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BIORAD LABORATORIES, INC.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

BIO-RAD LABORATORIES, INC., a Delaware Corporation,

Plaintiff,

v.

APPLERA CORPORATION, a Delaware Corporation, and APPLIED BIOSYSTEMS, INC., a Delaware Corporation,

Defendants.

Case No. C02-5946 JW

JOINT SUPPLEMENTAL CASE MANAGEMENT CONFERENCE STATEMENT AND [PROPOSED] ORDER UNDER CIVIL L.R. 16-10(d)

Date: March 22, 2004
Time: 10 a.m.
Judge: Honorable James Ware

Plaintiff Bio-Rad Laboratories, ("Bio-Rad") and defendant Applera Corporation – Applied Biosystems Group ("Applera") jointly submit this Supplemental Case Management Statement pursuant to Civil Local Rule 16-10(d).

PROGRESS SINCE THE LAST CMC STATEMENT

1. Since the parties' last Joint Case Management Statement, filed on June 20, 2003, the parties made the following progress:

a. The parties made initial disclosures pursuant to the Federal Rules, and preliminary infringement and invalidity disclosures pursuant to the Patent Local Rules 3-1 and 3-3.

b. The parties engaged in claim construction discovery and briefing, which culminated in this Court's claim construction hearing of January 30, 2004;

c. The parties stipulated to and filed a [Proposed] Protective Order and are awaiting its official entry.

ALTERNATIVE DISPUTE RESOLUTION

2. At this time, the principals of the parties have not yet met to discuss settlement. Therefore, the parties suggest that, after the Court issues a claim construction order, a settlement conference be conducted before a private mediator such as JAMS. The parties suggest that they attempt to be put on a settlement calendar within 10 days of the claim construction ruling.

DISCOVERY SCHEDULE AND LIMITS

3. The parties propose the following discovery plan:

A. *Depositions*. Applera and Bio-Rad propose that the parties be limited to 25 depositions, not including the depositions of experts.

Applera's Position: Applera further proposes that, of these 25 depositions, a maximum of five may be depositions of a party pursuant to the notice provisions of F.R.C.P. 30(b)(6). This issue was not addressed in the Court's prior case management scheduling order (which addressed the schedule for patent local rule discovery in this case).

Addressing Bio-Rad's position (as set forth below) that there should be an unlimited number of F.R.C.P. 30(b)(6) depositions allowed in this case, this proposal will only

lead to discovery abuse. The noticing of a F.R.C.P. 30(b)(6) deposition creates a burden on the noticed party to educate and prepare witness(es) on topics devised by the noticing party. Applera recognizes, by proposing that both parties are limited to five F.R.C.P. 30(b)(6) depositions, that this burden is only reasonable for a limited number of issues. Furthermore, the fact that Applera "is a large company," as Bio-Rad states, exacerbates the problem with allowing an unlimited number of F.R.C.P. 30(b)(6) depositions. A 30(b)(6) deposition is easy for a sole proprietor to give. It is burdensome for a large organization to give.

Bio-Rad's Position: Bio-Rad believes that Applera's proposed limitation on the number of F.R.C.P. 30(b)(6) depositions is unnecessary. Applera is a large company. The Federal Rules contemplate the use of 30(b)(6) depositions to prevent a party from constantly having witnesses testify that they are unaware of facts and essentially creating a shell game. *See Comments, Fed. R. Civ. P. 30(b)(6).* Bio-Rad and Applera had previously agreed not to put any limit on the number of F.R.C.P. 30(b)(6) depositions in the parties' Joint Case Management Statement submitted with this Court on June 20, 2003. There is no reason to impose this limitation now as it would be prejudicial both from an economic standpoint – as Bio-Rad would be forced to take more depositions than necessary to get the same evidence. Further, Bio-Rad might not be able to get the evidence it needs at all if it is limited to the number of 30(b)(6) depositions that Applera suggested. Since the Federal Rules do not impose a limitation of 30(b)(6) depositions and since their use is the most efficient way to go forward in this case, Applera's modification of the original proposal should not be adopted.

B. *Requests For Admission*. Applera and Bio-Rad propose that the number of Requests for Admission be limited to 100 per party, excluding requests solely to establish document authentication and admissibility.

C. *Interrogatories*. Applera and Bio-Rad propose that each party will be limited to 50 interrogatories.

D. *Discovery Schedule.*

Applera's Position: Applera proposes the following deadlines in accordance with the application of the Federal Rules of Civil Procedure and the Civil and Patent Local Rules.

The Court has yet to issue a case management order in this action, other than for patent local rule discovery.

Bio-Rad's position (as set forth below) is that the parties should be held to their original schedule proposed in the first joint case management statement (which did not result in an order on these dates), despite the fact that this schedule was proposed prior to any local patent rule discovery was scheduled and despite the fact that it was not previously adopted. Adopting this original proposal now (which would now be an extremely expedited schedule) would prevent Applera from effectively preparing the necessary issues for trial and would foreclose any opportunity for meaningful settlement discussions between the parties. Patent local rule discovery and claim construction proceedings, which occurred since the original joint claim construction statement, have introduced delay into the case schedule. Applera can not take meaningful discovery on Bio-Rad's patent infringement allegations until a claim construction order issues from the Court. Bio-Rad's proposal that fact discovery close less than four months from now provides Applera insufficient time to complete such discovery.

a.	Close of Fact Discovery	12/6/04
b.	Expert Reports (on issues for which a party has the burden of proof)	1/17/05
c.	Rebuttal Reports	2/28/05
d.	Close of Expert Discovery	3/21/05
e.	Last Day to File Dispositive Motions	4/20/05

Bio-Rad's Position: Bio-Rad does not believe the original schedule the parties proposed in the Case Management Schedule submitted on June 20, 2003 should be substantially changed. To the extent that Applera now tries to argue that there are too many tasks to complete by the times they originally agreed to, that would be a problem of its own creation. For example, when Bio-Rad originally offered to have its inventors deposed in December 2003, Applera declined to accept those dates and instead decided to wait after February 2004. Similarly, when Bio-Rad attempted to move ahead with depositions of Applera witnesses, Applera refused to provide them, essentially saying that all depositions should be halted until after the Markman ruling. Bio-Rad had to seek an order from Magistrate Trumbull that compelled the depositions it

had noticed for many months to go ahead. In granting Bio-Rad's motion to compel, Magistrate Trumbull rejected Applera's attempt to string the case along by postponing discovery. Accordingly, Bio-Rad believes that the discovery deadlines should be essentially the same as previously agreed dates, which are:

a. Close of Fact Discovery 7/9/04 (previously agreed 6/4/04)

b. Expert Reports (on issues for which a party has the burden of proof) 08/20/04 (originally agreed 7/16/04)

c. Rebuttal Reports 9/24/04 (previously agreed 8/20/04)

d. Close of Expert Discovery 10/29/04 (previously agreed 9/24/04)

e. Last Day to File Dispositive Motions 11/19/04 (previously agreed 10/29/04)

DISCLOSURES

4. The parties have made initial disclosures pursuant to the Federal Rules and preliminary infringement and invalidity disclosures pursuant to Patent L.R. 3-1 and 3-3. Both parties have also produced documents and responded to interrogatories.

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TRIAL DATE

5. Applera's Position: Applera proposes that the trial begin in July 2005.

6. Bio-Rad's Position: Bio-Rad does not believe the six month delay from the original schedule the parties proposed in the Joint Case Management Statement submitted with this Court on June 20, 2003 is necessary. Accordingly, Bio-Rad believes that the trial date should be in December 2004 or January 2005 and the trial of all issues can be completed in 10 days.

Dated: March 12, 2004

WEIL, GOTSHAL & MANGES LLP

By: /s/
Pat Costello
Attorneys for Defendants, Applera Corporation-Applied Biosystems Group

Dated: March 12, 2004

HOWREY, SIMON, ARNOLD & WHITE LLP

By: /s/
Wallace Wu
Attorneys for Plaintiff, Bio-Rad Laboratories, Inc.

[PROPOSED] CASE MANAGEMENT ORDER

The Case Management Statement and [Proposed] Order is hereby adopted by the Court as the Case Management Order for the Case and the parties are ordered to comply with this Order. With respect to matters as to which the parties disagree, the Court adopts as its Order:

- [ ] Applera's proposal to limit the number of F.R.C.P. 30(b)(6) depositions to a maximum of five; [ ] Bio-Rad's proposal that there be no specific limit to number of F.R.C.P. 30(b)(6) depositions beyond the general limits proposed above;
- [ ] Applera's proposed schedule; [ ] Bio-Rad's proposed schedule.

Dated: _____

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U.S. DISTRICT COURT JUDGE JAMES WARE