PUBLIC VERSION

UNITED STATES INTERNATIONAL TRADE COMMISSION

Washington, D.C.

In the Matter of **CERTAIN HIGH-PERFORMANCE GRAVITY-FED WATER FILTERS AND PRODUCTS CONTAINING THE SAME**	**Inv. No. 337-TA-1294**

ORDER NO. 35: **DENYING WITHOUT PREJUDICE COMPLAINANT'S MOTIONS *IN LIMINE* [MOTION DOCKET NOS. 1294-025 AND 1294-027]**

(August 5, 2022)

I. INTRODUCTION

On July 22, 2022, Complainant Brita LP ("Brita") filed two (2) motions *in limine* ("MILs"). (Motion Docket No. 1294-025 ("MIL No. 1"); Motion Docket No. 1294-027 ("MIL No. 2").). Brita also filed a memorandum in support of each of the MILs ("Mem. No. 1;" "Mem. No. 2").

In its MIL No. 1, Brita seeks to preclude Respondents Qingdao Ecopure Filter Co., Ltd. and EcoLife Technologies, Inc. ("Aqua Crest Respondents"); Kaz USA, Inc. and Helen of Troy Limited ("PUR Respondents"); Zero Technologies, LLC and Culligan International Co. ("ZeroWater Respondents"); and Vestergaard Frandsen Inc. d/b/a LifeStraw ("LifeStraw") (collectively, "Respondents," and with Brita, the "Parties")[1] from introducing during the

[1] Brita includes "AquaCrest Group" as a respondent in its MIL No. 1. However, "AquaCrest Group" is not a named respondent in this Investigation. *See* Fed. Reg. 87 at 4913 (Jan. 31, 2022). This appears to be an inadvertent error.

evidentiary hearing ("Hearing") the invalidity opinions of their expert, Mr. Robert Herman, that are premised on a rejected claim construction. (MIL No. 1 at 1.). Specifically, Brita requests that paragraphs 121 through 268 of Mr. Herman's original ("Herman Report") and corrected expert reports (*id.* at Ex. 1 ("Corrected Herman Report"))[2] be stricken and Respondents be precluded from eliciting testimony concerning these opinions. (MIL No. 1 at 1; Mem. No. 1 at 1.).

In its MIL No. 2, Brita seeks to preclude Respondents from introducing during the Hearing the opinions and testimony of their expert, Dr. Gary Hatch that are contained in his expert reports served on May 24, 2022 ("Hatch Opening Report") and June 20, 2022 ("Hatch Rebuttal Report"). (MIL No. 2 at 1.).

On July 29, 2022, Respondents filed an opposition to Brita's MIL No. 1 ("Opp'n MIL No. 1") and an opposition to Brita's MIL No. 2 ("Opp'n MIL No. 2"). (Doc. ID Nos. 776588, 776586.).

For the reasons discussed below, Brita's MILs are *denied*.

II. DISCUSSION

1. Brita's MIL No. 1: *Denied Without Prejudice*

Brita accurately represents that during the *Markman* proceedings, its proposed construction for the term "average filtration unit time over lifetime L" was adopted, and that Aqua Crest and PUR Respondents' proposed construction of plain and ordinary meaning, and ZeroWater Respondents and LifeStraw's argument that the term is indefinite were rejected.

[2] The Herman Report, which Brita refers to as "Mr. Herman's May 24 expert report," was not attached to its MIL No. 1. (Mem. at 1.). Brita only attached the Corrected Herman Report to MIL No. 1 as Exhibit 1. (*See id.*). Like the Herman Report, the Corrected Herman Report is also dated May 24, 2022. (*See* MIL No. 1 at Ex. 1.).

(Mem. No. 1 at 1; *see also* Order No. 30.). Brita contends that because Respondents' expert, Mr. Herman, offered opinions concerning anticipation and obviousness "solely" premised on the plain and ordinary meaning, which was rejected, Mr. Herman should be precluded from offering those opinions during the Hearing because "they are necessarily wrong, unreliable, and erroneous." (Mem. No. 1 at 1.).

Specifically, Brita argues that Mr. Herman's report contains certain opinions about the claimed FRAP equation that he formed based on the plain and ordinary meaning of the "average filtration unit time over lifetime L." (*Id.* at 2.). Namely, Mr. Herman "concluded that the references anticipated or rendered obvious claims 1-6, and 23 by achieving a FRAP factor of about 350 or less (and less than about 200 for claim 2)." (*Id.* (citing Corrected Herman Rpt. at ¶¶ 121-268).). Brita contends that "[b]ecause Mr. Herman did not offer any opinions concerning how the 'average filtration unit time over lifetime L' limitation was met under the adopted construction, he also could not offer any opinions that any of the asserted prior art had 'a FRAP factor of about 350 or less,'" and "[b]ecause every asserted claim directly or by dependency includes this limitation, none of Mr. Herman's opinions may be used to establish that the alleged prior art anticipates or renders obvious any asserted claim." (*Id.* at 3.).

Respondents assert that the "141 Patent, Brita's experts, and Respondents' experts, all calculate average flow rate (f) the same way without delineation between Brita's construction and the plain and ordinary meaning," that is, "by determining the average flow rate of one liter over a lifetime by evaluating a number of sample points." (Opp'n MIL No. 1 at 3.). As Respondents point out, "Brita never argued in Markman process how its construction differed whatsoever from the plain and ordinary meaning." (*Id.*). Moreover, as Respondents note, Brita appears to rely on isolated portions of the Corrected Herman Report "without mentioning the

hundreds of other pages of analysis that make clear the plain and ordinary meaning ***and*** Brita's construction is addressed by Mr. Herman's report as one in the same." (*Id.* at 4 (emphasis in original).). Additionally, Respondents submit that they would be "tremendously prejudiced" if Brita's motion is accepted because Brita seeks to "exclude the bulk of Mr. Herman's opinions, including dispositive proof that the claimed performance of the 141 Patent was already in the public domain through six different gravity fed water filters." (*Id.* at 4-5.).

In this instance, Respondents' arguments are persuasive. Mr. Herman's expert reports, i.e., Herman Report and Corrected Herman Report, are not stricken. He is permitted to testify during the Hearing about the term "average filtration unit time over lifetime L." Any testimony elicited from Mr. Herman during the Hearing with respect to this claim term will be evaluated for its weight and credibility, including his opinions contained in his expert reports concerning the same. *See Certain Wireless Communication Devices*, Inv. No. 337-TA-1180, Order No. 34 at 7 (June 5, 2020) ("*Certain Wireless Communication Devices*").

For these reasons, Brita's MIL No. 1 is *denied*, *but without prejudice*. This Order should not be construed as a decision on the merits or whether some of Mr. Herman's opinion testimony may be stricken during the Hearing as may be appropriate.

2. Brita's MIL No. 2: *Denied Without Prejudice*

Brita states that Respondents served two (2) expert reports prepared by Dr. Hatch that purport to contain his opinions on the validity of the '141 patent. (Mem. No. 2 at 1.). Brita submits that the Hatch Opening Report includes his positions under 35 U.S.C. §§ 101, 102, 103, and 112, as well as a summary of the disputed claim terms and proposed claim constructions. (*Id.* at 2.). Brita also represents that the Hatch Rebuttal Report addresses the Parties' claim constructions and analyses relating to issues priority and validity. (*Id.*).

Brita contends that during Dr. Hatch's deposition on July 12, 2022, "it became all too clear that Dr. Hatch's reports do not express his own opinions but rather serve as a mouthpiece for Respondents' counsels' arguments." (*Id.* at 1.). According to Brita, "Dr. Hatch repeatedly did not recognize entire theories and analysis that had been asserted in his report." (*Id.* at 4.).

In its MIL No. 2, Brita provided some of Dr. Hatch's testimony to support its claims that he did not understand what an "anticipation" analysis means.

> Q. Okay. So are you aware of when someone says a reference anticipates, they're saying all of the limitations are found in the reference?
>
> A. That's beyond my understanding. I don't recall understanding that.
>
> Q. Are you giving an opinion on anticipation?
>
> A. If I have, again, this was a long – quite a while back, and I don't recall what was involved in this. I'm sorry.
>
> Q. You're not able to tell me today whether you are giving an opinion as to whether the claims of the '141 Patent are anticipated -- by any reference?
>
> A. Again, I don't recall my position on that.

(*Id.* at 5 (citing *id.*, Ex. A (Hatch Dep. Tr.) at 194:19-195:15).).

Brita argues that the Hatch Opening Report, which Dr. Hatch signed less than two (2) months prior to his deposition, states that "[i]t is [his] opinion that claims 1-6, 20-21, and 23-24 of the '141 Patent are invalid as either anticipated and/or rendered obvious by the prior art cited in this report." (*Id.* (citing Ex. B (Hatch Opening Rpt.) at ¶ 18); *see also id.* at 5-6 (citing Ex. A (Hatch Dep. Tr.) at 213:2-11 (re-direct), 248:1-17 (re-cross)).).

In addition, Brita provided testimony from Dr. Hatch's deposition to support its claim that "Dr. Hatch was completely unfamiliar with the concept of claim construction[.]" (*Id.* at 7 (citing Ex. A (Hatch Dep. Tr.) at 178:15-179:1 ("Q. You've provided a number of opinions in this case. Would any of them change depending on the claim construction that Judge McNamara

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