

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO**

Civil Action No. 1:21-cv-2112-CMA-SKC

SMITH SPORT OPTICS, INC., a Delaware company,
and KOROYD SARL, a Monaco company,

Plaintiffs,

vs.

THE BURTON CORPORATION, a Vermont company,

Defendant.

SCHEDULING ORDER IN A PATENT CASE

**1. DATE OF CONFERENCE AND APPEARANCES
OF COUNSEL AND *PRO SE* PARTIES**

A Telephonic Scheduling Conference is scheduled for December 1, 2021, at 9:30
a.m., with appearances of the following counsel:

For Plaintiffs Smith Sport Optics, Inc. ("Smith") and Koroyd SARL ("Koroyd")
(collectively, "Plaintiffs"):

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2. STATEMENT OF JURISDICTION

This Court has subject matter jurisdiction under 28 U.S.C. §§ 1331 and 1338(a), as this case is a patent infringement action. No party objects to the Court's jurisdiction.

3. STATEMENT OF CLAIMS AND DEFENSES

a. Joint Statement of Claims and Defenses:

Plaintiffs assert claims for patent infringement under the Patent Act of the United States, 35 U.S.C. §§ 271. On August 13, 2013, U.S. Patent Application No. 13/965,703 was filed, which later matured into U.S. Patent No. 10,736,373 ("the '373 patent").

Plaintiffs assert infringement claims against Defendant based on Defendant's unauthorized importation, sales, and offers for sale of their Anon Merak and Logan helmets that incorporate WaveCel® material ("the Anon WaveCel® helmets"). Plaintiffs seek monetary damages under the Patent Act, injunctive relief, attorneys' fees and any other exemplary relief the Court deems appropriate. Defendant asserts defenses of non-infringement, invalidity, failure to disclaim, absence of causal nexus, unclean hands, invalid assignment and lack of standing, and unenforceability due to inequitable conduct.

b. Other Parties: None.

4. UNDISPUTED FACTS

The following facts are undisputed:

- a. Smith is a Delaware company with headquarters in Portland, Oregon.
- b. Koroyd is a Monaco company with a place of business in Monaco.

- c. Defendant is a Vermont company having a place of business in Burlington, Vermont.
- d. On August 13, 2013, Plaintiffs filed U.S. Patent Application No. 13/965,703, which later matured into the '373 patent.
- e. Defendant's Anon® brand Merak and Logan helmets incorporate WaveCel® technology.
- f. Retail sales of Defendant's Anon® Merak and Logan helmets began in January 2021 in the United States.

5. COMPUTATION OF DAMAGES

Plaintiffs: Plaintiffs seek an award of lost profits damages, or in the alternative, a reasonable royalty on past infringing sales by Defendant pursuant to 35 U.S.C § 284, and a permanent injunction barring future infringement. The information regarding sales of Defendant's infringing product that is necessary for a calculation of Plaintiffs' damages is in the exclusive custody, possession and control of Defendant and/or third-party online retailers who have sold or distributed the accused infringing product. Plaintiffs will supplement their Rule 26(a)(1) Disclosures in accordance with Rule 26(e) and the expert disclosure deadlines set forth herein.

Defendant: Defendant seeks an award of attorneys' fees and costs of suit under applicable law, and any other relief that the Court deems just and proper.

6. REPORT OF PRECONFERENCE DISCOVERY AND MEETING UNDER FED. R. CIV. P. 26(f)

- a. Date of Rule 26(f) meeting: November 9, 2021.
- b. Names of each participant and party he/she represented.

Mark Miller, Greg Tamkin and Maral Shoaee for Plaintiffs.

Michael Albert, Marie McKiernan and Scott Bialecki for Defendant.

- c. Statement as to when Rule 26(a)(1) disclosures were made or will be made.

Each side will exchange their respective Fed. R. Civ. P. 26(a)(1) Initial Disclosures on November 23, 2021. The parties agree that they will identify categories of relevant documents and begin production of documents on a rolling basis.

- d. Statement concerning any agreements to conduct informal discovery:

None.

- e. Statement concerning any other agreements or procedures to reduce discovery and other litigation costs, including the use of a unified exhibit numbering system:

Each side agrees to use of a unified exhibit numbering system. Each side also agrees to electronic service of discovery requests and responses and agrees that neither side shall be required to produce a privilege log, unless a privilege log is specifically requested in good faith with regard to a party's response(s) and objection(s) to one or more specific discovery requests.

- f. Statement as to whether the parties anticipate that their claims or defenses will involve extensive electronically stored information, or that a substantial amount of disclosure or discovery will involve information or records maintained in electronic form.

The parties agree that the case will involve a significant amount of discovery and that most records are maintained electronically. The parties will endeavor to reach agreement on the terms of a Proposed Stipulated Order Governing Electronic Discovery.

Further, the parties agree to be governed by Federal Rule of Civil Procedure 26(b)(5)(B) with respect to claims of privilege and Federal Rule of Evidence 502(b) with respect to inadvertent production of privileged materials. By this proposed order, the parties request that the Court hereby order protection against waiver of privilege by

inadvertent production to the fullest extent consistent with Federal Rule of Evidence 502(d).

- g. Statement summarizing the parties' discussions regarding the possibilities for promptly settling or resolving the case.

The parties have discussed settlement and will continue to explore opportunities for promptly settling or resolving the case.

7. CONSENT

All parties have not consented to the exercise of jurisdiction of a magistrate judge.

8. CASE PLAN AND SCHEDULE

- a. Deadline to join parties. January 14, 2022.

Infringement Contentions

- b. Deadline to serve Infringement Contentions, Claim Chart(s), and produce accompanying documents: December 22, 2021
- c. Deadline to serve Response to Infringement Contentions and produce accompanying documents: January 19, 2022

Invalidity Contentions

- d. Deadline to serve Invalidity Contentions and Claim Chart(s) and produce accompanying items of prior art: January 26, 2022
- e. Deadline to serve Response to Invalidity Contentions and Claim Chart(s) and produce accompanying documents: February 25, 2022

Opinion of Counsel

- f. Deadline to make opinion(s) of counsel available for inspection and copying: May 25, 2022

Claim Construction

- g. Deadline for parties to exchange list of claim terms to be construed and proposed construction, specifically identifying up to ten (10) of the most critical terms to be construed: March 18, 2022
- h. Deadline to file Joint Disputed Claim Terms Chart: April 8, 2022
- i. Proposed month for technology tutorial with District Judge and Magistrate Judge (optional): April 2022
- j. Deadline to file opening Claim Construction brief and all supporting evidence: April 29, 2022
- k. Deadline to file Response to opening Claim Construction brief and all supporting evidence: May 13, 2022
- l. Deadline to file reply brief in support of opening Claim Construction brief: May 20, 2022
- m. Proposed month for claim construction hearing and estimated time necessary for the hearing. June 2022; one day for hearing.

Final Patent Disclosures

- n. Deadline to file Final Infringement Contentions: 21 days after Court's Claim Construction Order
- o. Deadline to file Final Invalidity Contentions: 14 days after receiving Final Infringement Contentions

Fact Discovery, Expert Disclosures, and Dispositive Motions Deadlines

- p. Fact discovery deadline. July 24, 2022.
- q. Expert Witness Disclosure.

- 1. Each side shall identify anticipated fields of expert testimony, if any.

The parties anticipate the need for expert testimony on (1) issues affecting claim construction (to the extent claim terms are contested), (2) infringement, (3) invalidity (to the extent the validity of the Asserted Patents is contested), and (4) damages (lost profits and/or reasonable royalty).

2. Limitations which the parties propose on the use or number of expert witnesses.

The parties propose a limit of three trial experts per side.

3. The parties shall designate all affirmative experts and provide opposing counsel and any pro se parties with all information specified in Fed. R. Civ. P. 26(a)(2) on or before August 17, 2022.
 4. Each side shall designate all rebuttal experts and provide opposing counsel and any pro se party with all information specified in Fed. R. Civ. P. 26(a)(2) on or before September 7, 2022.
- r. Expert Discovery Deadline September 28, 2022.
 - s. Dispositive motions deadline: October 19, 2022.

9. DISCOVERY LIMITATIONS

- a. Modifications which any party proposes to the presumptive numbers of depositions or interrogatories contained in the Federal Rules.

Depositions shall be limited to 8 fact depositions per side. Interrogatories will be limited to 25 per side.

- b. Limitations which any party proposes on the length of depositions.

Each side agrees that each deposition will be limited to 1 day of 7 hours in accordance with Fed. R. Civ. P. 30(d)(1). The parties agree to work together in good faith so that any 30(b)(6) designee will be taken concurrently as such designee's individual deposition. The parties further agree that the total time for all Rule 30(b)(6) topics for each side shall be limited to 14 hours, no matter how many individuals are designated to provide testimony. The parties also agree that the total time allotted for each individual deposition shall remain 7 hours, even if this individual provides 30(b)(6) deposition testimony.

- c. Limitations which any party proposes on the number of requests for production and/or requests for admission.

Requests for admissions shall be limited to 25 per side. Requests for production shall be limited to 50 per side.

- d. Other Planning or Discovery Orders

1. Deadline for filing proposed protective order(s): November 22, 2021.

2. Other issues: The parties recognize that discovery procedures and timeline may require special flexibility in light of COVID-19 and agree to work together to use technology where appropriate and necessary (such as video depositions) and/or allow flexibility in deadlines that account for the parties' and counsel's remote work situations and the rapidly changing guidance on in-person work and gatherings.

10. DATES FOR FURTHER CONFERENCES

- a. Status conferences: The Parties shall submit a Joint Status Report in accordance with Magistrate Judge Crews Civil Practice standards on or before **February 24, 2022**
- b. A final pretrial conference will be held telephonically before Magistrate Judge Crews on **January 17, 2023 at 10:00 am**. A Final Pretrial Order shall be prepared by the parties and submitted to the court no later than seven days before the final pretrial conference.

11. OTHER SCHEDULING MATTERS

- a. Identify those discovery or scheduling issues, if any, on which counsel after a good faith effort, were unable to reach an agreement.
- b. Anticipated length of trial and whether trial is to the court or jury.

The parties anticipate a 7-day jury trial.

- c. Identify pretrial proceedings, if any, that the parties believe may be more efficiently or economically conducted in the District Court's facility at 212 N. Wahsatch Street, Colorado Springs, Colorado; Wayne Aspinall U.S. Courthouse/Federal Building, 402 Rood Avenue, Grand Junction, Colorado; or the U.S. District Court, LaPlata County Courthouse, Suite 150, 1060 E. 2nd Avenue Durango, CO 81301.

At this time, there are no pretrial proceedings that the parties believe may be more efficiently or economically conducted in the District Court's facilities located in Colorado Springs or Grand Junction.

12. NOTICE TO COUNSEL AND PRO SE PARTIES

Motions for extension of time or continuances must comply with D.C.COLO.LCivR 6.1, by containing proof that a copy of the motion has been served upon the moving attorney's client, all attorneys of record, and all *pro se* parties.

Counsel will be expected to be familiar and to comply with the Pretrial and Trial Procedures or Practice Standards established by the judicial officer presiding over the trial of this case.

With respect to discovery disputes, parties must comply with D.C.COLO.LCivR 7.1(a).

In addition to filing an appropriate notice with the clerk's office, a *prose* party must file a copy of a notice of change of his or her address or telephone number with the clerk of the magistrate judge assigned to this case. In addition to filing an appropriate notice with the clerk's office, counsel must file a copy of any motion for withdrawal, motion for substitution of counsel, or notice of change of counsel's address or telephone number with the clerk of the magistrate judge assigned to this case.

13. AMENDMENTS TO SCHEDULING ORDER

The scheduling order may be altered or amended only upon a showing of good cause.

DATED: November 30, 2021

BY THE COURT:

A handwritten signature in black ink, appearing to read 'S. Kato Crews', written over a horizontal line.

S. Kato Crews
United States Magistrate Judge

APPROVED:

s/ Mark A. Miller

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