UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Oxygenator Water Technologies, Inc.,

Plaintiff,

v.

Tennant Company,

Defendant.

Civil No. 20-cv-0358 (ECT/HB)

PRETRIAL CASE MANAGEMENT ORDER (PATENT CASES)

Pursuant to Rule 16 of the Federal Rules of Civil Procedure and the Local Rules of this Court, and in order to secure the just, speedy, and inexpensive determination of this action, the following schedule shall govern these proceedings.

This schedule may be modified only upon formal motion and a showing of good cause as required by Local Rule 16.3.[1] Counsel must promptly notify the Court of developments in the case that could significantly affect the case management schedule.

The Court expects the parties and their counsel to work cooperatively throughout this litigation to narrow the issues in dispute, and to use reasonable, good faith and proportional efforts to preserve, request, identify and produce relevant information and resolve discovery disputes.

[1] Parties who agree to seek a modification of this Scheduling Order may file a joint motion with a proposed order to the Court without requesting a hearing; however, the joint motion must set forth good cause for modification of the order as required by Local Rule 16.3. The parties are reminded that even if they are in agreement, the decision about whether such a motion will be granted is ultimately that of the Court.

The parties are also reminded that Magistrate Judge Bowbeer's Practice Pointers, which are periodically revised, are available on the United States District Court for the District of Minnesota's website (*mnd.uscourts.gov*). All parties are expected to be familiar with and adhere to these Practice Pointers, including any variances from the Local Rules.

Attachment A to this Order is a Schedule setting forth the key dates set forth in the order in chronological order. The Schedule is provided for the convenience of the Court and the parties, but is not intended to modify or supersede this Order. In all cases of apparent dispute, this Order controls.

PLEADINGS

1. All motions that seek to amend or supplement the pleadings or to add parties, together with supporting documents, must be filed and served on or before **December 3, 2020**.

2. Discovery will be permitted with respect to claims of willful infringement and defenses of patent invalidity or unenforceability not pleaded by a party, where the evidence needed to support the pleading of those claims or defenses is in whole or in part in the hands of another party. Once a party has provided the necessary discovery, and on or before the deadline set forth in Paragraph 1 above, the opposing party may seek leave of Court to add claims or defenses for which it alleges, consistent with Fed. R. Civ. P. 11, that it has support. Such support must be explained in the motion seeking leave. Leave will be liberally given where prima facie support is present, provided the party has been diligent in seeking the necessary discovery and that it seeks leave as soon as reasonably possible following receipt of the necessary discovery.

3. Any motion that seeks to amend or supplement the pleadings must include a redlined version reflecting the changes contained in the proposed pleading. (See Local Rule 15.1.)

4. The moving party may file a reply memorandum as a matter of right in connection with a motion for leave to amend a pleading if the other side argues that the amendment would be futile. In such case, the initial motion and supporting papers must be filed no less than 21 days before the hearing date, and the reply must be filed no more than 7 days after the other side files its response arguing futility. To anticipate this expanded briefing schedule, the parties must discuss during the required pre-motion meet-and-confer whether the other side intends to argue futility. The total word count for the opening and reply memoranda may not exceed 12,000 words unless otherwise authorized. If the other side does not argue futility, no reply will be permitted without leave of Court. See ¶ 3 in the section on NON-DISPOSITIVE MOTIONS, below.

FACT DISCOVERY DEADLINES AND LIMITS

1. The parties must make their initial disclosures required by Rule 26(a)(1) on or before **July 24, 2020**.

2. As to the production of core technical documents by Defendant, Defendant represents that there are owner's manuals and parts manuals available on its website for all products that incorporate the accused electrolysis units, and that the parts manuals contain detailed drawings of the accused electrolysis units. Defendant represents that on **July 31, 2020,** it produced CAD files for the electrodes that were placed in floor scrubbers in production from 2015-2020 and a chart that cross-references the CAD drawings with the floor scrubbers that incorporated those electrolysis units. Defendant further represents that it has produced manuals containing voltage information requested by Plaintiff. Defendant is currently searching for information concerning the current applied to the electrodes and will produce documents if it can locate any within its possession, custody, or control.

   Defendant has inquired, and Tennant is investigating, whether any additional electrodes were made, used, or sold by Tennant from 2015-2020. If additional relevant electrodes are identified, Defendant will promptly produce core technical documents comparable to those described above for those electrodes and the floor scrubbers that incorporated them. Provided that production is separately made and explicitly called to the attention of Plaintiff's counsel (as opposed to being incorporated into a larger production), and unless otherwise ordered for good cause shown, Plaintiff must provide infringement contentions for products containing those electrodes **no later than 3 weeks** from the date CAD files and 2d drawings are produced for those electrodes.

3. Defendant has proposed that this case be bifurcated into a liability phase and a damages phase, with the latter phase deferred until and only if there is a finding of liability in favor of Plaintiff. The Court has considered the advantages and disadvantages of bifurcation in connection with its responsibility under Federal Rule of Civil Procedure 1 to work with the parties toward a just, speedy, and inexpensive resolution of this case, and concludes that in the circumstances of this case, bifurcation would not be appropriate.

   That being said, the Court intends to work with the parties to explore opportunities for early resolution, and recognizes that although some damages-related information will be necessary to that discussion, it may be appropriate to defer more detailed and burdensome damages discovery until later in the period set aside for fact discovery. The Court therefore expects the parties to confer as discovery progresses regarding whether discovery can be prioritized in this or other ways to optimize the opportunities for a meaningful settlement discussion before the parties have exhausted their potential settlement flexibility on the cost of litigation.

4. Fact discovery must be commenced in time to be completed on or before **June 18, 2021**.

5. To facilitate the taking of depositions, the parties agree that document production should be substantially complete no later than **April 16, 2021**.

6. No more than a total of **25 interrogatories**, counted in accordance with Rule 33(a), shall be served by each side. No more than **75 document requests** and no more than **75 requests for admissions** shall be served by each side. A reasonable number of requests for admissions that are directed solely to the authenticity or genuineness of documents will not count toward this limit.

7. The parties are reminded that Fed. R. Civ. P. 26(b)(1) provides that discovery must be both relevant to any party's claim or defense and proportional to the needs of the case, considering, *inter alia*, the importance of the issues at stake in the action and the importance of the discovery in resolving those issues, as well as whether the burden or expense of the proposed discovery outweighs its likely benefit. Accordingly, requests must be tailored and specific to the issues, and general requests for "all relevant documents" do not meet these criteria.

   At the same time, Fed. R. Civ. P. 34(b)(2) requires that a responding party must "state with specificity the grounds for objecting to the request, including the reasons" and that the objection "must state whether any

responsive materials are being withheld on the basis of that objection. An objection to part of a request must specify the part and permit inspection of the rest." Boilerplate or general objections that do not clearly communicate whether and to what extent the scope of the response is more limited than the scope of the request do not meet these criteria.

8. Each side may take no more than **10 fact depositions**, including Rule 30(b)(6) and non-party depositions.

The parties agree that three business days before any scheduled 30(b)(6) deposition, the party producing the 30(b)(6) witness(es) will identify the witness(es) being produced by name and will specifically identify the topics about which each witness will be prepared to testify.

The parties do not anticipate that any deposition will be taken outside the United States or conducted in a language other than English. If it is determined that a translator will be necessary, the parties will work together in good faith to reach agreement regarding any additional hours that might be required to conduct a full deposition.

9. Based on the parties' Draft Stipulation for Discovery Order (ECF No. 30) and the Court's resolution of certain disputes therein, a Discovery Order governing the discovery and production of electronically stored information ("ESI") has been entered (ECF No. 40). The parties are expected to be proactive and diligent in identifying and discussing any other issues that may arise relating to the scope, search, collection, review, and production of ESI. Any disputes that cannot be resolved through a good faith meet and confer process must be brought promptly to the Court for resolution so that such disputes do not impede the progress of discovery.

10. Claims of Privilege or Protection as Attorney Work Product.

a. Defendant may postpone the waiver of any applicable attorney-client privilege on topics relevant to claims of willful infringement, if any, until **thirty (30) days after the Court issues its Claim Construction Order**, provided that it will produce all relevant privileged documents no later than **thirty (30) days after the Court issues its Claim Construction Order**. All additional discovery regarding the waiver must be completed **no later than the close of fact discovery or sixty (60) days after the Court issues its claim construction order, whichever is later**.

b. Unless otherwise ordered, the parties are not obligated to include on their privilege logs documents, communications, or other materials

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