

Plaintiff's Opposition Brief bears out what Defendants pointed out in its Motion for Leave – this dispute is at its heart an attempt by Plaintiff to litigate by “gotcha,” rather than trying to work out a reasonable compromise on a legitimate scheduling issue.

First, Plaintiff presumes, and implies that Defendants agree, that the 60-day deadline for filing motions for summary judgment and *Daubert* motions contained in the Court's “Standing Order Regarding Letter Briefs” of August 12, 2011 automatically applies to this case and that Defendants knowingly ignored that deadline. Dkt. No. 285 at 2. This is not true. Rather, that is the crux of Defendants' motion and what Defendants tried to work out with Plaintiff in order to avoid motion practice. In short, for the first time in this case, Plaintiff is now attempting to suggest that the 60-day deadline in the Court's general Standing Order, issued after the Docket Control Order was entered, has always been understood by the parties to apply to this case, *despite* the impracticality of the same when looking at the parties' agreed and often modified schedules.

Second, contrary to Plaintiff's Opposition, Plaintiff has failed to explain or establish any possible prejudice should the Court grant Defendants' Motion for Leave. Defendants sought leave to file, and have filed, not an undisciplined flood of letter briefs requesting motion practice on a multitude of issues, but only two: 1) a single motion for summary judgment; and 2) a single *Daubert* motion regarding only one of Plaintiff's experts. Plaintiff would not be prejudiced by Defendants' requested extensions. Telling is the language Plaintiff chose in its Opposition Brief:

Now, Defendants seek to force Wi-LAN to respond to letter briefs (and potentially summary briefs) **in the months** immediately before trial and as other pre-trial deadlines approach. This unnecessary expenditure of resources will necessarily distract from Wi-LAN's trial preparations during the critical **months** before the **April 8, 2012** trial setting (emphasis added). Dkt. No. 285 at 10.

To the complete contrary, Plaintiff has ample time and resources, including a combined total of eleven local and national counsel of record, to adequately respond to Defendants' potential ensuing motion for summary judgment and *Daubert* motion. Indeed, Plaintiff strategically chose to force Defendants into the instant motion practice rather than simply work out a reasonable timeline, with leave of Court, to allow the filing of these two letter briefs, as well as any possible ones that Plaintiff sought to file.¹

Defendants' Motion is not the typical request for leave to extend a deadline. It rather errs on seeking the Court's leave to file letter briefs since the parties' could not agree on the procedure for the same and given Plaintiff's late professed, disingenuous position that the 60-day deadline applied. However, even under the standard criteria for seeking such an extension, one is warranted here. As set forth in the Defendants' Motion (Dkt. No. 277), the Court's Standing Order had not been issued at the the outset of this case.² This fact, along with the various other adjustments of dates by the Court subsequent to the "working together" by the parties,³ illuminates clearly that the parties never designed nor envisioned that the 60-day timing deadlines of the Standing Order would in any way be applicable to the schedule of this case. Indeed, Defendants' letter brief regarding its motion for summary judgment of invalidity could not have been filed within the 60-day deadline, as it did not become clear until Wi-LAN served its rebuttal expert report that no disputed issues of fact existed between the parties. (*See* Dkt. No. 280 Ex. A. at 3.) Common sense and fairness thus conclude that the 60-day deadlines do not apply here. Moreover, despite the intimations of Plaintiff (Dkt. No. 285 at 2), this conclusion

¹ Of note is that Plaintiff did not initiate any letter briefing of its own in this case, but merely defensively responded to Defendants' briefing. Apparently, this bespeaks of the timing of Plaintiff discarding its willingness to continue to work through scheduling issues with Defendants. Plaintiff's resistance strategy arises late in this case and demonstrates that it too was not earlier acting under any 60-day deadline.

² This case was originally filed on October 5, 2010, and the original DCO was issued on July 6, 2011. Afterwards, the Court issued its "Standard Order Regarding Letter Briefs" on August 12, 2011.

³ Dkt. No. 277 at 3-4. Plaintiff also acknowledges the specific extensions in the letter briefing of this case. Dkt. No. 285 at 3.

does not contradict the Court's Order of November 21, 2011 (Dkt. No. 143), whereby leave was granted to both Plaintiff and Defendants to file summary judgment motions, as neither the parties' previous letter briefs, or the Court's Order implicated the Standing Order timing deadlines. (Dkt. No. 277 at 3.)

In the light of Defendants Motion for Leave and Reply in support thereof, Defendants respectfully request leave to file a letter brief seeking permission to file a motion for summary judgment and a letter brief seeking permission to file a *Daubert* motion.

Dated: January 7, 2012

Respectfully submitted,

/s/ (with permission)

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CERTIFICATE OF SERVICE

The undersigned certifies that on January 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 _____
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