

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA

POST-MARKMAN (*Phase II*)
CASE MANAGEMENT PLAN IN PATENT CASES (TRACKS 1 AND 2)

(Modified December 10, 2013)

The format for the Case Management Plan should be as follows:

[INSERT CASE CAPTION]

CASE MANAGEMENT PLAN

I. Parties and Representatives

- A. [Insert correct name of each party]
- B. [Insert full name, address, telephone, fax number, and e-mail address of all counsel]

II. Pretrial Pleadings and Disclosures

- A. Not later than **15 days after the court's *Markman* decision**, the court shall set a case management plan conference at which Phase II dates and trial date will be set.
- B. Each party opposing a claim of patent infringement that will rely on an opinion of counsel as part of a defense to a claim of willful infringement shall: (i) Produce the opinion(s) and any other documents relating to the opinion(s) as to which that party agrees the attorney-client or work product protection has been waived; and (ii) Serve a privilege log identifying any other documents, except those authored by counsel acting solely as trial counsel, relating to the subject matter of the opinion(s) which the party is withholding on the grounds of attorney-client privilege or work product protection. This will be completed on or before _____ [no later than **30 days after the court's *Markman* decision**].

A party opposing a claim of patent infringement who does not comply with these requirements shall not be permitted to rely on an opinion of counsel as part of a defense to willful infringement absent a stipulation of all parties or by order of the court, which shall be entered only upon a showing of good cause.

- C. A party claiming patent infringement may serve "Final Infringement Contentions" that amend its Preliminary Infringement Contentions if that party in good faith believes that the court's Claim Construction Ruling or the documents produced by

the other part(ies) during the course of discovery so require. These shall be filed on or before _____ [within **30 days after the court's *Markman* decision**].

- D. Plaintiff(s) shall serve (but not file with the court) on or before _____ [no later than **30 days after the court's *Markman* decision**] a statement of damages to be sought at trial, if any, and make a settlement demand. Defendant(s) shall serve (but not file with the court) a response thereto within **30 days** after receipt of the demand.
- E. All parties shall file and serve their final witness and exhibit lists on or before _____ [no later than **30 days after the court's *Markman* decision**]. **These lists shall be updated (narrowed) every 30 days until trial witness lists are filed.** These lists should reflect the specific potential witnesses the party may call at trial. It is not sufficient for a party to simply incorporate by reference “any witness listed in discovery” or such general statements. The list of final witnesses shall include a brief synopsis of the expected testimony and certification by counsel that each witness has either been deposed in this action or interviewed by counsel.
- F. On or before _____ [no later than **60 days after the court's *Markman* decision**] each party opposing a claim of patent infringement may serve “Final Invalidity Contentions” without leave of court that amend its “Preliminary Invalidity Contentions” if: (i) a party claiming patent infringement has served “Final Infringement Contentions,” or (ii) the party opposing a claim of patent infringement believes in good faith that the court’s Claim Construction Ruling so requires.
- G. Amendment or modification of the Preliminary or Final Infringement Contentions or the Preliminary or Final Invalidity Contentions, other than as expressly permitted herein, may be made only by order of the court, which shall be entered only upon a showing of good cause.
- H. On or about _____ [**120 days after the court's *Markman* decision**] all fact discovery shall be completed
- I. The party with the burden of proof on an issue shall disclose the name, address, and vita of any expert witness, and shall serve the report required by Fed. R. Civ. P. 26(a)(2) on or before [**no later than 150 days after the *Markman* ruling**]. The party not bearing the burden of proof shall disclose the name, address, and vita of any expert witness, and shall serve the report required by Fed. R. Civ. P. 26(a)(2) on or before [**30 days after the opposing party serves its expert witness disclosure**]; or if the party with the burden of proof has disclosed no experts, the opposing party shall make its expert disclosure on or before [**no later than 180 days after the *Markman* ruling**].

- J. If a party intends to use expert testimony in connection with a motion for summary judgment to be filed by that party, such expert disclosures must be served on opposing counsel **no later than 90 days** prior to the dispositive motion deadline. If such expert disclosures are served the parties shall confer within 7 days to stipulate to a date for responsive disclosures (if any) and completion of expert discovery necessary for efficient resolution of the anticipated motion for summary judgment. The parties shall make good faith efforts to avoid requesting enlargements of the dispositive motions deadline and related briefing deadlines. Any proposed modifications of the CMP deadlines or briefing schedule must be approved by the court.
- K. All dispositive motions shall be filed on or before _____ [**210 days after the court's *Markman* decision**] and shall be briefed pursuant to Local Rule 56-1.
- L. All expert discovery shall be completed on or before _____ [**210 days after the court's *Markman* decision**].
- M. Any party who believes that bifurcation at trial is appropriate with respect to any issue or claim shall file a motion to that effect as soon as practicable, but in no event later than _____ [**120 days prior to trial date in Section VI below**]; responses shall be filed **within 15 days**; replies shall be filed **within 10 days**.
- N. Any motions to exclude or limit expert testimony at trial (*Daubert* motions) shall be filed on or before _____ [**120 days prior to trial date in Section VI below**]; responses shall be filed **within 15 days**; replies shall be filed **within 10 days**.
- O. The court will schedule a case management conference approximately **320 days after the court's *Markman* decision**.

III. Trial Date

The parties request a trial date in _____ [month/year]. The trial is by _____ [Court or jury] and is anticipated to take _____ hours/days. While all dates herein must be initially scheduled to match the presumptive trial date, if the Court agrees that a different track is appropriate, the case management order approving the CMP plan will indicate the number of months by which all or certain deadlines will be extended to match the track approved by the Court.

IV. Referral to Magistrate Judge

- A. **Case.** At this time, all parties _____ [do/do not] consent to refer this matter to the currently assigned Magistrate Judge pursuant to 28 U.S.C. 636(b) and Federal Rules of Civil Procedure 73 for all further proceedings including trial. [This section should be marked in the affirmative only if all parties consent. Do not indicate if some parties consent and some do not. Indicating the parties' consent in this paragraph may result in this matter being referred to the currently assigned Magistrate Judge for all further proceedings, including trial. It is not necessary to file a separate consent. Should this case be reassigned to another Magistrate Judge, any attorney or party of record may object within 30 days of such reassignment. If no objection is filed, the consent will remain in effect.]
- B. **Motions.** The parties may also consent to having the assigned Magistrate Judge rule on motions ordinarily handled by the District Judge, such as motions to dismiss, for summary judgment, or for remand. If all parties consent, they should file a joint stipulation to that effect. Partial consents are subject to the approval of the presiding district judge.

V. Required Pre-Trial Preparation

- A. **SIXTY DAYS BEFORE THE FINAL PRETRIAL CONFERENCE**, the parties shall:
1. File a list of trial witnesses, by name, who are actually expected to be called to testify at trial. This list may not include any witnesses not on a party's final witness list filed pursuant to section II. E.
 2. Number in sequential order all exhibits, including graphs, charts and the like, that will be used during the trial. Provide the court with a list of these exhibits, including a description of each exhibit and the identifying designation. Make the original exhibits available for inspection by opposing counsel. Stipulations as to the authenticity and admissibility of exhibits are encouraged to the greatest extent possible.
 3. Submit all stipulations of facts in writing to the court. Stipulations are always encouraged so that at trial, counsel can concentrate on relevant contested facts.
 4. A party who intends to offer any depositions into evidence during the party's case in chief shall prepare and file with the court and copy to all opposing parties either:
 - a. brief written summaries of the relevant facts in the depositions that will be offered. (Because such a summary will be used in lieu of

the actual deposition testimony to eliminate time reading depositions in a question and answer format, this is strongly encouraged.); or

b. if a summary is inappropriate, a document which lists the portions of the deposition(s), including the specific page and line numbers, that will be read, or, in the event of a video-taped deposition, the portions of the deposition that will be played, designated specifically by counter-numbers.

5. Provide all other parties and the court with any trial briefs, along with all proposed jury instructions, *voir dire* questions, and areas of inquiry for *voir dire* (or, if the trial is to the court, with proposed findings of fact and conclusions of law).
6. File any motions in limine, which shall be briefed according to Local Rule 7-1.
7. Notify the court and opposing counsel of the anticipated use of any evidence presentation equipment.

B. THIRTY DAYS BEFORE THE FINAL PRETRIAL CONFERENCE, the parties shall:

1. Notify opposing counsel in writing of any objections to the proposed exhibits. If the parties desire a ruling on the objection prior to trial, a motion should be filed noting the objection and a description and designation of the exhibit, the basis of the objection, and the legal authorities supporting the objection.
2. If a party has an objection to the deposition summary or to a designated portion of a deposition that will be offered at trial, or if a party intends to offer additional portions at trial in response to the opponent's designation, and the parties desire a ruling on the objection prior to trial, the party shall submit the objections and counter summaries or designations to the court in writing. Any objections shall be made in the same manner as for proposed exhibits. However, in the case of objections to video-taped depositions, the objections shall be brought to the court's immediate attention to allow adequate time for editing of the deposition prior to trial.
3. File any objections to proposed instructions and *voir dire* questions submitted by the opposing parties.
4. Notify the court and opposing counsel of requests for separation of witnesses at trial.

VI. Other Matters

Anything shown or told to a testifying expert relating to the issues on which he/she opines, or to the bases or grounds in support of or countering the opinion, is subject to discovery by the opposing party.

The parties shall agree that: (A) drafts of expert reports [will/will not] be retained and produced; and (B) inquiry [is/is not] permitted into who, if anyone, other than the expert participated in the drafting of his/her report. The court will not entertain motions on these two issues. In the absence of such an agreement, drafts of expert reports need not be produced, but inquiry into who participated in the drafting and what their respective contributions were is permitted.

At the final pretrial conference, the parties will inform the court whether the parties agree that the video “An Introduction to the Patent System,” distributed by the Federal Judicial Center, should be shown to the jurors in connection with its preliminary jury instructions.

Exhibit numbering shall, to the extent possible, be maintained with a single and unique exhibit number throughout the entire case. A party first marking a document as an exhibit (whether with a pleading or declaration, for a deposition or trial, or otherwise) shall mark it, and the parties shall cooperatively track which documents are so marked, and shall thereafter use that exhibit numbering for all purposes. While it is preferable to have exhibits marked sequentially, the parties may also agree to ranges of exhibit numbers for their respective, initial marking. If the same document is marked with more than one exhibit number inadvertently, such multiple exhibit numbers shall remain. The parties are not to mark exhibits as letters, but may, and are encouraged to, mark related documents (such as duplicates with different bates numbers, or related versions of the same document) with numbers followed by letters (e.g. Exh. 7, Exh. 7-A, and Exh. 7-B).

[Insert any other matters any party believes should be brought to the Court’s attention]

[INSERT SIGNATURE BLOCKS FOR ALL COUNSEL TO SIGN THE CMP HERE]

	PARTIES APPEARED IN PERSON/BY COUNSEL ON _____ FOR A PRETRIAL/STATUS CONFERENCE.
	APPROVED AS SUBMITTED.
	APPROVED AS AMENDED.
	APPROVED AS AMENDED PER SEPARATE ORDER
	APPROVED, BUT ALL OF THE FOREGOING DEADLINES ARE SHORTENED/LENGTHENED BY _____ MONTHS.
	APPROVED, BUT THE DEADLINES SET IN SECTION(S) _____ OF THE PLAN IS/ARE SHORTENED/LENGTHENED BY _____ MONTHS.
	THIS MATTER IS SET FOR TRIAL BY _____ ON _____ . A FINAL PRETRIAL CONFERENCE IS SCHEDULED FOR _____ AT _____ .M., ROOM _____.
	A SETTLEMENT/STATUS CONFERENCE IS SET IN THIS CASE FOR _____ AT _____ .M. COUNSEL SHALL APPEAR: _____ IN PERSON IN ROOM _____; OR _____ BY TELEPHONE, WITH COUNSEL FOR _____ INITIATING THE CALL TO ALL OTHER PARTIES AND ADDING THE COURT JUDGE AT (____) _____; OR _____ BY TELEPHONE, WITH COUNSEL CALLING THE JUDGE'S STAFF AT (____) _____.
	DISPOSITIVE MOTIONS SHALL BE FILED NO LATER THAN _____.

Upon approval, this Plan constitutes an Order of the Court. Failure to comply with an Order of the Court may result in sanctions for contempt, or as provided under Rule 16(f), to and including dismissal or default.

Approved and So Ordered.

Date

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U. S. District Court
Southern District of Indiana