

HON. MARSHA J. PECHMAN

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

<p>INTERVAL LICENSING LLC,</p> <p>Plaintiff,</p> <p>v.</p> <p>AOL, INC.; APPLE, INC.; eBAY, INC.;</p> <p>FACEBOOK, INC.; GOOGLE INC.;</p> <p>NETFLIX, INC.; OFFICE DEPOT, INC.;</p> <p>OFFICEMAX INC.; STAPLES, INC.;</p> <p>YAHOO! INC.; AND YOUTUBE, LLC,</p> <p>Defendants.</p>

Case No. 2:10-cv-01385-MJP

**SUPPLEMENTAL JOINT STATUS
REPORT**

Pursuant to Federal Rule of Civil Procedure 26(f), Local Rule CR 16, and this Court’s December 14, 2010 Order (Dkt. Nos. 148, 149), the parties hereto submit the following supplemental Joint Status Report:

1. **Nature and Complexity of Case:** Interval Licensing LLC (“Interval” or “Plaintiff”) has asserted four patents – United States Patent Nos. 6,263,507; 6,034,652; 6,788,314; and 6,757,682 – against 11 defendants. Two of the patents (the ’652 and ’314 Patents) share the same specification, but have distinct claims. Each defendant is alleged to have

1 infringed at least two of the patents. Set forth below is a list of defendants, and the claims
 2 asserted against each. Claim numbers in bold-face are asserted against all defendants:

DEFENDANT	PATENTS IN SUIT			
	'314	'652	'682	'507
AOL, INC.	<i>8 Claims Asserted:</i> 1, 3, 7, 9, 10, 12, 13, 15	<i>6 Claims Asserted:</i> 4, 5, 8, 11, 17, 18	<i>14 Claims Asserted:</i> 1-9, 11, 12, 13, 16, 17, 20	<i>26 Claims Asserted:</i> 20-24, 27, 28, 31, 34, 37, 39, 40, 43, 63-67, 70, 71, 74, 77, 80, 82, 83, 86
APPLE, INC.	<i>8 Claims Asserted:</i> 1, 3, 7, 9, 10, 12, 13, 15	<i>7 Claims Asserted:</i> 4, 5, 8, 11, 15, 16, 18	<i>14 Claims Asserted:</i> 1-9, 11, 12, 13, 16, 17, 20	<i>20 Claims Asserted:</i> 20-24, 27, 28, 31, 34, 37, 63-67, 70, 71, 74, 77, 80
eBAY, INC.			<i>14 Claims Asserted:</i> 1-9, 11, 12, 13, 16, 17, 20	<i>20 Claims Asserted:</i> 20-24, 27, 28, 31, 34, 37, 63-67, 70, 71, 74, 77, 80
FACEBOOK, INC.			<i>14 Claims Asserted:</i> 1-9, 11, 12, 13, 16, 17, 20	<i>20 Claims Asserted:</i> 20-24, 27, 28, 31, 34, 37, 63-67, 70, 71, 74, 77, 80
GOOGLE INC.	<i>8 Claims Asserted:</i> 1, 3, 7, 9, 10, 12, 13, 15	<i>10 Claims Asserted:</i> 4, 5, 6, 7, 8, 11, 15, 16, 17, 18	<i>15 Claims Asserted:</i> 1-9, 10, 11, 12, 13, 16, 17, 20	<i>28 Claims Asserted:</i> 20-24, 27, 28, 31, 34, 37, 38, 39, 40, 43, 63-67, 70, 71, 74, 77, 80, 81, 82, 83, 86
NETFLIX, INC.			<i>14 Claims Asserted:</i> 1-9, 11, 12, 13, 16, 17, 20	<i>20 Claims Asserted:</i> 20-24, 27, 28, 31, 34, 37, 63-67, 70, 71, 74, 77, 80
OFFICE DEPOT, INC.			<i>14 Claims Asserted:</i> 1-9, 11, 12, 13, 16, 17, 20	<i>20 Claims Asserted:</i> 20-24, 27, 28, 31, 34, 37, 63-67, 70, 71, 74, 77, 80
OFFICEMAX INC.			<i>14 Claims Asserted:</i> 1-9, 11, 12, 13, 16, 17, 20	<i>20 Claims Asserted:</i> 20-24, 27, 28, 31, 34, 37, 63-67, 70, 71, 74, 77, 80
STAPLES, INC.			<i>14 Claims Asserted:</i> 1-9, 11, 12, 13, 16, 17, 20	<i>20 Claims Asserted:</i> 20-24, 27, 28, 31, 34, 37, 63-67, 70, 71, 74, 77, 80
YAHOO! INC.	<i>13 Claims Asserted:</i> 1, 2, 3, 4, 7, 8, 9, 10, 11, 12, 13, 14, 15	<i>9 Claims Asserted:</i> 4, 5, 6, 8, 11, 15, 16, 17, 18	<i>15 Claims Asserted:</i> 1-9, 10, 11, 12, 13, 16, 17, 20	<i>26 Claims Asserted:</i> 20-24, 27, 28, 31, 34, 37, 39, 40, 43, 63-67, 70, 71, 74, 77, 80, 82, 83, 86
YOUTUBE, LLC			<i>14 Claims Asserted:</i> 1-9, 11, 12, 13, 16, 17, 20	<i>20 Claims Asserted:</i> 20-24, 27, 28, 31, 34, 37, 63-67, 70, 71, 74, 77, 80

21 Plaintiff's Contention:

22 Defendants exaggerate the complexity of the case by overlooking several key facts.
 23 First, the same claims for each patent are generally asserted against the defendants, which gives
 24 rise to substantial overlap and efficiencies. For example, with respect to the '507 patent, 20 of
 25 the 28 asserted claims are asserted against each of the defendants. For the '682 patent, 14 of the
 26 15 asserted claims are asserted against each of the defendants. In addition, the majority of the

1 asserted claims are dependent claims – Interval is asserting a total of 16 independent claims.
2 Second, the ‘314 and ‘652 patents are related and share the same specification. Third, while
3 there is a large number of accused instrumentalities and websites, the First Amended Complaint
4 (“FAC”) makes clear that the vast majority of those accused instrumentalities and websites
5 infringe the asserted claims based on the same general theories. For example, paragraph 21 of
6 the FAC alleges that AOL infringes the ‘507 patent and identifies 69 examples of AOL
7 websites that infringe. But the fact that AOL has at least 69 websites that employ the *same*
8 infringing functionality will add little complexity to the case. The same is true for paragraph 34
9 of the FAC, which alleges that Yahoo infringes the ‘507 patent and identifies 43 examples of
10 Yahoo websites that infringe using the *same* infringing functionality. Finally, although there
11 are eleven defendants, the FAC alleges that many of the defendants infringe the asserted claims
12 under the same basic theory. For example, paragraph 22 of the FAC alleges that AOL Spam
13 Filter infringes claims 39, 40, 43, 82, 83, and 86 of the ‘507 patent because “[w]hen a new
14 email is received by AOL Mail, the hardware and software associated with the AOL Spam
15 Filter categorize the new email as either ‘spam’ or ‘not spam.’ The categorization is based at
16 least in part on a comparison between the new email and other emails that have been received
17 by AOL Mail.” Similarly, paragraph 28 of the FAC alleges that Google infringed the same
18 claims of the ‘507 patent by operating the Gmail Spam Filter. And paragraph 36 of the FAC
19 alleges that Yahoo infringed the same claims of the ‘507 patent by operating Yahoo
20 SpamGuard.

21 As discussed below, rather than adopting defendants’ proposed bifurcation of the case
22 and conducting discovery on validity first, the greatest efficiency would be gained by dividing
23 the case into two groups of patents: the ‘314 and ‘652 patents in one group and the ‘507 and
24 ‘682 patents in the other group. The ‘314 and ‘652 patents are related, are asserted against the
25 same defendants, and Interval’s theories of infringement for each of the two patents are similar.
26 With respect to the second group, the ‘507 and ‘682 patents are asserted against the same

1 defendants, and while the infringement theories are not identical, there is overlap. Specifically,
2 for AOL, eBay, Netflix, Office Depot, OfficeMax, Staples, and YouTube, the accused
3 functionality with respect to the ‘507 and ‘682 patents (generally speaking, product and content
4 recommendations functionality) is either the same or very closely related. Similar functionality
5 is accused of infringing the ‘507 and ‘682 patents for Apple, Google, and Yahoo as well,
6 although these defendants also operate a number of more unique systems that also infringe
7 Interval’s patents. The allegations against Facebook are similar to those asserted against all of
8 the other defendants for the ‘507 patent and similar to the theories asserted Apple, Google, and
9 Yahoo with respect to the ‘682 patent. Such grouping of the patents would capitalize on the
10 similarities of Interval’s infringement theories on a single patent asserted against multiple
11 defendants, shorten the time to trial and the duration of the trial, and minimize the possibility of
12 inconsistent verdicts.

13 Defendants contend that the Court should bifurcate the issues of validity and
14 enforceability and proceed on those issues before infringement because such an approach would
15 “resolve the case or greatly simplify it before the parties expend resources on discovery
16 regarding infringement (and damages) issues, which is often expensive, invasive and
17 burdensome.” But defendants’ arguments would apply equally to all patent cases, yet neither
18 the Local Patent Rules nor the Federal Rules of Civil Procedure adopt such an approach.

19 The Federal Rules of Civil Procedure “should be construed and administered to secure
20 the just, speedy, and inexpensive determination of every action and proceeding.” FRCP 1
21 (emphasis added). Similarly, the Local Patent Rules “are designed to streamline the pre-trial and
22 claim construction process, and generally to reduce the cost of patent litigation.” LPR 101
23 (emphasis added). Defendants’ proposed bifurcation defeats the fundamental goals of the
24 Federal Rules and this District’s Local Patent Rules by injecting substantial and needless delay
25 into the schedule. For example, the Local Patent Rules provide that a Markman hearing will be
26 held 180 days from the date of the scheduling conference. Yet defendants’ proposed schedule

1 sets a Markman hearing almost 300 days after the scheduling conference and over a year after
2 this case was filed. Defendants' proposed schedule runs through March 30, 2012, at which time
3 only a single issue (validity) would have been addressed, and even that issue would not have
4 been tried despite the fact that this case will have been on the Court's docket for over 18 months.
5 Indeed, under defendants' proposed schedule, this case will likely be on the Court's docket for at
6 least 3-4 years before a trial commences, which would do little to minimize discovery expenses
7 and would put an unfair strain on the Court's resources. Such a lax schedule does not streamline
8 the pre-trial and claim construction processes nor does it minimize discovery expenses.

9 In addition, discovery on all issues promotes early settlement and would likely permit
10 Interval to narrow the number of asserted claims. For example, if Interval learns through
11 damages discovery that a certain accused website generates no revenues, then that would be an
12 important component in the cost/benefit analysis to determine whether to proceed against that
13 accused website. In addition, discovery on infringement issues permits Interval to identify early
14 in the case those accused functionalities/websites with the strongest infringement reads, and to
15 focus its efforts on those specific accused functionalities/websites.

16 At the December 2010 scheduling conference, this Court's instructions regarding the
17 proposed schedules were clear:

18 Don't be coming back to me with a schedule that basically puts me
19 in my dotage. I don't want this on my senior status schedule. I am
20 looking for a rigorous schedule. If I let you stretch it out, that is
21 one of the things I am telling you, you will simply fill up the time
22 and spend more money. That doesn't necessarily mean you will get
23 a better piece of litigation. So I am much more interested up front
24 in having you spend time about what you are going to leave on the
25 cutting room floor, and which issues are really worth pursuing, so
26 that you can stay inside the schedule.

27 12/13/2010 Scheduling Conference Transcript at 24:23-25:7. The Court correctly noted that an
aggressive and rigorous schedule would minimize costs and would not compromise the quality

1 of the parties' presentations or the Court's rulings. This Court also pointed out that this District
2 can get cases ready for trial quickly and efficiently:

3 In this district we can try your cases pretty fast. Usually I can try
4 them faster than you want to go. We usually operate on a 12- to
5 14-month schedule. Now, we have already burned through four or
6 five months of that.

6 *Id.* at 24:18-22.

7 Defendants' proposed schedule fails to heed the Court's instructions. Under their
8 schedule, the Court would not even hold a case management conference to set the schedule on
9 discovery relating to infringement and damages until *over eighteen months after the case was*
10 *filed*. That is the antithesis of an aggressive and rigorous schedule, and would do nothing to
11 minimize costs.

12 This case no doubt raises important issues, some of which might prove challenging to
13 resolve. And a substantial amount of money is at stake. But neither of these factors warrants a
14 trial date 3-4 years in the future. Defendants have retained some of the most skilled lawyers in
15 the nation to represent them in this case. These lawyers and their firms are quite capable of
16 adhering to a schedule that proposes a trial over a year and a half after filing, as Interval
17 proposes (20 months from August 2010 until April 2012).

18 Finally, defendants announce that one or more of them will submit a request for
19 reexamination on one or more of the asserted patents, and accordingly request that this Court
20 stay all discovery until they have time to prepare and file their motions for reexamination.
21 Again, defendants are inviting needless delay into the schedule. The parties held their Rule
22 26(f) conference over two months ago and yet formal discovery has commenced only in the last
23 week with Interval serving its first set of document requests and interrogatories. Formal
24 discovery should not be further delayed, especially where defendants have not even submitted a
25 request for reexamination, and the Court remains in the dark as to the basic details of those
26 (possible) requests for reexamination, including which parties will request a reexamination,

1 which patents, which claims, and the type of reexamination requested. *See, e.g., F5 Networks,*
2 *Inc. v. A10 Networks, Inc.*, 2010 WL 5138375, *3 (W.D. Wash. Dec. 10, 2010) (denying
3 motion to stay pending reexamination based in part because “the Court remains in the dark” as
4 to basic details concerning the reexamination). “A court is under no obligation to delay its own
5 proceedings by yielding to ongoing PTO patent reexaminations, regardless of their relevancy to
6 infringement claims which the court must analyze.” *Esco Corp v. Berkeley Forge*, 2009 WL
7 3078463, *2 (N.D. Cal. Sept. 28, 2009). And “[t]here is no per se rule that patent cases should
8 be stayed pending reexaminations, because such a rule ‘would invite parties to unilaterally
9 derail’ litigation.” *Id.* (citation omitted); *see also F5 Networks*, 2010 WL 5138375 at *2 (noting
10 that this Court is “is unaware of any ‘policy’ which favors the granting of such stays.”). This
11 Court has referenced USPTO statistics that “show that in only 13% of all *ex parte*
12 reexaminations were all claims cancelled.” *F5 Networks*, 2010 WL 5138375 at *2. In addition,
13 a stay pending reexamination would create incredible delay. The USPTO website shows that a
14 record number of requests for *ex parte* reexaminations were filed in 2010—over 18% more than
15 the number of requests filed in 2009.¹ And the same website shows that *ex parte*
16 reexaminations take on average more than two years to complete. *Id.* As this Court
17 recognized,

18 [S]ince it is unlikely that the reexamination request will resolve *all*
19 of the claims and causes of action, the parties will be back in front
20 of this Court in another two to three years, with another 18 months
21 after that before they get to trial. If no stay is granted, all issues
are resolved less than 18 months from now.

22 *F5 Networks*, 2010 WL 5138375 at *3 (emphasis in original).

23 Moreover, the case has been on file since August. In fact, many Defendants were
24 contacted by Vulcan/Interval in the Spring of 2010. Thus, the Defendants’ current claim that

25
26 ¹ http://www.uspto.gov/patents/stats/EP_quarterly_report_Sept_30_2010.pdf.

1 they need even more time in order to prepare their reexamination requests – and that the
2 schedule should be delayed as a result – should be rejected.

3 Finally,² if the Court is considering granting a stay pending reexamination, Interval
4 respectfully requests an opportunity to brief the issue fully. Thus, at a minimum, this issue
5 should not affect setting the current schedule, and any Defendant can move to stay pending a
6 reexamination at the appropriate point. Interval intends to vigorously oppose any stay pending
7 reexamination.

8 Defendants’ Contention:

9 As this Court directed, Defendants have identified the issues common to the case and
10 have proposed a case schedule that provides for streamlined and joint discovery and
11 motion/briefing practice on those common issues. Defendants’ proposal would consolidate the
12 proceedings, identify one set of claim terms for construction, present one set of claim
13 construction briefs, and streamline discovery on invalidity issues and invalidity briefs/motions.

14 Plaintiff’s First Amended Complaint (“FAC”) and infringement contentions, which for
15 the first time shed any light on what is accused, make clear that Defendants’ Motions for
16 Severance were well founded. Plaintiff makes no allegation of any common transaction or
17 occurrence related to its infringement allegations. In effect, Plaintiff has brought what should
18 have been 11 separate actions in a single case. Although it would be appropriate for the
19 Defendants to renew their severance motions at this time, Defendants are mindful of the Court’s
20 request to attempt to identify common issues that can be resolved first. Thus, rather than renew
21 their request for severance at this time, Defendants have done their best, based on the limited
22 information Plaintiff has provided concerning its infringement allegations, to identify the
23 potentially common issues that the Court may address in a first phase of the case.

24 ² Defendants also criticize the way in which Interval defined the term “Accused Products” in its
25 recent discovery requests. But the Joint Status Report is not the proper document to engage in a
26 discovery dispute. To the extent Defendants believe that the definition is inappropriate, Interval
is happy to meet and confer with them during discovery to discuss the issue.

1 Defendants propose to handle the common issues concerning validity, enforceability and
2 claim construction together in a first phase of the litigation (“validity issues”). This approach
3 will pose significantly less burden on the parties and the Court than proceeding with 11 separate
4 cases. Defendants are not proposing to unduly delay this litigation, but simply to recognize the
5 practical realities created by Plaintiff choosing to assert in one case more than sixty claims from
6 four patents against 11 defendants and at least 175 accused instrumentalities and 145 different
7 websites.

8 As explained in Defendants’ respective severance motions, Plaintiff’s allegations of
9 infringement, whether or not they rest on some “common theory” (as asserted by Plaintiff), are
10 directed to disparate websites and functions that are necessarily subject to different proofs and a
11 wide variety of evidence. Plaintiff will be required to prove infringement in a particularized
12 manner and with separate evidence for each accused instrumentality of each Defendant. By
13 phasing the litigations, the potentially massive amount of infringement evidence (and potential
14 disputes concerning discovery on infringement) will only be necessary for the infringement
15 issues that remain viable following claim construction and dispositive motion practice
16 concerning validity issues.

17 Therefore, Defendants propose that, rather than diving headlong into discovery regarding
18 the widely disparate infringement and damages issues, the parties and the Court be permitted to
19 focus their efforts on invalidity discovery, claim construction and dispositive motions
20 concerning invalidity.

21 Defendants’ phased approach offers the realistic possibility of narrowing the issues in the
22 overall litigation to a more manageable scope. Defendants’ approach, both through phasing and
23 placing limits on asserted claims, provides the most feasible mechanism to rein in an unwieldy
24 litigation.

25 In contrast, Plaintiff’s approach makes no effort to address the very real prejudice that
26 Plaintiff has created by lumping together disparate Defendants. Nor does Plaintiff respond to

1 the Court’s request that the parties identify the common issues that might be resolved jointly.
2 Plaintiff’s allegations of “common theories” only serve to demonstrate the prejudice that
3 Defendants will face. For example, notwithstanding that Plaintiff contends to have the same
4 “general theories” of infringement, it has accused, for example, 69 websites for just one
5 Defendant on one patent and 43 websites of another Defendant on the same patent. Plaintiff
6 has made no showing that these websites operate in the same manner or are subject to
7 overlapping evidence. Plaintiff’s own explanation suggests that it will try to prove its case
8 against one website or service, and then attempt to argue that every other purportedly “similar”
9 accused instrumentality infringes for the same reasons. This approach is improper and highly
10 prejudicial to Defendants since there is no reasonable way for a jury to assess the merits of the
11 claims against 11 different defendants at least 175 accused instrumentalities. Defendants’
12 proposal addresses this prejudice and lack of common evidence by taking the common
13 invalidity and claim construction issues first. Afterwards, depending on the issues that remain,
14 the parties may seek separate trials as appropriate.

15 Plaintiff’s recently served discovery requests, excerpts of which are attached as
16 Defendants’ Exhibit A, further support Defendants’ proposal that this litigation should be
17 phased. Plaintiff’s requests demonstrate the overreaching nature of discovery that Plaintiff
18 plans to seek and the many disputes Plaintiff’s overreaching will cause, none of which need to
19 be addressed in the first phase of this litigation, or perhaps ever. For example, Plaintiff has not
20 even limited its discovery requests to what it has accused of infringement or for which it has
21 provided infringement contentions. As one example, in the requests provided to Google,
22 Plaintiff has defined terms “Accused Products” more broadly than those for which it has served
23 contentions and added another category of what it calls “Relevant Products,” which it defines
24 even more broadly. Thus, rather than propose a solution to make managing the unwieldy
25 litigation it created by joining 11 disparate Defendants in a single case with multiple patents,
26

1 Plaintiff has demonstrated that it will only seek to further complicate matters and make this a
2 litigation about discovery disputes and attrition.

3 Plaintiff's criticism that Defendants are seeking to delay the case is unfounded. Plaintiff
4 first provided an amended Complaint that contained even minimal notice of what was accused
5 in the last days of December 2010. As this Court already found, Plaintiff's original Complaint
6 failed to meet the requirements of the Federal Rules. Only after this Court's Order [Dkt. No.
7 147], did the Plaintiff file its FAC, adding some substance to the bare bones of its initial
8 pleading. The FAC also newly asserted the '507 Patent against Facebook, which had previously
9 only been accused of infringing the '682 Patent. Thus, the delay, if any, in getting this
10 litigation started was of Plaintiff's own making by refusing to even attempt to clarify its
11 allegations until the Court ordered it to do so.

12 This is a very complex case. Based on Plaintiff's allegations, this case involves:

- 13 • 11 separate Defendants;
- 14 • 4 asserted patents;
- 15 • 67 asserted claims; and
- 16 • At least 175 accused instrumentalities and 145 different websites.

17 The case's complexity is compounded by shortcomings in Plaintiff's infringement contentions,
18 leaving Defendants *still* guessing in certain instances as to what is accused. For example,
19 Plaintiff provides no information regarding most of the method claims, but rather suggests that
20 Defendants should simply look to non-method claims to divine what Plaintiff's infringement
21 contentions will be. In addition, many of the asserted claims contain means-plus-function
22 terms, yet Plaintiff has failed to provide any indication of the accused functions or the structures
23 in the accused instrumentalities where these limitations are alleged to be found. Plaintiff has
24 also failed to provide any claim charts for several accused websites, in violation of the local
25 patent rules. These are but a few examples of the shortcomings in Plaintiff's allegations that
26 will likely only lead to more extensive discovery disputes on the issues of infringement; issues

1 which may be avoided, or at least narrowed, by addressing claim construction and invalidity
2 first.

3 In particular, Defendants request a schedule – set forth in detail in Section 6(B) – that
4 first addresses validity/standing/enforceability issues (“validity issues”) on all four asserted
5 patents. This schedule includes invalidity contentions, claim construction, validity issues
6 discovery, and dispositive motions on validity issues, and stays discovery on other issues during
7 the first phase. Because the nature and scope of any claims that remain may change significantly
8 after the claim construction and invalidity phase of this litigation, Defendants request that the
9 Court hold a Case Management Conference, after the first phase of the litigation is completed, to
10 set the schedule and structure for the remaining parts of the case. As part of that Case
11 Management Conference, Defendants expect to seek to sever the cases because the common
12 issues (i.e., the validity issues) will have been addressed at least up through dispositive motions
13 and the remaining issues (i.e., infringement and damages issues) present little or no overlap
14 between the parties.

15 This Court has broad discretion to phase the case. Defendant’s recommended first
16 phase has the potential to resolve the case or greatly simplify it before the parties expend
17 resources on discovery regarding infringement (and damages) issues, which is often expensive,
18 invasive and burdensome. As the Court is well aware, this case is not “normal” because
19 plaintiff chose to tie together 11 different Defendants, on four patents and a host of accused
20 instrumentalities. Phasing validity issues first is an approach that has been adopted by other
21 Courts to handle the complexity introduced by a plaintiff suing multiple, unrelated Defendants
22 in the same case. *See General Patent Corp. Int’l v. Hayes Microcomputer Prods., Inc.*, 44
23 U.S.P.Q.2d 1954,1997 WL 770874, (C.D. Cal. 1997); *cf. Quito v. Netflix, et al* (Ex. B) (initial
24 phase of case limited to issues regarding summary judgment of invalidity); *55 Brake, L.L.C. v.*
25 *Audi of America, Inc.*, 2009 WL 35343 (D. Idaho Jan. 5, 2009) (initial phase of discovery
26

1 limited issues regarding *Markman*, as “part of the Court’s initiative to lower the costs of
2 discovery by making that process more efficient.”).

3 By contrast, Plaintiff’s proposal accomplishes little to no streamlining of the case.
4 Although Plaintiff suggests it is splitting a single case by patent, some of which are not even
5 related, Plaintiff’s allegations create what should be 11 separate cases at least. This approach
6 does not limit briefing and disputes on common issues as does Defendants’ proposal nor does it
7 provide any staging of the litigation that would allow the Court to narrow the issues by
8 addressing common issues first, as does Defendants’ proposal. In fact, Plaintiff’s proposal, as
9 compared to Defendants’ proposal which combines all common issues, doubles the various
10 filings related to the common issues, yet does nothing to address the prejudice it created by
11 lumping 11 disparate Defendants together or narrow the issues by phasing.

12 Defendants’ proposed phasing is also particularly appropriate for this case, as
13 Defendants have begun to identify prior art, and one or more Defendants plan to seek
14 reexamination of one or more of the asserted patents, as soon as possible. One or more
15 Defendants are expeditiously preparing for reexamination now and plan to move by March 11,
16 2011 to stay this action with respect to one or more of the patents-in-suit pending
17 reexamination. This Court has regularly recognized the benefits of staying litigation pending
18 reexamination. See e.g., Order Granting Mot. to Stay Proceedings Pending Reexamination of
19 U.S. Pat. No. 7,573,706, *National Prods., Inc. v. Gamber-Johnson LLC*, No. 09-cv-1212 MJP
20 (W.D. Wash. Oct. 23, 2009); Order Granting Def. Mot. to Stay Case Pending Reexamination of
21 U.S. Pat. No. 7,467,229, *Direct Route, LLC v. Onoffline, Inc.*, No. 09-cv-1509 MJP (W.D.
22 Wash. Feb. 8, 2010); Minute Order, *Avocent Redmond Corp. v. Rose Elecs., Inc.*, No. 06-cv-
23 1711 MJP (W.D. Wash. Oct. 30, 2007); Order Granting Def. Mot. to Stay, *Prokop Labs, LLC v.*
24 *Staples, Inc.*, No. 07-cv-1094 MJP (W. D. Wash. Feb. 22, 2008). A stay pending the Patent
25 Office’s reexamination of the patents-in-suit is particularly appropriate in this highly complex
26 case. Rather than embroiling the parties in the far-reaching litigation that Plaintiff has created

1 by accusing 11 Defendants and more than 100 accused instrumentalities, reexamination
2 provides the opportunity to address the validity of Plaintiff's patents and thereby conserve the
3 resources of both the Court and the parties by avoiding potentially unnecessary litigation
4 concerning a host of patent claims and products. By setting a time by which one or more
5 Defendants plan to request a stay pending reexamination, it is clear that Defendants are not
6 seeking to delay this case indefinitely as Plaintiff suggests.

7 Finally, Defendants' proposed schedule is reasonable given that Plaintiff has effectively
8 only properly begun this complex litigation in the last days of 2010 with the filing of its FAC.
9 Defendants' proposal would complete the common issues in this 11-defendant, four patent case
10 in less than a year from Plaintiff's proper initiation of this case. By this stage, the parties will
11 have completed claim construction and dispositive motion briefing on invalidity. Thereafter,
12 the parties would be in a position to set an appropriate schedule for any remaining issues.

13 2. **ADR Method:** The parties believe that a party appointed mediator as described
14 in Local Rule 39.1(b)(3) should be the initial method of alternative dispute resolution.

15 3. **ADR Scheduling:** The parties will continue to discuss the appropriate scheduling
16 of non-binding mediation after *Markman* briefs have been filed.

17 4. **Deadline to Join Additional Parties:** The parties propose March 4, 2011.

18 5. **Proposed Discovery Plan:**

19 (A - 1) **FRCP 26(f) and Local Rule CR 16 Conference:**

20 A telephonic meeting was held on October 25, 2010, and was attended by representatives
21 of all parties; these individuals are identified in the Joint Status Report filed by the Parties on
22 November 8, 2010 [Dkt. No. 124]. The parties have further conferred on some issues subsequent
23 to the service of the First Amended Complaint.

1 (A - 1) **FRCP 26(a)(I) Initial Disclosures:**

2 As required by the Court's orders, the parties served Initial Disclosures on November 1,
3 2010.

4 (B) **Scope of Discovery:**

5 Plaintiff's Contention:

6 As described above, Interval respectfully requests that asserted patents be divided into
7 two groups: the '507 and '682 patents in one group, and the '314 and '652 patents in the other
8 group. Each group of patents would be tried separately. Although Interval proposes the same
9 discovery schedule for both groups of patents, if unforeseen events delay discovery relating to
10 one group, the other group could proceed on a separate discovery track. Discovery on all issues
11 including infringement, validity, and damages should continue concurrently.

12 Accepting defendants' proposal of limiting discovery to validity issues will not only
13 delay the trial and consequently increase the cost of the litigation, but it will also impose an
14 undue burden on non-parties during discovery. For example, defendants contend that they intend
15 to seek discovery as to the "inventors' knowledge of prior art" during this first phase of
16 discovery relating to validity, which likely will include a deposition of each of the 19 inventors.
17 Yet defendants will no doubt request another deposition of each of the 19 inventors during the
18 later phases of discovery, causing multiple depositions of the same inventor. The same holds
19 true for other non-parties. To the extent that a non-party would have documents relevant to
20 validity of the asserted patents, the same non-party would likely have documents relevant to the
21 other issues in the case such as infringement. Defendants' proposed bifurcation would require
22 that multiple rounds of Rule 45 subpoenas be issued to the same non-parties, which not only
23 increases the discovery expenses for the parties but places an undue burden on non-parties.
24 Accordingly, such bifurcation should be rejected because it would not "streamline" the case nor
25 would it encourage the "speeding and inexpensive determination of" this action. *See* LPR 101;
26 FRCP 1.

1 Defendants' Contention:

2 As described above, Defendants request that discovery be phased to focus on the
3 common validity issues first, with discovery on the broad and unrelated infringement and
4 damages issues being deferred until after the common issues are addressed. Contrary to
5 Plaintiff's contention, this would not necessarily lead to multiple depositions of the same parties,
6 particularly the inventors. Plaintiff has provided no basis for its assertion that inventors will
7 have relevant testimony concerning issues of infringement and at this time, there is no reason to
8 believe that is the case. Rather, inventors are most likely to have discoverable information
9 limited to the common issues. Further, Plaintiff provides no reason why a third party with
10 information concerning prior art would have information concerning infringement. Such an
11 eventuality seems unlikely given that a third party is not likely to have direct first-hand
12 knowledge concerning the accused instrumentalities (at least no such information that is not
13 more readily obtained from operation of the accused instrumentalities and the Defendants
14 themselves).

15 As for subjects of the first phase of the case, Defendants are likely to need discovery
16 related to claim construction, invalidity, enforceability, patent ownership, inventorship, patent
17 prosecution, development of the alleged inventions, potential prior art, and Plaintiff's and
18 inventors' knowledge of prior art.

19 (C) **Discovery Limitations:**

20 The parties propose the following changes to the limitations on discovery imposed under
21 the Federal and Local Civil Rules.³

22 • Inventor Depositions:

- 23 ○ Plaintiff's Proposal: As discussed in more detail below in the section for all non-
24 party depositions, Interval proposes that each inventor be deposed not more than

25 ³ Defendants provide limitations based upon the planned phasing of the litigation, but recognize
26 that these limitations may need to be revisited.

1 once and that each deposition not exceed seven hours. Defendants' proposal of
2 12 hours per inventor on the '314 and '652 patents and 18 hours per inventor on
3 the '507 and '682 patents is entirely unreasonable. That would amount to a total
4 of 342 hours that defendants would be deposing the inventors during the validity
5 phase. Three of the inventors are on both the '507 and the '314 and '652 patents,
6 which means that under defendants' proposal, each of them would be deposed for
7 30 hours during the validity stage alone, which is nearly 5 days of depositions
8 each.

- 9 ○ Defendants' Proposal: Defendants propose a default for inventor depositions that
10 Defendants may depose each inventor of the '314 and '652 patents for a total of
11 12 hours to be allocated among the four Defendants accused of infringing the
12 '314 and '652 patents and each inventor of the '682 and '507 patents (which all
13 Defendants are accused of infringing) for a total of 18 hours to be allocated
14 among all of the Defendants. Defendants also propose that the parties will meet
15 and confer should adjustments to these time limits be appropriate for any given
16 inventor. These limitations represent a significant decrease in the collective
17 amount of time Defendants would be entitled to if Plaintiff had brought these as
18 separate actions (nearly 1500 hours), or if the actions were severed.

- 19 ● **Third-Party Depositions:**

- 20 ○ Plaintiff's Proposal: Each third party (including but not limited to inventors)
21 should be deposed not more than once absent a showing of good cause and leave
22 of court. The duration of each non-party deposition shall not exceed 7 hours. To
23 the extent that one side notices the non-party deposition, the other side is entitled
24 to an equal amount of time to question the non-party witness. Defendants'
25 proposal of each defendant taking up to 35 hours of third-party depositions is
26 unreasonable. That would mean that defendants could collectively take up to 385

1 hours of non-party depositions, or 55 days of depositions assuming a 7-hour
2 deposition day.

- 3 ○ Defendants' Proposal: Each Defendant may take up to 35 hours of third-party
4 depositions (excluding inventors); Plaintiff may take up to 70 hours of third party
5 depositions. Defendants have no desire to take unnecessary depositions or
6 unduly prolong depositions. The separate hour limit per Defendant is merely an
7 attempt to account for the fact that some Defendants may have greater need to
8 take third-party depositions and a collective limitation would be unfairly
9 prejudicial to those Defendants.

- 10 • Party Depositions:

- 11 ○ Plaintiff's Proposal: The officers, directors, employees, and representatives of the
12 parties should not be deposed more than once absent agreement by the parties or a
13 showing of good cause and leave of court. Defendants propose a set number of
14 depositions rather than a number of hours. But that does not encourage efficiency
15 with respect to the deposition of any individual witness. To the extent that a
16 certain witness has focused information, a deposition could last less than an hour,
17 and therefore should not count as one of five total party depositions.
- 18 ○ Defendants' Proposal: Each Defendant may take 7.5-hours of 30(b)(6)
19 depositions of the Plaintiff. The Plaintiff may take 7.5-hours of 30(b)(6)
20 depositions of each Defendant. Each Defendant may take up to 5 individual
21 depositions of Plaintiff's employees. Plaintiff may take up to 5 individual
22 depositions of each Defendant's employees. Plaintiff's unlimited proposal would
23 put Defendants at risk of having Plaintiff call a parade of witnesses (even if only
24 for a short deposition) and thereby greatly increase Defendants' expense.
25 Defendants have no intention of being unreasonable, but propose the foregoing
26

1 limits to reasonably focus discovery, which Plaintiff's discovery requests suggest
2 it has no intention of doing.

3 • **Depositions After Fact Discovery Deadline:**

4 ○ Plaintiff's Proposal: Each party may depose witnesses after the fact discovery
5 deadline to the extent that the witness appears on another party's witness list and
6 the party has not previously deposed that witness. Unless otherwise agreed to by
7 the parties, each such deposition should be limited to not more than three hours.

8 ○ Defendants' Proposal: Each party may depose witnesses after the fact discovery
9 deadline within two weeks of service of the trial witness list to the extent that the
10 witness appears on another party's trial witness list and the party has not
11 previously deposed that witness. Unless otherwise agreed to by the parties, each
12 such deposition should be limited to not more than three hours.

13 • **Time Limit on Depositions:**

14 ○ Plaintiff's Proposal: Absent agreement of the parties or a showing of good cause
15 and leave of court, the total deposition time for each party shall not exceed 30
16 hours for Rule 30(b)(6) depositions, and each side shall have no more than 100
17 hours for all other depositions. The 100 hour time limit should encompass all
18 depositions in the case other than the Rule 30(b)(6) depositions, whether party or
19 non-party depositions.

20 ○ Defendants' Proposal: Defendants believe the limitations on depositions for
21 parties, inventors and third parties outlined above adequately address the issue of
22 deposition limits. Plaintiff's proposal severely disadvantages Defendants,
23 allowing Plaintiff to take a full case worth of depositions, while leaving each
24 Defendant with less than 10 hours of total deposition time for all parties, inventors
25 and non-parties a Defendant may need to depose (outside of Rule 30(b)(6)

1 depositions). In addition, Plaintiff's proposal would not even permit the
2 Defendants to take one day of deposition with each of the named inventors.

3 • Interrogatories:

4 ○ Plaintiff's Proposal: Each side may serve no more than 30 written interrogatories
5 without a showing of good cause and leave of court. Defendants' proposal leaves
6 Plaintiff answering up to 185 separate interrogatories. If Defendants want
7 Plaintiff to have 25 interrogatories, then they should face the same limitation.
8 Plaintiff is fine limiting all parties to 25 interrogatories per party, so long as a
9 question that goes to a common issue (i.e., that is not Defendant-specific) counts
10 as an interrogatory used by each Defendant. In other words, Defendants should
11 not be able to use their "individual" interrogatories as cover to ask "common
12 interrogatory" type questions. Thus, based on Defendants' proposal, Plaintiff
13 proposes that Defendants have 20 "common" interrogatories, plus 5 individual
14 interrogatories that must be limited to a particular issue only in dispute between
15 Plaintiff and that specific Defendant.

16 ○ Defendants' Proposal: Plaintiff's proposal to limit interrogatories by side in a
17 case involving 11 Defendants, four patents and a multitude of products is
18 prejudicial to Defendants. Defendants may serve up to 20 common
19 interrogatories. Each Defendant may serve up to an additional 15 interrogatories.
20 Plaintiff may serve up to 25 interrogatories on each Defendant.

21 • Requests for Admission:

22 ○ Plaintiff's Proposal: Requests for admission should be used solely to authenticate
23 documents and not for any other issue. If Requests for Admission are used, they
24 should be applied per side, not per party. As the interrogatory issue above,
25 Defendants should not be permitted to skirt around the Rules by having each
26 Defendant ask a Request for Admission that goes to a common issue.

1 ○ Defendants’ Proposal: The parties may serve Requests for Admission in
2 accordance with the Federal Rules of Civil Procedure. Plaintiff’s artificial
3 limitation on the use of Requests for Admission prevents the parties from using
4 this discovery device to narrow the issues in dispute. Provided the Plaintiff agrees
5 that any response to a Request for Admission served by any Defendant may be
6 used by any other Defendant, Defendants will endeavor to avoid serving
7 duplicative Requests for Admissions.

8 • Number of Claim Terms to Construe:

9 ○ Plaintiff’s Proposal: The parties should select ten total terms to construe at the
10 Markman hearing, consistent with this Court’s Standing Patent Order. *See also*
11 12/13/2010 Schedule Conference at 22 (COURT: “You need to come up with a
12 common set of terms, what are the ten best that are going to get you the furthest in
13 the litigation.”); 16 (COURT: “So if you pick carefully, pick the ones that you
14 think are going to make the most impact or give you the biggest bang for your
15 buck in coming up with a solution to viewing whether or not there is, in fact,
16 infringement.”). Limiting the number of terms will force the parties to focus on
17 those terms that give the parties the “biggest bang for your buck” and therefore
18 those that are most important to the outcome of the case.

19 ○ Defendants’ Proposal: Plaintiff has asserted 16 independent claims in four
20 patents against 11 defendants and over 175 different instrumentalities. Limiting
21 the disputed terms to 10 would prevent Defendants from even presenting one
22 claim term per independent claim or one claim term per Defendant. The risk of
23 prejudice to the Defendants based on Plaintiff’s proposal is extraordinarily high
24 because, notwithstanding Plaintiff’s claims to common infringement theories, the
25 multiple accused instrumentalities of each Defendant no doubt operate differently
26 and may present unique issues for claim construction. Typically, there are several

1 disputed terms per independent claim and there may be some additional terms.
2 Defendants propose that the parties be permitted to present up to 10 terms per
3 patent group: 10 terms each for the unrelated '682 and '507 patents, and 10 terms
4 in total for the related '314 and '652 patents, for a total of 30 terms. Further, any
5 limit on the number of terms to be construed should not limit the parties' ability in
6 claim construction or thereafter to argue that a claim term is indefinite.

7 • **Number of Claims Asserted:**

8 ○ Plaintiff's Proposal: Interval believes that as discovery progresses and after
9 defendants serve invalidity contentions and non-infringement contentions, it will
10 likely be able to narrow the number of claims asserted. Interval submits that any
11 narrowing of the claims is without prejudice.

12 ○ Defendants' Proposal: Defendants propose that within two weeks of Defendants'
13 service of their invalidity contentions on any of the patents-in-suit, Plaintiff
14 should elect no more than 2 independent claims per patent and no more than 10
15 claims total for any patent to pursue in this case. This approach provides the
16 greatest possibility to focus the parties' disputes and present a manageable
17 number of claims and claim construction disputes to the Court. The selection of
18 claims to pursue must be binding; otherwise, it will likely only result in the parties
19 presenting further claim construction disputes to the Court.

20 • **Number of Prior Art References Identified:**

21 ○ Plaintiff's Proposal: Defendants should be required to limit the number of prior
22 art references in the interest of efficiency. The exact number of prior art
23 references per claim or per patent can be determined after defendants serve their
24 invalidity contentions.

25 ○ Defendants' Proposal: Again, the best way to limit the number of prior art
26 references the Defendants may seek to rely upon would be to have the Plaintiff

1 limit the number of asserted claims. With four patents and more than sixty
2 asserted claims against more than 100 products, it would be inappropriate to limit
3 the number of prior art references Defendants may identify at this stage of the
4 case. Further, Plaintiff has only recently provided any notice of the basis for its
5 allegations and the Court has not yet construed the asserted claims. Defendants
6 have no desire to present unnecessarily duplicative references and would
7 necessarily expect to streamline their selection of prior art as the litigation
8 progresses.

9 • **Non-Infringement Contentions:**

- 10 ○ Plaintiff's Proposal: Consistent with LPR 121, Interval respectfully requests that
11 the Court order defendants to serve non-infringement contentions. Non-
12 infringement contentions will allow the parties and the Court to identify precisely
13 the disputed issues and permit the parties to avoid discovery on issues that are not
14 in dispute, thereby minimizing discovery costs and burdens.
- 15 ○ Defendants' Proposal: Consistent with this Court's practice, Defendants believe
16 that non-infringement contentions are unnecessary and burdensome. Moreover,
17 in many of its infringement contentions, Plaintiff has failed to set forth how the
18 claim limitations are allegedly met, making non-infringement contentions
19 impossible. Further, as stated above, Defendants propose that infringement issues
20 be stayed until after the common invalidity phase.

21 (D) **Minimizing Expense in Discovery:**

22 The parties agree to attempt to minimize discovery expenses on each party by attempting to
23 cooperate on various discovery issues.

- 24 • The parties agree that if there is a discovery dispute, they will attempt to resolve it by
25 phone or email, and not engage in letter-writing campaigns. If the disputes are not
26

1 resolved, the parties also agree, in appropriate circumstances, to take advantage of the
2 Court's offer of telephonic conferences to resolve routine discovery disputes.

- 3 • Depositions will be taken by agreement and through agreeing upon dates for depositions
4 if possible.
- 5 • The parties will try to agree on the same court reporter/videographer company for
6 depositions, to obtain a discounted rate.
- 7 • All papers not publicly filed electronically will be served by email where feasible, which
8 shall count as regular service, if sent by midnight Pacific Time, and three days would not
9 be added as would normally be the case for service by electronic mail under FRCP 6(d).
- 10 • The parties will discuss an agreed common form of document exchange (ie -- electronic,
11 OCR, etc.).
- 12 • The parties do not have to include on their privilege log any communications/materials
13 generated after the filing of the Complaint.
- 14 • Consistent with FRCP 26(b)(4), neither side will be entitled to discovery of
15 communications between counsel and expert witnesses or to drafts of expert reports.
16 Expert communications shall be deemed work-product privileged unless the expert relies
17 on any communication.

18 Interval's Position: Adopting an aggressive and rigorous discovery schedule is
19 paramount in minimizing expense in discovery and in ensuring that parties and non-parties are
20 not unduly burdened. Interval proposes that expert reports and expert depositions for claim
21 construction should not occur, as expert testimony is marginally relevant at best for claim
22 construction issues given Federal Circuit caselaw. Moreover, the discovery limitations that
23 Interval proposed above will streamline the discovery process and will focus the parties'
24 discovery efforts on those truly important issues that will get the case ready for trial. Interval
25 also proposes the following:

1 a. The parties will try to reach agreement on a protective order. If we cannot reach
2 agreement, we will each submit our proposed version without argument and ask the Court
3 to select one or the other.

4 b. Documents that the other side claims are privileged can be snapped back when
5 discovered they were produced without any need to show that the production was
6 inadvertent.

7 Interval is also open to other ideas for shortening or simplification.

8 Defendants' Position: To conserve the resources of the parties and to avoid wasteful
9 discovery, the initiation of discovery should be stayed until the date on which one or more
10 Defendants plan to file for a stay pending reexamination, as set forth in section 6 below.
11 Defendants need this time to draft their reexamination requests in light of the large number of
12 claims asserted, as well as the unexpected addition of an entire patent to the case against
13 Facebook, Inc. If one or more Defendants do not file for a stay pending reexamination by the
14 date set forth in this schedule, discovery on invalidity issues may be initiated the following day.
15 If one or more Defendants do file for a stay pending reexamination by the date set forth in this
16 schedule, discovery on invalidity issues will continue to be stayed until the Court issues a
17 decision on the motion to stay the case. Discovery on infringement and damages issues will be
18 stayed until completion of the invalidity phase, as described further herein.

19 Regarding Plaintiff's proposals a and b immediately above, Defendants believe these
20 matters are more appropriately addressed in the context of a protective order. Defendants also
21 propose that to the extent the parties cannot reach final agreement on a protective order, the
22 parties submit a protective order that identifies the disputed issues and be permitted to present
23 argument (although perhaps without briefing) to the Court to resolve any disputes.

24 (E) **FRCP 26(c) Orders:** The parties request that the Court enter a protective
25 order, to be negotiated between the parties before the beginning of
26 discovery. Interval respectfully submits that until this Court rules on a

1 proposed protective order, the parties are to proceed with discovery and
2 that any confidential documents produced are to be treated on a
3 “confidential—attorneys eyes only” basis. Defendants do not agree to a
4 default treatment of documents prior to entry of a protective order. There
5 may be very highly confidential documents requested for which such
6 default treatment will not be adequate and the availability of such default
7 will disincentivize the parties to negotiate a protective order for the case in
8 a timely manner. Additionally, to the extent the parties are not able to
9 negotiate a mutually agreeable protective order, Defendants request the
10 ability raise the disputed issues and arguments with the Court.

11 **6. Date by Which Remainder of Discovery Can Be Completed:**

12 (A) Plaintiff’s Contention:

13 Interval submits that a fair discovery schedule will minimize costs without sacrificing the
14 quality of the parties’ presentations. The most certain way to increase cost and burden is to have
15 a discovery schedule that lasts for years, as Defendants propose. Interval believes that fact
16 discovery can be complete on all issues by **October 26, 2011**. Below is Interval’s proposed
17 discovery schedule, which substantially tracks the time frames set forth in the Court’s Standing
18 Order for Patent Cases (Dkt. # 26):

Event	Date
Disclosure of Preliminary Invalidity Contentions and Non-Infringement Contentions	1/28/11
Terms for Construction	2/9/11
Claim Construction-related Expert Report Deadline (if necessary)	2/18/11
Deadline to Join Parties	3/4/11
Deadline by which Defendants shall produce source code that is responsive to document requests that Interval served on 1/13/11.	3/17/11
Claim Construction Rebuttal Expert Report Deadline (if necessary)	3/18/11

Event	Date
Preliminary Claim Chart	4/1/11
Joint Claim Chart and Prehearing Statement	4/29/11
Opening Briefs (term limits should remain at 10, and page limits should remain at 24)	5/13/11
Response Briefs (page limits should remain at 24)	5/27/11
Submit <i>Markman</i> DVD Tutorial (not to exceed one hour in length per side)	6/10/11
<i>Markman</i> Hearing	Week of 6/27/11
Close of Fact Discovery on All Issues	10/26/11
Opening Expert Reports (Burden of Proof) on All Issues	11/16/11
Rebuttal Expert Reports on All Issues	12/16/11
Completion of Expert Discovery on All Issues	1/11/12
Deadline for Filing Dispositive Motions on All Issues and Daubert Motions	2/3/12
Deadline for Filing Responses to Dispositive Motions on All Issues and Daubert Motions	2/24/12
Summary Judgment and Daubert Hearing	Week of 3/9/12
Trial Date on '507 and '682 Patent Group	Week of 4/2/12
Trial Date on '314 and '652 Patent Group	Week of 6/4/12

(B) Defendants' Contention:

Defendants set forth the proposed schedule for common issues below, the reasons for which are more fully explained above in Section 1. Fact discovery can be complete on validity issues by November 18, 2011. As described in Section 1, above, Defendants propose phasing the case to address common validity issues first. Given the likely narrowing of issues through

1 phasing the common issues first, Defendants' proposed schedule sets a common schedule
2 through claim construction and dispositive motions on common issues.

3 Focusing the case on validity issues is the most efficient way to streamline this
4 complicated, multi-party, multi-patent litigation. Defendants also propose slightly phased dates
5 for the Preliminary Invalidation Disclosures, as we expect the disclosures will be voluminous.

Event	Date
Deadline to Join Parties	3/4/11
Date by which one or more Defendants plan to move for stay pending reexamination ⁴	3/11/11
Disclosure of Preliminary Invalidation Contentions	4/8/11 for '314/'652 Patents 4/12/11 for '682 Patent 4/15/11 for '507 Patent
Terms for Construction	5/3/11
Claim Construction-related Expert Report Deadline (if necessary)	5/10/11
Preliminary Claim Chart	6/10/11
Claim Construction Rebuttal Expert Report Deadline (if necessary)	6/10/11
Joint Claim Chart and Prehearing Statement	7/13/11
Opening Briefs (page limit increased to 50 pages; term limit increased to 20)	7/22/11
Response Briefs (page limit increased to 50 pages)	8/24/11
<i>Markman</i> Tutorial	Week of 9/19/11

22 _____
23 ⁴ Although such patent reexamination requests may very well lead to cancellation of all of the
24 asserted patents, such requests by statute are more limited in scope than any invalidity
25 contentions to be developed in this case, and thus the reexamination requests can be filed
26 substantially sooner than those invalidity contentions are fully prepared. For example, the
reexamination requests cannot address several categories of prior art, such as public use, on sale,
and prior invention prior art, and cannot address invalidity under the Section 112, para. 1
disclosure requirements of written description, enablement, etc., or the Sec. 112, para. 2 claiming
requirements, or the Sec. 101 patentability requirements, etc.

Event	Date
<i>Markman</i> Hearing (2 non-concurrent days)	Week of 9/19/11
Close of Fact Discovery on Validity Issues ⁵	11/18/11
Deadline for Filing Dispositive Motions on Validity Issues	12/23/11
Deadline for Filing Motions to Sever	3/9/12
Case Management Conference to decide the schedule and structure for the remaining parts of the case, which are infringement and damages discovery and dispositive motions, pretrial, and trial ⁶	3/30/12

7. **Magistrate Judge:** Interval consents that a full-time Magistrate Judge may conduct all proceedings. At least one Defendant does not consent to referral to a full-time Magistrate Judge.

8. **Bifurcation:**

(A) Plaintiff’s Contention: As discussed in Section 1 and the proposed schedule above, Interval believes that the greatest efficiencies will be gained by dividing the asserted patents into two groups: the ‘314 and ‘652 patents in the first group; and the ‘507 and ‘682 patents in the second group.

⁵ Facebook reserves the right to approach the Court about the possibility of adding invalidity expert reports at this stage, should it become obvious that they would be beneficial.

⁶ Depending on the outcome of the first phase, which may substantially narrow the issues that remain, Defendants have proposed setting a schedule for the remaining issues after the first phase of the litigation, at which time Defendants make seek additional phasing by first focusing any remaining liability issues (e.g., non-infringement issues) and then on damages issues, if any, that remain relevant following the earlier phases. *See, e.g., StreamServe AB v. Exstream Software LLC, et al.*, 1-08-cv-00343 (D. Del. August 26, 2009) (Robinson, J.) (“Bifurcation is appropriate, if not necessary, in all but exceptional patent cases . . . in my experience, discovery disputes related to document production on damages and the *Daubert* motion practice related to damages experts are a drain on scarce judicial resources”).

1 (B) Defendants' Contention: As set forth above in Section 1 and Defendants'
2 proposed schedule, Defendants propose phasing the litigation to address common claim
3 construction and validity issues first will provide the most efficient approach.

4 9. **Pre-Trial Statements and Orders**: The parties were not able to agree on ways to
5 shorten or simplify the Pre-Trial Statements or Pre-Trial Order at this time. The parties agree
6 that Pre-Trial Statements and Orders called for by Local Rules CR 16(e), (h), (i), and (l), and
7 16.1 should not be dispensed with in whole or in part.

8 10. **Suggestions for Shortening or Simplifying the Case:**

9 Interval's Position: Interval's proposed discovery limitations in section 5(C) and
10 proposals for minimizing expense in discovery in section 5(D) both will simplify the case. In
11 addition, Interval proposes that the parties forego claim construction experts. With a tutorial,
12 experts would likely add little if any benefit because the focus during claim construction is on
13 intrinsic evidence from the patent itself rather than extrinsic evidence. To the extent that
14 extrinsic evidence is needed, the parties can submit it from a source other than an expert report
15 and rely on it in their briefing. Interval also respectfully suggests that the parties submit a DVD
16 tutorial two weeks before the Markman hearing instead of an in-person tutorial. Each side's
17 DVD tutorial should not exceed an hour in length.

18 Interval also is open to other ideas, such as a mediator supervising a non-binding, joint
19 focus group early in the case for settlement purposes only under Rule 408 that would remain
20 confidential among the parties.

21 What will not simplify or shorten the case is spending two years on the case focusing
22 solely on validity and enforceability of the patents, as Defendants propose.

23 Defendants' Position: Defendants' phasing of the case will significantly assist the
24 simplification of this case. Defendants agree that the parties may forego calling experts in
25 connection with claim construction. Defendants believe that a live tutorial (potentially presented
26 by an expert), rather than the DVD proposed by the Plaintiff may better assist the Court.

1 Defendants suggest that this could be presented in a classroom style setting, rather than by
2 questioning and cross examination. Presenting the tutorial live would allow the Court to ask
3 questions that might otherwise remain unanswered in a recorded tutorial.

4 **11. Trial Date:**

5 Plaintiff's Contention: As set forth in paragraph 6(A) above, Interval respectfully
6 submits that this case will be ready for trial on all issues for the '507 and '682 patents by April 2,
7 2012, and for the '314 and '652 patents by June 4, 2012. The proposed trial date on the first
8 group of patents is approximately 20 months after this case was filed, and is therefore consistent
9 with the district's practice of setting trials 12-24 months out, as this Court noted at the December
10 2010 scheduling conference.

11 Under Defendants' proposal, the Court would not even convene a hearing to set the trial
12 date until nearly 18 months after the filing of the case.

13 Defendants' Contention: As set forth in paragraph 6(B) above, Defendants believe that,
14 given the complexity of the case, including the number of Defendants and patents, this case
15 should be phased and will require more time to litigate to trial. Under Defendants' proposed
16 schedule, the end of the first phase focused on invalidity would conclude with dispositive
17 motions. After such motions are heard, Defendants recommend a Case Management Conference
18 on or around March 30, 2012 to set a schedule for any remaining issues. Setting a schedule at
19 that time will be more effective as the issues in dispute will likely have been narrowed by the
20 first phase of the case addressing claim construction and common validity issues.

21 **12. Jury Trial:** The Parties have requested a jury trial on all non-equitable issues.

22 **13. Trial Days:** The parties were not able to agree on the number of trial days.

23 (A) Plaintiff's Contention: Interval believes that between 6-8 trial days are needed to
24 complete the trial for each of the two groups of patents, for a total of 12-16 trial days.
25
26

1 (B) Defendants' Contention: Defendants believe that setting and length for trials is better
 2 reserved until after the first phase of the litigation is completed, but Plaintiff's proposal
 3 concerning the length of trial is not realistic given the present scope of the litigation.

4 14. The names, addresses and telephone numbers of all trial counsel:

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15. **Service:** Defendants have been duly served with the First Amended Complaint.

1 **16. Scheduling Conference:**

2 Interval's Contention: There already has been one in-person scheduling conference in
3 this case. Interval is at the Court's pleasure on whether to hold another scheduling conference.
4 Any such conference, however, should not delay the schedule.

5 Defendants' Position:

6 Given the significant disputes identified above, Defendants believe that a scheduling
7 conference may be helpful.

8 **17. Tutorial:**

9 Interval's Contention: As discussed above in section 10, Interval respectfully suggests
10 that the parties submit a DVD to serve as the tutorial. The DVD tutorial should not exceed one
11 hour in length per side.

12 Defendants' Contention: As discussed above in Section 10, Defendants respectfully
13 suggest that the parties provide the Court with a live, classroom style tutorial. Defendants have
14 proposed that this occur at or near the time of the Markman hearing as this will allow the parties
15 to focus on the tutorial on issues in dispute for claim construction.

16 **18. Neutral Expert:** At this point, the parties do not believe that a neutral expert is
17 necessary in this case.

18 **19. Defendant "Whip"** (per Order of December 14, 2010 [Dkt. No. 149]): Kevin
19 McGann. For a particular issue, should the Court need a local contact, Mark Walters, would also
20 be available in this "whip" capacity.

21 **20. Motions to Sever** (per Order of December 14, 2010 [Dkt. No. 149]): Defendants
22 may file motions to sever on or before March 9, 2012.

23 **21. Scheduling Conferences:** Per the Court's Order of December 14, 2010 [Dkt. No.
24 149], the first periodic telephonic scheduling conference shall be on March 28, 2010 at 1:00 PM,
25 Pacific, subject to the Court's availability, and scheduled at each such conference for an
26 additional conference approximately 90 days thereafter.

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DATED this 14th day of January 2011.

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I hereby certify that on January 14, 2011, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following counsel of record:

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