

United States District Court, Northern District of Illinois

Name of Assigned Judge or Magistrate Judge	Ronald A. Guzman	Sitting Judge if Other than Assigned Judge	Geraldine Soat Brown
CASE NUMBER	07 C 2921	DATE	5/19/2011
CASE TITLE	Kathrein-Werke KG vs. Radiacion Y Microondas SA et al		

DOCKET ENTRY TEXT

Motion hearing held. For the reasons stated on the record and as further explained below, defendants' motion to strike [129] is granted. This is without prejudice to any motion plaintiff may bring to the District Judge for leave to serve a revised response to discovery relating to damages in light of the decision of the Federal Circuit in *Uniloc USA, Inc. v. Microsoft Corp.* 632 F.3d 1292 (Fed. Cir. 2011). The decision as to whether expert discovery shall be reopened to accommodate the plaintiff's revised damage theory is for the District Judge. All matters relating to the referral of this action having been concluded, the referral is closed and the case is returned to the assigned judge.

■ [For further details see text below.]

Notices mailed by Judicial staff.
*Copy to judge/magistrate judge.

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STATEMENT

On April 6, 2011, plaintiff served a second supplemental response to defendants' interrogatory 6 relating to plaintiff's calculation of damages. [Dkt 131, Ex. 26 (submitted under seal).] That "supplemental" response changed the methodology of plaintiff's damage calculation in light of the decision by the Federal Circuit in *Uniloc USA, Inc. v. Microsoft Corp.* 632 F.3d 1292 (Fed. Cir. 2011), which rejected the previously recognized 25% rule of thumb as a measure of patent damages. Defendants have moved to strike that supplemental response as untimely. [Dkt 129.]

The court agrees that plaintiff's revised answer to interrogatory 6 is not a "supplementation" contemplated by Federal Rule of Civil Procedure 26(e). That rule relates to "additional or corrective information," not a change in plaintiff's damages methodology. Defendants are correct that, if plaintiff is permitted to change its damages methodology, defendants' expert should be permitted to supplement his expert report to address that methodology. If that happens, plaintiff may want a further session of defendants' expert's deposition.

The District Judge ordered expert discovery to close in October 2010, "[n]o extensions," [dkt 99], although it appears that defendants' expert's deposition was taken after that by agreement of the parties. But this court does not have authority to alter the District Judge's discovery cut off dates and to reopen expert discovery.

It may well be that the *Uniloc* decision requires plaintiff to revise its damage methodology, and that expert discovery should be reopened to accommodate that. But that is a decision for the District Judge because it alters the schedule set by the District Judge. It is not appropriate to insert such a significant change in the case under the label "supplementation." Plaintiff must address such a change directly to the District Judge. Therefore, defendants' motion is granted without prejudice to any such motion plaintiff may bring to the District Judge.

STATEMENT

Defendants alternatively ask that if plaintiff is permitted to amend its discovery response to alter its damages methodology, that plaintiff be required to bear some or all of defendants' additional expert's expenses to respond. Defendants argue that, had plaintiff amended its answer promptly after the *Uniloc* decision was rendered, some additional costs such as an additional deposition of its expert could have been avoided. Plaintiff responds that it waited until the Federal Circuit denied the petition for rehearing *en banc*. That dispute need not be decided now, in light of this order granting the motion.