

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

NEIL MINTZ; MARCUS MINTZ; and
JIF-PAK MANUFACTURING, INC.,

Plaintiffs,

v.

DIETZ & WATSON, INC.; and PACKAGE
CONCEPTS & MATERIALS, INC.,

Defendants.

And related counterclaims.

Civil No. 05cv1470-L (CAB)

**ORDER DENYING DEFENDANTS'
MOTION TO EXCLUDE EXPERT
DESIGNATION OF ARNOLD
MIKELBERG**

[Doc. No. 156]

On June 1, 2009, the Court held a telephonic hearing on Defendants' request to exclude an expert designated by Plaintiff as untimely. [Doc. No. 156.] The parties submitted papers directly to Chambers. Lael Andara, Esq., appeared for Plaintiff. Jonathan Hangartner, Esq., appeared for Defendants. Having considered the submissions and arguments of counsel, the request to exclude the expert is **DENIED**.

This a patent infringement action that has been pending for some time. On May 1, 2006 the Court entered the initial scheduling order in this case [Doc. No. 39]. Among the deadlines set in that order was the Claim Construction Hearing for October 20, 2006, and the initial identification of experts for December 20, 2006, with a rebuttal exchange on January 10, 2007. On October 18, 2006, the Court granted Plaintiff's request to continue the Claim Construction Hearing to February 23, 2007. [Doc. No. 60.] The parties, therefore, jointly requested that the original December date for identification of experts be vacated and be rescheduled to occur 30 days after the Claim Construction Hearing. [Doc. No. 67.]

1 The Court granted that request and modified the scheduling order on February 16, 2007, rescheduling the
2 identification of experts and other deadlines to reflect the scheduling change of the Claim Construction
3 Hearing. [Doc. No. 78.]

4 The Claim Construction Hearing was held on March 16, 2007 [Doc. No. 86], and the parties
5 exchanged expert identification on April 16, 2007, in accordance with the Court's February 16, 2007
6 scheduling order. [Doc. No. 78.] Rebuttal designations were timely made on April 23, 2007. Plaintiff's
7 designation or rebuttal designation did not include the expert at-issue, Arnold Mikelberg. Expert reports
8 for the designated experts were due to be exchanged June 11, 2007. On May 7, 2007, as the Claim
9 Construction Order had not yet issued, the Court vacated the dates of the Scheduling Order except for
10 the Pretrial Conference date. [Doc. No. 97.] On July 9, 2007, the Court also vacated the Pretrial
11 Conference date and instructed the parties to contact Chambers for a new scheduling order within five
12 days of the issuance of the Claim Construction Order. [Doc. No. 98.]

13 The Claim Construction Order issued on February 13, 2009. [Doc. No. 134.] On March 2, 2009,
14 the Court entered an order setting deadlines going forward. [Doc. No. 140.] The Order set dates for the
15 exchange of final contentions following the issuance of the Claim Construction Order, in accordance
16 with the Local Patent Rules, and reset the dates for the exchange of expert reports, discovery deadlines
17 and the other Pretrial dates. This new scheduling order did not address the designation of experts, as that
18 deadline and exchange had already occurred.

19 On May 26, 2009, the parties exchanged initial expert reports on infringement and invalidity.
20 Plaintiff's exchange included a report from Mr. Mikelberg on industry-related matters. Defendants
21 objected to the report on the basis that Mr. Mikelberg had not been identified in Plaintiff's designation
22 served in April 2007, and his designation was untimely and prejudicial to Defendants as they had no
23 notice of his subject area. Plaintiff's counsel represented that it was his understanding that when the
24 Court vacated the scheduling order in May 2007, it rendered the order a nullity. Therefore, although the
25 designation deadline had passed and the parties had complied with it, he believed that under the March
26 2, 2009 Order, Plaintiff could designate new and additional experts at the same time reports were served.

27 The Court's Order of March 2, 2009 sets a deadline for the exchange of exchange expert reports.
28 [Doc. No. 140, at ¶ 4.] It does, however, also reference Rule 26a(2)(A) which requires a party to

1 disclose the identity of any expert witness to be used at trial. Plaintiff understood this reference to
2 reopen the opportunity to designate experts. This was not the intention of the Order, which continued
3 the schedule where the parties left off in May 2007 and did not to reopen the designation deadline which
4 had already expired before the remaining dates were vacated. Under the circumstances, however,
5 counsel's interpretation is not unreasonable. Consequently, the Court **DENIES** Defendants' request to
6 exclude Mr. Mikelberg as an expert.

7 Although it was not the intention of the Court's order to reopen the opportunity to designate
8 additional experts, Defendants should not be prejudiced by the uncertainty created by the text of the
9 Court's scheduling order. Therefore, Defendants are permitted until **July 10, 2009** to identify an expert
10 and provide a rebuttal report to Mr. Mikelberg's report. This extension applies only to the designation of
11 Mr. Mikelberg and his opinions. All other rebuttal reports on infringement and invalidity remain due no
12 later than June 19, 2009. [Doc. No. 155.]

13 **IT IS SO ORDERED.**

14 DATED: June 3, 2009

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17 **CATHY ANN BENCIVENGO**
18 United States Magistrate Judge
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