

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

THE LARYNGEAL MASK COMPANY LTD. and LMA NORTH AMERICA, INC.,	)	Civil No.07cv1988-DMS (NLS)
	)	
Plaintiffs,	)	ORDER DENYING WITHOUT
v.	)	PREJUDICE MOTION TO EXCLUDE
	)	EXPERT TESTIMONY OF NIKOLAUS
AMBU A/S, AMBU INC., AMBU LTD., and	)	GRAVENSTEIN, SAMSUN
AMBU SDN. BHD,	)	LAMPOTANG, MICHAEL MAZIS, RYAN
	)	SULLIVAN AND J. MICHAEL THESZ
Defendants.	)	[Docket No 365 ]
_____	)	

On October 15, 2007, Plaintiffs The Laryngeal Mask Company Ltd. and LMA North America, Inc. (collectively, "LMA") commenced this patent infringement suit against Defendants Ambu A/S, Ambu Inc. and Ambu Ltd. (collectively, "Ambu"). [Doc. No. 1]. On August 25, 2008, Ambu filed an Amended Answer and Counterclaims, asserting counterclaims based on the allegation that LMA used a brochure that falsely asserted that Ambu's mask can cause nerve injury. [Docket No. 72.]

On September 1, 2009, LMA filed a motion to exclude the testimony of the following Ambu expert witnesses: Nikolaus Gravenstein, Samsun Lampotang, Michael Mazis, Ryan Sullivan and J. Michael Thesz. The motion is based on the alleged spoliation of all draft expert reports. Ambu opposed the motion, arguing: 1) that no draft reports were destroyed, the working documents were simply overwritten as changes were made; 2) draft reports are not required to be produced under Rule 26; 3) draft reports are covered by the work product immunity; 4) LMA used the same process for the production of expert reports; and 5) LMA has not been prejudiced.

1 On September 25, 2009, the presiding judge granted LMA's renewed Motion for Entry of  
2 Judgment and to Stay the Counterclaims pending appeal. [Docket No. 476.] On October 6, 2009, the  
3 presiding judge entered Judgment on the patent claims and Ordered that the proceeding be stayed as to  
4 the counterclaims. [Docket nos. 484, 485.] After the resolution of the appeal, the parties are to contact  
5 the court, at which time the Court will consider lifting the stay and setting a new trial date. Because the  
6 law<sup>1</sup> and issues involved in this motion may be substantially different if and when the new trial date is  
7 set, and in the interests of judicial economy, It Is Hereby Ordered that the Motion to Exclude Expert  
8 Testimony is DENIED WITHOUT PREJUDICE.

9 IT IS SO ORDERED.

10  
11 DATED: October 29, 2009

12 

13 Hon. Nita L. Stormes  
14 U.S. Magistrate Judge  
15 United States District Court

16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26 \_\_\_\_\_  
27 <sup>1</sup>An Amendment to Rule 26 of the Federal Rules of Civil is pending on the topic of whether  
28 draft expert reports are covered by the work product immunity. *See*  
[http://www.uscourts.gov/rules/Reports/Combined\\_ST\\_Report\\_Sept\\_2009.pdf](http://www.uscourts.gov/rules/Reports/Combined_ST_Report_Sept_2009.pdf). The split in authority on  
this issue, and the pending amendment, argue strongly against exclusionary sanctions for any failure to  
maintain draft expert reports.