**UNITED STATES DISTRICT COURT**

**EASTERN DISTRICT OF MICHIGAN**

**SOUTHERN DIVISION**

|  |  |
| --- | --- |
| [PARTY NAME],  Plaintiff,  vs.  [PARTY NAME],  Defendant. | Case No.: [CASE NUMBER]  Honorable [NAME]  Magistrate Judge [NAME] |

**MODEL RULE 26(f) REPORT AND PROPOSED STIPULATED SCHEDULING ORDER FOR PATENT INFRINGEMENT CASES**

[This Model Scheduling Order is intended to reflect the Court’s anticipated timeline for a typical patent infringement case. Generally, the deadlines assume one asserted patent (or multiple patents, if the patents are related), one accused product, and around five to ten asserted claims. The parties are free to negotiate and tailor the deadlines (and other items such as page limits) to the particular case (e.g., complexity of technology, number of parties, number of patents and asserted claims, number of accused products, etc.).]

Pursuant to Rule 26(f) of the Federal Rules of Civil Procedure, the parties to this case, by and through their respective counsel, jointly submit this Rule 26(f) Report and Proposed Scheduling Order:

| **Event** | **Date**[[1]](#footnote-1) |
| --- | --- |
| Fact Discovery Commences | Entry Date of Scheduling Order |
| Initial Disclosures Due | 1 Week from Entry of Scheduling Order |
| Infringement Contentions | 1 Week from Entry of Scheduling Order |
| Deadline to Amend Pleadings | 1 Month from Entry of Scheduling Order |
| Deadline to Add Parties | 1 Month from Entry of Scheduling Order |
| Invalidity and Non-Infringement Contentions | 1 Month from Entry of Scheduling Order |
| Contact Special Master to Schedule Settlement Conference | 1 Week from Invalidity and Non-Infringement Contentions |
| Initial Identification of Disputed Claim Terms | 1.5 Months from Entry of Scheduling Order |
| Exchange Proposed Interpretations of Disputed Claim Terms Along with Intrinsic and Extrinsic Evidence | 2.5 Months from Entry of Scheduling Order |
| Final Identification of Disputed Claim Terms and Proposed Constructions (after Meet and Confer) | 3.5 Months from Entry of Scheduling Order |
| Plaintiff’s Opening Claim Construction Brief | 4.5 Months from Entry of Scheduling Order |
| Defendant’s Responsive Claim Construction Brief | 5.5 Months from Entry of Scheduling Order |
| Plaintiff’s Reply Claim Construction Brief | 6 Months from Entry of Scheduling Order |
| Informal Technology Tutorial (Court) | Parties to leave blank: Court will schedule approximately 1.5 Months before Claim Construction Hearing |
| Claim Construction Hearing (Court) | Parties to leave blank: Court will schedule approximately 2 Months after Reply Brief Deadline |
| Fact Discovery Closes (Deadline to Complete Discovery) | 8.5 Months from Entry of Scheduling Order |
| Expert Reports on Infringement (Plaintiff), Invalidity (Defendant), and Damages (Plaintiff) | 2 Months from Claim Construction Opinion |
| Rebuttal Expert Reports | 3 Months from Claim Construction Opinion |
| Expert Discovery Deadline | 4 Months from Claim Construction Opinion |
| Dispositive Motion Deadline | 5 Months from Claim Construction Opinion |
| Motions in Limine | 5 Weeks before Final Pretrial Conference |
| Proposed Joint Final Pretrial Order | 5 Weeks before Final Pretrial Conference |
| Stipulated Proposed Jury Instructions | 3 Weeks before Final Pretrial Conference |
| Final Pretrial Conference (Court) | Parties to leave blank: Court will schedule approximately 1 Week before Trial |
| Trial (Court) | Parties to leave blank: Court will schedule approximately 6.5 Months from Dispositive Motion Deadline or 2.5 Months from Opinion resolving Dispositive Motions |

# RULE 26(f) CONFERENCE

Pursuant to Rule 26(f), the parties held a meeting on [DATE], which was attended by the following attorneys:

|  |  |
| --- | --- |
| Attorney (Bar Number)  FIRM  ADDRESS  ADDRESS  TELEPHONE NUMBER  EMAIL | Attorney (Bar Number)  FIRM  ADDRESS  ADDRESS  TELEPHONE NUMBER  EMAIL |
|  |  |
| Attorneys for Plaintiff | Attorneys for Defendant |

# SUBJECTS AND NATURE OF DISCOVERY

## **DISCOVERY BY PLAINTIFF**

[Plaintiff to list topics on which it wants discovery: For example, “Plaintiff will need to conduct discovery on the issues of claim construction, patent infringement, damages, and all defenses raised by Defendant.”]

## **DISCOVERY BY DEFENDANT**

[Defendant to list topics on which it wants discovery: For example, “Defendant will need to conduct discovery on infringement, validity, damages, and other defenses.”]

## **ELECTRONICALLY STORED INFORMATION**

[Parties to specify the scope and any limits concerning discovery of ESI, the format for any production of ESI, and actions to be taken to preserve ESI, etc. *See* Fed. R. Civ. P. 26(f)(3)(C) and 26(b)(2)(B).]

# DISCOVERY SCHEDULE

## **FACT DISCOVERY**

Fact discovery shall commence on [the date identified above] and be completed no later than [the date identified above]. Discovery shall begin on all discoverable issues and shall not be limited to claim interpretation. Discovery shall include any relevant opinions of counsel if Defendant intends to rely upon an opinion of counsel as a defense to a claim of willful infringement. Discovery and the disclosures set forth herein cannot be withheld or delayed on the basis of confidentiality. If the Court has not entered a protective order, any discovery or disclosure that is not publicly available and deemed confidential by a party shall be produced to the opposing party for outside counsel’s Attorney’s Eyes Only, solely for purposes of the pending case and shall not be disclosed to the client or any other person.

## **RULE 26(a)(1) INITIAL DISCLOSURES**

The parties will exchange the initial discovery disclosures required by Rule 26(a)(1) of the Federal Rules of Civil Procedure by [the date identified above]. If Plaintiff is seeking damages, in its initial disclosure regarding damages pursuant to Rule 26(a)(1)(A)(iii), Plaintiff shall identify each category of damages it is seeking (e.g., reasonable royalty, lost profits, convoyed sales, etc.) and to the extent possible a good faith damages calculation for each category of damages. As fact discovery progresses, Plaintiff shall seasonably amend its initial disclosure regarding damages in accordance with Rule 26(e) of the Federal Rules of Civil Procedure upon learning that the initial disclosure is incomplete or incorrect.

## **DEADLINE TO ADD PARTIES**

The deadline for adding parties is [the date identified above]. The deadline for amending the pleadings is [the date identified above].

## **DISCLOSURE OF INFRINGEMENT CONTENTIONS**

Plaintiff must serve disclosures containing the following information by [the date identified above]:

### Each patent claim that is allegedly infringed by Defendant;

### For each asserted claim, the accused product of Defendant of which Plaintiff is aware. This identification shall be as specific as possible. Plaintiff shall identify each accused product by name or model number, if known.

### A chart identifying specifically where each limitation of each asserted patent claim is found within each accused product, including for each limitation that such party contends is governed by 35 U.S.C. § 112(f), the identity of the structure(s), act(s), or material(s) in the accused product that performs the claimed function.

### Whether each claim limitation of each asserted claim is claimed to be literally present or present under the doctrine of equivalents in the accused product.

## **DISCLOSURE OF INVALIDITY CONTENTIONS**

If Defendant asserts invalidity or unenforceability claims/defenses, it must serve disclosures containing the following information by [the date identified above]:

### Each item of prior art that forms the basis for any allegation of invalidity by reason of anticipation under 35 U.S.C. § 102 or obviousness under 35 U.S.C. § 103. For prior art that is a document, a copy of the document should be provided to Plaintiff’s counsel or be identified by Bates Number if it was previously produced. As to prior art that is not documentary in nature, such prior art shall be identified with particularity (by “who, what, when, and where” etc.) as to publication date, sale date, use date, source, ownership, inventorship, conception and any other pertinent information.

### Whether each item of prior art anticipates each asserted claim or renders it obvious. If a combination of items of prior art makes a claim obvious, each such combination, and the reason why a person of ordinary skill in the art would combine such items must be identified.

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

### For any grounds of invalidity based on 35 U.S.C. §§ 101 or 112 or other defenses, the party asserting the claim or defense shall provide its reasons and evidence why the claims are invalid or the patent unenforceable and make specific reference to relevant portions of the patent specification and/or claims. Such positions shall be made in good faith and not simply *pro forma* arguments.

## **NON-INFRINGEMENT CONTENTIONS**

On or before [the date identified above], Defendant shall serve non-infringement contentions, which shall explain the factual basis for any allegation that it does not infringe the patent-in-suit either literally or under the doctrine of equivalents, including identifying what claim limitations that it believes are not present in the accused products and why an equivalent is not present.

## **DEADLINE FOR AMENDING INFRINGEMENT, NON-INFRINGEMENT, AND INVALIDITY CONTENTIONS**

Each party shall seasonably amend any infringement, invalidity, or non-infringement contention in accordance with Rule 26(e) of the Federal Rules of Civil Procedure upon learning that the contention is incomplete or incorrect. The parties should timely conduct fact discovery and consult with any expert witness expected to offer testimony to support their respective positions so that these contentions can be updated as soon as possible. Except as set forth below, each party’s initial contentions, or amended contentions as of the deadline to complete fact discovery, if any, shall be deemed that party’s final contentions. Any amendment to a party’s infringement, invalidity, or non-infringement contentions, or other pleading, that the party reasonably believes is necessary due to the Court’s claim construction ruling, must be made no later than two weeks after the Court’s claim construction ruling.

## **SETTLEMENT CONFERENCE**

Within one week after Defendant’s submission of invalidity and non-infringement contentions, the parties shall contact the Court’s Special Master to discuss the timing of having a settlement conference. Alternatively, if the Court has not appointed a Special Master, then the parties shall file a Joint Status Report setting forth their proposed plan (timing, mediator, etc.) for having settlement discussions.

## **CLAIM CONSTRUCTION PROCEEDINGS**

Pursuant to the decision of *Markman v. Westview Instruments, Inc.*, 517 U.S. 370 (1996), the following procedures will be followed for resolution of claim construction issues in this case.

### INITIAL IDENTIFICATION OF DISPUTED CLAIM TERMS – The parties will confer to determine what claim terms may need to be interpreted by the Court by [the date identified above].

### PROPOSED INTERPRETATIONS – On or before [the date identified above], the parties shall exchange, but not file, a chart that lists for each disputed claim term the party’s proposed interpretation of the disputed claim term along with citations to the intrinsic and extrinsic evidence (e.g., patent, prosecution history, dictionary definitions, etc.) that supports its interpretation along with a summary of any testimony that is expected to be offered to support that interpretation.

### FINAL IDENTIFICATION OF DISPUTED CLAIM TERMS – On or before [the date identified above], the parties shall confer about the claim terms in dispute and their proposed interpretations. At this meeting, the parties shall attempt to narrow and finalize the claim terms that need to be interpreted by the Court. If, at any time, the parties determine that a claim construction hearing is not necessary, they shall notify the Court in a timely matter. The parties shall set forth separately the construction of those claim terms on which the parties agree.

### PLAINTIFF’S OPENING CLAIM CONSTRUCTION BRIEF – Plaintiff shall file its opening claim construction brief on or before [the date identified above]. Plaintiff’s opening claim construction brief shall not exceed 25 pages (14 point font), unless a different page limit is set by the Court.

### DEFENDANT’S RESPONSE BRIEF – Defendant shall file its responsive claim construction brief on or before [the date identified above]. Defendant’s responsive claim construction brief shall not exceed 25 pages (14 point font), unless a different page limit is set by the Court.

### PLAINTIFF’S REPLY BRIEF – Plaintiff shall file its reply claim construction brief on or before [the date identified above]. Plaintiff’s reply brief shall not exceed 7 pages (14 point font), unless a different page limit is set by the Court. Plaintiff shall also serve within this time period a four-column claim interpretation chart in the form of Exhibit A. Plaintiff shall also submit a copy of the final version of the claim chart to the Court in Microsoft Word format via email as a proposed order through the Court’s electronic filing system.

### TECHNOLOGY TUTORIAL – The Court will hold an informal conference with the attorneys on [the date identified above]. The conference will not be recorded. At the conference, the attorneys for each side will explain the technology at issue in the litigation. The parties may discuss their infringement, non-infringement, invalidity, and/or claim construction positions to provide general context on the issues, but shall do so in a non-argumentative manner. If the parties have determined that more than ten (10) claim terms need to be interpreted by the Court, then the parties shall be prepared to discuss which claim terms are most material to the outcome of the case. The Court may limit the number of claim terms that will be argued at the claim construction hearing and interpreted by the Court.

### CLAIM CONSTRUCTION HEARING – The Court will conduct a claim interpretation hearing on [the date identified above]. The Court does not typically hear live testimony at the claim construction hearing. A request for live testimony must be made by written motion.

## **EXPERT DISCOVERY**

### Each party shall serve expert reports as required by Rule 26(a)(2), on issues where that party bears the burden of proof, by [the date identified above]; on issues where a party does not bear the burden of proof, rebuttal expert reports are due by [the date identified above].

### All expert discovery shall be completed by [the date identified above].

## **MOTIONS**

### All dispositive motions shall be filed on or before [the date identified above].

### All motions in limine shall be filed at least [the time identified above] before the final pretrial conference.

## **PRETRIAL**

### The Parties shall file stipulated proposed jury instructions at least [the time identified above] before the final pretrial conference. In the event that the parties cannot agree as to any specific instructions, they are to present to the Court their respective proposed instructions on the first day of trial along with those instructions on which they stipulate. The Court will then resolve the conflict.

### The parties shall submit a Proposed Joint Final Pretrial Order pursuant to Local Rule 16.2 at least [the time identified above] before the Final Pretrial Conference.

### A Final Pretrial Conference will be held pursuant to Local Rule 16.1 on [the date identified above].

## **TRIAL**

## Trial will begin on [the date identified above]. The trial of the liability portion of the case will normally be bifurcated from the damages portion. If the jury finds liability, the Court will continue the trial to the damages issues before the same jury. The liability and damages portions of the trial will only be separated by a short period of time, likely around a week, depending on the availability of the jurors and the Court’s schedule.

**SO ORDERED**

|  |  |  |  |
| --- | --- | --- | --- |
| Dated: |  |  |  |
|  |  |  | The Honorable [NAME]  United States District Judge |

Stipulated to by:

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | |  |  | |
| Attorney (Bar Number)  FIRM  ADDRESS  ADDRESS  TELEPHONE NUMBER  EMAIL | |  | Attorney (Bar Number)  FIRM  ADDRESS  ADDRESS  TELEPHONE NUMBER  EMAIL | |
|  | |  |  | |
| Attorneys for Plaintiff | |  | Attorneys for Defendant | |
|  | |  |  | |
| Date: |  |  | Date: |  |

**EXHIBIT A**

**CLAIM INTERPRETATION CHART**

|  |  |
| --- | --- |
| **Agreed**  **Claim Term** | **Agreed Construction** |
| 1. “Term 1” |  |
| 2. “Term 2” |  |
| 3. “Term 3” |  |
| 4. “Term 4” |  |

|  |  |  |  |
| --- | --- | --- | --- |
| **Disputed**  **Claim Term** | **Plaintiff’s Proposed Construction** | **Defendant’s Proposed Construction** | **Court’s Construction** |
| 1. “Term 1” |  |  |  |
| 2. “Term 2” |  |  |  |
| 3. “Term 3” |  |  |  |
| 4. “Term 4” |  |  |  |

1. Unless instructed to leave blank, parties to enter date corresponding to specified time from entry of Scheduling Order. [↑](#footnote-ref-1)