

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION**

***,		
Plaintiff,	:	Case No.
	:	
v.	:	Hon. Sandra S. Beckwith
	:	
***,	:	
Defendant	:	

**CASE MANAGEMENT AND SCHEDULING ORDER
FOR PATENT LITIGATION**

I. FINAL PRETRIAL & TRIAL DATES

The above captioned case is set for trial on _____. The final pretrial/settlement conference is set for _____ before the Honorable Sandra S. Beckwith, United States District Judge.

Trial counsel and their clients shall be present at the final pretrial/settlement conference unless otherwise excused by the Court prior to the conference. The parties must have exchanged offers and demands at least forty-eight (48) hours prior to the conference and have full authority to discuss settlement at the conference.

II. TRIAL ASSIGNMENTS

Patent cases are scheduled for trial on a non-trailing docket and take precedence over non-patent civil cases scheduled during the same trial setting period. Criminal cases may also be scheduled during the trial setting period and will take precedence over patent cases under the Federal Speedy Trial Act. Patent cases so scheduled will be held on a standby basis until preceding criminal cases are disposed of. You are responsible for monitoring the progress of your case. To do so, you may call my Case Manager, Mary Brown, at 513/564-7520. If your case should settle, you must immediately notify Mrs. Brown.

NOTE: Should a case settle after 12:00 Noon on the business day immediately preceding the trial date, the Court may assess against either or both parties the costs of summoning a jury. A case will be considered settled for the purposes of this provision when notice thereof is given to the Court. A hearing will be held before such costs are assessed, if requested by the parties.

III. CONTINUANCE OF TRIAL

Ordinarily, counsel will receive three to six months advance notice of the trial date. The Court will defer to a prior setting of any Court of record if advised within fifteen (15) days following notice of trial. Continuances may be granted for reasons of health of trial counsel or parties. The Court will generally deny a continuance for any other reason.

IV. DISCOVERY

All non-expert discovery must be completed by _____. All expert discovery must be completed by _____. Discovery shall be initiated so as to enable the opposing party to serve a response within the period allowed by the rules but in advance of this deadline. Discovery requested before the discovery cutoff date, but not scheduled for completion before the discovery closing date, does not comply with this Notice. No depositions may be scheduled to occur after the discovery cutoff date. All discovery-related motions must be filed no later than the discovery cutoff date. In structuring their discovery requests, counsel are reminded that Southern District of Ohio Local Rule 37.1 requires exhaustion of extrajudicial means for resolving discovery differences prior to filing motions to compel and motions for protective orders.

Discovery may continue beyond the cutoff date by agreement of counsel or by order of the Court. No supervision or intervention by the Court, such as a Rule 37 proceeding, will occur after the cutoff date without a showing of extreme prejudice. No trial date will be vacated because of information acquired in post-cutoff discovery. The Court expects discovery disputes to be resolved by counsel. Discovery motions that do not comply with S.D. Ohio Rules 37.1 and 37.2 will not be accepted. Attorney's fees will normally be assessed against the losing party pursuant to Fed.R.Civ.P. 37. If a pending discovery motion should jeopardize a trial date, counsel are to notify the Court immediately.

V. EXPERTS

The plaintiff must identify its expert witnesses by _____ and must provide expert witness reports by _____. The plaintiff must file a Notice of Compliance within 10 days of the latter of these two dates.

The defendants must identify its expert witnesses by _____ and must provide expert witness reports by _____. The defendant must file a Notice of Compliance within 10 days of the latter of these two dates.

If the Court deems it necessary, it may appoint an expert to advise and orient the Court regarding any issues that may arise during the case. If such an expert is appointed, the Court will appraise the parties of the substance of his communications with the expert. The court-appointed expert may contact the parties regarding specific issues, but the parties are prohibited from initiating contact with the court-appointed expert. Prior to trial, the Court or the parties may determine that the court-appointed expert should testify at trial. In such an event, the court-appointed expert will be required to prepare an expert report, and the parties may conduct discovery regarding any conclusions or opinions contained in the report. The parties will bear any fees and costs associated with the appointment of the expert, preparation of the expert report, and trial appearance by the expert if such an appearance is requested by the Court. If a party calls the court-appointed expert at trial, that party must bear any fees and costs associated with the appearance of the expert at trial.

[VI. BIFURCATION

To ensure the orderly and efficient resolution of this case, the court bifurcates (*describe claims*) for separate trial, following the trial of plaintiff's patent infringement claims, pursuant to Fed.R.Civ.P. 42(b). This case management order shall, therefore, govern only the proceedings relevant to the patent validity and infringement issues, which will be referred to as Phase I of this litigation.]

[VII. INFORMAL CONFERENCE

On _____, the Court will conduct an informal, off-the-record conference, designed to acquaint the Court with the patents in suit and the claims and defenses of the parties. Counsel should be prepared to demonstrate the patented and accused items, by use of the items themselves (if practicable) or photographs or models. The conference will take place at the Potter Stewart United States Courthouse, Cincinnati, Ohio.]

VIII. DISCLOSURE OF PRELIMINARY INFRINGEMENT CONTENTIONS

Any party asserting patent infringement claims or counterclaims must file and serve disclosures of the following information by _____

- a. Each patent claim that is allegedly infringed by each opposing party;
- b. For each asserted claim, the accused product of each opposing party of which the party is aware. This identification shall be as specific as possible. Each product must be identified by name or model number, if known. If a method or process is allegedly infringed, the method or process must be identified by name, if known, or by any product that, when used, allegedly results in the practice of the claimed method or process;
- c. A chart identifying specifically where each element of each asserted patent claim is found within each accused product, including for each element that such party contends is governed by 35 U.S.C. § 112, (paragraph 6), the identity of the structure(s), act(s), or material(s) in the accused product that performs the claimed function. The chart shall state particular theories of infringement with sufficient specificity to provide the defendant with notice of infringement beyond which is provided by the mere language of the patent claims themselves;
- d. Whether each element of each asserted claim is claimed to be literally present or present under the doctrine of equivalents;

- e. For any patent that claims priority to an earlier application, the priority date to which each asserted claim allegedly is entitled; and
- f. If a party claiming patent infringement wishes to preserve the right to rely, for any purpose, on the assertion that its own product practices the claimed invention, the party must identify, separately for each asserted claim, each product that incorporates or reflects that particular claim.

IX. DISCLOSURE OF PRELIMINARY INVALIDITY CONTENTIONS

Any party asserting patent invalidity claims, counterclaims, or defenses must file and serve disclosures containing the following information by _____

- a. 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 must be identified by its title, date of publication, and where feasible, 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);
- b. Whether each item of prior art anticipates each asserted claim or renders it obvious. If a combination of items or prior art makes a claim obvious, each such combination, and the motivation to combine such items, must be identified;

- c. 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, (paragraph 6), the identity of the structure(s), act(s), or material(s) in each item of prior art that performs the claimed function; and
- d. Any grounds of invalidity based on indefiniteness under 35 U.S.C. § 112, (paragraph 2), or enablement or written description under 35 U.S.C. § 112, (paragraph 1), of any of the asserted claims.

X. SUPPLEMENTATION OF PRELIMINARY INFRINGEMENT AND INVALIDITY CONTENTIONS

The parties must make their preliminary infringement and invalidity contentions based on the information reasonably available to them at the time of their disclosures and are not excused from making their disclosures because they have not fully completed their investigations of the case. The parties may supplement their preliminary contentions based on additional information that only becomes available during the course of discovery. Preliminary contentions may not be supplemented after the close of expert discovery.

XI. FINAL INFRINGEMENT AND INVALIDITY CONTENTIONS

Each party's Preliminary Infringement Contentions and Preliminary Invalidity Contentions shall be deemed to be that party's final contentions, except as set forth below.

- a. If a party claiming patent infringement believes in good faith that the Court's Claim Construction Ruling requires it to amend its Preliminary Infringement Contentions, that party may serve "Final Infringement Contentions" without leave of court not later than 30 days after service by the Court of its Claim Construction Ruling.
- b. If a party opposing a claim of patent infringement (1) believes in good faith that the Court's Claim Construction Ruling requires it to amend its Preliminary Invalidity Contentions or (2) Final Infringement Contentions have been served, that party may serve "Final Invalidity Contentions" without leave of court not later than 45 days after

service by the Court of its Claim Construction Ruling.

XII. ADVICE OF COUNSEL

If a party claims willful infringement, the opposing party, no later than _____, shall file and serve a written election as to whether it will assert advice of counsel as a defense to the allegation of willful infringement. Such an election will waive the attorney-client privilege otherwise applicable to advice of counsel and will require prompt disclosure of all written opinions embodying such advice. The parties may thereafter pursue this issue by discovery.

XIII. CLAIM CONSTRUCTION PROCEEDINGS

In light of the decision in *Markman v. Westview Instruments, Inc.*, 116 S.Ct. 1384 (1996), the Court has established the following procedures for resolution of the claim construction issues in this case.

The parties must simultaneously exchange a list of claim terms that they contend should be construed by the Court by _____. Not later than 30 days after this exchange, the parties shall meet and confer for the purpose of preparing a Joint Claim Construction and Prehearing Statement. At this meeting, the parties shall exchange proposed constructions of the claim terms and attempt to narrow and finalize the issues for the Joint Claim Construction and Prehearing Statement. If, at any time, the parties determine that a Claim Construction Hearing is not necessary, they should notify the Court immediately.

By _____, the parties shall complete and file a Joint Claim Construction and Prehearing Statement, which shall contain the following information:

- a. The construction of those claim terms on which the parties agree;
- b. Each party's proposed construction of each disputed claim term 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 of the claim or to oppose any other party's proposed construction of the claim, 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;

- c. Whether any party proposes to call one or more witnesses, including experts, at the Claim Construction Hearing and the identity of each such witness;

A Claim Construction Hearing will be held on _____

XIV. DISPOSITIVE MOTIONS

Dispositive motions must be filed by _____.

[XV. ALTERNATIVE DISPUTE RESOLUTION

This matter shall be submitted to _____ no later than _____.
A separate Order will issue regarding the method and schedule for alternative dispute resolution.]

XVI. SETTLEMENT CONFERENCE

The parties are under an ongoing obligation to engage in good faith settlement negotiations. A settlement conference will be held on _____ at _____. Unless excused upon a showing of good cause, the attorney who is to conduct the trial shall attend the settlement conference. Counsel attending the settlement conference must be accompanied by a representative of the party with full settlement authority, unless excused upon a showing of good cause. Any party may request the Judge to conduct an earlier settlement conference.

XVII. WITNESS LISTS

No witness may be included on a witness list if not identified in connection with initial disclosures required under F.R.Civ.P. 26 (or reasonably timely supplements thereto) or in response to a discovery request seeking the identity of persons with knowledge regarding the matters at issue (or reasonably timely supplements thereto), unless neither pretrial obligation applies to the action. A list of witnesses, other than rebuttal witnesses, must be filed by _____ .

**WITNESSES NOT INCLUDED ON A TIMELY FILED WITNESS LIST
WILL NOT BE PERMITTED TO TESTIFY AT TRIAL.**

No later than 4:00 p.m. on the day before trial, and by the close of court each day thereafter, the counsel conducting witness examinations on the following day shall provide opposing counsel with a list of those witnesses he or she anticipates calling, in the order in which they are expected to testify.

XVIII. FINAL PRETRIAL STATEMENT (REQUIRED FORM)

Counsel are hereby **REQUIRED** to submit a Joint Final Pretrial Statement to the Case Manager, Mary Brown, no later than **ONE WEEK** prior to the final pretrial conference. Counsel are required to follow the format of the final pretrial statement, enclosed herein. It is counsels' duty to confer, when practical, in person or by telephone, in a good faith effort to reach an agreement on all items referred to in the final pretrial statement. The purpose is to eliminate all items in dispute, and, thus, resolve all disputed items before the final pretrial conference.

Trial counsel for the parties shall be present at the final pretrial conference together with their clients or a representative thereof, with full authority to discuss all aspects of the case including pleadings, scheduling, and settlement. Attorneys not present at the final pretrial conference may not participate at trial.

XIX. TRIAL BRIEFS

Trial briefs must be filed with the Clerk of Courts and served upon opposing counsel within **ONE WEEK** after the final pretrial conference. All briefs shall be in full compliance with S.D. Ohio Rule 5.1. All references and citations shall conform to S.D. Ohio Rule 7.2(b). Counsel should utilize their trial briefs to instruct the Court in advance of trial in any area of the law upon which counsel will rely at trial. Therefore, the trial briefs should contain arguments with citations to legal authority in support of any evidentiary questions and any other legal questions which may be reasonably anticipated to arise at trial.

XX. TRIAL MOTIONS AND MOTIONS IN LIMINE

Any trial motions should be filed with the Clerk of Courts and served upon

opposing counsel within **ONE WEEK** after the final pretrial conference. Motions filed thereafter will not be considered except upon a showing of good cause.

Daubert Motions. Any motions in limine addressed to the admissibility of expert testimony under *Daubert* if not included in a previously filed summary judgment motion, shall be filed at least forty-two (42) days prior to the final pretrial conference. Responses to such motions shall be filed not later than thirty-five (35) days prior to the final pretrial conference. No replies will be filed unless otherwise ordered by the Court.

In non-jury trials, proposed findings of fact and conclusions of law shall be incorporated into the trial brief.

In all cases, trial briefs and Motions in limine are to be exchanged with opposing counsel by hand delivery or fax.

XXI. JURY INSTRUCTIONS

Counsel shall exchange proposed jury instructions no later than fourteen (14) days prior to the final pretrial conference. Counsel shall then confer regarding their respective proposals in an effort to reach an agreement regarding as many jury instructions as possible.

Seven (7) days after the final pretrial conference, a joint submission shall be made indicating 1) agreed instructions; 2) instructions proposed by plaintiff, but opposed by defendant; and 3) instructions proposed by defendant, but opposed by plaintiff. All proposed instructions shall be supported by citations to authority at the time submitted to the Court. Grounds for objections need not be articulated at this time, but will be addressed at the final pretrial conference. Boiler plate instructions need not be submitted. Counsel are encouraged to develop detailed special verdict forms or interrogatories to the jury, which should be filed along with the jury instructions.

During trial or at the close of all evidence, the parties may submit supplemental requests for instructions on matters not anticipated prior to trial.

Courtesy copies of all filings set forth in this Notice shall be hand-

delivered to chambers at the time of the filing with the Clerk.

XXII. COMMUNICATION WITH CHAMBERS

There should be minimal communication with chambers. Any communication should be in the form of a written pleading, served upon opposing counsel and filed in accordance with the procedures set out in this notice. However, in the event communication with the Court becomes necessary, counsel may contact my Case Manager, Mary Brown.

XXIII. SANCTIONS FOR NON-COMPLIANCE

Counsel are expected to comply literally with this notice. The Court will consider the imposition of appropriate sanctions in the event of non-compliance, specifically, failure of counsel to comply with this notice could result in sanctions, including limitations on evidence and witnesses permitted at trial, and dismissal of the action.

Date

Sandra S. Beckwith
United States District Judge