IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

	:	
	:	
v.	:	**CIVIL ACTION NO.**
	:	
	:	

JOINT REPORT OF RULE 26(f) MEETING

In accordance with Federal Rule of Civil Procedure 26(f), counsel for the parties conferred on _____ and submit the following report of their meeting for the Court's consideration:

Date and time of Rule 16 Conference: _____

Plaintiff's Counsel participating in the Rule 16 conference: _____

Defendant's Counsel participating in the Rule 16 conference: _____

Jury trial _____ **Non-Jury Trial** _____ **Arbitration** _____

1. **Discussion of Claims, Defenses, and Relevant Issues**

You should assume that the Court has read the complaint and answer and is familiar with the claims. However, the facts supporting those claims and defenses are unknown. Therefore, counsel shall set forth concisely the controlling facts that the parties contend support their claims and defenses. Each party shall provide a brief factual summation of the case which should be provided as an attachment, double spaced in 12-point font.

If counsel contends that one or more issues of fact or law will be dispositive, they should specifically identify such issues.

2. **Informal Disclosures**

Except in exceptional cases with a substantial quantity of documents, the parties are expected to have identified and produced documents falling within the definition of initial disclosures under Rule 26(a)(1) in advance of the Conference with sufficient time for opposing counsel to review them and be prepared to address them. **When did the parties participate with Rule 26(a)'s duty of self-executing disclosure? _____**

If the parties have not made initial disclosures within the time required by the Court's Order scheduling the pretrial conference, they should explain why not.

3. **Formal Discovery**

The discovery deadline should normally be no more than 90 - 120 days from the date of that the Court provided notice of the Rule 16 conference, not from the date of the conference itself. However, because of the nature of patent litigation, the Court allows for discovery to extend beyond this typical range, within reason. The parties will determine a joint schedule for discovery. This schedule should specifically contemplate document production and discovery cut off date(s).

a. The parties should determine, with reason, the number of admissions and interrogatories and hours of depositions each side[1] is permitted.

[1] In the event that the Court consolidates related cases for pretrial purposes, with regard to calculating limits imposed by this Order, a "side" shall be interpreted as if the cases were proceeding individually. For example, in consolidated cases the plaintiff may serve up to 30 interrogatories on each defendant, and each defendant may serve up to 30 interrogatories on the plaintiff.

i. Requests for Admission: Each side is permitted a maximum of _____ requests for admission.

ii. Interrogatories: Each side is permitted a maximum of _____ interrogatories, including contention interrogatories.

iii. Depositions: Each side is limited a total of _____ hours of taking testimony by deposition upon oral examination.

b. Discovery Disputes: A party may not file a Motion to Compel discovery unless: (1) lead counsel have met and conferred in good faith to try to resolve the dispute, and (2) the party has contacted the Court's law clerk (with opposing counsel) to arrange a conference with the Court to summarize the dispute and the parties' respective positions. After hearing from the parties, the Court will determine if further briefing is required.

c. Miscellaneous Discovery Matters:

i. The parties should set forth a statement identifying any pending or completed litigation, including IPRs, involving one or more of the asserted patents. Parties should advise whether they expect to institute any further related litigation in this or other Districts within the next year, as well as any IPRs and, if so, when.

ii. If one or more of the patents-in-suit have already been licensed or the subject of a settlement agreement, either (1) Plaintiff shall provide the licenses and/or settlement agreements to Defendant

no later than the time of the initial Rule 16 Conference, or (2) if Plaintiff requires a Court Order to make such disclosures, Plaintiff shall file any necessary proposed orders no later than twenty-four hours before the Rule 16 Conference.

iii. Please advise the Court if the parties agree to stay all fact discovery until after the Claim Construction Hearing.

Is electronic discovery needed: _____ If so, have the parties reached an agreement on how to conduct electronic discovery? _____. If the parties cannot reach an agreement, in most cases, the Court will enter an order incorporating default standards. The default order can be viewed at www.paed.uscourts.gov.

4. **Protective Order**

Pending entry of the final Protective Order, the Court issues the following interim Protective Order to govern the disclosure of confidential information in this matter:

> If any document or information produced in this matter is deemed confidential by the producing party and if the Court has not entered a protective order, until a protective order is issued by the Court, the document shall be marked "confidential" or with some other confidential designation (such as "Confidential – Outside Attorneys Eyes Only") by the disclosing party and disclosure of the confidential document or information shall be limited to each party's outside attorney(s) of record and the employees of such outside attorney(s).
>
> If a party is not represented by an outside attorney, disclosure of the confidential document or information shall be limited to one designated "in house" attorney, whose identity and job functions shall be disclosed to the producing party 5 days prior to any such disclosure, in order to permit any motion for protective order or other relief regarding such disclosure. The person(s) to whom disclosure of a confidential document

or information is made under this local rule shall keep it confidential and use it only for purposes of litigating the case.

5. <u>Claim Construction Identification</u>

If a party proposes a construction of a term to be its "plain and ordinary" meaning, the party must explain what that meaning is. If a term is arguably a means-plus-function term, and a party does not propose a function and a structure, it is waiving any right to propose a function and a structure at a later time. The parties shall exchange a list of those claim term(s)/phrase(s) that they believe need construction and their proposed claim construction of those term(s)/phrase(s).[2] This document will not be filed with the Court.

Subsequent to exchanging that list, the parties will meet and confer to prepare a Joint Claim Construction Chart. The Joint Claim Construction Chart should identify for the Court the term(s)/phrase(s) of the claim(s) in issue and should include each party's proposed construction of the disputed claim language with citation(s) only to the intrinsic evidence in support of their respective proposed constructions. The Joint Claim Construction Chart should include an explanation of why resolution of the dispute makes a difference. A copy of the patent(s) in issue as well as those portions of the intrinsic record relied upon shall be submitted with the Joint Claim Construction Chart. In this joint submission, the parties shall not provide argument.

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[2] If a party proposes a construction of a term to be its "plain and ordinary" meaning, the party must explain what that meaning is. If a term is arguably a means-plus-function term, and a party does not propose a function and a structure, it is waiving any right to propose a function and a structure at a later time

6. Claim Construction Briefing

Parties shall serve, but not file, their opening and answering briefs. Each party is permitted one reply brief. The parties shall copy and paste their unfiled briefs into one brief, with their positions on each claim term in sequential order, in substantially the form below. The parties will then file this brief with the Court.

Joint Claim Construction Brief

I. Representative Claims

II. Agreed-upon Constructions

III. Disputed Constructions

A. [TERM 1][3]
   1. Plaintiff's Opening Position
   2. Defendant's Answering Position
   3. Plaintiff's Reply Position
   4. Defendant's Sur-Reply Position

B. [TERM 2]
   1. Plaintiff's Opening Position
   2. Defendant's Answering Position
   3. Plaintiff's Reply Position
   4. Defendant's Sur-Reply Position

Etc. The parties need not include any general summaries of the law relating to claim construction. If there are any materials that would be submitted in an appendix, the parties shall submit them in a Joint Appendix.

[3] For each term in dispute, there should be a table or the like setting forth the term in dispute, the parties' competing constructions, and why resolution of the dispute matters. The table does not count against the word limits.

7. Hearing on Claim Construction – *Markman* Hearing

The parties will propose a mutually agreed upon date where the Court will hear argument on claim construction. When the Joint Claim Construction Brief is filed, the parties shall simultaneously file a motion requesting the claim construction hearing, state that the briefing is complete, and state how much total time the parties are requesting that the Court should allow for the argument.

Absent prior approval of the Court, the parties shall not present testimony at the argument. The Court is open to the presentation of live technology tutorials when they may be of benefit. The parties may also submit tutorials in electronic form by the deadline for submission of the Joint Claim Construction Brief. If a party intends to present a live tutorial, it should be directed to the underlying technology (rather than argument related to infringement or validity).

The Court will consider the parties suggestions on the order of argument at the *Markman* hearing. However, if the parties do not suggest a different procedure, the Court will allow the Plaintiff to pick the first term and then alternate by term. As a general rule, if one side proposes "plain and ordinary meaning" as its construction or asserts that a term is indefinite, the other party shall go first.

8. Expert Testimony

The parties will determine the schedule for disclosure of expert testimony. This should contemplate the initial 26(a)(2) disclosure of expert testimony by the party with the initial burden of proof, supplemental disclosure to contradict or rebut evidence on the same matter identified by another party, and reply export reports

from the party with the initial burden of proof. Along with the submissions of the expert reports, the parties shall advise of the dates and times of their experts' availability for deposition. This schedule is separate from any expert witnesses used at the *Markman* Hearing.

a. No other expert reports will be permitted without either the consent of all parties or leave of the Court. If any party believes that an expert report does not comply with the rules relating to timely disclosure or exceeds the scope of what is permitted in that expert report, the complaining party must notify the offending party within one week of the submission of the expert report. The parties are expected to promptly try to resolve any such disputes, and, when they cannot reasonably be resolved, use the Court's Discovery Dispute Procedure or the complaint will be waived.

b. To the extent any objection to expert testimony is made pursuant to the principles announced in *Daubert v. Merrell Dow Pharm.*, Inc., 509 U.S. 579 (1993), as incorporated in Federal Rule of Evidence 702, it shall be made by motion no later than the deadline for dispositive motions set forth herein, unless otherwise ordered by the Court.

9. <u>Case Dispositive Motions</u>

The parties will determine a date whereby all case dispositive motions shall be served and filed. No case dispositive motion under Rule 56 may be filed more than ten days before the above date without leave of the Court.

10. Applications by Motion

Except as otherwise specified herein, any application to the Court shall be by written motion.

11. Pretrial Conference

As needed, after ruling on dispositive motions, the Court will hold a final pretrial conference in Court with counsel.

12. Default Schedule[4]

ITEM	DEADLINE	
	Plaintiff	**Defendant**
Exchange Rule 26(a) disclosures	3 weeks before Rule 16	
Parties to file Rule 26(f) report with comprehensive proposed case schedule	2 weeks before Rule 16	
Plaintiff's identification of accused products and the asserted patent(s) they allegedly infringe	2 weeks before Rule 16	
Plaintiff serves initial infringement contentions chart[5]	2 weeks before Rule 16	
Defendant serves initial invalidity contentions[6]		1 week before Rule 16
RULE 16 CONFERENCE		
Joinder of parties and amendment of pleadings		
Submit proposed protective order		
Defendant's technical document production		
Completion of document production by parties		
Exchange term(s)/phrase(s) for claim construction		
Exchange claim constructions of term(s)/phrase(s)		
Parties disclose extrinsic evidence[7]		
Filing of joint claim construction chart		
Opening claim construction brief		
Responsive claim construction brief		
Reply claim construction brief		
Sur-reply claim construction brief		
Joint claim construction brief		
MARKMAN HEARING		
Serve final infringement contentions		
Serve final invalidity contentions		
Close of fact discovery		
Opening expert reports		
Responsive expert reports		
Reply expert reports		
Close expert discovery		
Dispositive motions deadline (with opening briefs)		
Dispositive motions opposition briefs		
Dispositive motions reply briefs		
FINAL PRE-TRIAL CONFERENCE		
TRIAL		

[4] The parties are permitted to amend this template scheduling order within reason (add and/or remove events as needed). The parties are expected add tentative dates for deadlines for each event. If the parties cannot agree, the parties shall submit a separate motion for their respective scheduling order, briefly setting forth their positions on items where they cannot agreement. The Court will have previously set the date for the Rule 16 Conference. Parties should propose dates for the Markman Hearing, Final Pre-Trial Conference, and Trial. These dates will be finalized by the Court at the Rule 16 Conference or a later date.

[5] The chart should set forth where in the accused product(s) each of the asserted claim(s) are found. Plaintiff should also produce a copy of the file history for each patent in suit.

[6] Defendant should serve invalidity contentions in the form of (1) a chart setting forth where in the prior art references each element of the asserted claim(s) are found, (2) an identification of any limitations the defendant contends are indefinite or lack written description under section 112, and (3) an identification of any claims the defendant contends are directed to ineligible subject matter under section 101. Defendant should also supply documents in support of any invalidity contentions.

[7] The parties shall disclose any extrinsic evidence, including the identity of any expert witness they may rely upon with respect to claim construction/indefiniteness. With respect to any expert identified, the parties shall also provide a summary of the witness's expected testimony including the opinions to be expressed and a general description of the basis.