

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

REALTIME DATA LLC d/b/a ISO,

Plaintiff,

v.

SUNGARD AVAILABILITY SERVICES, LP,
and SUNGARD AVAILABILITY SERVICES
TECHNOLOGY LLC,

Defendants.

Civil Action No. 1:18-cv-12227-IT

~~PROPOSED~~ SCHEDULING ORDER

This Scheduling Order is intended to provide a reasonable timetable for discovery and motion practice in order to help ensure a fair and just resolution of this matter without undue expense or delay.

I. Timetable for Discovery and Motion Practice

Pursuant to Rule 16(b) of the Federal Rules of Civil Procedure and Local Rules 16.1(f) and 16.6, it is hereby ORDERED that:

1. **Preliminary Disclosures**

- a. **Initial Disclosures.** Initial disclosures required by Fed. R. Civ. P. 26(a)(1) and by this court's Notice of Scheduling Conference must be completed by **Feb. 22, 2019.**
- b. **Preliminary Infringement Claim Charts.** No later than **March 8, 2019,** the patentee shall serve and file preliminary infringement claim charts identifying, with as much specificity as reasonably possible from publicly available information or other information then within the patentee's possession, custody, or control: (i) each accused product and/or method; (ii) the patent(s) and the claim(s) each product or method allegedly infringes; (iii) an element-by-element description of where and how each element of each asserted claim is found in each accused product or method; (iv) as to each element that the patentee contends is a means-plus function term under 35 U.S.C. § 112, the identity of the structures, acts, or materials in the accused product(s) or

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method(s) that perform the claimed function; (v) whether each element of each asserted claim is asserted to be present literally or under the doctrine of equivalents; (vi) which subsections of 35 U.S.C. § 271 apply; and (vii) if any alleged infringement is based on the acts of multiple parties, the role of each such party in the infringement.

- c. **Prosecution History.** No later than March 8, 2019, the patentee shall produce copies of the prosecution histories for each asserted patent, including any parent applications and provisional applications from which the asserted patents descend and to which each asserted patent claims priority. The patentee shall also produce any non-privileged documents in its possession, custody, or control concerning the conception and reduction to practice of the invention claimed in the asserted patents, including but not limited to lab notebooks (electronic or otherwise).
- d. **Ownership Interest.** No later than March 8, 2019, the patentee shall produce documents (including, without limitation, any licenses or assignments) sufficient to establish that the patentee owns the asserted patent(s) or has the authority to assert the patent(s).
- e. **Real Parties in Interest.** No later than March 8, 2019, the patentee shall produce documents sufficient to establish the identity of all real parties in interest as to the patentee and the asserted patent(s).
- f. **Conference Concerning Preliminary Patent Disclosures.** No later than March 29, 2019, the parties shall meet and confer about the following issues: (A) the sufficiency of the patentee's disclosures under LR 16.6(d)(1); provided, however, that those disclosures, as well as the accused infringer's disclosures in LR 16.6(d)(4), are preliminary and may be amended with leave of court during the discovery period; and (B) a plan for the accused infringer's compliance with the disclosure requirements of LR 16.6(d)(4), including the feasibility of, and procedures for, production or inspection of exemplary samples of the accused products and methods, technical documents, and/or source code. The parties' failure to agree on the sufficiency of the patentee's disclosures or a plan for the accused infringer's compliance with its disclosure obligations shall not entitle the accused infringer to avoid or delay its disclosure obligations in LR 16.6(d)(4).
- g. **Accused Infringer's Preliminary Production of Technical Documents, Source Code, and Samples of Accused Products.** Not later than April 19, 2019 and subject to any agreement of the parties as to the contours of production or inspection, the accused infringer shall make the following disclosures:
 - i. **Technical Documents.** Documents sufficient to show the composition, operation, construction, and performance of the accused components, elements, or functionality identified in the patentee's infringement claim

charts under LR 16.6(d)(1)(A). Such documents may include, for example, source code, specifications, schematics, flow charts, artwork, and formulas.

- ii. **Samples.** Sufficient samples of the accused products (or products that perform or were produced by the accused methods). When production is not practicable, the accused infringer shall permit inspection of the accused product(s) or method(s), provided that the accused infringer is only required to permit inspection of a method that continues to be practiced in the ordinary course of business.
- iii. **Source Code.** Source code, if relevant, subject to any protective order or procedures on which the parties may agree.
- iv. **Noninfringement Claim Charts.** Noninfringement charts identifying specifically which elements of the asserted claims each accused product or method fails to practice.
- v. **Invalidity Claim Charts – Anticipation or Obviousness.** Invalidity claim charts identifying all prior art that such party contends anticipates or renders obvious the patent claims identified by the patentee.
 - 1) For each such prior-art reference, the accused infringer shall specify whether it anticipates or renders the asserted claim obvious and shall also identify specifically where in each alleged reference each element of each asserted claim can be found. For each element that the accused infringer contends is a means-plus-function term under 35 U.S.C. § 112, the chart shall include the identity of the structures, acts, or materials in each prior-art reference that perform the claimed function.
 - 2) If the accused infringer asserts that a combination of prior-art references renders a claim obvious, then the accused infringer shall identify each such combination and the reason to combine the references. For each combination, the accused infringer shall identify specifically where in the combination of references each element of each asserted claim can be found. For each element that the accused infringer contends is a means-plus-function term under 35 U.S.C. § 112, the chart shall include the identity of the structures, acts, or materials in each combination that performs the claimed function. If applicable, the accused infringer shall also identify the primary and secondary references in each such combination.
- vi. **Other Grounds for Invalidity.** Any asserted grounds of invalidity based on patentability under 35 U.S.C. § 101, indefiniteness under 35 U.S.C. § 112, or lack of enablement or written description under 35 U.S.C. § 112 of

any of the asserted claims.

- vii. **Supporting Evidence for Invalidity Defense.** Documents sufficient to support any asserted invalidity defense.
- viii. **Identity of Real Parties in Interest.** Documents sufficient to establish the identity of all real parties in interest as to the accused infringer.

2. **Amendments of Preliminary Patent-Related Disclosures.** The preliminary infringement, noninfringement and invalidity contentions required by this Order may be amended and supplemented only by leave of court upon a timely showing of good cause. Non-exhaustive examples of circumstances that may, absent undue prejudice to the non-moving party, support a finding of good cause include:

- a. a claim construction by the court that is different from that proposed by the party seeking amendment within 28 days of the court's claim construction ruling;
- b. discovery of material prior art that was not located, despite diligent efforts, before the service of the invalidity contentions; and
- c. discovery of nonpublic information about the asserted infringement that was not discovered or located, despite diligent efforts, before the service of the infringement claim charts.
- d. The duty to supplement discovery responses does not excuse the need to obtain leave of court to amend disclosures. If one party is allowed to amend its disclosures, the opposing party may, within 28 days after service of the amended disclosure, serve responsive amended disclosures.

3. **Resolution of Disputes.** Any party seeking to file a motion to resolve a dispute arising out of disclosure obligations must follow the procedures applicable to discovery disputes set forth in L.R. 37.1.

4. **Amendments to Pleadings.** Except for good cause shown, no motions seeking leave to add new parties or to amend the pleadings to assert new claims or defenses may be filed after **30 days before the Markman Hearing**.

5. **Claim Construction Proceedings**

- a. No later than **May 10, 2019**, the parties shall simultaneously exchange a list of claim terms to be construed and their proposed constructions.
- b. Within 7 days of the exchange of claim terms, the parties shall confer to see if agreement can be reached on the construction of claim terms and the number of claims to be considered.
- c. The parties may jointly present to the court no more than 10 claim terms for

construction; provided, however, that, for good cause, either party, after conferring with the other parties, may petition the court to increase the number of claim terms for construction. Factors supporting good cause include, without limitation, the complexity of the patented technology, the number of asserted claims and patents, the lack of relation among the asserted patents, the number and complexity of invalidity defenses, and the number and diversity of accused products or methods.

- d. No later than **May 24, 2019**, the parties shall prepare and file a joint statement of the number of claims and terms to be construed. The joint statement shall include a joint claim-construction chart listing the claim terms in the order in which the parties would like the court to construe them and noting each party's proposed construction of each term. The parties may use the form shown below

Term	Patent Owner's Construction	Accused Infringer's Construction	Court's Construction

- e. **Opening Claim-Construction Briefs.** Not later than **June 14, 2019**, the parties shall simultaneously exchange and file opening claim-construction briefs.
- f. **Expert Testimony.** Any party seeking to rely on expert testimony to support claim construction must include with its opening brief an expert declaration. The offering party must make the expert available for deposition not later than 21 days before the responsive due date. Either party may cite to the expert deposition testimony in its responsive brief. Other than the initial declaration and deposition testimony, no further expert testimony shall be permitted unless the court requests further testimony or for good cause shown.
- g. **Responsive Briefs.** Not later than 42 days following exchange and filing of the opening claim construction briefs, the parties shall simultaneously exchange and file responsive briefs. This 42-day response period is intended to allow for depositions of opposing experts.
- h. **Page Limits.** Absent leave of court, the page limits of L.R. 7.1(b)(4) shall apply to all briefs.
- i. **Tutorials.** At the court's request, the parties may exchange and file tutorials, preferably in the form of a short video or slide presentation, at least 14 days before the claim-construction hearing. The court may also, at its own election, seek an independent third party to educate the court on the disputed technology.

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