UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO

LOCAL PATENT RULES

1. SCOPE OF LOCAL PATENT RULES

101.1 Citation.

These are the Local Rules of Practice for Patent Cases before the United States District Court for the Southern District of Ohio. They should be cited as "Pat.L.R." followed by the applicable rule number and subsection.

101.2 Application, Effective Date and Construction.

These Local Patent Rules shall take effect on September 1, 2009 (the "Effective Date") and shall apply to (1) each civil action filed in this Court on or after the Effective Date, which alleges infringement of a utility patent in a complaint, counterclaim, cross-claim or third party claim, or which seeks a declaratory judgment that a utility patent is not infringed, is invalid or is unenforceable ("Patent Case"), (2) each Patent Case transferred to this Court if the initial Rule 26(f) scheduling conference has not yet occurred (in this and the transferring Court) prior to the Effective Date, (3) each pending Patent Case if the initial Rule 26(f) scheduling conference has not yet occurred prior to the Effective Date, and (4) all other pending Patent Cases if just and practicable.

The Court, or the Parties with Court approval may accelerate, extend, eliminate, or modify the obligations or deadlines set forth in these Local Patent Rules based on the circumstances of any particular case, including, without limitation, the complexity of the case or the number of patents, claims, products, or parties involved.

If any motion filed prior to the Claim Construction Hearing provided for in Pat. L.R. 105.5 raises claim construction issues, the Court may, at its discretion, defer the motion until after completion of the disclosures, filings, or ruling following the Claim Construction Hearing.

The Local Civil Rules of this Court shall also apply to these actions, except to the extent that they are inconsistent with these Local Patent Rules.

2. GENERAL PROVISIONS

102.1 Governing Procedure.

(a) **Initial Scheduling Conference**. When the parties confer with each other pursuant to Fed.R.Civ.P. 26(f), in addition to the matters covered by Fed.R.Civ.P. 26, the parties shall discuss and address in the statement filed pursuant to Fed.R.Civ.P. 26(f), the following topics:

(1) Proposed modification of the deadlines provided for in these Local Patent Rules and the effect of any such modification on the date and time of the Claim Construction Hearing, if any;

(2) The scheduling of a Pre-Hearing Conference after the filing of the parties' opening claim construction briefs to address the format of the claim construction hearing, including such issues as whether the court will hear live testimony, the estimated length of the hearing and how the parties intend to educate the court on the technology issues;

(3) Whether parties are willing to consent to plenary magistrate judge jurisdiction under 28 U.S.C. §636(c). Any reference to this issue in the statement filed pursuant to Fed.R.Civ.P. 26(f) must conform to Rule 73(b) of the Federal Rules of Civil Procedure.

(b) **Further Scheduling Conferences**. To the extent that some or all of the matters provided for in Pat.L.R. 102.1(a)(1)-(3) are not resolved or decided at the Initial Scheduling Conference, the parties shall propose dates for further Scheduling Conferences at which such matters shall be decided.

102.2 Confidentiality/Default Protective Order.

The production of any document or information and any testimony given in any case governed by these Patent Local Rules shall be governed by the Default Protective Order attached hereto as Appendix A unless and until the Court enters a Protective Order.

102.3 Admissibility of Disclosures.

Except as hereinafter provided, statements, disclosures, or charts governed by these Local Patent Rules are admissible to the extent permitted by the Federal Rules of Evidence or Civil Procedure. However, the statements or disclosures provided for in Pat.L.R. 105.1 and 105.2 are not admissible for any purpose other than in connection with motions seeking an extension or modification of the time periods within which actions contemplated by these Local Patent Rules must be taken.

102.4 Relationship to Federal Rules of Civil Procedure.

Except as provided in this paragraph or as otherwise ordered, it shall not be a legitimate ground for objecting to an opposing party's discovery request (e.g., interrogatory, document request, request for admission, deposition question) or declining to provide information otherwise required to be disclosed pursuant to Fed.R.Civ.P. 26(a)(1) that the discovery request or disclosure requirement is premature in light of or otherwise conflicts with, these Local Patent Rules. A party may object, however, to the following categories of discovery requests (or decline to provide information in its initial disclosures under Fed.R.Civ.P. 26(a)(1)) on the ground that they are premature in light of the timetable provided in these Local Patent Rules:

(1) Requests seeking to elicit a party's claim construction position;

(2) Requests seeking to elicit from the patent claimant a comparison of the asserted claims and the accused apparatus, product, device, process, method, act, or other instrumentality;

(3) Requests seeking to elicit from an accused infringer a comparison of the asserted claims and the prior art; and

(4) Requests seeking to elicit from an accused infringer the identification of any opinions of counsel, and related documents, that it intends to rely upon as a defense to an allegation of willful infringement.

Where a party properly objects to a discovery request (or declines to provide information in its initial disclosures under Fed.R.Civ.P. 26(a)(1)) as set forth above, that party shall provide the requested information on the date on which it is required to provide the requested information to an opposing party under these Local Patent Rules, unless there exists another legitimate ground for objection.

The obligations under Fed.R.Civ.P. 26(e) to supplement disclosure and discovery responses shall apply to all Patent Initial Disclosures and all other discovery responses associated with these Local Patent Rules.

3. PATENT INITIAL DISCLOSURES

103.1 Initial Disclosures.

(a) Not later than fourteen (14) calendar days before the Initial Scheduling Conference, the parties shall exchange the initial disclosures required by Fed.R.Civ.P. 26(a)(1) ("Initial Disclosures").

(b) Not later than fourteen (14) calendar days after the Initial Scheduling Conference, the party asserting a claim of patent infringement shall produce or make available for inspection and copying, subject to agreement of the parties or order of the Court, among other items:

(1) Documents (e.g., contracts, purchase orders, invoices, advertisements, marketing materials, offer letters, beta site testing agreements, third party or joint development agreements, and any non privileged correspondence relating to such items and circumstances) sufficient to evidence each discussion with, disclosure to, or other manner of providing to a third party, a sale of or offer to sell or other manner of transfer, a product, system or process embodying the claimed invention prior to the application date of the patent in suit. A party's production of a document as required herein shall not constitute an admission that such document evidences or is prior art under 35 U.S.C. § 102;

(2) All documents evidencing the conception, reduction to practice, design, and development of each claimed invention, which were created on or before the application date of the patent in suit;

(3) Documents sufficient to evidence timing, places, parties and circumstances regarding any known use (whether the use was commercial, public, confidential, third-party or otherwise) of any product, system or process embodying the claimed invention prior to the application date of the patent in suit;

(4) All communications to or from the U.S. Patent Office for each patent in suit and for each patent on which a claim for priority is based; and

(5) All assignment and licensing documents supporting Plaintiff's standing to sue.

The producing party shall separately identify by production number which documents correspond to each category.

(c) Not later than thirty (30) calendar days after the Section 103.2 Disclosure of Asserted Claims and Infringement Contentions, the party opposing a claim of patent infringement shall produce or make available for inspection and copying: Source code, specifications, schematics, flow charts, white-papers, manuals, artwork, formulas, drawings or other documentation, including sales literature, sufficient to show the operation of any aspects or elements of each accused apparatus, product, device, process, method or other instrumentality identified in the Section 103.2 Disclosure of Asserted Claims and Infringement Contentions.

103.2 Disclosure of Asserted Claims and Infringement Contentions.

(a) Not later than thirty (30) calendar days after the Initial Scheduling Conference, a party claiming patent infringement must serve on all parties a "Disclosure of Asserted Claims and Infringement Contentions." Separately for each opposing party, the "Disclosure of Asserted Claims and Infringement Contentions" shall contain the following information:

(1) Each claim of each patent in suit that is allegedly infringed by each opposing party, <u>including for each claim the applicable statutory subsection of 35 U.S.C. 271 asserted</u>;

(2) Separately for each asserted claim, the identity of each accused apparatus, product, device, process, method, act, or other instrumentality ("Accused Instrumentality") of each opposing party of which the party claiming infringement is currently aware. This identification shall be as specific as possible. Each product, device, and apparatus must be identified by name, if known, or by any product, device, or apparatus which, when used, allegedly results in the practice of the claimed method or process;

(3) A chart identifying specifically where each element of each asserted claim is found within each Accused Instrumentality. Such charts shall include for each element that such party contends is governed by 35 U.S.C. § 112(6), a description of the claimed function of that element and the identity of the structure(s), act(s), or material(s) in the Accused Instrumentality that performs the claimed function;

(4) Whether each element of each asserted claim is claimed to be literally present or present under the doctrine of equivalents in the Accused Instrumentality, and if present under the doctrine of equivalents, the asserting party shall also explain each function, way, and result that it contends is equivalent, and why it contends that any differences are not substantial;

(5) For each claim which is alleged to have been indirectly infringed, an identification of any direct infringement and a description of the acts of the alleged indirect infringer that contribute to or are inducing that direct infringement. Insofar as alleged direct infringement is based on joint acts of multiple parties, the role of each such party in the direct infringement must be described.

(6) For any patent that claims priority to an earlier application, the stated priority date to which each asserted claim allegedly is entitled (the Stated Priority Date), and if the patent is the result of a continuation-in-part application or claims priority from a continuation-in-part application a chart shall be provided stating the Stated Priority Date for each element of each asserted claim; and

(b) If a party claiming patent infringement wishes to preserve the right to rely, for any purpose, on the assertion that its own apparatus, product, device, process, method, act, or other instrumentality practices the claimed invention, the party must identify, separately for each asserted claim, each such apparatus, product, device, process, method, act, or other instrumentality that incorporates or reflects that particular claim.

103.3 Document Production Accompanying Disclosure.

With the "Disclosure of Asserted Claims and Infringement Contentions," the party claiming patent infringement shall supplement its Initial Disclosures, if necessary, based upon the Initial Disclosures of the opposing party.

103.4 Invalidity Contentions.

(a) Not later than forty-five (45) calendar days after service upon it of the "Disclosure of Asserted Claims and Infringement Contentions" pursuant to Pat.L.R. 103.2, each party opposing a claim of patent infringement, shall serve upon all parties its "Invalidity Contentions." Invalidity Contentions must contain the following information:

(1) The identity of each item of prior art that allegedly anticipates each asserted claim or renders it obvious. Each prior art patent shall be identified by

its number, country of origin, and date of issue. Each prior art publication shall be identified, to the extent known, by its title, date of publication, author and publisher. Prior art under 35 U.S.C. § 102(b) shall be identified by specifying the item offered for sale or publicly used or known, the date the offer or use took place or the information became known, and the identity of the person or entity which made the use or which made and received the offer, or the person or entity which made the information known or to whom it was made known. Prior art under 35 U.S.C. § 102(f) shall be identified by providing the name of the person(s) from whom and the circumstances under which the invention or any part of it was derived. Prior art under 35 U.S.C. § 102(g) shall be identified by providing the identities of the person(s) or entities involved in and the circumstances surrounding the making of the invention before the patent applicant(s);

(2) Whether each item of prior art allegedly anticipates each asserted claim or renders it obvious. If a combination of items of prior art allegedly makes a claim obvious, each such combination and why it was obvious to make such combination, must be identified;

(3) A chart identifying where specifically in each alleged item of prior art each element of each asserted claim is found, including for each element that such party contends is governed by 35 U.S.C. § 112(6), a description of the claimed function of that element and the identity of the structure(s), act(s), or material(s) in each item of prior art that performs the claimed function; and

(4) Any grounds of invalidity based on indefiniteness under 35 U.S.C. § 112(2) or enablement or written description under 35 U.S.C. § 112(1) of any of the asserted claims.

103.5 Document Production Accompanying Invalidity Contentions.

With the "Invalidity Contentions," the party opposing a claim of patent infringement shall produce all non-privileged document(s), and/or make available for inspection all products, devices, processes or evidence not readily reproducible, supporting its "Invalidity Contentions," including, but not limited to, a copy of each item of prior art that allegedly anticipates each asserted patent and its related claims or renders them obvious.

103.6 Disclosure Requirements in Patent Cases Initiated by Declaratory Judgment Pleading.

(a) Invalidity Contentions If No Claim of Infringement. In all cases in which a party files a complaint or other pleading seeking a declaratory judgment that a patent is not infringed, is invalid, or is unenforceable, Pat.L.R. 103.2 and 103.3 shall not apply unless and until a claim for patent infringement is made by a party. If the defendant does not assert a claim for patent infringement in its answer to the complaint, no later than thirty (30) calendar days after the Initial Scheduling Conference, the party seeking

a declaratory judgment of invalidity must serve upon each opposing party its Invalidity Contentions that conform to Pat.L.R. 103.4 and produce or make available for inspection and copying the documentation described in Pat.L.R. 103.5.

(b) Application of Rules When No Specified Triggering Event Occurs. If the filings or actions in a case do not trigger the application of these Local Patent Rules under the terms set forth herein, the parties shall, as soon as such circumstances become known, meet and confer for the purpose of agreeing on the application of these Local Patent Rules to the case.

103.7 Amendment to Contentions.

Amendments or modifications of the Infringement Contentions or the Invalidity Contentions are permissible without leave of the Court, subject to other applicable rules of procedure and disclosure requirements if made in a timely fashion, asserted in good faith and without purpose of delay. Non-exhaustive examples of circumstances that may, absent undue prejudice to one of the parties, support a finding of good faith under this provision include, *inter alia*: information discovered or confirmed during fact discovery; information discovered, confirmed or provided by a party's consultant or expert after the party's contentions have been served; new product launches; amendments to the complaint or counterclaim adding or removing one or more asserted patents; information learned from or positions taken by another party during the exchange of contentions process set forth in Pat.L.R. 103; information learned from or positions taken by another party during the claim construction process set forth in Pat.L.R. 105; rulings made by the Court, such as the Court's Claim Construction ruling; and any circumstance that would support a finding of good cause under this provision.

An amendment or modification made more than sixty (60) days after the Court issues its Claim Construction Order can only be made by order of the Court upon a showing of good cause. Non-exhaustive examples of circumstances that may, absent undue prejudice to one of the parties, support a finding of good cause under this provision include, *inter alia*: a claim construction by the Court different from that proposed by the party seeking amendment; recent discovery of material, prior art despite earlier diligent search; and recent discovery of nonpublic information despite earlier diligent search.

103.8 Discovery regarding Contentions

These rules specifically allow for reasonable discovery of other possible infringing activities or invalidating grounds beyond the specific contentions identified by the patent holder in the Disclosure of Asserted Claims and Infringement Contentions or the accused infringer in the Invalidating Contentions.

4. ALTERNATIVE DISPUTE RESOLUTION

104.1 In addition to any Local Rule requirements of this Court, not later than thirty (30) days after the first Response to Invalidity Contentions is served by any party, counsel and a party representative with full settlement authority for each of the parties to the

action shall meet and confer to discuss possible mediation or arbitration regarding the claims and defenses pending in the action.

5. CLAIM CONSTRUCTION PROCEEDINGS

105.1 Exchange of Proposed Claim Terms and Phrases for Construction.

Not later than fourteen (14) calendar days after: (i) service of the Invalidity Contentions pursuant to Pat.L.R. 103.6; or (ii) an agreement of the parties to expedite claim construction following the Initial Scheduling Conference pursuant to Pat.L.R. 102.1(a): the parties shall simultaneously exchange lists of claim terms and phrases which that party contends should be construed by the Court, and identify any claim element which that party contends should be governed by 35 U.S.C. § 112(6). A failure to make a good faith effort to narrow the instances of disputed terms may expose counsel to sanctions, including those provided in 28 U.S.C. § 1927.

105.2 Exchange of Preliminary Claim Constructions, Extrinsic Evidence and Development of Joint Claim Construction and Prehearing Statement.

(a) Not later than twenty-one (21) days after the Pat. L.R. 105.1 exchange, the party which asserts the claim term or phrase needs to be construed by the Court (the "Asserting Party") shall provide all other parties (the "Receiving Party") with proposed Preliminary Claim Constructions of each such term or phrase. Each such "Preliminary Claim Construction" shall also, for each term which the Asserting Party contends is governed by 35 U.S.C. § 112(6), identify the structure(s), act(s), or material(s) corresponding to that term's function. The Asserting Party shall identify all references from the specification or prosecution history that support its proposed construction and designate any supporting extrinsic evidence including, without limitation, dictionary definitions, citations to learned treatises and prior art, and testimony of percipient and expert witnesses. Extrinsic evidence shall be identified by production number or by producing a copy if not previously produced. With respect to any supporting witness, percipient or expert, the Asserting Party shall also provide a general description of the substance of that witness' proposed testimony that includes a listing of any opinions to be rendered in connection with claim construction.

(b) Not later than forty (40) days after the Pat. L.R. 105.1 exchange, each Receiving Party shall provide all other parties with proposed responsive Preliminary Claim Constructions of each term or phrase originally construed by the Asserting Party. Each such "Preliminary Claim Construction" shall also, for each term which the Receiving Party contends is governed by 35 U.S.C. § 112(6), identify the structure(s), act(s), or material(s) corresponding to that term's function. The Receiving Party shall identify all references from the specification or prosecution history that support its proposed construction and designate any supporting extrinsic evidence including, without limitation, dictionary definitions, citations to learned treatises and prior art, and testimony of percipient and expert witnesses. Extrinsic evidence shall be identified by production number or by producing a copy if not previously produced. With respect to any supporting witness, percipient or expert, the Receiving Party shall also provide a

general description of the substance of that witness' proposed testimony that includes a listing of any opinions to be rendered in connection with claim construction.

(c) Not later than sixty (60) days after the Pat. L.R. 105.1 exchange, the parties shall meet and confer (i) for the purposes of limiting the terms in dispute by narrowing or resolving differences and facilitating the ultimate preparation of a Joint Claim Construction and Prehearing Statement; (ii) for the purposes of jointly identifying no more than ten (10) terms likely to be most significant to resolving the parties' dispute, including those terms for which construction may be case or claim dispositive; (iii) regarding whether the Court will hear live testimony at the Claim Construction Hearing; (iv) regarding whether the parties anticipate using expert witnesses for claim construction; (v) regarding the need for and any specific procedures or limits on discovery relating to claim construction, including depositions of witnesses, including expert witnesses; and (vi) regarding the order of presentation at the Claim Construction Hearing.

(d) Not later than eighty (80) days after the Pat. L.R. 105.1 exchange, the parties shall submit to the Court a Joint Claim Construction and Prehearing Statement, which shall contain the following information:

(i) The construction of those terms on which the parties agree;

(ii) Each party's proposed construction of each disputed term or phrase, together with an identification of all references from the specification or prosecution history that support that construction, and an identification of any extrinsic evidence known to the party on which it intends to rely either to support its proposed construction or to oppose any other party's proposed construction, including, but not limited to, as permitted by law, dictionary definitions, citations to learned treatises and prior art, and testimony of percipient and expert witnesses;

(iii) An identification of the terms or phrases whose construction will be most significant to the resolution of the case up to a maximum of ten (10). If the parties cannot agree on the ten (10) most significant terms, the parties shall identify the ones which they do agree are most significant and then they may evenly divide the remainder with each party identifying what it believes are the remaining most significant terms. However, the total terms identified by all parties as most significant cannot exceed ten (10). For example, in a case involving two (2) parties, if the parties agree upon the identification of five (5) terms as most significant, each may only identify two (2) additional terms as most significant; if the parties agree upon eight (8) such terms, each party may only identify only one (1) additional term as most significant;

(iv) The anticipated length of time necessary for the Claim Construction Hearing;

(v) Whether any party proposes to call one or more witnesses at the Claim Construction Hearing, the identity of each such witness, and for each

witness, a general summary of his or her testimony including, for any expert, each opinion to be offered related to claim construction.

The Joint Claim Construction and Prehearing Statement shall be in the format shown in Appendix "B". Each party shall also file with the Joint Claim Construction and Prehearing Statement an appendix containing a copy of each exhibit of intrinsic evidence cited by the party in the Joint Claim Construction and Prehearing Statements.

105.3 Completion of Claim Construction Discovery.

Not later than sixty (60) days after service and filing of the Joint Claim Construction and Prehearing Statement, the parties shall complete all discovery relating to claim construction, including any depositions with respect to claim construction of any witnesses, including experts, identified in the Joint Claim Construction and Prehearing Statement.

105.4 Claim Construction Briefing and Extrinsic Evidence.

(a) Not later than seventy-five (75) calendar days after filing of the Joint Claim Construction and Prehearing Statement pursuant to Pat.L.R. 105.2, each party shall serve and file an Opening Claim Construction Brief concerning the proposed construction of each claim term and phrase which the parties collectively have identified as being in dispute in each patent held by that particular party. Such Opening Claim Construction Brief shall also, for each element which the party contends is governed by 35 U.S.C. § 112(6), describe the claimed function of that element and identify the structure(s), act(s), or material(s) corresponding to that element.

(b) Not later than thirty (30) calendar days after service of the Opening Claim Construction Brief, each party may serve and file a Response to Opening Claim Construction Brief. Such Response shall further include a concise statement not to exceed five (5) pages as to whether the party objects to any another party's offer of extrinsic evidence.

(c) Prior to the Claim Construction Hearing, the Court may issue an order stating whether it will receive extrinsic evidence and, if so, the particular evidence that it will exclude and that it will receive, and any other matter the Court deems appropriate concerning the conduct of the hearing.

105.5 Claim Construction Hearing.

Subject to the convenience of the Court's calendar, thirty (30) calendar days following submission of the Response to the Claim Construction Brief specified in PAT.L.R. 105.4(b), the Court shall conduct a Claim Construction Hearing.

6. EXPERT WITNESSES

106.1 Disclosure of Experts and Expert Reports.

For issues other than claim construction to which expert testimony shall be directed, expert witness disclosures and depositions shall be governed by this Rule.

(a) No later than thirty (30) calendar days after the Court's ruling on claim construction each party shall make its initial expert witness disclosures required by F. R. Civ. P. 26 on the issues on which each bears the burden of proof.

(b) No later than thirty (30) calendar days after the first round of disclosures, each party shall make its initial expert witness disclosures required by F. R. Civ. P. 26 on the issues on which the opposing party bears the burden of proof.

(c) Unless otherwise ordered by the Court, no later than fourteen (14) calendar days after the disclosures in Pat.L.R. 106.1(b), each party shall make any rebuttal expert witness disclosures permitted by F. R. Civ. P. 26.

106.2 Depositions of Experts.

Depositions of expert witnesses disclosed under this Rule, if any, shall commence within fourteen (14) calendar days after rebuttal reports are served and shall be completed within sixty (60) calendar days after commencement of the deposition period.

7. TRIALS AND WILLFUL INFRINGEMENT

107.1 Timing of Trial.

Subject to the convenience of the Court's calendar, within eighteen (18) months following the initial Rule 26(f) Scheduling Conference, the Court shall conduct a Trial on all issues except willful infringement.

107.2 Willful Infringement.

If a patent holder has obtained a judgment of patent infringement against an accused infringer of at least one valid claim in the Patent Case, and all other claims of infringement and the accused infringer's legal and equitable defenses have been fully adjudicated, a scheduling conference will take place within fourteen (14) days to establish a scheduling order setting forth an accelerated schedule for the completion of fact and expert discovery on the issue of willful infringement.

107.3 Stay on Willfulness Discovery

Discovery of any attorney-client or work product privileged documents, information or testimony related to willful infringement in a Patent Case by an accused infringer is automatically stayed in the Patent Case until the patent holder has obtained

a judgment of patent infringement in the Patent Case against the accused infringer of at least one valid claim, and all other claims of infringement and legal defenses have been fully adjudicated.

8. PATENT LOCAL RULES LAW AND MOTION MEET AND CONFER REQUIREMENTS

108.1 In addition to any Local Rule requirements of this Court, every motion relating to the parties' obligations under these rules must include a statement that the parties met and conferred in person or by telephone in order to resolve the dispute by agreement or at least narrow the issues.

APPENDIX A

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO

	:	**CASE NO. ____________________**
PLAINTIFF,	:	**[JUDGE ______________________]**
V.	:	
DEFENDANT.	:	

DEFAULT PROTECTIVE ORDER

The parties to this action recognize that disclosure and discovery activity are likely to arise that will require the disclosure of trade secrets, confidential research, development, manufacturing, financial, process, marketing, and business information, or other commercial information within the meaning of Federal Rule of Civil Procedure 26(c). The parties believe that good cause exists to protect this information from public disclosure. In the absence of a suitable Protective Order safeguarding the confidentiality of such information, the parties would be hampered in their ability to produce such information.

Accordingly, the parties hereby stipulate as follows, subject to the approval of the Court:

1. DESIGNATION OF PROTECTED MATERIAL

1.1 This Order shall govern all documents and other products of discovery

obtained by the parties from one another, and from third parties, all information copied or derived therefrom, as well as all copies, excerpts, summaries or compilations thereof, including documents produced pursuant to requests authorized by the Federal Rules of Civil Procedure, answers to interrogatories, deposition transcripts, responses to requests for admission, affidavits, declarations, expert reports, and other such material and information as may be produced during the course of this litigation.

1.2 In connection with discovery proceedings in this action, any party or third party may designate any non-public document, material, or information as "CONFIDENTIAL" or "HIGHLY CONFIDENTIAL – ATTORNEY EYES ONLY" (collectively referred to as "Protected Material").

(a) A party may designate as "CONFIDENTIAL" any information, document, or thing that the party reasonably and in good faith believes to contain confidential information within the meaning of Fed. R. Civ. P. 26(c)(7) used by it in, or pertaining to, its business and that is not generally known, and which that party would not normally reveal to third parties or, if disclosed, would require such third parties to maintain in confidence.

(b) A party may designate as "HIGHLY CONFIDENTIAL – ATTORNEY EYES ONLY" such materials as the party reasonably and in good faith believes to contain particularly sensitive technical information relating to research for and production of current products; technical, business, and research information regarding future products; non-public and highly sensitive financial information; marketing and sales information, such as marketing plans and forecasts, customer lists, pricing data, cost data, customer orders, and customer

quotations; any pending or abandoned patent applications, foreign or domestic; and such other documents, information, or materials that relate to other proprietary information that the designating party reasonably believes is of such nature and character that disclosure of such information would be harmful to the designating party.

1.3 The following information shall not be designated or protected under this Protective Order:

(a) Information that is in the public domain at the time of disclosure, including patent file histories, publicly available prior art publications, catalogs and other advertising materials, press releases, and publicly-filed financial statements;

(b) Information that at any time is made public through no act of a non-designating party;

(c) Information that the designating party has not undertaken with others to maintain in confidence and that is in the possession of or becomes available to the receiving party other than through discovery in this action, but only if the receiving party can show by written documentation that the information independently came into its rightful possession; or

(d) Information that is independently developed by the receiving party, as reflected by written documentation demonstrated to be in existence prior to production by the party claiming confidentiality.

1.4 Any documents or things produced pursuant to a discovery request or other written materials exchanged by the parties (including discovery responses, letters,

and briefs) that a party desires to designate as Protected Material shall be so designated by marking each page of the document, paper or thing CONFIDENTIAL or HIGHLY CONFIDENTIAL – ATTORNEY EYES ONLY, as appropriate, and indicating the identity of the producing party (e.g., through the use of an identifying prefix to the document identification (Bates) number).

1.5 In the event a party may make available certain of its files for inspection by another party, which files may contain non-confidential material as well as material that may be subject to protection under this Protective Order, with the intent that following such inspection the inspecting party will designate certain of the inspected documents to be copied and furnished to it, such files need not be marked with either confidentiality designation in advance, but shall all be treated as HIGHLY CONFIDENTIAL – ATTORNEY EYES ONLY materials. Only those persons identified in paragraph 2.2 below as permitted to view HIGHLY CONFIDENTIAL – ATTORNEY EYES ONLY materials may be present at any such inspection. When the producing party copies the documents to furnish to the inspecting party, the producing party shall mark Protected Material with the appropriate confidentiality designation to the extent warranted under paragraph 1.2.

1.6 Whenever a deposition involves a disclosure of Protected Material, the following procedures shall apply:

(a) Any party may designate any portion or all of a deposition as CONFIDENTIAL or HIGHLY CONFIDENTIAL – ATTORNEY EYES ONLY by notifying the other parties on the record during the deposition. The Court Reporter shall be asked to make the appropriate confidentiality designation on

each page of the transcript that contains CONFIDENTIAL or HIGHLY CONFIDENTIAL – ATTORNEY EYES ONLY information. At that time, all persons not qualified to receive that category of information shall leave the room prior to continuation of the deposition and until the conclusion of such designated testimony.

(b) Any party may also designate any portion or all of a deposition as CONFIDENTIAL or HIGHLY CONFIDENTIAL – ATTORNEY EYES ONLY by notifying the other parties separately in writing within thirty days of receipt of the transcript. In such event, the parties shall confer as to the most convenient way to segregate the designated portions of the transcript. All information disclosed at a deposition and all information contained in deposition transcripts shall be treated as HIGHLY CONFIDENTIAL – ATTORNEY EYES ONLY for a period of thirty days after the receipt of the transcript to permit adequate time for review of the transcript and notice to other counsel regarding any designation as Protected Material by a designating party.

2. ACCESS TO AND USE OF PROTECTED MATERIAL

2.1 Protected Material, and all summaries, compilations, and derivations thereof, whether oral or written, shall be maintained in confidence, shall be used solely in the preparation, prosecution, or trial of this action and not for any other purpose, and may be disclosed only as provided in the following paragraphs.

2.2 Information which has been designated as HIGHLY CONFIDENTIAL – ATTORNEY EYES ONLY may be disclosed only to:

(a) The outside attorneys of record and their employees who are

engaged in assisting in this action; provided that such does not include any persons participating in the prosecution of any present or future patent application (including the reexamination or reissue of any present or future patent) that is a counterpart to or related to the patents-in-suit ("participating" in such prosecution includes preparing or reviewing patent applications, reviewing office actions, preparing or reviewing responses to office actions, and engaging in any discussion or other communication regarding the scope or validity of any claims in such patent applications or in the patents that are the subject of such reexamination or reissue); provided that this exclusion does not apply to persons whose involvement with the prosecution of such patents or patent applications is limited to administrative oversight for billing or project assignment purposes;

(b) [*Optional*: The following in-house counsel of a receiving party, (1) who has no involvement in competitive decision-making or in patent prosecution involving _________ [specify subject matter areas], (2) to whom disclosure is reasonably necessary for this litigation, and (3) who has signed the "Agreement to Be Bound by Protective Order" in Exhibit A, may have access: ________;]

(c) Independent consultants or experts retained by the party or its attorneys in connection with this action, including technical experts, damage and industry experts, patent experts, and jury or trial consultants, together with their employees engaged in assisting in this action (including mock jurors), but only subject to the provisions of paragraph 2.5 below; provided that such does not include any persons participating in the prosecution of any present or future patent application (including the reexamination or reissue of any present or future

patent) that is a counterpart to or related to the patents-in-suit ("participating" in such prosecution includes preparing or reviewing patent applications, reviewing office actions, preparing or reviewing responses to office actions, and engaging in any discussion or other communication regarding the scope or validity of any claims in such patent applications or in the patents that are the subject of such reexamination or reissue); provided that this exclusion does not apply to persons whose involvement with the prosecution of such patents or patent applications is limited to administrative oversight for billing or project assignment purposes;

(d) The Court and its personnel;

(e) Court reporters and their personnel engaged in proceedings incident to preparation for trial or trial;

(f) Professional vendors and their employees, including copy services, trial graphics services, and translation services, engaged by counsel; and

(g) Any person who is indicated on the face of a document to have been an author, addressee, or copy recipient of the document, or the original source of the information.

2.3 Information which has been designated as CONFIDENTIAL may be disclosed only to:

(a) The persons identified in paragraph 2.2; and

(b) Any party or employee of a party to whom disclosure is reasonably necessary for this litigant and litigation who has signed the “Agreement to Be Bound by Protective Order” in Exhibit A.

2.4 [*Optional – when 2.2(b) not used*: Notwithstanding the provisions of

paragraph 2.2 above, in order to permit full evaluation of the parties' respective positions, the following persons shall also be permitted access to all motions for summary judgment and all supporting, opposition and reply briefs or memoranda filed in connection with any such motions; all briefs or memoranda filed in connection with claim construction; all reports of testifying experts; and all exhibits or attachments to any of the above: _____________.]

2.5 Protected Material shall be disclosed to consultants and experts only upon the following terms:

(a) Prior to any disclosure, the consultant or expert shall be identified in writing to the other parties' counsel by name, address, and corporate, business or other professional affiliation or employment, together with a copy of the expert's *curriculum vitae* and a list of the expert's litigation or consulting engagements for the past three years;

(b) Unless another party notifies the proposing party of any objection within five business days after notification (by fax, by email, or by overnight mail), the consultant or expert shall thereafter be allowed to have access to Protected Material pursuant to the terms and conditions of this Protective Order;

(c) In the event of a timely objection, which objection shall be made in good faith and on reasonable grounds, the proposing party shall refrain from disclosure of Protected Material to the consultant or expert until the objection has been resolved between the parties or ruled upon by the Court;

(d) The parties shall endeavor in good faith to resolve the dispute without calling upon the intervention of the Court. The burden is on the objecting

party to seek the intervention of the Court by appropriate motion to preclude the proposing party from disclosing Protected Material to the consultant or expert. If no such motion is filed within ten business days of receipt of the objection, the proposing party may disclose Protected Material to the consultant or expert as if no objection had been raised; and

(e) No party shall use its right to object to a proposed consultant or expert to unreasonably interfere with the ability of another party to prepare for trial through the use of consultants and experts.

2.6 Prior to receiving any Protected Material, any persons described in sections (b), (c), (e), or (f) of paragraph 2.2 shall be furnished with a copy of this Protective Order and shall execute a copy of the "Agreement to Be Bound by Protective Order" attached as Exhibit A. A copy of the signed Agreement shall be maintained by counsel for the party providing such access.

2.7 Nothing in this Protective Order shall prevent any counsel of record from utilizing Protected Material in the examination of any person who is reasonably alleged to be the author or source of the Protected Material or who is reasonably believed to have knowledge relating thereto. In addition,

(a) Parties and present employees of the parties, or employees of third parties, may be examined as a witness at depositions and trial and may testify concerning all Protected Material produced or designated by that party, or by the employee's employer if a third party.

(b) Former employees of the parties, or former employees of third parties, may be examined and may testify concerning all Protected Material

produced or designated by the party or third party that formerly employed such person and which pertains to the period or periods of his/her employment and prior thereto; and

(c) Former experts of the parties may be examined and may testify concerning all Protected Material produced or designated by the respective party which pertains to the subject matter of his/her consultation.

2.8 Nothing in this Protective Order shall preclude any party from introducing Protected Material into evidence at any evidentiary hearing or at trial. However, if anyone intends to introduce or refer to Protected Material at any hearing or trial, the party wishing to make the disclosure shall first notify the producing party and provide them with an opportunity to object and/or to ask the Court to take appropriate precautionary procedures (e.g., clearing the Courtroom, sealing the record, etc.).

2.9 Nothing in this Protective Order shall bar or otherwise restrict any attorney from rendering advice to his or her clients with respect to this litigation and referring to or relying generally upon his examination of Protected Material, provided that in rendering such advice and in otherwise communicating with his or her clients, the attorney shall not disclose the content of such information.

2.10 All persons in possession of Protected Material shall exercise reasonable and appropriate care with regard to the storage, custody, and use of such information in order to ensure that the provisions of this Protective Order are observed and the confidential nature of the information is maintained.

3. CHALLENGES TO CONFIDENTIALITY DESIGNATIONS

3.1 Any party believing that particular information has been improperly

marked, i.e., that it is not in fact CONFIDENTIAL or HIGHLY CONFIDENTIAL – ATTORNEY EYES ONLY, may challenge such designation at any time by raising the issue, in writing to the designating party, and specifically identifying, by document identification (Bates) number, by deposition page and line, or by other appropriate specific identifier, the information whose confidentiality status is challenged. Within ten business days of receipt of such writing, the designating party shall either remove or reduce the designation, or respond that it has reviewed the matter and continues to maintain the designation in good faith.

3.2 The parties shall endeavor in good faith to resolve any such dispute without calling upon the intervention of the Court. If the designating party maintains its designation and the parties are unable to reach agreement, the challenging party may bring the issue to the Court. The party asserting confidentiality shall have the burden of establishing the appropriateness of the designation, except that a party claiming that information designated by the other as confidential is in the public domain shall have the burden of proving such public knowledge.

3.3 Challenged information shall be treated as designated until the resolution of the dispute by the parties or ruling by the Court.

4. FILING OF PROTECTED MATERIAL

This Protective Order does not authorize filing protected materials under seal. According to the authority of *Procter & Gamble Co. v. Bankers Trust Co.*, 78 F.3d 219 (6th Cir. 1996), no document may be filed with the Court under seal without prior permission as to each such filing, upon motion and for good cause shown, including the legal basis for filing under seal. Unless the Court orders otherwise, all sealed

documents shall be filed according to S.D. Ohio Civ. R. 79.3.

5. TERMINATION OF LITIGATION

5.1 The obligations of this Protective Order shall survive the termination of the action and continue to bind the parties. Within sixty days after termination of this action by judgment, settlement, or otherwise from which no appeal can be brought, each party shall destroy all documents containing or disclosing Protected Material of any other party. Each party's outside litigation counsel shall have the right to retain one copy of the pleadings; of motions, memoranda, documents and papers filed with the Court; of deposition transcripts and exhibits; and of any documents constituting work product.

6. THIRD PARTY DISCOVERY

6.1 In the event that any third party shall be called upon, by subpoena or otherwise, to provide or produce documents or information considered CONFIDENTIAL or HIGHLY CONFIDENTIAL – ATTORNEY EYES ONLY by such third party, such third party may elect to have its information treated in accordance with the terms of this Protective Order by so notifying counsel for all parties in writing. Upon service of such notice, such third party may designate documents and information as CONFIDENTIAL or HIGHLY CONFIDENTIAL – ATTORNEY EYES ONLY in the manner set forth in this Protective Order, and such third party's designated information shall be protected in the same manner as that of the parties to this action.

7. INADVERTENT DISCLOSURE

7.1 If a party inadvertently discloses any document or thing containing information that it deems CONFIDENTIAL or HIGHLY CONFIDENTIAL – ATTORNEY EYES ONLY without designating it pursuant to this Protective Order, the disclosing

party shall promptly upon discovery of such inadvertent disclosure inform the receiving party in writing, forwarding a replacement copy of the inadvertently disclosed material properly marked with the appropriate confidentiality designation. The receiving party shall thereafter treat the information as if it had been properly marked from the outset and shall make a reasonable effort to retrieve and destroy the unmarked version of the inadvertently disclosed material. Disclosure by the receiving party to unauthorized persons before being notified of the inadvertent disclosure shall not constitute a violation of this Protective Order. Nothing in this Protective Order shall preclude the receiving party from challenging the confidentiality designation of the late-marked material pursuant to the provisions of paragraph 3.

7.2 The inadvertent or mistaken production or disclosure of documents or other information subject to the attorney-client privilege, the work product doctrine, or other privilege shall not be deemed a waiver of a claim of privilege, either as to the specific information disclosed or as to any other related information. If a producing party inadvertently produces or otherwise discloses to a receiving party information that is subject to such privilege or immunity, the producing party shall promptly upon discovery of such disclosure so advise the receiving party in writing and request that the inadvertently disclosed information be returned. The receiving party shall return all copies of the inadvertently produced material within five business days of receipt of the request. Any notes or summaries referring or relating to any inadvertently produced privileged material shall be destroyed. Nothing in this Protective Order shall preclude the receiving party returning the inadvertently produced material from seeking an order compelling the production of information previously produced inadvertently.

8. MISCELLANEOUS PROVISIONS

8.1 If Protected Material in the possession of any receiving party is subpoenaed by any court, administrative or legislative body, or by any other person purporting to have authority to subpoena such information, or is the subject of any discovery request under Rules 30-36 of the Federal Rules of Civil Procedure or any comparable rule of court or of any adjudicative body (such subpoena or discovery request collectively referred to as a "Third Party Request") the party to whom the Third Party Request is directed will not produce such information without first giving prompt written notice (including a copy of the Third Party Request) to the attorneys of record for the producing party, no more than three business days after receiving the Third Party Request. The party receiving the Third Party Request must also promptly inform in writing the party who caused the Third Party Request to issue in the other litigation that some or all the material covered by the Third Party Request is subject to this Protective Order. The party receiving the Third Party Request must deliver a copy of this Protective Order promptly to the party in the other action that caused the Third Party Request to issue.

8.2 The producing party shall bear the burden and expense of seeking protection in court of its own Protected Material, and nothing in this Protective Order should be construed as authorizing or encouraging a party receiving a Third Party Request in this action to disobey a lawful directive from another court. Disclosure of information in response to a properly issued Third Party Request shall not constitute a violation of this Protective Order.

8.3 This Protective Order may be modified by further Order of the Court, or by

agreement of the parties or their counsel and approved by the Court, and is without prejudice to the rights of any party to move for relief from any of its provisions, or to seek or agree to different or additional protection for any particular material or information.

8.4 Treatment by counsel or the parties of information designated CONFIDENTIAL or HIGHLY CONFIDENTIAL – ATTORNEY EYES ONLY as designated shall not be construed as an admission by any party that the designated information contains trade secrets or other proprietary or confidential information. Conversely, failure to so designate shall not constitute a waiver of any party's claims, either within or outside this action, that any such documents or information do contain trade secrets or other proprietary or confidential information.

8.5 No party shall be obligated to challenge the propriety of any designation, and failure to challenge a claim of confidentiality at the time of receipt shall not constitute a waiver of the right to challenge a confidentiality designation at any later time.

So Stipulated:

Dated: ______________________ ____________________________
Counsel for Plaintiff

Dated: ______________________ ____________________________
Counsel for Defendant

So Ordered:

Dated: ______________________ ____________________________
United States District (or Magistrate) Judge

EXHIBIT A

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO

	:	**CASE NO. ___________________**
	:	
PLAINTIFF,	:	**[JUDGE _____________________]**
	:	
V.	:	
	:	
	:	
DEFENDANT.	:	
	:	

AGREEMENT TO BE BOUND BY DEFAULT PROTECTIVE ORDER

I, _______________________, hereby acknowledge that I received a copy of the Default Protective Order in this action. I read and understood the Protective Order and agree to be bound by its provisions. I agree not to copy or use any CONFIDENTIAL or HIGHLY CONFIDENTIAL – ATTORNEY EYES ONLY information that may be provided to me for any purpose other than in connection with my retention in connection with this action, and I agree not to reveal any such information to any person not authorized by this Protective Order.

I further acknowledge and understand that a violation of this Protective Order may subject me to penalties of the Court, and I hereby submit to the jurisdiction of the United States District Court for the Southern District of Ohio, in connection with any proceedings concerning enforcement of this Protective Order.

Dated: _____________________ ___________________________

APPENDIX B

JOINT DISPUTED CLAIM TERMS CHART** Plaintiff v. Defendant, Civ. Action No. 00-000-XXX

Disputed Claim Term	Plaintiff Proposed Construction	Plaintiff Citation To Intrinsic Evidence	Plaintiff Citation to Proposed Extrinsic Evidence	Defendant Proposed Construction	Defendant Citation To Intrinsic Evidence	Defendant Citation to Proposed Extrinsic Evidence
1. “Term 1”						
2. “Term 2”						
3. “Term 3”						
4. “Term 4”						

* This chart shall not contain legal argument.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF OHIO

Plaintiff, v. Defendant.)) Civil Action No.

MODEL SCHEDULING ORDER FOR USE IN PATENT CASES

AND NOW, this ________ day of ________________, 20__,

IT IS ORDERED that this action is placed under the Local Patent Rules of this Court for pretrial proceedings and all provisions of these Rules will be strictly enforced.

IT IS FURTHER ORDERED that counsel shall confer with their clients prior to all scheduling, status, or pretrial conferences to obtain authority to participate in settlement negotiations which may be conducted or ordered by the Court.

IT IS FURTHER ORDERED that compliance with provisions of Local Rule 16 and the Local Patent Rules shall be completed as follows:

(1) The parties shall move to amend the pleadings or add new parties by __________________

(2) The party claiming patent infringement shall produce or make available for inspection and copying the documents set forth in Pat. L.R. 103.1(b) by ________________; [*14 calendar days after the Initial Scheduling Conference; Pat. L.R. 103.1(b)*]

(3) The party claiming patent infringement must serve on all parties the Disclosure of Asserted Claims and Infringement Contentions described in Pat. L.R. 103.2 by ________________; [*30 calendar days after the Initial Scheduling Conference; Pat. L.R. 103.2*]

(4) The party opposing a claim of patent infringement shall produce or make available for inspection and copying the documents set forth in Pat. L.R. 103.1(c) by ________________; [*30 calendar days after the Disclosure of Asserted Claims and Infringement Contentions described in Pat. L.R. 103.2; Pat. L.R. 103.1(c)*]

(5) The party claiming invalidity must serve on all parties the Disclosure of Invalidity Contentions described in Pat. L.R. 103.4 by ______________; [45 calendar days after service of *Disclosure of Asserted Claims and Infringement Contentions; Pat. L.R. 103.4*]

(6) Each party will simultaneously exchange the Proposed Claim Terms and Phrases for Construction described in Pat. L.R. 105.1 by________________; [*14 calendar days after service of the Invalidity Contentions; Pat. L.R. 105.1*]

(7) Each party contending a claim term or phrase should be construed by the Court shall provide the parties with the proposed Preliminary Claim Constructions of each such term or phrase described in Pat. L.R. 105.2(a) and supporting evidence by________________; [*21 calendar days after the Pat. L.R. 105.1 exchange; Pat. L.R. 105.2(a)*]

(8) Each party disputing a proposed "Preliminary Claim Construction" shall provide all parties with their proposed constructions for the disputed term or phrase ("Responsive Claim Construction") described in Pat. L.R. 105.2(b) and supporting evidence by________________; [*40 calendar days after the Pat. L.R. 105.1 exchange; Pat. L.R. 105.2(b)*]

(9) The parties shall meet and confer regarding claim construction issues as described in Pat. L.R. 105.2(c) by________________; [*60 calendar days after the Pat. L.R. 105.1 exchange; Pat. L.R. 105.2(c)*]

(10) The parties shall file a Joint Disputed Claim Terms Chart as described in Pat. L.R. 105.2(e) by ________________; [*80 calendar days after the Pat. L.R. 105.1 exchange; Pat. L.R. 105.2(e)*].

(11) The parties shall complete discovery related to Claim Construction as described in Pat. L.R. 105.3 by ________________; [*60 calendar days after the filing date of the Pat. L.R. 105.2(e) Joint Disputed Claim Terms Chart; Pat. L.R. 105.3*]

(12) Each of the Parties shall file and serve an Opening Claim Construction Brief by ________________; [*75 calendar days after filing of the Pat. L.R. 105.2(e) Joint Disputed Claim Terms Chart; Pat. L.R. 105.4 (a)*]

(13) Each of the Parties may file and serve a response to the Opening Claims Construction Brief, and any objections to extrinsic evidence by ______________; [*30 calendar days after service of the opening claim construction brief. Pat. L.R. 105.4(b)*]

(14) The Court shall conduct a hearing on the issue of Claim Construction on ________________, [*30 calendar days after submission of the reply, subject to the convenience of the Court's calendar; Pat. L.R. 105.5*]

(15) The parties shall complete fact discovery by ________________, and all interrogatories, depositions, requests for admissions, and requests for production shall be served within sufficient time to allow responses to be completed prior to the close of discovery;

(16) Each party shall make its initial expert witness disclosures, as required under Rule 26, on the issues on which each bears the burden of proof by

_____________, [*60 days after court's ruling on claim construction; Pat. L.R. 106.1(a)*]

(17) Each party shall make its initial expert witness disclosures, as required under Rule 26, on the issues on which the opposing party bears the burden of proof by _____________ [*30 days after the first round of expert disclosures; Pat. L.R. 106.1(b)*]

(18) Rebuttal expert witness disclosures are to be made by ______________ [*14 calendar days after second round of expert disclosures; Pat. L.R. 106.1(c)*]

(19) Expert Depositions, if any, shall be completed by _____________; [*60 days after commencement of deposition period; Pat. L.R. 106.2*]

(20) Motions for summary judgment with evidentiary material and accompanying brief, if appropriate, shall be filed by ______________, responses to such motions shall be filed within ________ days thereafter and reply briefs shall be filed within ________ days thereafter. Surreply briefs shall not be filed unless approved/requested by the Court;

(21) All parties shall file an indication whether or not they are willing to proceed to trial in front of a Magistrate Judge by ____________;

(22) The Court shall conduct a pretrial conference on ________, at __________ ;

(23) The trial shall commence on ____________, at _________ (time), Courtroom No. _______.

____
United States District (or Magistrate) Judge

cc: All Counsel of Record