

UNITED STATES INTERNATIONAL TRADE COMMISSION

Washington, D.C.

In the Matter of

**CERTAIN ELECTRONIC DEVICES,
INCLUDING HANDHELD WIRELESS
COMMUNICATIONS DEVICES**

**Inv. Nos. 337-TA-673
337-TA-667**

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**ORDER NO. 34C: GRANTING SAMSUNG'S MOTION TO STRIKE
SUPPLEMENTAL EXPERT REPORT OF DR. SHUKRI J. SOURI**

(August 28, 2009)

On August 20, 2009 respondents Samsung Electronics Co., Ltd., Samsung Electronics America, Inc., and Samsung Telecommunications America, LLP (collectively "Samsung") filed a motion seeking to strike the supplemental expert report of Dr. Shukri J. Souri, served by complainant Saxon Innovations, LLC ("Saxon"). (Motion Docket No. 673-032.) On August 26, 2009, Saxon filed a response opposing the motion. On August 26, 2009, the Commission Investigative Staff ("Staff") filed a response supporting the motion in part.

Samsung explains that the deadline for initial expert reports was July 24, 2009. On August 17, 2009, Saxon served a supplemental expert report from Dr. Souri. The supplemental report provides Dr. Souri's opinion that Samsung's SPH-i325, SCH-i910, and SGH-i907 phones infringe U.S. Patent No. 5,530,597 ("the '597 patent"). Samsung argues that Saxon served this report without first seeking leave to do so. Samsung claims that the report relies on documents that were available to Saxon prior to the July 24, 2009 initial expert report deadline. Thus, Samsung argues that Saxon has no good cause to serve a supplemental report from Dr. Souri.

Samsung states that if its motion is denied, it alternatively requests that its expert, Dr. Robert G. Wedig, be given leave to prepare a rebuttal expert report addressing the supplemental expert report. Samsung also requests additional depositions for Dr. Sourì and Dr. Wedig. Samsung notes that this alternative relief is undesirable and prejudicial given the current procedural schedule.

Saxon opposes the motion, claiming that the supplemental report was proper. Saxon admits that Dr. Sourì inadvertently omitted the SPH-i325, SCH-i910, and SGH-i907 phones from his initial expert report. Saxon states that on June 10, 2009, it identified the SCH-i910 and SGH-i907 phones as infringing the '597 patent in contention interrogatory responses. Saxon avers that on June 3, 2009, it identified the SPH-i325 phone as incorporating the Marvel PXA270 processor. Saxon states that Dr. Sourì's expert report includes an infringement analysis of Palm's Centro phone based on the same Marvel processor. Thus, Saxon argues that Samsung is not prejudiced because it was already on notice regarding the three products at issue.

Saxon further points to the rebuttal expert report of Dr. Wedig. Dr. Wedig's rebuttal report addressed the three Samsung phones at issue and opined that they did not infringe the '597 patent. Saxon states that at Dr. Sourì's deposition, counsel expressly stated that Dr. Sourì was available to answer questions regarding his supplemental report, but Samsung's counsel declined the offer. According to Saxon, this provides further evidence that Samsung is not prejudiced by the supplemental expert report.

Saxon claims that, according to Ground Rule 6 and Commission Rule 210.27(c), the supplemental report is proper. Further, Saxon refers to Commission Rule 210.34(a) and argues that Samsung has failed to articulate any basis for a protective order. Saxon concludes that

Samsung is not entitled to a motion *in limine* because the information contained in the supplemental expert report is relevant and admissible.

Regarding Saxon's assertion that Samsung has not met the requirements for a protective order pursuant to 19 CFR § 210.34(a), I note that the substance of the motion is an objection to Saxon's late filing of expert discovery, citing Ground Rule 6. While I decline to issue a protective order pursuant to 19 CFR § 210.34(a), as it appears inapplicable here, I will nevertheless treat the substance of the motion as a motion *in limine* to exclude evidence that is submitted in violation of the rules of procedure applicable here.

Staff supports the motion in part. Staff states that the better course of action by Saxon would have been to seek leave to file a supplemental expert report. Still, Staff notes that nearly a month remains before the parties must file their pre-hearing briefs, and Samsung has been in possession of Dr. Souri's supplemental report for over a week. Staff therefore asserts that the supplemental report should be allowed provided that Dr. Wedig is allowed to supplement his report and Dr. Souri is made available for another deposition.

Ground Rule 6 governs expert reports and states:

On or before the dates set forth in the procedural schedule, a party shall disclose to other parties the identity of any person who is retained or employed to provide expert testimony at the trial and shall provide to the other parties a written report prepared and signed by the witness. The report shall not be filed with the Office of the Secretary of the Commission. ***The report shall contain a complete statement of all opinions to be expressed and the basis and reasons therefor;*** the data or other information considered by the witness in forming the opinions; any exhibits to be used as a summary of or support for the opinions; the qualifications of the witness, including a list of all publications authored by the witness within the preceding ten years; the compensation to be paid for the study and testimony; and a listing of any other cases in which the witness has testified as an expert at trial or by deposition within the preceding four years. The parties shall supplement these disclosures as needed in the manner provided in Commission Rule 210.27(c).

(Emphasis added.)

Commission Rule 210.27(c), which is referenced in Ground Rule 6, states:

A party who has responded to a request for discovery with a response is under a duty to supplement or correct the response to include *information thereafter acquired* if ordered by the administrative law judge or the Commission or in the following circumstances: A party is under a duty seasonably to amend a prior response to an interrogatory, request for production, or request for admission if the party learns that the response is in some material respect incomplete or incorrect and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing.

19 CFR § 210.27(c)(1) (Emphasis added.)

I find that because the information contained in Dr. Souri's supplemental report was clearly known to Saxon and its expert prior to the deadline for initial expert reports, Dr. Souri's supplemental report is not proper pursuant to Ground Rule 6 and Commission Rule 210.27(c).

The procedural schedule required initial expert reports to be exchanged on July 24, 2009, and rebuttal expert reports to be exchanged on August 7, 2009. (Order No. 8 in 337-TA-673) This situation is analogous to that contemplated in Fed. R. Civ. P. 26(a)(2)(C) which requires that parties must exchange expert reports "at the times and *in the sequence* that the court orders." (Emphasis added.) The Rule recognizes the unique nature of expert discovery, its timing and sequence, as opposed to fact discovery.

Saxon admits that it realized that Dr. Souri omitted the SPH-i325, SCH-i910, and SGH-i907 phones only after seeing Dr. Wedig discuss them in his August 7, 2009 rebuttal expert report. Saxon thus served Dr. Souri's supplemental report on August 17, 2009. Dr. Souri's deposition took place on August 22-23, 2009. Expert discovery closed on August 23, 2009. (Order No. 31C.)

Commission Rule 210.27(c) only contemplates supplemental discovery responses when new information is learned after the applicable discovery response is served that would make the original response incomplete or incorrect in some way. *Certain Catheter, Consoles & Other*

Apparatus For Cryosurgery & Components Thereof, Inv. No. 337-TA-642, Order No. 13 (Sept. 11, 2008) (explaining that “Commission Rule § 210.27(c) allows for supplementation of interrogatory responses based on information that was only discovered after the original response was served.”) That is not the situation here. Saxon does not dispute that Dr. Sourì had the necessary information regarding the SPH-i325, SCH-i910, and SGH-i907 phones prior to July 24, 2009; instead, Saxon states that Dr. Sourì inadvertently omitted the phones from his infringement analysis in his initial expert report and only realized the omission after reading Dr. Wedig’s rebuttal report.

Saxon focuses on the fact that Samsung knew about the relevance of the SPH-i325, SCH-i910, and SGH-i907 phones, and that Dr. Wedig even analyzed the phones in his rebuttal expert report. While this is true, it does not provide Saxon with an excuse to supplement an expert report when its expert failed to include all of the necessary information in his possession in the initial report. I find that, on these facts, allowing expert discovery to occur out of the sequence and timing set forth in the procedural schedule would prejudice Samsung at this late date, and Saxon’s attempt to file a supplemental expert report clearly violated my Ground Rules and Commission Rule 210.27(c).

ORDER

Motion No. 673-032 is hereby GRANTED. Dr. Sourì’s August 17, 2009 supplemental expert report is hereby stricken in its entirety.

Within seven (7) days of the date of this Order, each party shall submit to the Office of the Administrative Law Judges a statement as to whether or not it seeks to have any portion of this document deleted from the public version. The parties’ submissions may be made by facsimile and/or hard copy by the aforementioned date.

PUBLIC

Any party seeking to have any portion of this document deleted from the public version thereof must submit to this office a copy of this document with red brackets indicating any portion asserted to contain confidential business information. The parties' submissions concerning the public version of this document need not be filed with the Commission Secretary.

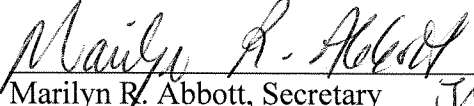
SO ORDERED.



Robert K. Rogers, Jr.
Administrative Law Judge

PUBLIC CERTIFICATE OF SERVICE

I, Marilyn R. Abbott, hereby certify that the attached **ORDER** was served upon **Lisa A. Murray, Esq.**, Commission Investigative Attorney, and the following parties via first class mail and air mail where necessary on **OCT 14 2009**


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