
IN THE UNITED STATES DISTRICT COURT
DISTRICT OF UTAH

POLAR ELECTRO OY,

Plaintiff,

v.

SUUNTO OY, *et al.*,

Defendants.

Case No. 1:17-cv-139-CW

**ORDER RE:
SUPPLEMENTING
EXPERT REPORT**

Judge Clark Waddoups

This matter is before the court on Polar Electro Oy’s (“Polar”) Motion for Leave to Supplement a Technical Expert Report. Polar asserts Dr. Harley R. Myler’s “original report analyzed [Firstbeat Technologies Oy’s] neural network source code and relied on and cited to a comment in Firstbeat’s source code to describe the result provided by the neural network within Firstbeat’s product.” Mot. for Leave, at 2 (ECF No. 420). Firstbeat’s expert, Mr. Thomas Blackadar, asserts the comment is not accurate probably because Firstbeat failed to update it when it changed its source code. *See* Opp’n Memo., at 9 (ECF No. 425). Thus, Firstbeat asserts its accused products do not incorporate a “substantially linear” operation. Following this assertion, Dr. Myler developed a protocol and contends he tested the functionality of an accused product. Polar seeks to supplement Dr. Myler’s expert report with those test results. Firstbeat opposes the motion.

Firstbeat contends its non-infringement contentions placed Polar on notice that it would assert the source code comment (hereinafter “the linear comment”) was inaccurate. In its non-

infringement contentions, Firstbeat asserted its accused products do not incorporate a substantially linear operation. Opp'n Memo., at 5 (ECF No. 425). It further stated that Polar had cited little evidence to support a linear operation other than its citation to the linear comment. Firstbeat asserts this was sufficient to place Polar on notice that it would later claim its own linear comment was inaccurate. The court disagrees and concludes Firstbeat's non-infringement contentions lacked sufficient specificity to place Polar on notice about this issue.

Next, Firstbeat contends Polar should have tested its theory from the outset rather than waiting until after Firstbeat submitted its report. Although it appears that Polar could have tested Firstbeat's product earlier, its ability to do so does not answer the question. Until Firstbeat challenged the accuracy of its own document, Polar lacked notice, and that lack of notice placed Polar at a disadvantage when determining what type of proof would be needed. Foreclosing Polar's ability to respond under such circumstance would perpetuate the disadvantage.

Third, Firstbeat contends Polar has mischaracterized Mr. Blackadar's report by stating he "challenges the reliability [of] Firstbeat's own documents." Opp'n Memo., at 9 (ECF No. 425). According to Firstbeat, Mr. Blackadar did not challenge the document's reliability. Instead, circumstances changed such that the comment is no longer accurate. *Id.* The court fails to see the distinction. An inaccurate document is not one a person may rely upon regardless of the reason why it became inaccurate. To the extent Firstbeat contends Polar otherwise mischaracterized Mr. Blackadar's conclusions, that may be challenged at trial.

Fourth, Firstbeat asserts Polar's motion is not justified because it has failed to satisfy the conditions of Local Patent Rule 5.3. According to Firstbeat, there is no good cause to supplement the expert report, Polar's request is untimely, and supplementation would be prejudicial to

Firstbeat.

Good cause does exist because of the lack of adequate notice discussed above. Moreover, the supplemental report addresses a claim element. Whether that claim element is satisfied should be decided on the merits rather than on an artifice about what evidence exists on the issue.

As to timeliness, Firstbeat submitted its expert report on November 6, 2020. Dr. Myler evaluated the report, designed a test protocol, conducted the test, and wrote a supplemental report by January 26, 2021. He did so despite his employment as a professor, COVID conditions, and intervening holidays for Thanksgiving, Christmas, and the New Year. Based on the totality of the circumstances, the court concludes Dr. Myler's report was not untimely.

Finally, on the issue of prejudice, Firstbeat asserts it will be prejudiced by the supplemental report because Firstbeat will have to expend more time and resources to respond. That will further delay resolution of the proceedings. The court accepts these assertions as true. Even so, the prejudice to Firstbeat is minimal when the proceedings are considered as a whole. Moreover, Polar will suffer a greater prejudice if supplementation is not allowed. Accordingly, the court concludes supplementation of Dr. Myler's expert report is appropriate.

CONCLUSION

For the reasons stated above, the court GRANTS Polar's Motion for Leave to Supplement a Technical Expert Report (ECF No. 420).

SO ORDERED this 9th day of April, 2021.

BY THE COURT:



Clark Waddoups
United States District Judge