

U.S. District Court
District of Delaware (Wilmington)
CIVIL DOCKET FOR CASE #: 1:18-cv-01869-CFC-CJB

Boston Scientific Corporation et al v. Micro-Tech Endoscopy
USA Inc. et al
Assigned to: Judge Colm F. Connolly
Referred to: Judge Christopher J. Burke
Cause: 35:271 Patent Infringement

Date Filed: 11/26/2018
Jury Demand: Plaintiff
Nature of Suit: 830 Patent
Jurisdiction: Federal Question

Date Filed	#	Docket Text
10/13/2020	197	<p>ORAL ORDER: The Court, having reviewed Defendants' motion to strike ("Motion") portions of Plaintiffs' final infringement contentions ("FIC"), (D.I. 168), and the parties' letter briefing related thereto, (D.I. 169; D.I. 170; D.I. 174), and determining that oral argument is unnecessary and thus that the parties' request for argument be DENIED, (D.I. 175), hereby ORDERS as follows with regard to the Motion: (1) With respect to Defendants' request to strike FICs asserting indirect infringement of the '371 and '725 patents, it is GRANTED. It is undisputed that Plaintiffs have never pleaded indirect infringement of these patents, (D.I. 170 at 1), and so any portion of their FICS that relate to that subject matter are simply about infringement claims that are not a part of this case. Although they have not filed a formal motion seeking to amend their currently operative complaint to include such claims, to the extent Plaintiffs suggest they would do so in the future, any such motion would be denied. The Scheduling Order set the deadline for amendment of pleadings as June 12, 2020, (D.I. 29 at 2), and we are now more than four months past that deadline (and were more than two months past that deadline during briefing on this Motion). In light of this, Plaintiffs could not demonstrate good cause to alter that deadline now, as they have not been diligent in moving to amend, see <i>Lipocine Inc. v. Clarus Therapeutics, Inc.</i>, C.A. No. 19-622 (WCB), 2020 WL 4794576, at *3 (D. Del. Aug. 18, 2020), because: (1) Plaintiffs did not move to amend their complaint between April 30, 2020 (the date Defendants made an argument in their supplemental interrogatory responses that is said to have triggered Plaintiffs' assertions of indirect infringement that are at issue here) and July 31, 2020 (the date when Plaintiffs served their FICs); and (2) Plaintiffs did not do so at any point thereafter. (D.I. 169 at 1; D.I. 170 at 1) In light of this, and the fact that Plaintiffs make no specific arguments about why the Pennypack factors would apply or would save these claims (nor can the Court see how they would, in light of the prejudice to Defendants and the relative lack of importance that this "third-tier alternative argument" has to Plaintiffs' case), (D.I. 170 at 1), Plaintiffs' relevant FICs should be stricken.; (2) With respect to Defendants' request to strike FICs asserting infringement of claim 9 of the '371 patent, it is DENIED. In its prior Order on June 24, 2020, the Court noted that Plaintiffs had done enough to plausibly plead direct infringement of at least one claim of the '371 patent, claim 8 (though Plaintiffs had not done so as to claim 9). (D.I. 136) In light of prior precedent from this Court, see, e.g., <i>Liqwd, Inc v. L'Oreal USA, Inc.</i>, Civil Action No. 17-14-JFB-SRF, 2019 WL 366223, at *4 (D. Del. Jan. 30, 2019), Defendants' argument here is not that Plaintiffs are unable to assert claim 9 by including direct infringement allegations as to that claim in Plaintiffs' infringement contentions. (D.I. 170 at 1 & n.1) Instead, Defendants' argument seems to be that these portions of the FICs should be stricken because in them, Plaintiffs did not deal with "the substance" of the Court's prior June 24 Order, in that the FICs amount to "repetition of [the] same allegations" about claim 9 that the Court found wanting in that Order. (D.I. 174 at 1) But in the Court's view, that is not so. In its June 24 Order, the Court explained that Plaintiffs had made no effort in their proposed amended complaint (or the briefing related thereto) to specifically explain how claim 9's unique "feature configured to mate" limitation was satisfied. (D.I. 136) But in the FICs, Plaintiffs have better set out their argument in this regard. (D.I. 169, Tab 1 at ex. B at 5, 9, 11) And Defendants do not explain why Plaintiffs' contentions there are insufficiently descriptive so as to warrant striking the FICs regarding claim 9.; (3) The Court will address the remaining portions of the Motion in a separate Oral Order(s). Ordered by Judge Christopher J. Burke on 10/13/2020. (mlc) (Entered: 10/13/2020)</p>