

**UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF KENTUCKY  
CENTRAL DIVISION  
AT LEXINGTON**

**ELECTRONICALLY FILED**

iLOR, LLC,

Plaintiff,

v.

GOOGLE INC.,

Defendant.

Civil Action No. 5:07-cv-00109-JMH

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**JOINT CASE MANAGEMENT STATEMENT AND RULE 26(F) REPORT AND  
[PROPOSED] CASE MANAGEMENT ORDER**

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Plaintiff iLOR, LLC (“iLOR”) and Defendant Google Inc. (“Google”) respectfully submit their Joint Case Management Statement and Rule 26(f) Report pursuant to Fed.R.Civ.P. 26(f) and the Court’s Order dated October 9, 2007, and request that the Court adopt it as its Case Management Order in this action.

**I. DATE OF RULE 26(F) CONFERENCE AND PARTICIPANTS**

Pursuant to Fed. R. Civ. P. 26(f), a telephonic meeting was held on October 30, 2007. The meeting was attended by David E. Schmit on behalf of Plaintiff, and Peter J. Kirk on behalf of Defendant.

**II. PRE-DISCOVERY DISCLOSURES**

The parties agree to exchange the information required by Fed. R. Civ. P. 26(a)(1) on or before December 9, 2007.

### **III. PROPOSED DISCOVERY PLAN**

#### **A. Subjects for Discovery**

The parties anticipate that, in the event Defendant's motion for summary judgment is not granted, discovery will be required regarding issues relating to (1) infringement, including the design and use of Google Notebook and allegations of willful infringement; and (2) Plaintiff's claimed damages, including the amount of any lost profits and calculation of a reasonable royalty rate.

Plaintiff further anticipates that discovery also will be required regarding issues relating to (1) Defendant's affirmative defenses and counterclaims; and (2) additional evidence relating to facts uncovered during discovery.

Defendant further anticipates that, in the event Defendant's motion for summary judgment is not granted, discovery also will be required regarding issues relating to (1) validity, including worldwide prior art relevant to the patent-in-suit; (2) enforceability of the patent-in-suit, including its prosecution history; and (3) the meaning and scope of the claims of the patent-in-suit.

#### **B. Production of Electronically Stored Information**

The parties do not anticipate any protracted discovery issues relating to electronically stored information and do not propose any special procedures or agreements for production of such information at this time.

#### **C. Privilege and Work Product Issues**

The parties request no separate order at this time relating to the handling of attorney-client privileged or work-product protected information.

#### **D. Parties' Proposals Regarding Discovery Limitations**

The parties agree that the discovery provisions pertaining to interrogatories and requests for production under Rules 33 and 34 of the Federal Rules of Civil Procedure are adequate for

this case. The parties were unable to agree on limitations for depositions or requests for admissions in this case.

**1. Plaintiff's Proposals Regarding Depositions and Requests for Admissions**

Plaintiff proposes a maximum limit of twenty-four (24) hours per side for all depositions in the case.

Plaintiff also proposes a maximum limit of no more than twenty-five (25) requests for admissions per party, regardless of the subject.

Plaintiff proposes that no other changes should be made to the limitations on discovery imposed under the Fed. R. Civ. P. or the Local Rules. Plaintiff contends that the ten (10) deposition limitation discussed in Federal Rule of Civil Procedure 30 applies to limit the total number of fact and expert depositions combined. *See Express One International, Inc. v. Sochata*, 2001 U.S. Dist. LEXIS 25281, \*7(N.D. Tex. 2001); *Andamiro U.S.A. v. Konami Amusement of Am.*, 59 U.S.P.Q.2d 1094 (C.D. Cal. 2001); Fed. R. Civ. P. 30(a)(2)(A)( “A party must obtain leave of court, . . . if, without the written stipulation of the parties a proposed deposition would result in more than ten depositions being taken.”).

Plaintiff believes Defendant's proposals set forth below unreasonably increase the costs and time required to prepare this case for trial.

**2. Defendant's Proposal Regarding Depositions and Requests for Admissions**

Defendant proposes that the ten (10) deposition limitation discussed in Federal Rule of Civil Procedure 30 should not include expert depositions, so that each party may take no more than ten (10) factual depositions, exclusive of expert depositions, and exclusive of the one deposition that Defendant has already taken in connection with Plaintiff's motion for a preliminary injunction. Defendant notes that Rule 30(a) is not ordinarily construed to limit the number of expert depositions permitted, and there is no reason to constrain the parties' ability to take fact discovery in this case by requiring them to forego fact depositions for expert

depositions. Defendants believe the presumptive seven-hour limit should apply to all 30(b)(1) fact depositions in this matter.

Defendant proposes a maximum limit of fifty (50) hours per side for all depositions noticed pursuant to Federal Rule of Civil Procedure 30(b)(6). Defendant does not believe limitations on the number of days or hours for any particular 30(b)(6) deposition are warranted at this time, since a single 30(b)(6) deponent may be designated to testify regarding a wide range of different subjects.

Defendant proposes a maximum limit of no more than fifty (50) requests for admissions per party, exclusive of requests for admission seeking only the authentication of documents.

Defendant believes that the discovery it proposes to permit is essential to ensure full discovery may be taken on the merits of Plaintiff's allegations, and that full discovery on the merits should not be impeded or truncated simply to accommodate an unreasonably premature trial date.

#### **E. Experts**

Plaintiff proposes that, in the event either party intends to call an employee, not specially employed to provide expert testimony, to provide testimony under Fed. R. Evid. 702, 703 and/or 705, that party will provide a written report meeting the requirements of Fed. R. Civ. P. 26(a)(2) disclosing the expected testimony.

Defendant proposes that, in accordance with the Federal Rules, no written report pursuant to Fed. R. Civ. P. 26(a)(2) shall be required for any employee of a party not specially employed to provide expert testimony.

#### **F. Proposed Scheduling Order**

The parties have discussed, but have not reached full agreement on, a proposed schedule for this action. Accordingly, the parties set forth separate proposed scheduling orders for consideration by the Court as follows (deadlines on which the parties disagree appear in bold type):

Event	Plaintiff's Proposal	Defendant's Proposal
<b>Rule 16(b) Pretrial Conference</b>	October 30, 2007	October 30, 2007
<b>Last day for the parties to exchange Rule 26(f) initial disclosures</b>	December 9, 2007	December 9, 2007
<b>Last day for the parties to join additional parties or amend the pleadings (on all issues but inequitable conduct)</b>	December 15, 2007	February 8, 2008
<b>Last day for the parties to exchange claim terms for construction by the Court</b>	December 15, 2007	July 5, 2008
<b>Last day for the parties to exchange proposed constructions of disputed claim terms and file Joint Claim Construction and Prehearing Statement</b>	January 15, 2008	July 18, 2008
<b>Last day for Plaintiff to file and serve opening claim construction brief</b>		August 1, 2008
<b>Last day for Defendant to file and serve opening claim construction brief</b>		August 22, 2008
<b>Last day for Plaintiff to file and serve responsive claim construction brief</b>		August 29, 2008
<b>Last day for Defendant to file and serve responsive claim construction brief</b>		September 5, 2008
<b>Claim Construction Hearing and Tutorial Presentation</b>	February 4, 2008	September 19, 2008
<b>Last day for Defendant to disclose reliance on opinions of counsel (willfulness)</b>	December 5, 2007	7 days after claim construction order
<b>Last day for Defendant to amend its pleadings to add inequitable conduct defense</b>		30 days after claim construction order
<b>Close of fact discovery</b>	January 1, 2008	90 days after claim construction order
<b>Last day for the parties to identify experts</b>	January 1, 2008	90 days after claim construction order
<b>Last day for the parties to exchange opening expert reports pertaining to subjects on which the party bears the burden of proof</b>	January 15, 2008	120 days after claim construction order
<b>Last day for the parties to exchange rebuttal expert reports</b>	February 1, 2008	150 days after claim construction order
<b>Close of expert discovery</b>	February 15, 2008	180 days after claim construction order
<b>Last day for the parties to file dispositive motions</b>	February 15, 2008	210 days after claim construction order

Plaintiff asserts that, as addressed during the preliminary injunction proceedings, Plaintiff is financially strapped and cannot endure the drawn out and unnecessarily complex proceedings proposed by Defendant. Accordingly, Plaintiff's proposals attempt to expedite and simplify the proceedings leading to the earliest available trial date. Plaintiff asserts that Defendant's proposed schedule unnecessarily increases the costs and time required to prepare this case for trial.

Defendant believes that the schedule governing this action should be tailored to permit full and fair discovery on the merits, and full consideration of claim construction issues central to Plaintiff's patent infringement claim. Plaintiff's proposed schedule allows virtually no time for discovery, as its proposed fact discovery cutoff is *less than three weeks after* the parties agreed to exchange Rule 26 *initial disclosures*. Plaintiff's proposed claim construction schedule is so compressed that it effectively precludes the in-depth analysis of terms required during claim construction. Defendant believes a staggered claim construction briefing schedule is required to allow the salient issues to be fully joined and addressed in an orderly manner. Moreover, Defendant believes Plaintiff's proposed trial date is exceedingly premature, and that the issues raised by Plaintiff's patent infringement claim cannot be fully or fairly adjudicated in such a short period of time.

While the parties propose the deadlines set forth above, the parties specifically reserve their right to request that the schedule be amended due to changes occurring in the course of the case, such as amendments to the pleadings, additions of parties, or other good cause, in accordance with Fed. R. Civ. P. 16(b).

#### **IV. ESTIMATED TIME NECESSARY TO FILE PRETRIAL MOTIONS**

The parties anticipate that time will be required to permit briefing, hearing and decision on claim construction issues, as well as for briefing, hearing and decision of various additional motions for summary judgment.

## **V. ESTIMATED LENGTH OF TRIAL**

The parties preliminarily anticipate that trial of this matter will require approximately five to seven court days, provided the case and issues remains of essentially the same scope as they are today.

## **VI. TRIAL DATES AND FINAL PRETRIAL CONFERENCE**

Plaintiff requests a trial commencing April 28, 2008, or as soon thereafter as the Court is available. Defendant believes additional time will be required to permit claim construction and summary judgment proceedings to take place, to permit discovery including of relevant prior art to the patent-in-suit and to investigate further unenforceability defenses, and therefore proposes that trial commence in approximately February, 2009.

The final pretrial conference will be determined by the Court.

## **VII. REFERRAL TO A MAGISTRATE JUDGE FOR TRIAL**

Plaintiff is willing to consent to referral to a magistrate judge if such referral would result in an earlier trial date. Defendant is at this time unwilling to consent to referral of this matter to a Magistrate Judge for trial.

## **VIII. RELATED COMPANIES**

Plaintiff has no parent corporations, subsidiaries, affiliates, members and/or partners.

Defendant has submitted a separate schedule of its related entities pursuant to the Court's Order dated October 9, 2007. (Dkt. 68)

## **IX. OTHER MATTERS**

### **A. Claim Construction Briefs**

Plaintiff proposes that the parties jointly submit a single Claim Construction and Prehearing Statement which will contain the following information (a) the construction of those 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. No further briefing will be permitted except by leave of Court.

Defendant proposes that Plaintiff submit a separate opening claim construction brief, after which Defendant will submit its separate opening claim construction brief, and that each opening claim construction brief shall be no more than forty (40) pages in length. Defendant also proposes that Plaintiff submit a responsive claim construction brief, after which Defendant will submit its responsive claim construction brief, and that no responsive claim construction brief shall exceed twenty (20) pages in length.

**B. Additional Scheduling Conference**

The parties request an additional telephonic scheduling conference with the Court before any scheduling order is adopted.

**C. Judge Versus Jury Trial**

Plaintiff proposes that a bench trial be conducted in this matter. Defendant at this time does not elect to waive its right to jury trial in this matter.

**D. Settlement**

Plaintiff has proposed to Defendant that the parties discuss possible settlement of the case. Defendant has not responded.

Respectfully submitted,

Dated: November 29, 2007

FROST, BROWN, TODD, LLC

By: /s/ David E. Schmit

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Dated: November 29, 2007

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**ATTORNEYS FOR DEFENDANT GOOGLE INC.**

## CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the above and foregoing JOINT CASE MANAGEMENT STATEMENT AND RULE 26(F) REPORT AND [PROPOSED] CASE MANAGEMENT ORDER was filed with the clerk of the court by using the CM/ECF system, which will send a notice of electronic filing to the following::

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