

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
CIVIL MINUTES – GENERAL

Case No. **2:22-cv-01717-MCS-MAR** Date August 16, 2023

Title ***Facet Technologies, LLC v. Lifescan Inc.***

Present: The Honorable **Mark C. Scarsi, United States District Judge**

Stephen Montes Kerr
Deputy Clerk

Not Reported
Court Reporter

Attorney(s) Present for Plaintiff(s):
None Present

Attorney(s) Present for Defendant(s):
None Present

**Proceedings: (IN CHAMBERS) ORDER RE: DEFENDANT’S MOTION TO REOPEN
DISCOVERY (ECF No. 220)**

Defendant LifeScan, Inc. moves to reopen discovery to allow production of evidence of prior art and information withheld under claims of attorney-client privilege. (Mot., ECF No. 220.) Plaintiff Facet Technologies, LLC opposed the motion, (Opp’n, ECF No. 227), and Defendant replied, (Reply, ECF No. 229). The Court heard oral argument on August 14, 2023.

I. Legal Standard

The party seeking to reopen discovery must present good cause to modify the scheduling order. *Johnson v. Mammoth Recreations, Inc.*, 975 F.2d 604, 609 (9th Cir.1992); *see also Sheridan v. Reinke*, 611 F. App’x 381, 384 (9th Cir. 2015) (applying *Johnson* “good cause” requirement to motion to reopen discovery). When considering a motion to reopen discovery, courts primarily focus on whether the moving party was diligent in attempting to complete discovery in a timely manner. *Johnson*, 975 F.2d at 609. “Motions are more often granted when the opposing party’s actions caused delay or when the need to amend arises from some unexpected or outside source.” *Johnson v. Merck & Co.*, No. 2:20-cv-00138-KJM-DB, 2022 WL 229860, at *2 (E.D. Cal. Jan. 26, 2022) (internal quotation marks omitted).

II. Analysis

In the interests of justice and judicial economy, the Court resolves the motion on its merits notwithstanding its untimeliness. (Am. Scheduling Order 3, ECF No. 171.) The Court also finds that any failure by LifeScan to act prior to the deadline was the result of “excusable neglect.” Fed. R. Civ. P. 6(b)(1)(B).

A. Evidence of Prior Art

Fact discovery closed on May 26, 2023. (Am. Scheduling Order at 3.) LifeScan served Request for Production (“RFP”) No. 18 on August 10, 2022. (Griffin Decl. Ex. 1, ECF No. 220-3.) RFP No. 18 requested “[a]ll documents relating to any Prior Art collected, identified, or considered by any person in connection with the Patent-in-Suit, including any Prior Art located or identified through any search or investigation.” (*Id.* at 6.) On May 3, 2023, LifeScan filed a motion to compel production of additional information responsive to RFP No. 18. (Mot. to Compel 16, ECF No. 167.) On May 15, 2023, Facet averred that it had “conducted a reasonable search for all of the requests addressed in LifeScan’s motion and has produced responsive materials.” (Facet Surreply Re Mootness 4, ECF No. 184.) “[B]ased on Facet’s . . . assertions that all responsive productions ha[d] been made,” Magistrate Judge Rocconi denied “LifeScan’s Motion to Compel . . . as moot.” (Order Denying Mot. to Compel as Moot 3, ECF No. 188.)

On May 24, 2023, two days before the close of fact discovery, LifeScan deposed Facet’s CEO, Andrew Goodrow. (Mot. 5; Griffin Decl. Ex. 5, ECF No. 220-7.) At his deposition, Mr. Goodrow testified that Facet maintained what he referred to as a “museum” which included lancets that were made both by Facet and by third parties. (Griffin Decl. Ex. 5 123:23–124:18.) “Mr. Goodrow further testified that there were at least 50 varieties of lancets stored in the ‘museum’ that Facet had not produced.” (Mot. 6 (citing Griffin Decl. Ex. 5, at 126:5–10) (emphasis removed).) LifeScan claims that “[a]t least some of these lancets appear to have been first made prior to the priority date of the ’635 Patent” and were “unknown prior to the depositions held on the eve of the close of fact discovery.” (*Id.* at 6, 14.)

At the hearing, Facet’s counsel acknowledged that there was indeed a “museum” containing items that should have been turned over in response to RFP No. 18, but despite his diligence in conducting a search, he was unaware of its existence when he responded to the motion to compel production. Taking counsel

at his word that there was no intentional misrepresentation, it is nonetheless clear that this information should have been produced in response to RFP No. 18 and LifeScan's subsequent motion to compel. Based on this misrepresentation, LifeScan has shown good cause to reopen discovery.

B. Evidence Withheld Under Attorney-Client Privilege

On May 25, 2023, Facet deposed Greg Lamps, who previously served as its Program Director. (Mot. 7; Griffin Decl. Ex. 6, ECF No. 220-8.) Mr. Lamps testified "concerning the development of a 'machined prototype' of a 'credit-card sized' lancing device in 2008" which "was designed to work with the Delica lancet, *i.e.*, the commercial embodiment of the '635 Patent." (Mot. 7 (citing Griffin Decl. Ex. 6, at 200:22–202:14, 207:14).) LifeScan argues that in this deposition, "Facet repeatedly elicited privileged communications regarding inventorship of the '635 Patent from Mr. Lamps—which directly relates to LifeScan's invalidity defense." (*Id.* at 20.)

LifeScan has not shown good cause to reopen discovery with respect to this issue. Facet purportedly waived its privilege on May 25, 2023, but LifeScan did not file a motion to compel until July 5, 2023, two days after the fact discovery cut-off. Even accounting for delays in the meet and confer process and the requirements of Local Rule 37-1, LifeScan was not sufficiently diligent in filing its motion with respect to this issue. As a result, it has not shown good cause to reopen discovery with respect to this issue.

III. Conclusion

The motion is GRANTED in part and DENIED in part. Discovery is reopened solely for the purpose of allowing production of documents, materials, and any other things that should have been produced, but were improperly withheld by Facet, with respect to the "museum" identified in Mr. Goodrow's deposition. Discovery remains closed as to all other issues. The Court directs the parties to meet and confer to allow LifeScan to conduct an inspection of the museum.¹ All future dates

¹ LifeScan seeks a broad order requiring Facet to produce improperly withheld materials. (Proposed Order 3, ECF No. 220-1.) The referral of discovery issues to the Magistrate Judge remains in place, so the Court will not make such an order at this time. The Court encourages the parties to work cooperatively with respect to

identified in the Court's scheduling order are hereby vacated. All pending motions are DENIED without prejudice to renewal after the Court resets the trial date.

The Court sets a status conference for September 18, 2023, at 10:00 a.m. to discuss a new trial schedule. Parties shall lodge a joint proposed trial schedule no later than September 13, 2023. If parties are unable to agree to a proposed schedule, they shall file separate proposed trial schedules accompanied by a written brief, not to exceed 1,000 words, explaining the basis for their position.

IT IS SO ORDERED.

the issues raised by the late disclosure of the museum's existence and to promptly raise any discovery disputes with the Magistrate Judge.