

United States District Court
For the Northern District of California

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

GSI TECHNOLOGY, INC.,)	Case No. 5:13-cv-01081-PSG
)	
Plaintiff,)	OMNIBUS ORDER RE: PRE-TRIAL
)	MOTIONS
v.)	
)	(Re: Docket Nos. 900, 905, 925, 930, 931)
UNITED MEMORIES, INC., ET AL.,)	
)	
Defendants.)	

With zero business days left before trial, Plaintiff GSI Technology, Inc. and Defendants United Memories, Inc. and Integrated Silicon Solution, Inc. have finished briefing four substantive pre-trial motions (and one motion to shorten time).¹ The court rules as follows:

- GSI's motion to quash UMI's trial subpoenas² is GRANTED.
- GSI's motion to have the Hardee document deemed authenticated³ is GRANTED.
- ISSI's motion to strike GSI's newly-added trial exhibits⁴ is DENIED.
- GSI's motion to strike and exclude the supplemental Cox report⁵ is GRANTED.

¹ See Docket Nos. 900, 905, 925, 930, 931.

² See Docket No. 900.

³ See Docket No. 905.

⁴ See Docket No. 925.

⁵ See Docket No. 930.

1 GSI's motion to shorten time⁶ is DENIED.

2 **A. Docket No. 900: GSI's Motion to Quash Trial Subpoenas to Jeffrey Shohet and Jeffrey**
3 **Aronson**

4 UMI issued trial subpoenas to Jeffrey Shohet and Jeffrey Aronson, both attorneys at DLA
5 Piper, GSI's outside counsel.⁷ GSI moves to quash both subpoenas.⁸ Because UMI has failed to
6 satisfy the three-factor Shelton v. Am. Motors Corp.⁹ test, GSI's motion is GRANTED.

7 Under Shelton, a party seeking to force opposing counsel to testify at trial must show that
8 (1) no other means exist to obtain the information; (2) the information is relevant and not
9 privileged; and (3) the information is crucial to the preparation of the case.¹⁰ Courts in the Ninth
10 Circuit have held that the Shelton factors apply even where, as here, the subpoenaed attorney is not
11 trial counsel.¹¹ As to the first factor, UMI seeks trial testimony from Aronson and Shohet about
12 GSI's representations and positions leading up to the execution of the contract between UMI and
13 GSI.¹² However, other means of obtaining this information plainly exist, as Robert Gower and
14 David Chapman, who negotiated the agreement for UMI and GSI respectively, both are on UMI's
15 trial witness list.¹³ Regarding the second factor, UMI seeks communications between Chapman
16 and Aronson and Shohet, which is plainly information protected by the attorney-client privilege.
17 Finally, UMI's own conduct shows that the third factor is not satisfied, because the information is
18 not crucial to the preparation of the case. Despite noticing Shohet's deposition during discovery,

19 ⁶ See Docket No. 931.

20 ⁷ See Docket No. 900 at 2.

21 ⁸ See id.

22 ⁹ 805 F.2d 1323, 1327 (8th Cir. 1986).

23 ¹⁰ See id.

24 ¹¹ See, e.g., Townsend v. Imperial Cnty., Case No. 12-CV-2739-WQH PCL, 2014 WL 2090689, at
25 *2 (S.D. Cal. May 19, 2014), reconsideration denied, Case No. 12-CV-2739-WQH PCL, 2014 WL
26 3734685 (S.D. Cal. July 28, 2014).

27 ¹² See Docket No. 923 at 2.

28 ¹³ See Docket No. 900 at 4.

1 UMI failed to pursue the matter after GSI objected, and did not depose Shohet. UMI did not seek
2 to depose Aronson at all.¹⁴ UMI's failure to pursue the depositions of Shohet and Aronson
3 indicates that their testimony is not crucial to UMI's case.

4 **B. Docket No. 905: GSI's Motion to Authenticate the Hardee Document or Reopen**
5 **Hardee's Deposition**

6 GSI moves for a court order authenticating the Hardee document, a copy of the GSI-UMI
7 agreement marked up by Kim Hardee, currently an ISSI employee and formerly a UMI
8 employee.¹⁵ GSI alternatively seeks to reopen Hardee's deposition for the purpose of
9 authenticating the document.¹⁶ Because the court finds that authentication is warranted as a
10 discovery sanction, GSI's motion is GRANTED.

11 Under Rule 37(b)(2)(A)(i), if a 30(b)(6) witness does not comply with a court order to
12 provide discovery, the court may issue an order "directing that the matters embraced in the order or
13 other designated facts be taken as established for purposes of the action, as the prevailing party
14 claims." Earlier this year, the court ordered ISSI to produce 30(b)(6) witnesses on a number of
15 topics, including ISSI's contention that it had no knowledge of UMI's work for and relationship
16 with GSI prior to March 2013; ISSI's discovery of UMI's work for and relationship with GSI
17 relating to high performance, DRAM, RLDRAM, LLDRAM, and/or Atris; and Hardee's role and
18 work at ISSI.¹⁷ The court also ordered GSI to send ISSI the specific documents it wanted
19 addressed during deposition.¹⁸ ISSI designated two 30(b)(6) witnesses to testify on those topics,
20 and GSI sent ISSI a list of the documents that would be used at those depositions.¹⁹ The Hardee
21 agreement was on the document list for both 30(b)(6) depositions, but both witnesses testified that

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23 ¹⁴ See Docket No. 900-1 at ¶ 4.

24 ¹⁵ See Docket No. 905 at 2.

25 ¹⁶ See id.

26 ¹⁷ See Docket No. 600.

27 ¹⁸ See id.

28 ¹⁹ See Docket No. 905 at 3.

1 they had never seen the Hardee document in preparation for their depositions.²⁰ Because the
2 30(b)(6) witnesses were plainly unprepared to testify knowledgeably about the Hardee document in
3 violation of the court’s order, discovery sanctions under Rule 37(b)(2)(A)(i) are warranted and the
4 court orders the Hardee document deemed authenticated. The court further notes that UMI
5 reasserts its previously rejected argument that the Hardee document is privileged attorney work
6 product and requests that the Hardee document be sealed.²¹ Consistent with its earlier order,²² the
7 court DENIES both requests.

8 **C. Docket No. 925: ISSI’s Motion to Strike Newly-Identified Exhibits**

9 ISSI moves to strike 18 trial exhibits from GSI’s Second Amended Exhibit List,²³ arguing
10 that these are “new” exhibits that were not timely identified.²⁴ However, ISSI’s own motion
11 concedes that these exhibits are not new, but were “produced by the parties at least six months ago
12 during discovery.”²⁵ GSI’s failure to identify the exhibits in a timely manner therefore is harmless
13 under Rule 37(c)(1).²⁶ Indeed, nine of the so-called “new” exhibits are on either ISSI or UMI’s
14 exhibit lists, showing that GSI’s late amendment of its exhibit list puts ISSI at no risk of trial by
15 ambush.²⁷ ISSI’s motion is DENIED.

16 **D. Docket No. 930: GSI’s Motion to Strike and Exclude Supplemental Expert Report of
17 Alan Cox and Related Documents**

18 Three days ago, ISSI supplemented the report of its damages expert, Alan Cox, to increase
19 the costs that ISSI allegedly incurred in developing the Atris chip.²⁸ GSI moves to strike the

20 ²⁰ See *id.* at 3-4.

21 ²¹ See Docket No. 609; Docket No. 610; Docket No. 915 at 1, 3-4.

22 ²² See Docket No. 610.

23 ²³ See Docket No. 919.

24 ²⁴ See Docket No. 925 at 1.

25 ²⁵ *Id.*

26 ²⁶ See, e.g., *Johnson v. Hix Wrecker Service, Inc.*, 528 Fed. App’x 636, 640-41 (7th Cir. 2013).

27 ²⁷ See Docket No. 938 at 2.

28 ²⁸ See Docket No. 928-4 at 2-3.

1 supplemental Cox report as untimely under Rules 26(e)(2) and 37(c)(1).²⁹

2 Rule 26(e)(1)(A) permits supplementation of discovery “in a timely manner if the party
3 learns that in some material respect the disclosure or response is incomplete or incorrect, and if the
4 additional or corrective information has not otherwise been made known to the other parties during
5 the discovery process or in writing.” If a supplemental expert report is untimely, however, it must
6 be excluded under Rule 37(c)(1) unless the failure to timely supplement was “substantially justified
7 or is harmless.”

8 Here, ISSI’s supplementation of the Cox report is untimely. Rule 26(e)(2) requires that
9 expert report supplements “be disclosed by the time the party’s pretrial disclosures under Rule
10 26(a)(3) are due.” The parties’ pretrial disclosures were due on September 22, 2015, per the
11 court’s standing order,³⁰ and so the supplemental Cox report, disclosed on October 20, 2015,³¹ was
12 untimely disclosed long after the Rule 26(e)(2) deadline. The failure to timely supplement the Cox
13 report was neither substantially justified nor harmless; the supplement addresses ISSI’s costs from
14 January 2015 to June 2015,³² and while it is understandable that the expense data would not have
15 been available immediately at the close of business on June 30, ISSI provides no explanation why
16 it took nearly four months to disclose the underlying cost information and the supplemental
17 report.³³ The supplemental report significantly increases the cost that ISSI argues should be
18 deducted from any unjust enrichment awarded to GSI, and at this late date, there is no time for GSI
19 to respond to Cox’s supplemental report.³⁴ Because the supplemental report was untimely, and the
20 untimeliness was neither substantially justified nor harmless, GSI’s motion to strike and exclude is
21 GRANTED.

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23 ²⁹ See *id.*

24 ³⁰ See *id.* at 5; Standing Order of Magistrate Judge Paul S. Grewal, June 2014, at 2-3.

25 ³¹ See Docket No. 928-4 at 3.

26 ³² See *id.* at 2-3.

27 ³³ See *id.* at 3.

28 ³⁴ See *id.* at 2.

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E. Docket No. 931: GSI's Motion to Shorten Time on Docket No. 930

Because the parties have fully briefed GSI's motion to strike and exclude the Cox expert report, GSI's motion to shorten time on briefing and hearing that motion is DENIED as moot.

SO ORDERED.

Dated: October 23, 2015



PAUL S. GREWAL
United States Magistrate Judge