

[Note: Throughout, material in brackets is provided as guidance to counsel as to the Court's practices and/or matter that needs to be addressed in the Proposed Final Pretrial Order.]

PROPOSED FINAL PRETRIAL ORDER – PATENT

This matter comes before the Court at a final pretrial conference held pursuant to Rule 16 of the Federal Rules of Civil Procedure.

Plaintiff(s) Counsel: [List name, address, telephone number, and e-mail address]¹

Defendant(s) Counsel: [List name, address, telephone number, and e-mail address]²

I. Nature of the Case

[The parties should prepare a brief statement of the nature of the case including identification of the parties and their claims. This statement may be used by the Court to explain the case to prospective jurors during the process of jury selection.]

II. Jurisdiction

This is an action for [state the remedy sought, such as damages or injunctive or declaratory relief].

The jurisdiction of the Court is not disputed [or, if the issue has not previously been raised, the basis on which jurisdiction is contested] and is based on [state the statutory, constitutional, or other basis of jurisdiction].

¹[For simplicity, "Plaintiff(s)" refers throughout this form order to the party asserting infringement of its patent(s).]

²[For simplicity, "Defendant(s)" refers throughout this form order to the party accused of infringement.]

III. Facts

A. Uncontested Facts

Any party, with prior notice to all other parties, may read any or all of the uncontested facts to the jury or Court, and will be charged for the time used to do so.

The following facts are not disputed or have been agreed to or stipulated to by the parties:

[This section should contain a comprehensive statement of the uncontested facts which the parties intend to make part of the evidentiary record, either by reading to the jury, or in a bench trial reading to the Court and/or filing with the Court in conjunction with post-trial briefing.]

B. Contested Facts

[Identify the facts in issue, with a brief statement of what each party intends to prove in support of its claims and/or defenses. These summaries should be sufficient to identify for the Court the essential facts in issue and to fairly notify the other parties of what counsel expects to prove at trial.]

IV. Issues of Law

[Include a statement of the issues of law which any party contends remain to be litigated, and a citation of authorities relied upon by each party.]

[The Court will preclude a party from seeking relief based on claims and defenses not described in the draft pretrial order.]

V. Witnesses

[Indicate which witnesses will testify in person and which by deposition. Indicate if there are any objections to a witness and, if so, briefly state the basis for the objection.] Any witness not listed will be precluded from testifying, absent good cause shown.

In the absence of an alternative agreement between the parties, fact witnesses will be sequestered. Also, unless the parties reach an alternative agreement, the order of the presentation of evidence will follow the burden of proof.

[The presumptive order of proof is:

Phase I: Plaintiff case-in-chief on infringement and damages

Phase II: Defendant response on infringement and damages, and case-in-chief on invalidity

Phase III: Plaintiff rebuttal on infringement and damages, and response on invalidity

Phase IV: Defendant rebuttal on invalidity]

A. List of Witnesses the Plaintiff Expects to Call

1. Expert witnesses

[For any expert witness, the Plaintiff shall indicate the precise subject matter on which it will ask the Court to recognize the witness's expertise. At trial, the Plaintiff should offer the witness as an expert on that same subject matter. No deviations as to the described subject matter will be permitted without approval of all parties or the Court, on good cause shown.]

2. Non-expert witnesses

B. List of Witnesses Defendant Expects to Call

1. Expert witnesses

[For any expert witness, the Defendant shall indicate the precise subject matter on which it will ask the Court to recognize the witness's expertise. At trial, the Defendant should offer the witness as an expert on that same subject matter. No deviations as to the described subject matter will be permitted without approval of all parties or the Court, on good cause shown.]

2. Non-expert witnesses

C. List of Witnesses Third Parties Expect to Call

[If there are any third parties to the action, they should include a list of witnesses like those contained in Parts A and B above.]

D. Testimony by Deposition

[Counsel should confer prior to the pretrial conference to determine which testimony will be offered by deposition (including video tape depositions), to agree on the designation of those portions of the depositions to be offered into evidence, and to identify objections.] This pretrial order contains the maximum universe of deposition designations, counter-designations, and objections to admission of deposition testimony; none of the foregoing shall be supplemented without approval of all parties or leave of the Court, on good cause shown.

If there are objections that remain to be resolved, the party calling the witness by deposition shall, no later than two (2) calendar days before the witness is to be called at trial, submit, on behalf of all parties: (i) a copy of the entire deposition testimony of the witness at issue, clearly highlighting the designations, counter-designations, and pending objections; and (ii) a cover letter clearly identifying the pending objections as well as a brief indication (i.e., no

more than one sentence per objection) of the basis for the objection and the offering party's response to it. Failure to comply with these procedures, absent an agreement by the parties and approval by the Court, will result in waiver of the use of the deposition testimony or waiver of objection to the use of the deposition testimony.

All irrelevant and redundant material, including colloquy between counsel and objections, will be eliminated when the deposition is read or viewed at trial.

When the witness is called to testify by deposition at trial, the party calling the witness shall provide the Court with two copies of the transcript of the designations and counter-designations that will be read or played. The parties will be charged for all time that elapses from the time the witness is called until the next witness is called, according to the proportions to be provided by the parties.

E. Impeachment with Prior Inconsistent Testimony

[The parties shall provide their position(s) as to whether the Court should allow objections to the use of deposition and other prior testimony for impeachment purposes, including objections based on lack of completeness and/or lack of inconsistency.]

F. Objections to Expert Testimony

[The parties shall provide their position(s) as to whether the Court should rule at trial on objections to expert testimony as beyond the scope of prior expert disclosures, taking time from the parties' trial presentation to argue and decide such objections; or whether the Court should instead defer ruling on all such objections unless renewed in writing following trial, subject to the proviso that a party prevailing on such a post-trial objection will be entitled to have all of its

costs associated with a new trial paid for by the party that elicited the improper expert testimony at the earlier trial.]

VI. Exhibits

A. Exhibits

[The parties are to provide a list of pre-marked exhibits which each party intends to offer at trial, along with citations to the Federal Rules of Evidence to note any objections thereto lodged by any other party.] This pretrial order contains the maximum universe of exhibits to be used in any party's case-in-chief, as well as all objections to the admission of such objections, neither of which shall be supplemented without approval of all parties or leave of the Court, on good cause shown. Exhibits not listed will not be admitted unless good cause is shown.

No exhibit will be admitted unless offered into evidence through a witness, who must at least be shown the exhibit. At some point before the completion of the witness' testimony, any party that has used an exhibit with the witness and wishes that exhibit to be admitted into evidence must formally move the exhibit into evidence, by exhibit number. Exhibits may not be published, displayed, or otherwise shown to the jury until after they have been admitted into evidence. Once admitted, counsel may publish exhibits to the jury without requesting to do so.

A party will provide exhibits to be used in connection with direct examination by 6:00 p.m. the day before their intended use, and objections will be provided no later than 8:00 p.m. the night before their intended use. If good faith efforts to resolve the objections fail, the party objecting to the exhibits shall bring its objections to the Court's attention prior to the witness being called to the witness stand. Failure to comply with these procedures, absent an agreement

by the parties and approval by the Court, will result in waiver of the use of an exhibit or waiver of objection to the exhibit.

Exhibits not objected to will be received into evidence by the operation of the Final Pretrial Order without the need for additional foundation testimony, provided they are shown to a witness.

On or before the first day of trial, counsel will deliver to the Courtroom Deputy a completed AO Form 187 exhibit list for each party.

B. Demonstrative Exhibits

The parties will exchange demonstratives to be used in opening statements by 8:00 p.m. two nights before opening statements. The parties will provide any objections to such demonstratives by 12:00 p.m (noon) on the day before opening statements.

A party will provide demonstrative exhibits to be used in connection with direct examination by 6:00 p.m. the night before their intended use, and objections will be provided no later than 8:00 p.m. the night before their intended use. If any of the demonstratives change after the deadline, the party intending to use the demonstrative will promptly notify the opposing party of the change(s).

The party seeking to use a demonstrative will provide a color representation of the demonstrative to the other side in PDF form. However, for video or animations, the party seeking to use the demonstrative will provide it to the other side on a DVD or CD. For irregularly sized physical exhibits, the party seeking to use the demonstrative will provide a color representation as a PDF of 8.5 x 11 copies of the exhibits.

This provision does not apply to demonstratives created during testimony or

demonstratives to be used for cross-examination, neither of which need to be provided to the other side in advance of their use. In addition, blow-ups or highlights of exhibits or parts of exhibits or testimony are not required to be provided to the other side in advance of their use.

If good faith efforts to resolve objections to demonstrative exhibits fail, the objecting party shall bring its objections to the Court's attention prior to the opening statements or prior to the applicable witness being called to the witness stand. Failure to comply with these procedures, absent an agreement by the parties and approval by the Court, will result in waiver of the use of an exhibit or waiver of objection to the exhibit.

VII. Damages

[Include an itemized statement of all damages, including special damages.]

VIII. Bifurcated Trial

[Indicate whether the parties desire a bifurcated trial, and, if so, why.]

IX. Motions *in Limine*

Motions *in limine* shall not be separately filed. All *in limine* requests and responses thereto shall be set forth in the proposed pretrial order. Each **SIDE** shall be limited to three (3) *in limine* requests, unless otherwise permitted by the Court. The *in limine* request and any response shall contain the authorities relied upon; each *in limine* request may be supported by a maximum of three (3) pages of argument and may be opposed by a maximum of three (3) pages of argument, and the side making the *in limine* request may add a maximum of one (1) additional page in reply in support of its request. If more than one party is supporting or opposing an *in limine* request, such support or opposition shall be combined in a single three (3) page submission (and, if the moving party, a single one (1) page reply), unless otherwise ordered by

the Court. No separate briefing shall be submitted on *in limine* requests, unless otherwise permitted by the Court.

X. Discovery

Each party has completed discovery.

XI. Number of Jurors

There shall be eight jurors. The Court will conduct jury selection through the “struck juror” method, beginning with the Court reading voir dire to the jury panel in the courtroom, continuing by meeting with jurors individually in chambers or at sidebar and there addressing any challenges for cause, and concluding with peremptory strikes.

XII. Non-Jury Trial

[If the parties desire a detailed opinion from the Court post-trial, counsel should include a proposed post-trial briefing schedule, including page limits, in the draft pretrial order.]

Along with their initial briefs, each party shall provide proposed Findings of Fact, separately stated in numbered paragraphs, constituting a detailed listing of the relevant material facts the party believes it has proven, in a simple narrative form, along with citations to the record. The proposed Findings of Fact shall be limited to a maximum of ____ pages. No separate Conclusions of Law shall be filed.

XIII. Length of Trial

The trial will be timed. Unless otherwise ordered, time will be charged to a party for its opening statement, direct and redirect examinations of witnesses it calls, cross-examination of witnesses called by any other party, closing argument, its argument on any motions for judgment

as a matter of law, and all sides' argument on objections a party raises (outside the presence of the jury) to another party's exhibits and demonstrative exhibits.

The Courtroom Deputy will keep a running total of trial time used by counsel. If any party uses all of its allotted trial time, the Court will terminate that party's trial presentation.

Considering the Court's procedures for counting time, and considering the nature and extent of the parties' disputes, the parties request ___ hours for their trial presentation. [Indicate the number of hours the parties request for their trial presentations. On days other than those involving jury selection, jury instructions, or deliberations, a typical day involves between 5 ½ and 6 ½ of trial time. In a typical bench trial, each day will involve between 6 and 7 hours of trial time. If the Court has previously set a maximum number of days that will be reserved for trial in this matter, the Court will not, absent good cause shown, allocate more hours for trial presentations than can be accommodated within the number of days reserved.]

XIV. Motions for Judgment as a Matter of Law

[The parties shall provide their position(s) as to how they will make motions for judgment as a matter of law, whether it be immediately at the appropriate point during trial or at a subsequent break, whether the jury should be in or out of the courtroom at the time such motions are made and/or argued, and whether such motions may be supplemented in writing.]

XV. Amendments of the Pleadings

[Indicate any amendments of the pleadings desired by any party, along with a statement whether the proposed amendment is objected to and, if objected to, the grounds for the objection.]

XVI. Additional Matters

[List any additional issues requiring resolution prior to trial, including whether the parties anticipate requesting that the courtroom be closed to the public for a portion of any specified witness' testimony.]

XVII. Settlement

[Provide a certification that the parties have engaged in a good faith effort to explore the resolution of the controversy by settlement, including a description of the overall extent of such efforts and identification of the date of the most recent substantive discussions regarding settlement.]

IT IS HEREBY ORDERED that this Final Pretrial Order shall control the subsequent course of the action, unless modified by the Court to prevent manifest injustice.

DATED: _____

UNITED STATES DISTRICT JUDGE

APPROVED AS TO FORM AND
SUBSTANCE:

ATTORNEY FOR PLAINTIFF(S)

ATTORNEY FOR DEFENDANT(S)