

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

Civil Action No.: 24-cv-01119-DDD-KAS

SAFETRAY PRODUCTS LTD
Plaintiff(s),

v.

OTTER PRODUCTS, LLC
Defendant(s).

SCHEDULING ORDER IN A PATENT CASE

1. DATE OF CONFERENCE AND APPEARANCES OF COUNSEL

The Scheduling Conference in this matter is set for September 11, 2024 at 10:00 AM in Courtroom C204 before Magistrate Judge Kathryn A. Starnella.

Counsel for Safetray Products LTD:

Joseph J. Zito
DNL ZITO
1250 Connecticut Avenue, NW, Suite 700
Washington, DC 20036
202-466-3500
jzito@dnlzito.com

Counsel for Otter Products, LLC

James W. Beard
MERCHANT & GOULD, P.C.
1801 California Street, Suite 3300
Denver, Colorado 80202
303-357-1670
jbeard@merchantgould.com

2. STATEMENT OF JURISDICTION

This Court has subject matter jurisdiction over this action pursuant to 35 U.S.C. §§271, 281 and 28 U.S.C. §§1331 and 1338(a), federal question, because this is an action filed under the patent laws of the United States.

3. STATEMENT OF CLAIMS AND DEFENSES

a. Plaintiff:

Plaintiff's original complaint seeks a judgment that Otter Products has, under 35 U.S.C. §271(a), directly infringed, and continues to directly infringe, literally and/or under the doctrine of equivalents, one or more claims of U.S. Patent No. 10,113,691 (the "'691 Patent"), by making, using, testing, selling, offering for sale, and/or importing into the United States Defendant's Accused Products.

In response to Defendant's invalidity counterclaims, Plaintiff denies any invalidity claim against the '691 patent.

b. Defendant:

Plaintiff's infringement allegations are misdirected, as the accused products do not practice any claim of the '691 Patent (whether literally or through the doctrine of equivalents), including at least because the accused OtterBox OtterGrip Symmetry Series and OtterGrip Symmetry Series for MagSafe do not contain "a base plate configured to be mounted on the portable computing device" as required by the independent claims of the '691 Patent.

Further, the '691 Patent is invalid, including at least as anticipated and obvious by, *inter alia*, United States Patent No. 8,844,098 to Karmatz and 8,794,686 to Grieve.

Otter seeks a declaratory judgment of non-infringement of the '691 Patent, a declaratory judgment of invalidity of the '691 Patent, and other relief as set forth in its Answer and Counterclaims.

4. UNDISPUTED FACTS

The following facts are undisputed:

1. U.S. Patent No. 10,113,691 is a United States Patent entitled STABILISING DEVICE that issued October 30, 2018.
2. Defendant manufactures and sells the accused OtterGrip Symmetry Series and the OtterGrip Symmetry Series for Magsafe products.

5. COMPUTATION OF DAMAGES

a. Plaintiff:

Plaintiff seeks a judgment awarding Plaintiff compensatory damages under 35 USC 284, sufficient to reasonably and entirely compensate Plaintiff for infringement of the '691 patent. Plaintiff is entitled to lost profits because Plaintiff sells a competing product. Plaintiff is also entitled to at least a reasonable royalty on all sales of Defendant. Plaintiff seeks an enhancement of damages for Defendant's willful infringement and an award of fees under 35 USC 285.

b. Defendant:

Otter cannot adequately compute the damages it may seek at this time. At a minimum, however, those damages include, without limitation, an award of its attorneys' fees and costs incurred in the defense of Plaintiff's claims under 35 USC 285. Otter reserves the right to supplement its calculation, explanation, and identification of damages once discovery and further investigation are made, including expert discovery.

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

- a. Date of Rule 26(f) meeting.

Counsel had an initial Rule 26(f) conference on August 14, 2024.

- b. Names of each participant and party he/she represented.

Joseph Zito and Erik N. Lund represented Plaintiff Safetray.

James Beard represented Defendant Otter.

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

The parties exchanged their Rule 26(a)(1) disclosures on or before August 28, 2024.

- 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:

The Parties agree to exclude e-mail from discovery, unless either party can show good cause to include e-mail and/or electronic discovery. Relevant attachments to e-mail will be produced as PDF documents. The Parties further agree that text messages or other instant messages, backup tapes, and random access memory are not reasonably accessible and need not be searched, collected, produced, or reviewed for inclusion on a privilege log.

The Parties agree to produce all documentation in multipage PDF format to avoid the expense of document management systems.

The Parties agree that confidential documents or communications reflecting legal advice sent, received, or created by, or which otherwise reflect edits from attorneys for the Parties that are withheld as privileged or work product do not need to be included on a privilege log. The Parties further agree that other materials withheld as privileged may be included on a privilege log by category.

- 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 recognize that currently almost all records, information and materials are stored in electronic form. The parties also recognize that the Court Systems requires that all exhibits and evidence must be submitted to the Court in the universally recognized and standardized multipage PDF format. The parties also recognize that the vast majority of the information possessed by the parties is readily producible as multipage PDF. Thus, the parties agree that all materials that can be produced in multipage PDF format will be produced as such.

To the extent that any relevant electronically stored materials cannot be produced in PDF format, such as excel spread sheets, database compilations, and the like, this information will be provided in native format.

The parties further agree not to increase the cost of litigation by providing documents in a "load file" or in any other manner that requires the other party to incur expense in opening or otherwise viewing the materials produced. However, notwithstanding the foregoing, the Parties agree that metadata for documents shall be provided upon reasonable request, and the Parties agree to confer over a mechanism for such metadata to be admissible as appropriate.

The parties will (i) preserve electronically stored information; (ii) facilitate discovery of electronically stored information; (iii) limit the associated discovery costs and delay; (iv) avoid discovery disputes relating to electronic discovery; and (v) address claims of privilege or of protection as trial-preparation materials after production of computer-generated records.

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

Plaintiff has raised the possibility of settlement, but the Parties have not made progress relating to any discussions.

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.

December 18, 2024.

Infringement Contentions

- b. Deadline to serve Infringement Contentions, Claim Chart(s), and produce accompanying documents: November 6, 2024
- c. Deadline to serve Response to Infringement Contentions and produce accompanying documents: December 18, 2024

Invalidity Contentions

- d. Deadline to serve Invalidity Contentions and Claim Chart(s) and produce accompanying items of prior art: December 18, 2024
- e. Deadline to serve Response to Invalidity Contentions and Claim Chart(s) and produce accompanying documents: January 29, 2025

Opinion of Counsel

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

May 30 2025

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 19, 2025
- h. Deadline to file Joint Disputed Claim Terms Chart:

April 23, 2025
- i. Proposed month for technology tutorial with District Judge and Magistrate Judge (optional):

The parties do not think a tech tutorial is required for this technology.
- j. Deadline to file opening Claim Construction brief and all supporting evidence:

May 21, 2025
- k. Deadline to file Response to opening Claim Construction brief and all supporting evidence:

June 11, 2025

- l. Deadline to file reply brief in support of opening Claim Construction brief:

June 18, 2025

- m. Proposed month for claim construction hearing and estimated time necessary for the hearing:

June 2025, four hours.

Final Patent Disclosures

- n. Deadline to file Final Infringement Contentions:

28 days after Court's Claim Construction Order

- o. Deadline to file Final Invalidity Contentions:

21 days after receiving Final Infringement Contentions

Fact Discovery, Expert Disclosures, and Dispositive Motions Deadlines

- p. Fact discovery deadline.

July 30, 2025

- q. Expert Witness Disclosure.

- 1. The parties shall identify anticipated fields of expert testimony, if any.

Technical/Mechanical, Biomechanical/Ergonomics, and Damages.

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

No limits

- 3. The parties shall designate all affirmative experts for issues on which they bear the burden of proof 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 27, 2025**.

This includes disclosure of information applicable to "Witnesses Who Must Provide A Written Report" under Rule 26(a)(2)(B) and information

applicable to "Witnesses Who Do Not Provide a Written Report" under Rule 26(a)(2)(C).

4. The parties shall designate all rebuttal experts for issues on which they do not bear the burden of proof 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 24, 2025**.

This includes disclosure of information applicable to "Witnesses Who Must Provide A Written Report" under Rule 26(a)(2)(B) and information applicable to "Witnesses Who Do Not Provide a Written Report" under Rule 26(a)(2)(C).

- r. Expert Discovery Deadline:

October 22, 2025

- s. Dispositive motions deadline:

November 19, 2025

9. DISCOVERY LIMITATIONS

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

No modifications. **5 depositions, excluding experts; 25 requests per side.**

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

No modifications.

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

No modifications to requests for production. **30 RFPs and 25 RFAs per side.**

The parties propose that additional Requests for admission for the purpose of document authentication be permitted.

- d. Other Planning or Discovery Orders

1. Deadline for filing proposed protective order(s):

September 18, 2024

2. Other issues:

None

10. DATES FOR FURTHER CONFERENCES

[The magistrate judge will complete this section at the scheduling conference if he or she has not already set deadlines by an order filed before the conference.]

a. Status conferences will be held in this case at the following dates and times:

TBD

b. A final pretrial conference will be held in this case on _____ at _____ o'clock __ m. A Final Pretrial Order shall be prepared by the parties and submitted to the court no later than five (5) days before the final pretrial conference. ****See DDD practice standards; also note deadlines contained therein.****

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.

5 days - Jury

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.

None.

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). **& Mag. J. discovery dispute procedures.**

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 this 11th day of September, 2024.

BY THE COURT:



United States Magistrate Judge

APPROVED:

Joseph J. Zito
DNL ZITO
1250 Connecticut Avenue, NW, Suite 700
Washington, DC 20036
202-466-3500
jzito@dnlzito.com
Attorney for Plaintiff

/s/ James Beard

James W. Beard
MERCHANT & GOULD, P.C.
1801 California Street, Ste 330
Denver, CO 80238
303-357-1189
jbeard@merchantgould.com
Attorney for Defendant (or Defendant,
Pro Se)