PUBLIC VERSION

UNITED STATES INTERNATIONAL TRADE COMMISSION

Washington, D.C.

In the Matter of	
CERTAIN LITHIUM METAL OXIDE CATHODE MATERIALS, LITHIUM-ION BATTERIES FOR POWER TOOL PRODUCTS CONTAINING SAME, AND POWER TOOL PRODUCTS WITH LITHIUM-ION BATTERIES CONTAINING SAME	**Inv. No. 337-TA-951**

ORDER No. 22: DENYING COMPLAINANTS' MOTION TO STRIKE EXPERT REPORT OF DR. GEORGE BLOMGREN

(September 24, 2015)

I. INTRODUCTION

On September 10, 2015, Complainants BASF Corporation ("BASF") and UChicago Argonne LLC ("UChicago") filed a motion to strike the expert report of Dr. George Blomgren (*Motion*). (Motion Docket No. 951-015.) On September 21, 2015,[1] Respondents Makita Corporation, Makita Corporation of America, and Makita U.S.A. Inc. (collectively, "Makita") filed an opposition (*Opposition*) to Complainants' *Motion*. The Commission Investigative Attorney (Staff) also filed a response to Complainants' *Motion* on September 21, 2015 (*Staff Response*).

II. PARTIES' ARGUMENTS

Complainants argue that Makita failed to disclose, in response to Complainants' interrogatories, Makita's non-infringement contentions as well as test data generated by

[1] Makita's *Opposition* was effectively filed on September 22, 2015 because it was filed after 5:15:59 pm on September 21, 2015. *See* Ground Rule 1.4 and Handbook on Filing Procedures at section II(F)(2) ("If the filing is submitted after the close of business, the filing will be deemed officially received on the next business day."). Nevertheless, I have reviewed Makita's motion to file its *Opposition* out of time (Motion Docket No. 951-017) and find that good cause exists to grant Makita's motion.

Avomeen, an outside laboratory. Specifically, Complainants object to Makita's contentions that "the composition of NCM in Makita's batteries varies from one model to another and even varies within the same model." (*See Memorandum* at 2.) Complainants request that Dr. Blomgren's report be stricken because it includes opinions relating to the undisclosed contentions and test data. (*See id.* at 3, 16-17.) In the alternative, Complainants request that Makita be compelled to present the relevant Avomeen employees for deposition, and if necessary, Complainants further request permission to supplement their expert reports, witness statements, and prehearing briefs. (*See Memorandum* at 8n.1.)

Makita responds that the bulk of the test data was not received until after the close of fact discovery, and that in any event, the data was protected under the work-product privilege doctrine until Makita decided to rely on it. (*Opposition* at 4-5.) In addition, Makita argues that Complainants were not unfairly surprised by Makita's non-infringement contentions because Complainants were aware that Makita acquires its batteries from different suppliers and should have expected that such batteries would not all contain the same cathode material. (*See id.* at 3.) Makita concludes that Complainants' objections lack credibility and stem from Complainants' own failure to carry their burden to provide test data for all accused products. (*See id.*) Finally, Makita argues that Complainants' request to take the deposition of relevant Avomeen employees and to supplement their expert reports, witness statements, and prehearing briefs, should be rejected because Complainants already declined Makita's offer for the same relief. (*See Opposition*, Ex. N).

The Staff also opposes Complainants' *Motion* and argues that Complainants should have known that Makita's batteries had different compositions because they were sourced from at

least three different suppliers. (*Staff Response* at 3.) The Staff concludes that Makita should not be penalized for Complainants' lack of diligence. (*See id.* at 4.)

III. DISCUSSION

I agree with Makita and the Staff that Complainants' predicament was caused by their own lack of diligence. Complainants bear the burden of proof on infringement and must prove infringement for the accused products by a preponderance of the evidence.

There is no evidence that Makita withheld non-privileged information during fact discovery. Makita provided discovery to Complainants showing that it acquires its batteries from at least three different suppliers, and Makita produced twenty-six (26) battery samples. (*See Opposition* at 9, 16-17.) As explained by Makita's corporate representative, Makita does not receive chemical composition information from its suppliers but information on product performance. (*See id.* at 16.) Complainants could have pursued third-party discovery from the suppliers or conducted their own testing on the samples provided by Makita.

The Avomeen test data discussed in Dr. Blomgren's expert report, was generated for the most part after the close of fact discovery. (*See Opposition* at 7.) In addition, the testing was done in the context of litigation and at the request of Makita's attorneys. (*See id.* at 2.) Thus, I agree with Makita that such data enjoyed protection under the work-product privilege doctrine, up until Makita relied on it and disclosed it as part of Dr. Blomgren's expert report. *See, e.g.*, *Certain Sucralose, Sweeteners Containing Sucralose, and Related Intermediate Compounds Thereof*, Inv. No. 337-TA-604, Order No. 23, 2007 WL 3248000, *2 (Oct. 1, 2007) ("The undersigned agrees with Complainants that, should Complainants decide once they have received the samples and tested them and decide not to use any of the testing data as evidence

during the hearing, then Complainants should not be compelled to produce any of the testing data to Respondents. If Complainants decide, however, to use certain testing data from the samples, then all testing data should be produced to Respondents."). *See also Tillotson Corp. v. Shijiazhaung Hongray Plastic Products, Ltd.*, 244 F.R.D. 683, 693 (N.D. Ga. 2007) ("[R]ecognizing that the information was prepared in anticipation of litigation, this court will not require the plaintiff to disclose the test data unless it relies on that information to support its infringement claims or will use that information in the future.").

I also agree that Complainants were not unfairly surprised by Dr. Blomgren's opinions that the composition of NCM in Makita's batteries varies from one model to another and even varies within the same model. Complainants were on notice that Makita acquires its batteries from at least three different suppliers. (*See Opposition* at 11.) In addition, Complainants' own testing showed different compositions for Makita's battery models BL1830 [ ] BL1840 [ ] and BL1021B [ ]. (*See id.* at 8.) Thus, Complainants were not prejudiced by Dr. Blomgren's opinions.

Makita timely and properly disclosed the Avomeen testing during the expert discovery phase of this investigation as well as the expert opinions interpreting such testing. Makita even offered that Complainants depose the relevant Avomeen employee and/or supplement their infringement expert report, if needed.

The question of the Avomeen test reports is a different matter. These test reports are the foundation of the testimony by Dr. Blomgren that Complainants seek to exclude and Respondents seek to offer. While I have explained why Dr. Blomgren can offer his opinions, there is no way to test his opinions, cross examine him on his opinions, or rebut that part of his

opinion derived from the Avomeen test results. This could induce problems for me, as the trier of fact in determining how much credibility to give Dr. Blomgren's opinion, since it is predicated upon the test results. Hence, Complainants may have, not more than five business days from the receipt of this Order, in which to conduct the deposition(s) Makita properly offered in the first place, if they so choose. Similarly, I expect Makita will facilitate arrangements for such deposition(s). In so ruling, I note that the deadline has passed for this kind of discovery. However, I view the question of the validity of these tests to be potentially critical under the unique facts of this investigation and thus to my role as a finder of fact and thus grant this exception.

Accordingly, Complainants' *Motion* is DENIED to the extent explained above.

Within 7 days of the date of this order, the parties shall jointly submit: (1) a proposed public version of this order with any proposed redactions bracketed in red; and (2) a written justification for any proposed redactions specifically explaining why the piece of information sought to be redacted is confidential and why disclosure of the information would be likely to cause substantial harm or likely to have the effect of impairing the Commission's ability to obtain such information as is necessary to perform its statutory functions.[2]

SO ORDERED.

Thomas B. Pender
Administrative Law Judge

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[2] Under Commission Rules 210.5 and 201.6(a), confidential business information includes:

> information which concerns or relates to the trade secrets, processes, operations, style of works, or apparatus, or to the production, sales, shipments, purchases, transfers, identification of customers, inventories, or amount or source of any income, profits, losses, or expenditures of any person, firm, partnership, corporation, or other organization, or other information of commercial value, the disclosure of which is likely to have the effect of either impairing the Commission's ability to obtain such information as is necessary to perform its statutory functions, or causing substantial harm to the competitive position of the person, firm, partnership, corporation, or other organization from which the information was obtained, unless the Commission is required by law to disclose such information.

See 19 C.F.R. § 201.6(a). Thus, to constitute confidential business information the disclosure of the information sought to be designated confidential must ***likely have the effect of*** either: (1) impairing the Commission's ability to obtain such information as is necessary to perform its statutory functions; or (2) ***causing substantial harm*** to the competitive position of the person, firm, partnership, corporation, or other organization from which the information was obtained.

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337-TA-951

CERTIFICATE OF SERVICE

I, Lisa R. Barton, hereby certify that the attached **PUBLIC ORDER NO. 22** has been served upon the **Commission Investigative Attorney, James Wiley, Esq.,** and the following parties as indicated on OCT - 2 2015.

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