

INTRODUCTION

Defendants seek leave to file a letter brief requesting permission to file a single motion for summary judgment for consideration by the Court. In addition, Defendants seek leave to file a letter brief requesting permission to file an as yet undetermined Daubert motion based on the previously disclosed expert reports served by Wi-LAN and pending depositions of Wi-LAN's experts.¹ Defendants request that the date for filing a letter brief regarding a summary judgment motion be set for December 14, 2012. Defendants also request that the date for filing a letter brief regarding a Daubert motion be set for January 4, 2013, to permit Defendants the opportunity to complete expert discovery and obtain relevant testimony prior to filing these motions.

DISCUSSION

When the original Docket Control Order (DCO) in this case was entered on July 6, 2011 (Dkt. No. 99) the Court's Standing Order Regarding Letter Briefs had not yet been entered. Accordingly the DCO did not contain the Court's now standard procedure for the filing of letter briefs seeking leave to file motions for summary judgment, Daubert motions and motions in limine. Rather, it contained the then typical deadline for the filing of motions requiring a hearing, including motions for summary judgment, and setting that deadline at November 16, 2012. (The parties, by agreement and with leave of Court, have moved that date to December 7, 2012, Dkt. No. 216.)

On August 12, 2011, following entry of the DCO in this matter, the Court entered its Standing Order Regarding Letter Briefs. This Order included timing deadlines for letter briefs requesting motions for summary judgment:

Summary Judgment Motions: The opening letter brief shall be no longer than 5 pages and shall be filed with the Court no later than 60 days before the deadline for filing summary judgment motions. Answering letter briefs shall be no longer than 5 pages and filed with the Court no later than 14 days thereafter. Reply letter briefs

¹ Expert discovery closes on December 21, 2012, a full two weeks after the current December 7, 2012 deadline for Dispositive Motions.

shall be no longer than 3 pages and filed with the Court no later than 5 days thereafter.

Motions to Strike Expert Testimony/*Daubert* Motions: The opening letter brief in each *Daubert* motion or motion to strike shall be no longer than 3 pages and shall be filed with the Court no later than 60 days before the deadline for filing Motions to Strike or *Daubert* Motions. Answering letter briefs shall be no longer than 3 pages and filed with the Court no later than 14 days thereafter. Reply briefs shall be no longer than 2 pages and filed with the Court no later than 5 days thereafter.

(This time requirement is referred to as “Standing Order Timing Deadline”)

Following this, and in acknowledgment of this new procedure, both sides in this case filed several letter briefs relating to motions for summary judgment. (See Sealed Letter Brief filed by Sony Ericsson on November 4, 2011 Dkt. No. 132, Sealed Letter Brief filed by Ericsson Inc. on November 4, 2011 Dkt. No. 133 and Sealed Responses by WI-LAN, Inc. filed on November 21, 2011, Dkt. Nos. 140 and 141, respectively.) The Court, in turn, issued an Order on November 21, 2011, permitting briefing on the summary judgments motions requested. (Dkt. No. 143) It is important to keep in mind, however, that neither those letter briefs, nor the Court’s Order (Dkt. No. 143) implicated the Standing Order Timing Deadline.

As discovery has progressed in this case the parties have—with leave of Court and as is typical—made a number of amendments to the dates and deadlines regarding disclosure of expert reports and the taking of expert depositions. Such amendments are set forth in the following table:

EVENT	MOVED DATES	DATE OF ORDER
Parties with burden of proof designate expert witnesses (nonconstruction and/or damages issues). Expert witness reports due.	8/24/2012 to 9/21/2012	Aug. 8, 2012 Order Dkt. No. 216
same as above	9/21/2012 to 9/26/2012	Sept. 7, 2012 Order Dkt. No. 226
same as above	9/26/2012 to 10/3/2012	Oct. 1, 2012 Order Dkt. No. 232
same as above	10/3/2012 to 11/2/2012	Oct. 22, 2012 Order

		Dkt. No. 238
Parties designate rebuttal expert witnesses (nonconstruction and/or damages issues), Rebuttal expert witness reports due.	9/21/2012 to 10/19/2012	Sept. 7, 2012 Order Dkt. No. 226
same as above	10/19/2012 to 10/24/2012	Aug. 8, 2012 Order Dkt. No. 216
same as above	10/24/2012 to 10/31/2012	Oct. 1, 2012 Order Dkt. No. 232
Parties with burden of proof designate expert witnesses (non-damages issues). Expert witness reports due (non-damages issues).	9/21/2012 (no date set in original DCO)	Sept. 7, 2012 Order Dkt. No. 226
Parties designate rebuttal expert witnesses (nondamages issues). Rebuttal expert witness reports due (non-damages issues).	10/19/2012 (no date set in original DCO)	Sept. 7, 2012 Order Dkt. No. 226
Discovery [Expert] deadline.	10/19/2012 to 11/16/2012	Aug. 8, 2012 Order Dkt. No. 216
same as above	11/16/2012 to 11/30/2012	Oct. 22, 2012 Order Dkt. No. 238
same as above	11/30/2012 to 12/21/2012	Nov. 5, 2012 Order Dkt. No. 247
Dispositive Motions due from all parties and any other motions that may require a hearing (including Daubert motions) due.	11/16/ 2012 to 12/7/2012	Aug. 8, 2012 Order Dkt. No. 216
Response to Dispositive Motions (including Daubert motions) due.	12/17/2012 to 1/18/2013	Aug. 8, 2012 Order Dkt. No. 216

As the Court will note, none of these amendments to the DCO, agreed to by the parties and approved by the Court, contemplated, included, or implicated, the Standing Order Timing Deadline. Further, neither Wi-LAN nor any of the Defendants ever raised the issue of the Standing Order Timing Deadline until to the most recent negotiations regarding the deadline to complete expert discovery. It was only after the Defendants raised the issue of extending the current December 7, 2012 deadline for Dispositive Motions as part of that discussion, that Wi-LAN, for the first time,

asserted that the parties had been operating under the Standing Order Timing Deadline and argued that the deadline to file letter briefs seeking permission to file summary judgment motions had long since passed.

Respectfully, this appears to be Wi-LAN's attempt at litigation by "gotcha". As the table above shows, under the schedule agreed to by Wi-LAN it would have in several instances been impossible to comply with the Standing Order Timing Deadline and in all other instances it would have been extremely impractical if not impossible. For example, it would have been impossible to file a letter brief requesting permission to file a Daubert motion pursuant to the Standing Order Timing Deadline since rebuttal expert reports were due on October 19, 2012, less than 60 days prior to the December 7, 2012 deadline for filing Dispositive Motions. Despite this and numerous meet and confers, Wi-LAN refuses to compromise and continues to play its game of "gotcha", insisting that the Defendants have foregone the opportunity to ask this Court for leave to file any motions for summary judgment or Daubert motions.

Defendants are mindful of the reasoning expressed in the Court's Standing Order Regarding Letter Briefs:

Parties now routinely file summary judgment motions on nearly every major trial issue, regardless of whether the documentary evidence warrants summary judgment. Filing motions that are not even arguably meritorious wastes clients' money and the Court's limited resources. Accordingly, the Court strongly encourages parties to only raise issues where there is no question of material fact or issues that raise significant dispositive legal issues.

However, Defendants believe that the evidence warrants summary judgment and have no intention of wasting the Court's resources.² Accordingly, Defendants request leave to file a single letter brief

² The Ericsson and Sony Mobile Defendants join this motion but presently do not intend to file new summary-judgment motions. Rather, they will seek leave on December 7th to supplement their already pending summary-judgment motions [Docket Nos. 172, 181] to add an *alternative* ground for relief based on the arguments made by Wi-LAN in its oppositions to the motions. As described in the motion for leave, despite Ericsson and Sony Mobile's repeated efforts to obtain discovery on the exact issue involved in the Supplement, Wi-LAN steadfastly refused to provide any discovery relating to the issue. This continued refusal required Ericsson and Sony Mobile to file a motion on November 20th to compel such discovery. Ideally, the Supplement would have the benefit of discovery, but given Wi-LAN's unjustified

seeking permission to file a motion for summary judgment seeking judgment that: (1) U.S. Patent Nos. 6,088,326 and 6,381,211 are invalid because they are anticipated under Title 35 U.S.C. Section 102(a), (b), and/or (e), and are invalid because they were obvious at the time of filing under Title 35 U.S.C. Section 103(a).

Defendants also request leave to file a single letter brief seeking permission to file an as yet undetermined Daubert motion based on the previously disclosed expert reports served by Wi-LAN and pending depositions of Wi-LAN's experts.

III. RELIEF REQUESTED

WHEREFORE, based on the above, the Defendants respectfully request leave file a letter brief seeking permission to file a motion for summary judgment and a letter brief seeking permission to file a Daubert motion. Defendants also respectfully request to have until December 14, 2012 to file such letter brief regarding summary judgment and until January 4, 2013 to file such letter brief regarding a Daubert motion.

Dated: December 7, 2012

Respectfully submitted,

/s/ (with permission)

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refusal to provide the discovery, Ericsson and Sony Mobile are seeking leave to supplement the motions before the Court rules on their pending motion to compel. Wi-LAN cannot use its unjustified refusal to provide relevant discovery as a basis for arguing that Ericsson and Sony Mobile should have sought earlier leave to file the supplement to the summary-judgment motions.

Because Ericsson and Sony Mobile merely seek leave to supplement motions already pending, they do not believe that the letter-brief requirement is applicable to their motion. Nevertheless, they join this motion should the Court conclude that providing an alternative ground for relief constitutes a separate summary-judgment motion to which the letter-brief requirement applies.

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CERTIFICATE OF SERVICE

The undersigned certifies that on December 7, 2012, the foregoing document was filed electronically in compliance with Local Rule CV-5(a). As such, this document was served on all counsel who are deemed to have consented to electronic service. Local Rule CV-5(b)(1).

/s/ Eric H. Findlay
Eric H. Findlay

CERTIFICATE OF CONFERENCE

Counsel for Plaintiff and counsel for Defendants participated in a meet and confer *via* numerous e-mails and telephone conferences discussing the subject of this motion. Plaintiff remains opposed to the relief requested and the parties need the Court to resolve this dispute.

/s/ Eric H. Findlay
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