



Civil Procedure by serving the required written report. Rule 26(a)(2) requires that the expert's report must contain, inter alia, a complete statement of all opinions the witness will express and the basis and reasons for them. Fed. R. Civ. P. 26(a)(2)(B)(i). On March 26, 2014, plaintiff filed expert designations of Rogers and DiLonardo and served a report prepared by each of them.

The report prepared by Rogers provides virtually none of the information required by Rule 26(a)(2)(B)(i). Plaintiff's response to the motion asserts as an excuse for noncompliance lack of sufficient discovery before Rogers prepared his report for him to have the information he would need to comply with the requirements of Rule 26(a)(2)(B). After a thorough review of the material provided by the parties, the court is not persuaded that plaintiff's excuse for noncompliance with the scheduling order as to Rogers has merit. Plaintiff had ample time before Rogers prepared and submitted his report for the collection of whatever information it needed for Rogers to provide the information in his report required by Rule 26(a)(2)(B)(i).

The court made clear in the November 26, 2013 scheduling order that strict compliance with the terms of the order was required. Rule 16(f)(1)(C) of the Federal Rules of Civil Procedure authorizes the court to issue any just orders if a

party fails to obey a scheduling or other pretrial order. The court has concluded that a just order to address plaintiff's failure to obey the part of the November 26, 2013 pretrial order that fixed a deadline of March 26, 2014, for the service of a report by Rogers making the disclosures required by Rule 26(a)(2) would be an order that Rogers will not be permitted to serve as an expert witness for plaintiff in this action.

Such a sanction finds support as well in Rule 37(e)(1), which authorizes a court to deny a party the use of information at a hearing or at trial if the party has failed to provide that information as required by Rule 26(a), unless the failure was substantially justified or is harmless. Plaintiff has not persuaded the court that its failure to provide the information it was obligated to provide relative to the opinions of Rogers in compliance with the November 26, 2013 scheduling order was substantially justified or harmless. The court has concluded that no lesser sanction would adequately address plaintiff's failure to comply with the scheduling order as to Rogers.

The DiLonardo report is a slight improvement over the Rogers report inasmuch as it does contain conclusory opinions of DiLonardo that certain devices of defendants have characteristics that cause those devices to infringe one or more of the patents at issue. However, his report is deficient because it obviously

does not have all his opinions, nor does it express the basis and reasons for his opinions. The declaration of DiLonardo that plaintiff provided with its response to the motion establishes that the March 26, 2014 DiLonardo report also had the shortcoming that it did not, as Rule 26(a)(2)(B)(ii) requires, disclose facts or data considered by DiLonardo in reaching his opinions -- the declaration established that, in addition to the things DiLonardo disclosed in his original report, he considered charts that were marked as Appendices A-D to plaintiff's responses to defendants' first set of interrogatories. Those appendices apparently were plaintiff's claim charts, which had been served by plaintiff on defendant before March 26, 2014.

As an alternative to its request that DiLonardo's testimony be excluded, defendants requested that the court rule that his testimony should be strictly limited to the contents of the DiLonardo report plaintiff served on March 26, 2014. Consistent with that alternative request, the court has concluded that the testimony of DiLonardo related to plaintiff's contention that defendants' devices infringe the patents at issue will be strictly limited to the contents of his initial report and the contents of the Appendices A-D that were served with plaintiff's responses to defendants' first set of interrogatories. If, as appears to be the case, defendants were aware of Appendices A-D

at the time they received DiLonardo's March 26, 2014 report, they are not in a position to claim surprise that Appendices A-D provide some of the detailed information required by Rule 26(a)(2)(B).

Plaintiff's response to defendants' motion to exclude as it pertains to DiLonardo asserts as an excuse lack of sufficient discovery before DiLonardo prepared his March 26, 2014 report. The court has concluded that that excuse has no more merit as to DiLonardo than it did as to Rogers. A diligent discovery effort by plaintiff would have enabled it to collect for DiLonardo's use on March 26, 2014, whatever information it needed for DiLonardo to provide in his report the information required by Rule 26(a)(2)(B)(i). The court has concluded that a just order to address plaintiff's failure to obey the part of the November 26, 2013 pretrial order that fixed a deadline of March 26, 2014, for the service of a report by DiLonardo making the disclosures required by Rule 26(a)(2) would be an order that the testimony of DiLonardo in support of plaintiff's contention that defendants' devices infringe the patents at issue will be strictly limited to the contents of his initial report and the contents of the Appendices A-D that were served with plaintiff's response. Plaintiff has failed to show that its failure to provide more complete information in the March 26, 2014 report of DiLonardo

was substantially justified or harmless. No lesser sanction would adequately address plaintiff's failure to comply with the scheduling order as to DiLonardo.

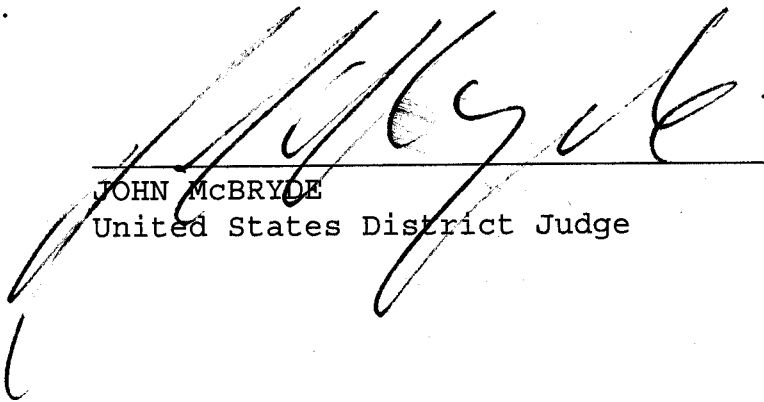
The court notes that plaintiff has designated DiLonardo as its rebuttal expert witness. The court does not anticipate that any limitation it has imposed on plaintiff's use of DiLonardo as a witness would affect his status as an expert rebuttal witness.

Therefore,

The court ORDERS that Rogers will not be permitted to serve as an expert witness in this action.

The court further ORDERS that the testimony of DiLonardo in support of plaintiff's contention that defendants' devices infringe the patents at issue will be strictly limited to the contents of his March 26, 2014 report and the contents of the Appendices A-D that were served with plaintiff's responses to defendants' first set of interrogatories.

SIGNED July 17, 2014.



JOHN MCBRYDE  
United States District Judge