evidence to be discoverable." Id. A court may limit discovery of relevant material if it determines that the discovery sought is unreasonably cumulative or duplicative, or obtainable from some other source that is more convenient, less burdensome, or less expensive, or the burden or expense of the proposed discovery weighs the likely benefit. See Fed. R. Civ. P. 26(b)(2)(C). The party who resists discovery has the burden of showing that discovery should not be allowed, and must clarify, explain, and support its objections. See DIRECTV, Inc. v. Trone, 209 F.R.D. 455, 458 (C.D. Cal. 2002).

Patent L.R. 3-8. Flexicare argues that Judge Selna adopted the Patent Local Rules, including Rule 3-8, which requires each party asserting infringement to provide its damages contentions 50 days after service of invalidity contentions. See JS at 23. FHP's refusal to disclose its damages theories prejudices Flexicare's ability "to understand what is relevant and proportional," and so FHP's Motion should be denied. Id. at 25-26. FPH responds that Judge Selna did not adopt all the Patent Local Rules and thus FPH was not required to serve damages contentions of any kind. See JS at 20-21.

The Court agrees with FPH. On May 10, 2019, Judge Selna entered the initial Order Setting Rule 26(f) Scheduling Conference. See Dkt. 10. Paragraph (m) states:

> Patent cases: propose dates and methodology for claim construction and Markman[1] hearings. The Court requires the parties to file concurrent opening briefs and concurrent reply briefs for the hearing. The Court intends to follow the rule for patent cases which have been adopted by the Northern District of California.

Id. at 5. Significantly, the Order used the singular "rule," not "rules," presumably referring to Patent Local Rule 4, entitled "Claim Construction Proceedings." See Patent L.R. 4.

Flexicare's interpretation is also inconsistent with the various scheduling orders. In the Joint Rule 26(f) Report, FPH proposed a case schedule that did not include any damages contentions. See Dkt. 37 at 18-19. Two days later, at

[1] A Markman hearing is also known as a "Claim Construction Hearing."

the July 29, 2019 scheduling conference, Judge Selna adopted "all of [FPH's] patent dates in the Rule 26f Report." Dkt. 39 at 1. That scheduling order was amended on August 21, October 11, and finally, November 12, 2019; each time, dates were extended without any mention of damages contentions. See Dkts. 43, 59, 67. The Court will not require compliance with rules that neither the parties agreed to nor Judge Selna ordered.

Flexicare argues that FPH's interpretation goes against "[Judge Selna's] interpretation of [his] own order in other cases." JS at 24 (citing cases). Flexicare cites Judge Selna's scheduling orders in cases from 2012 and 2016, but Patent Local Rule 3-8 did not go into effect until January 17, 2017.[2] Otherwise, Flexicare does not cite, and the Court did not find, any cases in which Judge Selna required parties to comply with Local Rule 3-8.

Local Rule 37-1. Flexicare argues that that FPH failed to follow Local Rule 37-1 because the parties did not meet and confer on FPH's present discovery requests nor did FPH specifically articulate what it needs and why for its request. See JS at 27. FPH responds that the parties met and conferred several times, and that it was Flexicare's "drastic change in position" regarding Patent Local Rule 3-8 that necessitated this motion. Supp. at 4.

Local Rule 37-1 requires that before filing any motion related to discovery, "counsel for the parties must confer in a good-faith effort to eliminate the necessity for hearing the motion or to eliminate as many of the disputes as possible." C.D. Cal. L.R. 37-1. Here, it appears that with respect to Flexicare's damages-related discovery responses, the parties exchanged numerous letters and emails and met and conferred five times over five months. See JS at 13-14. It was not until March 26, 2020, that Flexicare claimed that FPH had waived any claim for damages because FPH did not comply with Patent Local Rule 3-8. See Dkt. 125, Wentzel Decl. ¶ 20, Ex. 19. On April 1, the parties met and conferred on the present issue but were unable to reach a resolution. On this record, the Court finds that FPH has sufficiently complied with Local Rule 37-1.

Premature. Flexicare argues that FPH's Motion is premature because it has already agreed to provide supplemental responses to the requests in the Motion. See JS at 28-30. Flexicare believes that FPH's goal is to avoid disclosing its damages

[2] Prior to January 2017, the Patent Local Rules did not require the exchange of damages contentions. See Patent L.R. 3 (effective Nov. 1, 2014; superseded Jan. 17, 2017), https://cand.uscourts.gov/filelibrary/1533/Local_Rules-Patent-Eff_11.1.14.pdf (containing no damages contentions requirement).

theories while obtaining a Court order for "unrestrained damages discovery." JS at 30. FPH responds that Flexicare's proposed compromises were unacceptable, and that Court intervention is necessary given Flexicare's incomplete supplementations. See Supp. at 4-5.

The Court agrees with FPH that the Motion is ripe. On April 10, 2020, Flexicare wrote that it was willing to provide supplemental damages-related discovery only after FPH provided a "full and complete response to Flexicare's Interrogatory No. 15," which sought "the damages contention information required under ND Cal. Patent LR 3-8." Wentzel Decl. ¶ 23, Ex. 22. FPH need not agree to Flexicare's pre-conditions in order to obtain Rule 26 discovery, especially with the September 7, 2020 discovery cut-off date fast approaching.

It does appear that Flexicare has recently produced some documents responsive to FPH's Interrogatories and RFPs. See Dkt. 129, Supp. Wentzel Decl. ¶ 2. This is a good start. The Court is hopeful that the parties can resolve outstanding discovery disputes without further judicial intervention. **For now, FPH's Motion is GRANTED. Flexicare is ORDERED to serve full and complete verified answers to FPH's Interrogatory Nos. 7 and 11 and shall complete their document production for RFPs Nos. 3, 5-7, 9-13, 15-23, 25-27, 29-31, and 33 within 14 calendar days of the date of this order. If needed, disagreements about the sufficiency of Flexicare's supplemental production may be resolved by informal teleconference with Judge McCormick.**