

## LOCAL RULES FOR PATENT CASES – 5/1/2017

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## **LOCAL RULES FOR PATENT CASES**

### **LR 101.1 TITLE**

These are the local rules of practice for Patent Cases before the United States District Court for the Middle District of North Carolina. They should be cited as "LR \_\_\_."

### **LR 101.2 PURPOSE, SCOPE AND CONSTRUCTION**

(a) These rules are intended to supplement the Local Civil Rules of this District to facilitate the speedy, fair and efficient resolution of patent disputes.

(b) These rules apply to all civil actions filed in or transferred to this Court which allege infringement of a utility patent in a complaint, counterclaim, cross-claim or third party claim, or which seek a declaratory judgment that a utility patent is not infringed, is invalid or is unenforceable.

(c) The Court may accelerate, extend, eliminate, or modify the obligations or deadlines set forth in these Local Patent Rules based on the circumstances of any particular case, including, without limitation, the complexity of the case or the number of patents, claims, products, or parties involved. If any motion filed prior to the Claim Construction Hearing provided for in LR 104.6 raises claim construction issues, the Court may, for good cause shown, defer the motion until after completion of the disclosures, filings, or ruling following the Claim Construction Hearing.

### **LR 101.3 EFFECTIVE DATE**

Local Civil Rules 101 et seq shall apply to any case filed or transferred to this Court after April 2, 2012. Relevant provisions of these rules may be applied to any pending case by the Court, on its own motion or on motion by any party.

### **LR 102.1 INITIAL SCHEDULING CONFERENCE**

(a) Initial Rule 26(f) Scheduling Conference ("Initial Scheduling Conference"). When the parties confer with each other pursuant to FED. R. CIV. P. 26(f), in addition to the matters covered by FED. R. CIV. P. 26, the parties must discuss and address in the Discovery Plan filed pursuant to FED. R. CIV. P. 26(f) and Local Civil Rule 26.1(e)(2) the following additional deadlines and procedural matters:

(1) Proposed modification of the deadlines provided for in the local patent rules, and the effect of any such modification on the date and time of the Claim Construction Hearing provided for in LR 104.6, if any;

(2) Whether the Court will hear live testimony at the Claim Construction Hearing;

(3) The need for and any specific limits on discovery relating to claim construction, including depositions of witnesses, including expert witnesses; and

(4) The order of presentation at the Claim Construction Hearing.

(b) Further Scheduling Conferences. To the extent that some or all of the matters provided for in Local Patent Rule 102.1(a)(1)-(4) are not resolved or decided at the Initial Scheduling Conference, the parties shall propose dates for further Scheduling Conferences at which such matters shall be decided.

## **LR 102.2 CONFIDENTIALITY**

(a) The Court understands that patent cases typically involve a higher volume of confidential information than most civil litigation, and also is aware of the need of the parties to exchange such information early in the case and before a protective order has been entered. Thus, if any document or information produced under these Local Civil Rules is deemed confidential by the producing party and if the Court has not entered a protective order or otherwise ruled on the confidentiality of the document or information, then until a protective order is issued by the Court, the document shall be marked “confidential” or with some other confidential designation (such as “Confidential Outside Attorneys Eyes Only”) by the disclosing party and disclosure of the confidential document or information shall be limited to each party's outside attorney(s) of record and the employees of such outside attorney(s). If a party is not represented by an outside attorney, disclosure of the confidential document or information shall be limited to one (1) designated “in house” attorney, whose identity and job functions shall be disclosed to the producing party seven (7) days prior to any such disclosure, in order to permit any motion for protective order or other relief regarding such disclosure. The person(s) to whom disclosure of a confidential document or information is made under this Local Patent Rule shall keep it confidential and use it only for purposes of litigating the case, unless and until the Court issues a ruling to the contrary.

(b) If a party wishes to file with the Court any document or information that has been designated as confidential pursuant to subsection (a) and as to which the Court has not ruled, that party must comply with the provisions of Local Rules regarding filing a motion to seal the document. If the party proffering the document or information designated as confidential does not agree it is entitled to be sealed, then the party shall so state in its motion to seal and the party that made the “confidential” designation shall be entitled, in its responsive brief, to explain its position. The provisions of Local Rules regarding documents filed under seal shall thereafter determine the status and handling of the material with respect to such filing.

### **LR 102.3 CERTIFICATION OF INITIAL DISCLOSURE**

All statements, disclosures, or charts filed or served in accordance with these Local Civil Rules must be dated and signed by counsel of record. Counsel's signature shall constitute a certification that to the best of his or her knowledge, information, and belief, formed after an inquiry that is reasonable under the circumstances, the information contained in the statement, disclosure, or chart is complete and correct at the time it is made.

### **LR 102.4 ADMISSIBILITY OF DISCLOSURES**

Statements, disclosures, or charts governed by these Local Civil Rules are admissible to the extent permitted by the Federal Rules of Evidence or Federal Rules of Civil Procedure. However, the statements or disclosures provided for in Local Civil Rules 104.1 and 104.2 are not admissible for any purpose other than in connection with motions seeking an extension or modification of the time periods within which actions contemplated by these Local Civil Rules must be taken.

### **LR 102.5 RELATIONSHIP TO THE FEDERAL RULES OF CIVIL PROCEDURE**

Except as provided in this paragraph or as otherwise ordered by the Court, it shall not be a legitimate ground for objecting to an opposing party's discovery request (e.g., interrogatory, document request, request for admission, deposition question) or declining to provide information otherwise required to be disclosed pursuant to FED. R. CIV. P. 26(a)(1) by contending that the discovery request or disclosure requirement is premature in light of, or otherwise conflicts with, these Local Civil Rules. A party may object, however, to responding to the following categories of discovery requests (or decline to provide information in its initial disclosures under FED. R. CIV. P. 26(a)(1)) on the ground that they are premature in light of the timetable provided in the Local Patent Rules:

- (a) Requests seeking to elicit a party's claim construction position;
- (b) Requests seeking to elicit from the patent claimant a comparison of the asserted claims and the accused apparatus, product, device, process, method, act, or other instrumentality;
- (c) Requests seeking to elicit from an accused infringer a comparison of the asserted claims and the prior art; and
- (d) Requests seeking to elicit from an accused infringer the identification of any opinions of counsel, and related documents, that it intends to rely upon as a defense to an allegation of willful infringement.

Where a party properly objects to a discovery request (or declines to provide information in its initial disclosures under FED. R. CIV. P. 26(a)(1)) as set forth above, that party shall provide the requested information on the date on which it is required to provide the requested information to an opposing party under these Local Patent Rules, unless there exists another legitimate ground for objection.

### **LR 103.1 DISCLOSURE OF ASSERTED CLAIMS AND PRELIMINARY INFRINGEMENT CONTENTIONS**

Not later than thirty (30) days after the Initial Scheduling Conference, a party claiming patent infringement must serve on all parties a “Disclosure of Asserted Claims and Preliminary Infringement Contentions.” Separately for each opposing party, the “Disclosure of Asserted Claims and Preliminary Infringement Contentions” shall contain the following information:

- (a) Each claim of each patent in suit that is allegedly infringed by each opposing party;
- (b) Separately for each such asserted claim, each accused apparatus, product, device, process, method, act, or other instrumentality (“Accused Instrumentality”) of each opposing party of which the party is aware. This identification shall be as specific as possible. Each product, device, and apparatus must be identified by name or model number, if known. Each method or process must be identified by name, if known, or by any product, device, or apparatus which, when used, allegedly results in the practice of the claimed method or process;
- (c) A chart identifying specifically where each element of each asserted claim is found within each Accused Instrumentality, including each element that such party contends is governed by the sixth paragraph of 35 U.S.C. § 112, and the identity of the structure(s), act(s), or material(s) in the Accused Instrumentality that performs the claimed function;
- (d) Whether each element of each asserted claim is claimed to be literally present or present under the doctrine of equivalents in the Accused Instrumentality;
- (e) For any patent that claims priority to an earlier application, the priority date to which each asserted claim allegedly is entitled; and
- (f) If a party claiming patent infringement wishes to preserve the right to rely, for any purpose, on the assertion that its own apparatus, product, device, process, method, act, or other instrumentality practices the claimed invention, the party must identify, separately for each asserted claim, each such apparatus, product, device, process, method, act, or other instrumentality that incorporates or reflects that particular claim.

## **LR 103.2 DOCUMENT PRODUCTION ACCOMPANYING DISCLOSURE OF ASSERTED CLAIMS AND PRELIMINARY INFRINGEMENT CONTENTIONS**

With the “Disclosure of Asserted Claims and Preliminary Infringement Contentions,” the party claiming patent infringement must produce to each opposing party or make available for inspection and copying the following:

- (a) Documents (e.g., contracts, purchase orders, invoices, advertisements, marketing materials, offer letters, beta site testing agreements, and third party or joint development agreements) sufficient to evidence each discussion with, disclosure to, or other manner of providing to a third party, or sale of or offer to sell, the claimed invention prior to the date of application for the patent in suit. A party's production of a document as required herein shall not constitute an admission that such document evidences or is prior art under 35 U.S.C. § 102;
- (b) All documents evidencing the conception, reduction to practice, design, and development of each claimed invention, which were created on or before the date of application for the patent in suit or the priority date identified pursuant to Local Patent Rule 103.1(e), whichever is earlier; and
- (c) A copy of the file and prosecution history for each patent in suit.

The producing party shall separately identify by production number which documents correspond to each category.

## **LR 103.3 PRELIMINARY NON-INFRINGEMENT AND PATENT INVALIDITY CONTENTIONS**

Not later than forty-five (45) days after service upon it of the “Disclosure of Asserted Claims and Preliminary Infringement Contentions,” each party opposing a claim of patent infringement, shall serve on all parties its “Preliminary Non-Infringement and Invalidity Contentions.”

(a) Non-Infringement Contentions shall contain a chart, responsive to the chart required by Local Patent Rule 103.1(c), that states as to each identified element in each asserted claim, whether such element is present literally or under the doctrine of equivalents in each Accused Instrumentality, and, if not, the reason for such denial and the relevant distinctions.

(b) Invalidity Contentions must contain the following information:

- (1) The identity of each item of prior art that allegedly anticipates each asserted claim or renders it obvious. Each prior art patent shall be identified by its number, country of origin, and date of issue. Each prior art publication must be identified by its title, date of publication, and where feasible, author and publisher. Prior art under 35 U.S.C. § 102(b) shall be identified by specifying the item offered for sale or publicly used or known, the date the offer or

use took place or the information became known, and the identity of the person or entity which made the use or which made and received the offer, or the person or entity which made the information known or to whom it was made known. Prior art under 35 U.S.C. § 102(f) shall be identified by providing the name of the person(s) from whom and the circumstances under which the invention or any part of it was derived. Prior art under 35 U.S.C. § 102(g) shall be identified by providing the identities of the person(s) or entities involved in and the circumstances surrounding the making of the invention before the patent applicant(s);

(2) Whether each item of prior art anticipates each asserted claim or renders it obvious. If a combination of items of prior art makes a claim obvious, each such combination, and the motivation to combine such items, must be identified;

(3) A chart identifying where specifically in each alleged item of prior art each element of each asserted claim is found, including for each element that such party contends is governed by the sixth paragraph of 35 U.S.C. § 112, the identity of the structure(s), act(s), or material(s) in each item of prior art that performs the claimed function; and

(4) Any grounds of invalidity based on any applicable provision of 35 U.S.C. § 112.

#### **LR 103.4 DOCUMENT PRODUCTION ACCOMPANYING PRELIMINARY NON-INFRINGEMENT AND INVALIDITY CONTENTIONS**

With the “Preliminary Non-Infringement and Invalidity Contentions,” the party opposing a claim of patent infringement must produce or make available for inspection and copying:

(a) Source code, specifications, schematics, flow charts, artwork, formulas, or other documentation sufficient to show the operation of any aspects or elements of an Accused Instrumentality identified by the patent claimant in its LR 103.1(c) chart; and

(b) A copy of each item of prior art identified pursuant to LR 103.3(b)(1) that does not appear in the file history of the patent(s) at issue. To the extent any such item is not in English, an English translation of the portion(s) relied upon must be produced.

## **LR 103.5 DISCLOSURE REQUIREMENT IN PATENT CASES SEEKING A DECLARATORY JUDGMENT**

**(a) Invalidity Contentions If No Claim of Infringement.** In all cases in which a party files a complaint or other pleading seeking a declaratory judgment that a patent is not infringed, is invalid, or is unenforceable, LR 103.1 and 103.2 shall not apply if the declaratory judgment only raises issues of invalidity, and will only apply if and when a claim for patent infringement is made by a party. If the defendant does not assert a claim for patent infringement in its answer to the complaint, no later than fourteen (14) days after the defendant serves its answer, or fourteen (14) days after the Initial Scheduling Conference, whichever is later, the party seeking a declaratory judgment must serve upon each opposing party its Preliminary Invalidity Contentions that conform to LR 103.3 and produce or make available for inspection and copying the documents described in LR 103.4. The parties shall meet and confer within fourteen (14) days of the service of the Preliminary Invalidity Contentions for the purpose of determining the date on which the plaintiff will file its Final Invalidity Contentions which shall be no later than fifty (50) days after service by the Court of its Claim Construction Ruling.

**(b) Applications of Rules When No Specified Triggering Event.** If the filings or actions in a case do not trigger the application of these Local Civil Rules under the terms set forth herein, the parties shall, as soon as such circumstances become known, meet and confer for the purpose of agreeing on the application of these such rules to the case.

**(c) Inapplicability of Rule.** This LR 103.5 and the time periods set forth above shall not apply to cases in which a request for a declaratory judgment that a patent is not infringed, is invalid, or is unenforceable is filed in response to a complaint for infringement of the same patent.

## **LR 103.6 FINAL CONTENTIONS**

Each party's "Preliminary Infringement Contentions" and "Preliminary Non-Infringement and Invalidity Contentions" shall be deemed to be that party's final contentions, except as set forth below.

(a) If a party claiming patent infringement believes in good faith that (1) the Court's Claim Construction Ruling or (2) the documents produced pursuant to LR 103.4 so requires, not later than thirty (30) days after service by the Court of its Claim Construction Ruling, that party may serve "Final Infringement Contentions" without leave of court that amend its "Preliminary Infringement Contentions" with respect to the information required by Local Civil Rule 103.1(c) and (d).

(b) Discovery has revealed information requiring modification of the contentions.

(c) Not later than fifty (50) days after service by the Court of its Claim Construction Ruling, each party opposing a claim of patent infringement may

serve “Final Non-Infringement and Invalidity Contentions” without leave of court that amend its “Preliminary Non-Infringement and Invalidity Contentions” with respect to the information required by LR 103.3 if:

(1) a party claiming patent infringement has served “Final Infringement Contentions” pursuant to LR 103.6(a), or

(2) the party opposing a claim of patent infringement believes in good faith that the Court's Claim Construction Ruling so requires the amendment.

### **LR 103.7 AMENDMENT TO CONTENTIONS**

Amendment or modification of the Preliminary or Final Infringement Contentions or the Preliminary or Final Non-Infringement and Invalidity Contentions, may be made only as expressly permitted by Local Civil Rule 103.6, or within thirty (30) days of the discovery of new information relevant to the issues of infringement, noninfringement, or invalidity. Otherwise, amendment or modification shall be made only by order of the Court, which shall be entered only upon a showing of good cause.

### **LR 103.8 WILLFULNESS OF INFRINGEMENT AND DISCOVERING OF OPINIONS OF COUNSEL ON NON-INFRINGEMENT**

(a) The substance of any advice of counsel tendered in defense to a charge of willful infringement, and any other information which might be deemed to be within the scope of a waiver attendant to disclosure of such advice, shall not be discoverable until the earlier of:

(1) seven (7) days after a ruling on summary judgment expressly identifying a triable issue of fact to which willfulness would be relevant; or

(2) sixty (60) days prior to the close of fact discovery under the Scheduling Order.

(b) On the day such willfulness information becomes discoverable, the party relying on such advice shall produce the following:

(1) a copy of all written opinions to be relied on by the party opposing the claim of infringement;

(2) a copy of all materials or information related to the opinion that were provided to the attorney in the course of preparation of each such opinion;

(3) a copy of all written attorney work product related to each such opinion that (i) was developed in the course of preparation of the opinion and (ii) was disclosed to the client;

(4) identification of the date, sender and recipient (but not necessarily the substance) of all written and oral communications between the party opposing the

claim of infringement and the attorney or law firm rendering any opinions to be relied on, which communications discuss the same subject matter as such opinion;

(5) any other opinion(s) that discuss the same subject matter as such opinion and that were provided to the party opposing the claim of infringement by any other attorney or law firm, whether or not the party relied on such additional opinions; and

(6) identification of the date, sender and recipient (but not necessarily the substance) of all written and oral communications between the party opposing the claim of infringement and the attorney or law firm rendering such opinions that were not relied on, which communications discuss the same subject matter as such opinion.

(c) After such willfulness information becomes discoverable, a party claiming willful infringement shall be entitled (subject to any limitations, including limitations on numbers of depositions, otherwise imposed by the Scheduling Order) to take the deposition of any attorneys rendering the advice relied on and any persons who received such advice, including but not limited to any person who claims to have relied on such advice.

(d) A party opposing a claim of patent infringement who does not comply with the requirements of this LR 103.8 shall not be permitted to rely on an opinion of counsel as part of a defense to willful infringement absent a stipulation of all affected parties or by order of the Court, which shall be entered only upon a showing of good cause.

#### **LR 104.1 EXCHANGE OF PROPOSED TERMS AND CLAIM ELEMENTS FOR CONSTRUCTION**

(a) Not later than twenty-one (21) days after service of the “Preliminary Non-Infringement and Invalidity Contentions” pursuant to LR 103.3, each party shall simultaneously exchange a list of claim terms, phrases, or clauses which that party contends should be construed by the Court, and identify any claim element which that party contends should be governed by the sixth paragraph of 35 U.S.C. § 112.

(b) The parties shall thereafter meet and confer for the purposes of finalizing this list, narrowing or resolving differences, and facilitating the ultimate preparation of a Joint Claim Construction Statement in accordance with LR 104.3.

## **LR 104.2 EXCHANGE OF PRELIMINARY CLAIM CONSTRUCTIONS AND EXTRINSIC EVIDENCE**

(a) Not later than twenty-one (21) days after the exchange of “Proposed Terms and Claim Elements for Construction” pursuant to LR 104.1, the parties shall simultaneously exchange a preliminary proposed construction of each claim term, phrase, or clause which the parties collectively have identified for claim construction purposes. Each such “Preliminary Claim Construction” shall also, for each element which any party contends is governed by the sixth paragraph of 35 U.S.C. § 112, identify the structure(s), act(s), or material(s) corresponding to that element.

(b) At the same time the parties exchange their respective “Preliminary Claim Constructions,” they shall each also provide a preliminary identification of extrinsic evidence, including without limitation, dictionary definitions, citations to learned treatises and prior art, and testimony of percipient and expert witnesses they contend support their respective claim constructions. The parties shall identify each such item of extrinsic evidence by production number or produce a copy of any such item not previously produced. With respect to any such witness, percipient or expert, the parties shall also provide a brief description of the substance of that witness' proposed testimony.

(c) The parties shall thereafter meet and confer for the purposes of narrowing the issues and finalizing preparation of a Joint Claim Construction Statement in accordance with LR 104.3.

## **LR 104.3 JOINT CLAIM CONSTRUCTION STATEMENT**

Not later than sixty (60) days after service of the “Preliminary Non-Infringement and Invalidity Contentions,” the parties shall complete and file a Joint Claim Construction Statement, which shall contain the following information:

(a) The construction of those claim terms, phrases, or clauses on which the parties agree.

(b) Each party's proposed construction of each disputed claim term, phrase, or clause, together with an identification of all references from the specification or prosecution history that support that construction, and an identification of any extrinsic evidence known to the party on which it intends to rely either to support its proposed construction of the claim or to oppose any other party's proposed construction of the claim, including, but not limited to, as permitted by law, dictionary definitions, citations to learned treatises and prior art, and testimony of percipient and expert witnesses.

(c) The anticipated length of time necessary for the Claim Construction Hearing.

(d) Whether any party proposes to call one or more witnesses, including experts, at the Claim Construction Hearing, the identity of each such witness, and

for each expert, a summary of each opinion to be offered in sufficient detail to permit a meaningful deposition of that expert.

No other FED. R. CIV. P. 26 report or disclosure shall be required for testimony directed solely towards claim construction.

#### **LR 104.4 COMPLETION OF CLAIM CONSTRUCTION DISCOVERY**

Not later than thirty (30) days after service and filing of the Joint Claim Construction Statement, the parties shall complete all discovery relating to claim construction, including any depositions with respect to claim construction of any witnesses, including experts, identified in the Joint Claim Construction Statement.

#### **LR 104.5 CLAIM CONSTRUCTION BRIEFS**

(a) Not later than forty-five (45) days after serving and filing the Joint Claim Construction Statement, each party shall serve and file an opening brief and any evidence supporting its claim construction.

(b) Not later than twenty-one (21) days after service upon it of an opening brief, the opposing party shall serve and file its responsive brief and supporting evidence.

(c) Prior to the Claim Construction Hearing, the Court may issue an order stating whether it will receive extrinsic evidence, and if so, the particular evidence that it will exclude and that it will receive, and any other matter the Court deems appropriate concerning the conduct of the hearing.

#### **LR 104.6 CLAIM CONSTRUCTION HEARING**

The Court may at its discretion conduct a Claim Construction Hearing to the extent the Court believes a hearing is necessary for construction of the claims at issue.

#### **LR 105.1 DISCLOSURE OF EXPERTS AND EXPERT OPINIONS**

(a) For issues other than claim construction to which expert testimony shall be directed, expert witness disclosures and depositions shall be governed by this rule.

(b) No later than thirty (30) days after (1) the normal close of discovery pursuant to the Scheduling Order, or (2) the close of discovery after claim construction, whichever

is later, each party shall make its initial expert witness disclosures required by FED. R. CIV. P. 26 on the issues on which each bears the burden of proof;

(c) No later than thirty (30) days after the first round of disclosures, each party shall make its initial expert witness disclosures required by FED. R. CIV. P. 26 on the issues on which the opposing party bears the burden of proof;

(d) No later than fourteen (14) days after the second round of disclosures, each party shall make any rebuttal expert witness disclosures permitted by FED. R. CIV. P.26.

## **LR 105.2 DEPOSITIONS OF EXPERTS**

Depositions of expert witnesses disclosed under this Rule shall commence within seven (7) days of the deadline service of rebuttal reports and shall be completed within thirty (30) days after commencement of the deposition period.