

**UNITED STATES DISTRICT COURT
FOR THE United States District Court for the Western District of Washington**

WizKids Inc

Plaintiff,

v.

Case No.: 2:07-cv-00809-MJP
Hon. Marsha J. Pechman

Wizards of the Coast Inc

Defendant.

ORDER SETTING TRIAL AND RELATED DATES

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| JURY TRIAL DATE | JANUARY 9, 2009 |
| Statement of asserted claims and preliminary infringement contentions due | 01/07/2008 |
| Reports from expert witnesses regarding Markman issues due | 02/25/2008 |
| Statement of preliminary invalidity contentions | 02/29/2008 |
| Deadline for joining additional parties | 03/10/2008 |
| Deadline for filing amended pleadings | 03/20/2008 |
| Rebuttal expert reports regarding Markman issues due | 03/28/2008 |
| Proposed terms and Claim Elements and Preliminary Claim Chart due | 04/07/2008 |
| Joint claim chart due | 05/06/2008 |
| Opening claim construction briefs due (24 pages per side) | 05/20/2008 |
| Responsive claim construction briefs due (24 pages per side) | 06/03/2008 |
| <u>Markman</u> hearing | June 27, 2008 at 09:00 AM |
| Reports from expert witnesses under FRCP 26(a)(2) due | 07/28/2008 |
| Rebuttal expert reports due | 08/22/2008 |
| All motions related to discovery must be noted on the motion calendar no later than the Friday before discovery closes pursuant to CR7(d)(3) or CR37(a)(2)(B) | |
| Discovery completed by | 09/22/2008 |
| All dispositive motions must be filed by and noted on the motion calendar no later than the fourth Friday thereafter (see CR 7(d)) | 10/14/2008 |
| Settlement conference per CR 39.1(c)(2) held no later than | 11/10/2008 |
| Mediation per CR 39.1(c)(3) held no later than | 12/12/2008 |
| All motions in limine must be filed by and noted on the motion calendar seven judicial days | 12/12/2008 |

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| thereafter pursuant to CR7(d)(2) | |
| Agreed pretrial order | 01/07/2009 |
| Pretrial conference is set for | January 9, 2009 at 10:00 AM |
| Trial briefs, proposed voir dire questions, proposed jury instructions, proposed verdict form, and trial exhibits due | 01/04/2009 |
| Length of Trial: | 10 days |

These dates are set at the direction of the Court after reviewing the joint status report and discovery plan submitted by the parties. All other dates are specified in the Local Civil Rules. If any of the dates identified in this Order or the Local Civil Rules fall on a weekend or federal holiday, the act or event shall be performed on the next business day. These are firm dates that can be changed only by order of the Court, not by agreement of counsel or the parties. The Court will alter these dates only upon good cause shown: failure to complete discovery within the time allowed is not recognized as good cause.

If the Markman hearing or trial dates assigned to this matter create an irreconcilable conflict, counsel must notify Eileen Scollard, Deputy Clerk, at 206-370-8518 within 10 days of the date of this Order and must set forth the exact nature of the conflict. A failure to do so will be deemed a waiver. Counsel must be prepared to begin trial on the date scheduled, but it should be understood that the trial may have to await the completion of other cases.

CLAIM CONSTRUCTION PROCEDURES

The following procedures shall apply to all patent claim construction issues:

Asserted Claims and Preliminary Infringement Contentions

A party claiming patent infringement will serve on all parties a statement of the Asserted Claims and Preliminary Infringement Contentions, which will include the following information: (1) the identity of each claim of each patent alleged to be infringed; (2) the identity of the opposing party's accused device/method/etc. by specific name/model number/etc. for each claim asserted; (3) a chart that identifies specifically where each element of each asserted claim is found within each accused device/method/etc.; (4) whether each element is literally or equivalently infringed; and (5) the priority date to which each asserted claim allegedly is entitled, if priority is an issue.

Preliminary Invalidity Contentions

A party opposing a claim of infringement on the basis of invalidity shall serve on all parties a statement of its Preliminary Invalidity Contentions including: (1) the identity of prior art that allegedly anticipates each asserted claim or renders it obvious; (2) whether each piece of prior art anticipates or renders obvious the asserted claims; (3) a chart that identifies where in each piece of prior art each element of each asserted claim is found; and (4) any grounds for invalidity based on indefiniteness, enablement, or written description under 35 U.S.C. § 112.

Expert Reports

If the parties wish to present expert testimony at the claim construction hearing, the parties will disclose expert reports related to claim construction by the date established in the Scheduling Order. Rebuttal expert reports will be exchanged 30 days later. These dates do not affect the more general expert report deadlines included in this Scheduling Order.

Proposed Terms and Claim Elements and Preliminary Claim Chart

At some point prior to the formulation of the preliminary claim chart, the parties will exchange a list of Proposed Terms and Claim Elements, which will include each term that each party contends the Court should construe. Each party will also identify any claim element that it contends should be governed by 35 U.S.C. § 112(6) as a means-plus-function element. The parties will then meet to identify terms in genuine dispute and facilitate the preparation of the Joint Claim Chart.

The parties will then exchange preliminary proposed constructions for each disputed claim term that the parties have collectively identified. Each party will also provide a preliminary identification of any extrinsic evidence, along with a copy of it, as well as a brief description of any witness' proposed testimony that supports its construction of the claim. The parties will then meet to narrow the issues and finalize the Joint Claim Chart and Prehearing Statement.

Joint Claim Chart and Prehearing Statement

All allegations of infringement and invalidity will be filed with the Court in the form of a Prehearing Statement. After that time, the Court will not consider new allegations of infringement or invalidity without the asserting party showing good cause. A Joint Claim Chart will also be filed, in the format provided in the Sample Joint Claim Chart found at the end of this Order. This Chart will include each party's proposed construction of disputed terms, together with specific references to the relevant portions of the specification and the prosecution history, and descriptions of the extrinsic evidence to be used. The parties will attach to the Joint Claim Chart copies of all patents in dispute, together with the relevant prosecution history. These documents need not be resubmitted upon briefing. The parties will have the complete prosecution history available at the Court's request. In addition, the parties will indicate whether any witnesses are to be called, and if so, their identities. For expert witnesses, the party calling the expert will provide a summary of the opinion to be offered.

The Court expects the terms to be truly in dispute, and further expects that the preparation of the Preliminary and Joint Claim Charts will narrow the terms in dispute. A party is not allowed to propose a construction when the other party is unable to respond without leave of court (e.g., in a Response Brief). If a party must propose a new construction, the Joint Claim Chart must be amended to reflect that change. At the time of the Hearing, the Joint Claim Chart before the Court must reflect the current proposed constructions. The parties should note that the Court will construe a maximum of 10 claim terms at the initial Markman hearing. Prioritization should be guided by the twin goals of narrowing the issues and choosing the 10 claim terms for which a claim construction would be most productive in terms of setting the groundwork for possible settlement.

Tutorial and/or Court-Appointed Neutral Expert and Claim Construction Hearing

The Court or the parties can request that the Court have a tutorial on the subject matter of the patent(s) at issue prior to the Markman hearing. In those instances, the Court will schedule a tutorial to occur two to four weeks prior to the Markman hearing. The parties, in consultation with the Court, will jointly agree to the format of the tutorial, including a

summary and explanation of the subject matter at issue. The length of the tutorial will depend upon the subject matter. Visual aids and suggestions for reading material are encouraged.

Alternatively, depending on the technology involved, the Court may determine that the assistance of a neutral expert would be helpful. In such an instance, the Court may direct the parties to confer and, if possible, reach an agreement as to three experts in the field that would be appropriate to act as a neutral expert to assist the Court during the claim construction proceedings and/or the trial of this matter. The Court will then choose one to appoint as a neutral expert pursuant to Federal Rule of Evidence 706. In such a situation, the parties will split the cost of the expert equally.

The claim construction hearing will be set for one full trial day (5 hours). If more or less time is required, the parties are instructed to inform Eileen Scollard, Deputy Clerk, at 206-370-8518.

PLEASE NOTE: The Court will not rule on dispositive motions that raise issues of claim construction prior to the Hearing, unless special circumstances warrant and leave of Court is obtained in advance of filing.

COOPERATION

As required by CR 37(a), all discovery matters are to be resolved by agreement if possible. Counsel are further directed to cooperate in preparing the Joint Claim Chart and final pretrial order in the format required by CR 16.1, except as ordered below.

EXHIBITS

The original and one copy of any exhibits to be used at the Markman hearing and/or trial are to be delivered to chambers five days before the trial date. Each exhibit shall be clearly marked. Exhibit tags are available in the Clerk's Office. The Court hereby alters the CR 16.1 procedure for numbering exhibits: plaintiff's exhibits shall be numbered consecutively beginning with 1; defendant's exhibits shall be numbered consecutively beginning with 500. Duplicate documents shall not be listed twice: once a party has identified an exhibit in the pretrial order, any party may use it. Each set of exhibits shall be submitted in a three-ring binder with appropriately numbered tabs.

SETTLEMENT

Should this case settle, counsel shall notify Eileen Scollard, Deputy Clerk, at 206-370-8518 as soon as possible. Pursuant to GR 3(b), an attorney who fails to give the deputy clerk prompt notice of settlement may be subject to such discipline as the Court deems appropriate.

DATED: September 20, 2007

/s Marsha J. Pechman
Honorable Marsha J. Pechman
United States District Judge

Sample Joint Claim Chart

| Claim Language (Disputed Terms in Bold) | Plaintiff’s Proposed Construction and Evidence in Support | Defendant’s Proposed Construction and Evidence in Support |
|---|--|--|
| <p>‘123 Patent</p> <p>1. A method for mending fences</p> <p>[or]</p> <p>fences</p> <p>Found in claim numbers:</p> <p>‘123 Patent: y, z</p> <p>‘456 Patent: a, b</p> | <p>fence</p> <p>Proposed Construction: A structure that keeps things out.</p> <p>Dictionary/Treatise Definitions: Merriam–Webster Dictionary (“a barrier intended to prevent . . . intrusion”).</p> <p>Intrinsic Evidence: ‘123 Patent col __:__ (“keeps stray animals out”); Prosecution History at __ (“this method is more effective than the prior art in reinforcing the fence, and therefore in keeping out unwanted intruders”).</p> <p>Extrinsic Evidence: R. Frost Depo. at xx:xx (“Good fences make good neighbors”); ‘000 Patent at col __:__; Vila Decl. at ¶__.</p> | <p>fence</p> <p>Proposed Construction: A structure that keeps things in.</p> <p>Dictionary/Treatise Definitions: Random House Dictionary (“a barrier enclosing or bordering a field, yard, etc. ”).</p> <p>Intrinsic Evidence: ‘123 Patent col __:__ (“keeps young children from leaving the yard “); Prosecution History at __ (“dilapidated fences meant to pen in cattle are particularly amenable to this method”).</p> <p>Extrinsic Evidence: C. Porter Depo. at xx:xx (“Don’t fence me in”); ‘111 Patent at col __:__; Thomas Decl. at ¶__.</p> |