

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF INDIANA
FORT WAYNE DIVISION**

GLOBAL ARCHERY PRODUCTS, INC.,

Plaintiff,

v.

JORDAN GWYTHER d/b/a/
LARPING.ORG and UPSHOT ARROWS,

Defendant.

Civil Action No. 1:15-cv-00297-JVB-SLC

MOTION FOR RELIEF FROM LOCAL
PATENT RULES, FOR LIMITED
DISCOVERY, AND FOR A SHOW-CAUSE
HEARING

I. INTRODUCTION

Defendant Jordan Gwyther d/b/a/ Larping.Org and Upshot Arrows (“Mr. Gwyther”) hereby moves for relief from local patent rules, for limited discovery, and for a hearing whereby Plaintiff, Global Archery Products, Inc. shall be ordered to show cause why all claims in the complaint should not be dismissed pursuant to Fed. R. Civ. P. 56. Support for the relief requested is based on the following facts:

1. Plaintiff has refused to explain how a good-faith claim for patent infringement can exist where the claimed arrows are anticipated by the prior art and where the prior art is identical in all material respects to the accused arrows.

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2. The amount in controversy does not exceed \$47,000, the approximate gross sales of the accused products. Accordingly, compliance with the local patent rules will end up costing far more than the case is worth even if the patent claims had merit.

II. AUTHORITY

Recent amendments to Fed. R. of Civ. P. 26 provide that “the scope of discovery is as follows: Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party’s claim or defense *and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties’ relative access to relevant information, the parties’ resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit.*” Fed. R. of Civ. P. 26(b)(1) (emphasis added).

These factors, save the one pertaining to “the parties’ relative access to relevant information,” appeared in the prior subsection of Rule 26—former Rule 26(b)(2)(C)—which governed court-ordered limitations on discovery. Under the old rule, the factors were a limitation usually implicated by motions for a protective order. Under the amended rule, the factors must be considered by the parties and the court in determining the overall scope of discovery.

The Advisory Committee intended this amendment to reduce the costs of discovery, which according to surveys of practitioners “are disproportionately high in small cases.” *See* Fed. R. Civ. P. advisory committee’s note at 83 (citing surveys of the ABA Section of Litigation and NELA

attorneys).¹ Hence, one of the goals of integrating proportionality into an affirmative definition of the scope of discovery is to keep courts and litigants cognizant of the appropriate scope of discovery on a case-by-case basis.

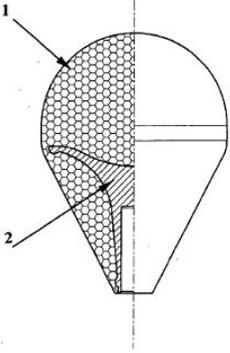
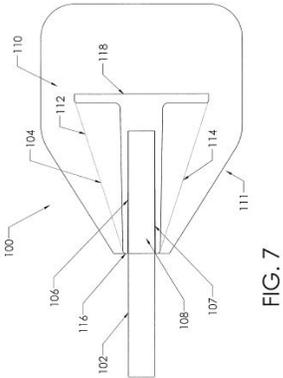
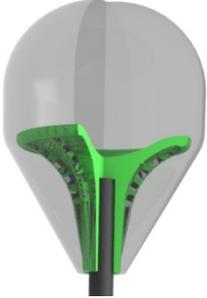
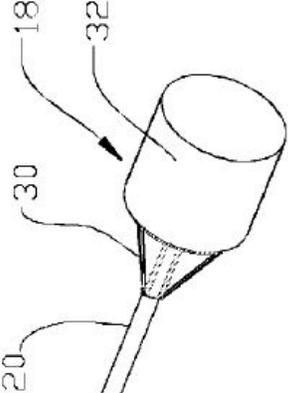
III. ANALYSIS

The claimed arrows are identical in all material respects to those of the prior art. Specifically, German Patent DE202004016059 to Nobert Fleck discloses the arrow. *See* Declaration of Mark P. Walters (“Walters Decl.”), Exhibit A. This German patent counts as prior art under the pre- and post-AIA versions of 35 U.S.C. § 102 because it was published December 30, 2004, which is more than a year prior to the earliest filing dates upon which the patents-in-suit may claim.

There are two patents-in-suit, U.S. Patent No. 8,449,413 (“the ’413 patent”) and U.S. Patent No. 8,932,159 (“the ’159 patent”). The ’413 patent was filed December 6, 2011 and the ’159 patent was filed April 26, 2013. *See* Dkt. No. 1, Exhs. A and B. Where all elements of the claimed arrows can be found in a single prior art reference, the claims of the patent are said to be “anticipated” by the prior art and they are invalid. *See Verdegaal Bros. v. Union Oil Co. of California*, 814 F.2d 628, 631, 2 USPQ2d 1051, 1053 (Fed. Cir. 1987). Moreover, where the evidence supports a finding that the accused infringer used or soled the accused arrow more than one year before the effective filing date of a patent-in-suit, a prior-use defense to infringement exists under 35 U.S.C. § 273. Finally, even if the claims of the patent-in-suit are not invalid over the prior art, and even if Mr.

¹ Available at: <http://www.uscourts.gov/file/18022/download?token=4S6SRw0T> (last visited Jan. 27, 2016).

Gwyther is unable to prevail on a defense under 35 U.S.C. § 273, the scope of the claims will be limited by the prior art. This is because “[a] patent may not, like a nose of wax, be twisted one way to avoid anticipation and another to find infringement,” *Amazon.com, Inc. v. Barnesandnoble.com, Inc.*, 239 F.3d 1343, 1351 (Fed. Cir. 2001) (quoting *Sterner Lighting, Inc. v. Allied Elec. Supply, Inc.*, 431 F.2d 539, 544 (5th Cir. 1970) (citing *White v. Dunbar*, 119 U.S. 47, 51, 30 L. Ed. 303, 7 S. Ct. 72 (1886) (internal quotation marks omitted)). So, in summary, plaintiff’s patent claims are highly dubious in view of the prior art patent DE202004016059 to Nobert Fleck.

DE202004016059 to Nobert Fleck (“Prior Art”)	Arrows Claimed in Patents-in-Suit	Accused Arrows
 <p data-bbox="347 1251 391 1268">Fig. 2</p>	 <p data-bbox="894 1142 922 1205">FIG. 7</p>	
<p data-bbox="204 1356 548 1640">The German translation of DE202004016059 to Nobert Fleck states at [0005] that “[t]he hit area” of the arrow may be constructed “with a cylindrical cut foam board”</p>		

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Despite the dubious nature of plaintiff's claims for patent infringement in view of the prior art, Plaintiff has refused to respond substantively to counsel's identification of DE202004016059 to Nobert Fleck. *See* Walters Decl., ¶ 3 and Exh. B. Instead, counsel stated "I cannot read German," requesting "a certified English translation." *Id.* Counsel stated further "I cannot respond to the substance of your claims with respect to the patents-in-suit without such a translation." *Id.*

It is not the defendant's responsibility to provide a certified translation of the prior art to plaintiff, particularly where unofficial translations are available on a variety of websites, including Google. *Id.* at Exh. C. Further, it is unclear what the plaintiff needs from a translation where the drawings of DE202004016059 to Nobert Fleck disclose much of the structure of the prior art arrows.

Notwithstanding the existence of an unofficial German translation, the mere existence of DE202004016059 to Nobert Fleck significantly narrows the issues surrounding Plaintiff's claims for patent infringement. Early adjudication of plaintiff's claims in view of DE202004016059 to Nobert Fleck is appropriate and would save substantial resources.

Saving resources is important in this case because the amount in controversy does not exceed \$47,000. Declaration of Jordan Gwyther ("Gwyther Decl.") at ¶ 2. If the procedures of the local patent rules are followed, the issues surrounding DE202004016059 to Nobert Fleck will not be resolved for months, after expensive discovery and briefing. Compliance with these rules will end up costing more than the case is worth. Further, Mr. Gwyther's resources to defend these claims are limited. It is unclear whether he could continue defending himself through the many

months it might take to complete claim construction and discovery according to the local patent rules. *See* Gwyther Decl. ¶ 3.

In view of the above, Mr. Gwyther requests an order limiting discovery in this matter to the following issues:

1. Whether plaintiff can maintain claims of patent infringement where the claimed arrows and the accused products are identical in all material respects to the prior art.
2. Whether plaintiff has evidence sufficient to raise a genuine issue of material fact concerning its remaining claims.

Mr. Gwyther further seeks an order limiting each side to no more than 10 interrogatories, 20 requests for production, 10 requests for admission (not including admissions as to authenticity or admissibility of documents) and 3 depositions. Mr. Gwyther also seeks an order setting the close of discovery on the above issues on or before April 1, 2016 and a hearing on or before May 6, 2016 whereby plaintiff shall be ordered to show cause why the complaint should not be dismissed pursuant to Fed. R. Civ. P. 56.

IV. CONCLUSION

For all the foregoing reasons, Mr. Gwyther respectfully requests suspension of the local patent rules and limitations on discovery as set forth herein.

DATED this 1st day of February, 2016.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on February 1, 2016 I electronically filed the foregoing **DEFENDANT'S ANSWER TO COMPLAINT AND AFFIRMATIVE DEFENSES** with this **CERTIFICATE OF SERVICE** with the Clerk of the Court using the CM/ECF system, which upon information and believe will send notification of such filing to the following attorney of record:

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Attorney for Global Archery Products, Inc.

s/Robert T. Keen, Jr.

Robert T. Keen, Jr.

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