

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

[PLAINTIFF],)
)
Plaintiff,)
)
v.) C.A. No. 00-0000 (EGT)
)
[DEFENDANT],)
)
Defendant.)

[PROPOSED] SCHEDULING ORDER [PATENT, NON-ANDA]

This _____ day of _____, 20____, [the Court having conducted an initial scheduling conference pursuant to Local Rule 16.1(b), and] the parties having determined after discussion that the matter cannot be resolved at this juncture by settlement, voluntary mediation or binding arbitration;

IT IS HEREBY ORDERED that:

1. Rule 26(a)(1) Initial Disclosures and E-Discovery Default Standard. Unless otherwise agreed to by the parties, the parties shall make their initial disclosures pursuant to Federal Rule of Civil Procedure 26(a)(1) within five (5) days of the date this Order is entered by the Court. If they have not already done so, the parties are to review the Court’s Default Standard for Discovery, Including Discovery of Electronically Stored Information (“ESI”), which is posted at <https://www.ded.uscourts.gov> (see Other Resources, Default Standard for Discovery) and is incorporated herein by reference.

2. Joinder of Other Parties and Amendment of Pleadings. All motions to join other parties, and to amend or supplement the pleadings, shall be filed on or before [DATE]. Unless otherwise ordered by the Court, any motion to join a party or motion to amend the pleadings shall be made pursuant to the procedures set forth in Paragraphs 8(g) and 9 below.

3. Application to Court for Protective Order. Should counsel find it will be necessary to apply to the Court for a protective order specifying terms and conditions for the disclosure of confidential information, counsel should confer and attempt to reach an agreement on a proposed form of order and submit it to the Court within ten (10) days from the date the Court enters this Order. If counsel are unable to reach an agreement on a proposed form of protective order, counsel must follow the provisions of Paragraph 8(g) below.

Any proposed protective order must include the following paragraph:

Other Proceedings. By entering this order and limiting the disclosure of information in this case, the Court does not intend to preclude another court from finding that information may be relevant and subject to disclosure in another case. Any person or party subject to this order who becomes subject to a motion to disclose another party's information designated "confidential" [the parties should list any other level of designation, such as "highly confidential," which may be provided for in the protective order] pursuant to this order shall promptly notify that party of the motion so that the party may have an opportunity to appear and be heard on whether that information should be disclosed.

4. Papers Filed Under Seal. In accordance with section G of the Revised Administrative Procedures Governing Filing and Service by Electronic Means, a redacted version of any sealed document must be filed electronically within seven (7) days of the filing of the sealed document.

Should any party intend to request to seal or redact all or any portion of a transcript of a court proceeding (including a teleconference), such party should expressly note that intent at the start of the court proceeding. Should any party subsequently choose to make a request for sealing or redaction, it must, promptly after the completion of the transcript, file with the Court a motion for sealing/redaction, and include as attachments (1) a copy of the complete transcript highlighted so the Court can easily identify and read the text proposed to be sealed/redacted and (2) a copy of the proposed redacted/sealed transcript. With such request, the party seeking redactions must

demonstrate why good cause exists for the redactions and why disclosure of the redacted material would work a clearly defined and serious injury to the party seeking redaction.

5. Courtesy Copies. The parties shall provide to the Court two (2) courtesy copies of all briefs and any other document filed in support of any briefs (*i.e.*, appendices, exhibits, declarations, affidavits, etc.). This provision also applies to papers filed under seal. All courtesy copies shall be double-sided. Exhibits and attachments must be separated by tabs, and the parties should highlight the portions of the exhibits and attachments that they wish the Court to read.

6. ADR Process. This matter is NOT referred to a magistrate judge to explore the possibility of alternative dispute resolution.

7. Disclosures. Absent agreement among the parties and approval of the Court:

(a) Identification of Accused Products and Asserted Patents. On or before [DATE], Plaintiff shall identify the accused product(s) [or method(s) or system(s)], the asserted patent(s) and Plaintiff's damages theory. On the same date, Plaintiff shall also produce the prosecution history for each asserted patent.

(b) Core Technical Documents. On or before [DATE], Defendant shall produce core technical documents related to the accused product(s) sufficient to show the functionality of the accused product(s), including but not limited to non-publicly available operation manuals, product literature, schematics and specifications. Defendant shall also produce sales figures for the accused product(s).

(c) Infringement Contentions. On or before [DATE], Plaintiff shall provide its initial infringement contentions for each asserted claim. On or before [DATE], Defendant shall provide its initial non-infringement contentions in response to Plaintiff's initial contentions. On or before [DATE], Plaintiff shall provide its final infringement contentions. On or before [DATE],

Defendant shall provide its final non-infringement contentions in response to Plaintiff's final contentions.

(d) Invalidity Contentions. On or before [DATE], Defendant shall provide its initial invalidity contentions for each asserted claim and the related invalidating references. On or before [DATE], Plaintiff shall provide its initial validity contentions in response to Defendant's initial contentions. On or before [DATE], Defendant shall provide its final invalidity contentions. On or before [DATE], Plaintiff shall provide its final validity contentions in response to Defendant's final contentions.

(e) All final contentions (*i.e.*, infringement, non-infringement, invalidity, validity) must include a party's contentions under its proposed claim construction(s), as well as under the opposing claim construction(s) (if such an alternative contention exists).

8. Discovery. Unless otherwise ordered by the Court or agreed to by parties, the limitations on discovery set forth in the Federal Rules shall be strictly observed.

(a) Fact Discovery Cutoff. All fact discovery in this case shall be initiated so that it will be completed on or before [DATE].

(b) Document Production. Document production shall be substantially complete by [DATE].

(c) Requests for Admission. A maximum of ___ requests for admission are permitted for each side.

(d) Interrogatories.

(i) A maximum of ___ interrogatories, including contention interrogatories, are permitted for each side.

(ii) The Court encourages the parties to serve and respond to contention interrogatories early in the case. In the absence of agreement among the parties, contention interrogatories, if served, shall first be addressed by the party with the burden of proof. The adequacy of all interrogatory answers shall be judged by the level of detail each party provides (*i.e.*, the more detail that a party provides, the more detail the party shall receive).

(e) Depositions.

(i) Limitation on Hours for Deposition Discovery. Each side is limited to a total of ___ hours of taking testimony by deposition upon oral examination.

(ii) Location of Depositions. Any party or representative (officer, director, or managing agent) of a party filing a civil action in this district court must ordinarily be required, upon request, to submit to a deposition at a place designated within this district. Exceptions to this general rule may be made by order of the Court. A defendant who becomes a counterclaimant, cross-claimant, or third-party plaintiff shall be considered as having filed an action in this Court for the purpose of this provision.

(f) Disclosure of Expert Testimony.

(i) Expert Reports. For the party who has the initial burden of proof on the subject matter, the initial Federal Rule of Civil Procedure 26(a)(2) disclosure of expert testimony is due on or before [DATE]. The supplemental disclosure to contradict or rebut evidence on the same matter identified by another party is due on or before [DATE]. Reply expert reports from the party with the initial burden of proof are due on or before [DATE]. No other expert reports will be permitted without either the consent of all parties or leave of the Court. Along with the submissions of the expert reports, the parties shall advise of the dates and times of their experts' availability for deposition.

(ii) Expert Report Supplementation. The parties agree that they **[will]** **[will not]** permit expert declarations to be filed in connection with motions briefing (including case dispositive motions).

(iii) Objections to Expert Testimony. To the extent that any objection to expert testimony is made pursuant to the principles announced in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), as incorporated in Federal Rule of Evidence 702, it shall be made by motion no later than the deadline for dispositive motions set forth herein, unless otherwise ordered by the Court. Briefing on such motions is subject to the page limits set out in connection with briefing of case dispositive motions.

(iv) Expert Discovery Cutoff. All expert discovery in this case shall be initiated so that it will be completed on or before **[DATE]**.

(g) Discovery Matters and Disputes Relating to Protective Orders.

(i) Any discovery motion filed without first complying with the following procedures will be denied without prejudice to renew pursuant to these procedures.

(ii) Should counsel find that, after reasonable efforts pursuant to Local Rule 7.1.1, they are unable to resolve a discovery matter or a dispute relating to a protective order, the moving party (*i.e.*, the party seeking relief from the Court) should file a Motion for Teleconference to Resolve a Discovery or Protective Order Dispute. The text for this motion can be found in the “Forms” section of Magistrate Judge Tennyson’s portion of the Court’s website.

(iii) After reviewing the motion, the Court will issue an order setting a discovery conference and outlining the specific dispute procedure to be used. On the date set by court order, generally not less than seventy-two (72) hours prior to the conference, the party seeking relief shall file with the Court a letter not to exceed three (3) pages in 12-point font

outlining the issues in dispute and that party's position on those issues. This submission shall include as exhibits (1) a proposed order that identifies with specificity the relief sought on an issue-by-issue basis and (2) copies of any discovery requests and responses relating to the dispute. On the date set by court order, generally not less than forty-eight (48) hours prior to the conference, any party opposing the application for relief may file a letter not to exceed three (3) pages in 12-point font outlining that party's reason for its opposition.

(iv) Should the Court find further briefing necessary upon conclusion of the conference, the Court will order it. Alternatively, the Court may choose to resolve the dispute prior to the conference and will, in that event, cancel the conference.

9. Motions to Amend / Motions to Strike.

(a) Any motion to amend (including a motion for leave to amend) a pleading or any motion to strike any pleading or other document shall be made pursuant to the discovery dispute procedure set forth in Paragraph 8(g) above.

(b) Any such motion shall attach the proposed amended pleading (as well as a "redline" comparison to the prior pleading) or the document proposed to be stricken.

10. Technology Tutorials. Although technology tutorials are not required by the Court, they are appreciated and, if any party chooses to file such a tutorial, it shall be submitted on or before the date that the joint claim construction brief is filed.

11. Claim Construction Issue Identification. On [DATE], the parties shall exchange a list of claim term(s)/phrase(s) that they believe need construction and their proposed claim construction of those term(s)/phrase(s). This document will not be filed with the Court. Subsequent to exchanging that list, the parties will meet and confer to prepare a joint claim construction chart to be submitted two weeks prior to service of the opening claim construction

brief. The parties' joint claim construction chart must identify for the Court the term(s)/phrase(s) of the claim(s) in issue and must include each party's proposed construction of the disputed claim language with citation(s) only to the intrinsic evidence in support of their respective proposed constructions. All joint claim construction charts shall be in substantially the same form as the sample joint claim construction chart found in the "Forms" section of Magistrate Judge Tennyson's portion of the Court's website. Intrinsic evidence (including copies of the patent(s) at issue) shall NOT be attached to the joint claim construction chart and, instead, the parties shall include a joint appendix with the joint claim construction brief, and the joint appendix shall include a copy of the patent(s) at issue and portions of all relevant intrinsic evidence, as well as any additional evidence cited in the parties' briefing.

12. Claim Construction Briefing. Plaintiff shall serve, but not file, its opening brief, not to exceed 20 pages, on [DATE]. Defendant shall serve, but not file, its answering brief, not to exceed 30 pages, on [DATE]. Plaintiff shall serve, but not file, its reply brief, not to exceed 20 pages, on [DATE]. Defendant shall serve, but not file, its sur-reply brief, not to exceed 10 pages, on [DATE]. No later than [DATE], the parties shall file a joint claim construction brief. The parties shall copy and paste their unfiled briefs into one brief, with their positions on each claim term in sequential order, in substantially the form below. If the joint brief as submitted is more than 80 pages, the parties must certify that the page limits in the Scheduling Order have not been violated and provide a brief explanation (*e.g.*, formatting issues, listing of agreed-upon terms, etc.) as to why the brief is longer than 80 pages.

JOINT CLAIM CONSTRUCTION BRIEF

- I. Agreed-Upon Constructions
- II. Disputed Constructions

[TERM 1]

1. Plaintiff's Opening Position
2. Defendant's Answering Position
3. Plaintiff's Reply Position
4. Defendant's Sur-Reply Position

[TERM 2]

1. Plaintiff's Opening Position
2. Defendant's Answering Position
3. Plaintiff's Reply Position
4. Defendant's Sur-Reply Position

The parties should not include any general summaries of the law relating to claim construction. If there are any materials that would be submitted in an index, the parties shall submit them in a joint appendix accompanying the joint claim construction brief.

13. Hearing on Claim Construction. Beginning at _____ on [DATE], the Court will hear argument on claim construction. The parties need not include any general summaries of the law relating to claim construction in their presentations to the Court. On or before the date on which the joint claim construction brief is filed, the parties shall file a joint letter indicating the amount of time they are requesting for the hearing and whether they are requesting leave to present testimony at the hearing.

14. Case Dispositive Motions.

(a) All case dispositive motions, an opening brief, and affidavits, if any, in support of the motion shall be filed on or before [DATE] [a date approximately four months prior to the pretrial conference, the four months being calculated from the conclusion of the briefing]. Briefing will be presented pursuant to the Court's Local Rules. No case dispositive motion under

Federal Rule of Civil Procedure 56 may be filed more than ten (10) days before the above date without leave of the Court.

(b) Concise Statement of Facts. Any motion for summary judgment must be accompanied by a separate concise statement, not to exceed six (6) pages, which details each material fact that the moving party contends is essential for the Court's resolution of the summary judgment motion (not the entire case) and for which the moving party contends there is no genuine issue to be tried. Each fact shall be set forth in a separate numbered paragraph and shall be supported by specific citation(s) to the record.

Any party opposing the motion shall include with its opposing papers a response to the moving party's concise statement, not to exceed six (6) pages, which admits or disputes the facts set forth in the moving party's concise statement on a paragraph-by-paragraph basis. To the extent a fact is disputed, the basis of the dispute shall be supported by specific citation(s) to the record. Failure to respond to a fact presented in the moving party's concise statement of facts shall indicate that fact is not in dispute for purposes of summary judgment. The party opposing the motion may also include with its opposing papers a separate concise statement, not to exceed four (4) pages, which sets forth material facts as to which the opposing party contends there is a genuine issue to be tried. Each fact asserted by the opposing party shall also be set forth in a separate numbered paragraph and shall be supported by specific citation(s) to the record.

The moving party shall include with its reply papers a response to the opposing party's concise statement of facts, not to exceed four (4) pages, on a paragraph-by-paragraph basis. Failure to respond to a fact presented in the opposing party's concise statement of facts shall indicate that fact remains in dispute for purposes of summary judgment.

(c) Page limits combined with *Daubert* motion page limits. Each party is permitted to file as many case dispositive motions as desired, but each **SIDE** will be limited to a combined total of 40 pages for all opening briefs, a combined total of 40 pages for all answering briefs, and a combined total of 20 pages for all reply briefs, regardless of the number of case dispositive motions that are filed. In the event that a party files, in addition to a case dispositive motion, a *Daubert* motion to exclude or preclude all or any portion of an expert's testimony, the total amount of pages permitted for each **SIDE** for all case dispositive and *Daubert* motions shall be increased to 50 pages for all opening briefs, 50 pages for all answering briefs, and 25 pages for all reply briefs.¹

15. Applications by Motion. Except as otherwise specified herein, any application to the Court shall be by written motion. Any non-dispositive motion must contain the statement required by Local Rule 7.1.1.

16. 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, 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)

¹ The parties must work together to ensure that the Court receives no more than a **total** of **250 pages** (*i.e.*, 50 + 50 + 25 regarding one side's motions, and 50 + 50 + 25 regarding the other side's motions) of briefing on all case dispositive motions and *Daubert* motions that are covered by this scheduling order and any other scheduling order entered in any related case that is proceeding on a consolidated or coordinated pretrial schedule.

page submission (and, if the moving party, a single one (1) page reply). No separate briefing shall be submitted on *in limine* requests unless otherwise permitted by the Court.

17. Pretrial Conference. On [DATE], the Court will hold an in-person pretrial conference with counsel beginning at _____. Not later than seven (7) days before the pretrial conference, the parties shall file a joint proposed final pretrial order in compliance with Federal Rule of Civil Procedure 26(a)(3) and Local Rule 16.3(c) & (d)(4). Unless otherwise ordered by the Court, the parties shall comply with the timeframes set forth in Local Rule 16.3(d) for the preparation of the joint proposed final pretrial order.

The parties shall provide the Court two (2) double-sided courtesy copies of the joint proposed final pretrial order and all attachments. The proposed final pretrial order shall contain a table of contents and the paragraphs must be numbered.

18. Jury Instructions, Voir Dire and Special Verdict Forms. At least seven (7) days before the final pretrial conference, the parties shall file proposed voir dire, preliminary jury instructions, final jury instructions and special verdict forms pursuant to Local Rules 47.1(a)(2) and 51.1. The Court expects the parties to work together to submit joint proposed versions of the voir dire, preliminary jury instructions and final jury instructions, indicating within those joint submissions any differences between the parties' proposals. The foregoing submissions shall be accompanied by a courtesy copy containing electronic files of these documents, in Microsoft Word format, emailed to egt_civil@ded.uscourts.gov.

19. Trial. This matter is scheduled for a _____ day jury trial beginning at 9:30 a.m. on [DATE], with the subsequent trial days beginning at 9:00 a.m. Until the case is submitted to the jury for deliberations, the jury will be excused each day at 4:30 p.m. The trial will be timed, as counsel will be allocated a total number of hours in which to present their respective cases.

20. Post-Trial Briefing. Unless otherwise ordered by the Court, each ***SIDE*** is limited to a maximum of 20 pages of opening briefs, 20 pages of answering briefs, and 10 pages of reply briefs relating to any post-trial motions filed by that side, regardless of the number of motions filed.

UNITED STATES MAGISTRATE JUDGE

