

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE**

EYESMATCH LTD. and
MEMOMI LABS INC.,

Plaintiffs,

v.

FACEBOOK, INC., INSTAGRAM, LLC and
WHATSAPP LLC.,

Defendants.

C.A. No. 21-cv-111-RGA

SCHEDULING ORDER

This 4 day of June 2021, the Court having conducted an initial Rule 16(b) scheduling conference pursuant to Local Rule 16.1(b), and the parties having determined after discussion that the matter cannot be resolved at this juncture by settlement, voluntary mediation, or binding arbitration;

IT IS ORDERED that:

1. Rule 26(a)(1) Initial Disclosures. Unless otherwise agreed to by the parties, the parties shall make their initial disclosures pursuant to Federal Rule of Civil Procedure 26(a)(1) by **June 30, 2021**.

2. Joinder of Other Parties and Amendment of Pleadings. All motions to join other parties, and to amend or supplement the pleadings, shall be filed on or before **October 9, 2021**, except for amendments to add the defense of inequitable conduct or Plaintiffs to add a claim of willful infringement, which shall be filed **within thirty (30) days** after the Court issues its claim construction order.

3. Discovery.

a. Discovery Cut Off. All fact discovery in this case shall be initiated so that it will be completed on or before **October 28, 2022**.

b. Document Production. Document production shall be substantially complete by **June 17, 2022**.

c. Requests for Admission. A maximum of **50** requests for admission are permitted for each side. This limitation is not inclusive of requests for admission related to the authenticity or admissibility of documents or other evidence.

d. Interrogatories. A maximum of **25** interrogatories, including contention interrogatories, are permitted for each side in this case. An Interrogatory directed to Defendants, or Plaintiffs, will be responded to for each Defendant or Plaintiff and count as one Interrogatory.

e. Depositions

i. Limitation on Hours for Deposition Discovery. Each side is limited to a total of **100** hours of taking testimony by deposition upon oral examination per side, inclusive of third party discovery. No individual shall be deposed beyond the 7 total hours limit under the Federal Rules, except for the named inventors of the asserted patents, who may be deposed for a maximum of 14 hours each.

ii. Location of Depositions. Depositions of the named inventors will take place in Palo Alto, California or Redwood City, California. Depositions of Plaintiffs' employees in the United States will take place in Palo Alto, California or Redwood City, California. Depositions of Plaintiffs' employees in Israel (other than a named inventor) may be conducted by videoconference or in person in Israel, if preferred by Defendants. Depositions of

Defendants' employees in the United States will take place (a) within Palo Alto, California, Redwood City, California, or San Francisco, California, if the employee resides within the San Francisco Bay Area, or (b) within 50 miles of their home residence or work address, if the employee is outside the San Francisco Bay Area. Depositions of Defendants' employees outside of the United States may be conducted by videoconference.

f. Discovery Matters and Disputes Relating to Protective Orders. Should counsel find they are unable to resolve a discovery matter or a dispute relating to a protective order, the parties involved in the discovery matter or protective order dispute shall contact the Court's Case Manager to schedule an in-person conference/argument. Unless otherwise ordered, by no later than seven business days prior to the conference/argument, any party seeking relief shall file with the Court a letter, not to exceed three pages, outlining the issues in dispute and its position on those issues. By no later than five business days prior to the conference/argument, any party opposing the application for relief may file a letter, not to exceed three pages, outlining that party's opposition. A party should include with its letter a proposed order with a detailed issue-by-issue ruling such that, should the Court agree with the party on a particular issue, the Court could sign the proposed order as to that issue, and the opposing party would be able to understand what it needs to do, and by when, to comply with the Court's order. Any proposed order shall be e-mailed, in Word format, simultaneously with filing to rga_civil@ded.uscourts.gov.

If a discovery-related motion is filed without leave of the Court, it will be denied without prejudice to the moving party's right to bring the dispute to the Court through the discovery matters procedures set forth in this Order.

g. Miscellaneous Discovery Matters.

i. Initial patent disclosures shall be undertaken in accordance with the Court's Default Standard for Discovery, Including Discovery of Electronically Stored Information ("ESI") ("Delaware Default ESI Rules"):

- a. Delaware Default ESI Rule 3 Disclosures: The disclosures required by ESI Rule 3 shall be made by **June 30, 2021**.
- b. Delaware Default ESI Rule 4.a. Disclosures: By **June 30, 2021**, Plaintiffs shall specifically identify the accused products and the asserted patent(s) they allegedly infringe and produce the file history for each asserted patent.
- c. Delaware Default ESI Rule 4.b. Disclosures: By **July 30, 2021**, Defendants shall produce to the Plaintiffs core technical documents related to the accused product(s).
- d. Delaware Default ESI Rule 4.c. Disclosures: By **August 27, 2021**, Plaintiffs shall produce to Defendants an initial claim chart relating each accused product to the asserted claims each product allegedly infringes.
- e. Delaware Default ESI Rule 4.d. Disclosures: By **October 1, 2021**, Defendants shall produce to Plaintiffs initial invalidity contentions for each asserted claim, as well as the related invalidating references (e.g., publications, manuals and patents).

ii. Narrowing of the Asserted Claims and Prior Art References.

Plaintiffs shall serve an election of asserted claims, not to exceed thirty-two (32) claims in total, by **August 27, 2021**. Defendants shall serve an election of prior art references,¹ not to exceed more than forty-eight (48) prior art references total by **October 1, 2021**. Within **thirty (30) days** of the Court's Claim Construction order, Plaintiffs will narrow their previous selection of asserted claims, not to exceed six (6) claims per patent and twenty (20) claims in total. Within **sixty (60) days** after the Court's Claim Construction order, Defendants will narrow their previous selection of prior art references, not to exceed five (5) prior art grounds per claim using prior art references from the previously selected forty-eight (48) prior art references in total.

iii. Additional Litigation and IPRs

- a. **Defendants' statement regarding whether they expect to file one or more IPRs, and if so, when:** Defendants expect to file IPRs addressing each of the asserted claims approximately 2-4 months after Plaintiffs serve their election of asserted claims (as noted above). If IPRs are instituted, Defendants expect to file a motion for stay pending IPRs.
- b. **Plaintiffs' statement regarding whether it expects to institute any further litigation in this or other Districts within the next year:** There is no other pending or completed litigation involving one or more of the asserted patents in this or other Districts. Plaintiffs do not expect to amend their complaint to add one or more additional patents to this action.

¹ For purposes of this Order, a prior art instrumentality (such as a device or process) and associated references that describe that instrumentality shall count as one reference, as shall the closely related work of a single prior artist.

iv. Plaintiffs shall provide a copy of any relevant licenses and/or settlement agreements to Defendants no later than June 30, 2021. If Plaintiffs require a Court Order to make such disclosures, Plaintiffs shall file any necessary proposed orders no later than twenty-four hours before June 30, 2021.

4. Application to Court for Protective Order. Should counsel find it will be necessary to apply to the Court for a protective order specifying terms and conditions for the disclosure of confidential information, counsel should confer and attempt to reach an agreement on a proposed form of order and submit it to the Court by **June 30, 2021**. Should counsel be unable to reach an agreement on a proposed form of order, counsel must follow the provisions of Paragraph 3(f) above.

Any proposed protective order must include the following paragraph:

Other Proceedings. By entering this order and limiting the disclosure of information in this case, the Court does not intend to preclude another court from finding that information may be relevant and subject to disclosure in another case. Any person or party subject to this order who becomes subject to a motion to disclose another party's information designated as confidential pursuant to this order shall promptly notify that party of the motion so that the party may have an opportunity to appear and be heard on whether that information should be disclosed.

5. Papers Filed Under Seal. When filing papers under seal, counsel shall deliver to the Clerk the required number of copies as directed in paragraph 6. A redacted version of any sealed document shall be filed electronically within seven days of the filing of the sealed document.

6. Courtesy Copies. The parties shall provide to the Court two courtesy copies of all briefs and one courtesy copy of any other document filed in support of any briefs (i.e., appendices, exhibits, declarations, affidavits etc.). This provision also applies to papers filed

under seal.

7. Claim Construction Issue Identification. On or before **October 15, 2021**, the parties shall exchange a list of those claim term(s)/phrase(s) that they believe need construction. The parties shall exchange their proposed claim construction of those term(s)/phrase(s) with citations to intrinsic evidence no later than **October 29, 2021**. These documents will not be filed with the Court. Subsequent to exchanging proposed constructions with intrinsic evidence, the parties will meet and confer no later than **November 5, 2021** to prepare a Joint Claim Construction Chart to be filed no later than **November 12, 2021**. The Joint Claim Construction Chart, in Word format shall be e-mailed simultaneously with filing to rga_civil@ded.uscourts.gov. The parties' Joint Claim Construction Chart should identify for the Court the term(s)/phrase(s) of the claim(s) in issue, and should include each party's proposed construction of the disputed claim language with citation(s) only to the intrinsic evidence in support of their respective proposed constructions. A copy of the patent(s) in issue as well as those portions of the intrinsic record relied upon shall be submitted with this Joint Claim Construction Chart. In this joint submission, the parties shall not provide argument.

8. Claim Construction Briefing². Plaintiffs shall serve, but not file, their opening brief, not to exceed 5,000 words, on **December 17, 2021**. Defendants shall serve, but not file, their answering brief, not to exceed 7,500 words, on **January 28, 2022**. Plaintiffs shall serve, but not file, their reply brief, not to exceed 5,000 words on **February 18, 2022**. Defendants

² As each brief is written and provided to the opposing party, the individual responsible for verifying the word count will represent to the other party that it has so verified and by what means. These verifications should not be provided to the Court unless a dispute arises about them. Pictures, Figures copied from the patent, and other illustrations do not count against the word limit. Plaintiffs should include with their opening brief one or more representative claims with the disputed terms italicized. Should Defendants want to add additional representative claims, Defendants may do so. The representative claims and the agreed-upon claim constructions do not count against the word limits.

shall serve, but not file, their sur-reply brief, not to exceed 2,500 words, on **March 11, 2022**.

No later than **March 18, 2022**, the parties shall file a Joint Claim Construction Brief. The parties shall copy and paste their unfiled briefs into one brief, with their positions on each claim term in sequential order, in substantially the form below.

JOINT CLAIM CONSTRUCTION BRIEF

I. Representative Claims

II. Agreed-upon Constructions

III. Disputed Constructions

A. [TERM 1]³

1. Plaintiffs Opening Position
2. Defendants Answering Position
3. Plaintiffs Reply Position
4. Defendants Sur-Reply Position

B. [TERM 2]

1. Plaintiffs Opening Position
2. Defendants Answering Position
3. Plaintiffs Reply Position
4. Defendants Sur-Reply Position

Etc. The parties need not include any general summaries of the law relating to claim construction. If there are any materials that would be submitted in an appendix, the parties shall submit them in a Joint Appendix.

³ For each term in dispute, there should be a table or the like setting forth the term in dispute and the parties' competing constructions. The table does not count against the word limits.

9. Hearing on Claim Construction. Beginning at **8:30** a.m. on **a day of the Court's convenience in April or May 2022**, the Court will hear argument on claim construction. Absent prior approval of the Court (which, if it is sought, must be done so by joint letter submission no later than the date on which answering claim construction briefs are due), the parties shall not present testimony at the argument, and the argument shall not exceed a total of three hours. When the Joint Claim Construction Brief is filed, the parties shall simultaneously file a motion requesting the above- scheduled claim construction hearing, state that the briefing is complete, and state how much total time the parties are requesting that the Court should allow for the argument.

10. Disclosure of Expert Testimony.

a. Expert Reports. For the party who has the initial burden of proof on the subject matter, the initial Federal Rule 26(a)(2) disclosure of expert testimony is due on or before **December 16, 2022**. The supplemental disclosure to contradict or rebut evidence on the same matter identified by another party is due on or before **January 27, 2023**. Reply expert reports from the party with the initial burden of proof are due on or before **February 27, 2023**. No other expert reports will be permitted without either the consent of all parties or leave of the Court. If any party believes that an expert report does not comply with the rules relating to timely disclosure or exceeds the scope of what is permitted in that expert report, the complaining party must notify the offending party within one week of the submission of the expert report. The parties are expected to promptly try to resolve any such disputes, and, when they cannot reasonably be resolved, use the Court's Discovery Dispute Procedure or the complaint will be waived.

Along with the submissions of the expert reports, the parties shall advise of the dates and

times of their experts' availability for deposition. Depositions of experts shall be completed on or before **March 31, 2023**.

b. Objections to Expert Testimony. To the extent any objection to expert testimony is made pursuant to the principles announced in *Daubert v. Merrell Dow Pharm ., Inc.*, 509 U.S. 579 (1993), as incorporated in Federal Rule of Evidence 702, it shall be made by motion no later than the deadline for dispositive motions set forth herein, unless otherwise ordered by the Court.

11. Case Dispositive Motions. All case dispositive motions shall be served and filed on or before **May 5, 2023**. No case dispositive motion under Rule 56 may be filed more than ten days before the above date without leave of the Court. Absent an order of the Court upon a showing of good cause, each side is limited to one forty-page opening brief, one forty- page answering brief, and one twenty-page reply brief for all of its Daubert and case dispositive motions.

12. Applications by Motion. Except as otherwise specified herein, any application to the Court shall be by written motion. Any non-dispositive motion should contain the statement required by Local Rule 7.1.1.

13. Pretrial Conference. On **September 22, 2023**, the Court will hold a Rule 16(e) final pretrial conference in Court with counsel beginning at 8:30 a.m. The parties shall file a joint proposed final pretrial order in compliance with Local Rule 16.3(c) no later than 5 p.m. on the fourth business day before the date of the final pretrial conference. Unless otherwise ordered by the Court, the parties shall comply with the timeframes set forth in Local Rule 16.3(d) for the preparation of the proposed joint final pretrial order.

14. Motions in Limine. Motions *in limine* shall be separately filed, with each

motion containing all the argument described below in one filing for each motion. Any supporting documents in connection with a motion *in limine* shall be filed in one filing separate from the motion *in limine*. Each party shall be limited to three *in limine* requests, unless otherwise permitted by the Court. The *in limine* request and any response shall contain the authorities relied upon; each *in limine* request may be supported by a maximum of three pages of argument and may be opposed by a maximum of three pages of argument, and the party making the *in limine* request may add a maximum of one additional page in reply in support of its request. If more than one party is supporting or opposing an *in limine* request, such support or opposition shall be combined in a single three-page submission (and, if the moving party, a single one-page reply). No separate briefing shall be submitted on *in limine* requests, unless otherwise permitted by the Court.

15. Jury Instructions. Voir Dire. and Special Verdict Forms. Where a case is to be tried to a jury, pursuant to Local Rules 47.1(a)(2) and 51.1, the parties should file (i) proposed voir dire, (ii) preliminary jury instructions, (iii) final jury instructions, and (iv) special verdict forms no later than 6 p.m. on the fourth business day before the date of the final pretrial conference. Areas of dispute shall be identified as narrowly as possible and in a manner that makes it readily apparent what the dispute is. The parties shall submit simultaneously with filing each of the foregoing four documents in Word format to rga_civil@ded.uscourts.gov.

16. Trial. This matter is scheduled for a five (5) day⁴ jury trial beginning at 9:30 a.m. on **October 2, 2023** with the subsequent trial days beginning at 9:30 a.m. Until the case is submitted to the jury for deliberations, the jury will be excused each day at 5:00 p.m. The trial will be timed, as counsel will be allocated a total number of hours in which to present their respective cases.

17. ADR Process. This matter is referred to a magistrate judge to explore the possibility of alternative dispute resolution.

/s/ Richard G. Andrews
UNITED STATES DISTRICT JUDGE

⁴ Five days (i.e., about ten to thirteen hours per side) is the presumptive length of a patent jury trial. If the parties think it is obvious that this will not be enough, they may put in a different length and should be prepared to explain why at the Rule 16 conference. A final decision on the precise length of trial will not be made before the final pretrial conference.

[PROPOSED] CASE SCHEDULE WITH ALL RELEVANT DATES

Subject Matter	Agreed Proposed Date
Parties to file Motion for Protective Order	June 30, 2021
FRCP 26(a) Initial Disclosures	June 30, 2021
Production of licenses	June 30, 2021
ESI Rule 3 disclosures	June 30, 2021
Plaintiffs will identify accused products, asserted patents, and produce the file histories	June 30, 2021
Defendants produce core technical documents	July 30, 2021
Plaintiffs serve an election of asserted claims and initial claim chart relating each accused product to the asserted claims each product allegedly infringes, asserted claims are not to exceed thirty-two (32) claims in total	August 27, 2021
Defendants produce initial invalidity contentions and known invalidating references. Identified prior art references are not to exceed forty-eight (48) references in total	October 1, 2021
Exchange list of claim construction terms	October 15, 2021
Exchange list of proposed constructions with citations to intrinsic evidence	October 29, 2021
File Joint Claim Construction Chart	November 12, 2021
Plaintiffs serve opening claim construction brief	December 17, 2021
Joinder of other parties and amendment of pleadings	October 9, 2021
Defendants serve answering claim construction brief	January 28, 2022
Plaintiffs serve reply claim construction brief	February 18, 2022
Defendants serve sur-reply claim construction brief	March 11, 2022
Joint claim construction brief filed with Court	March 18, 2022
Claim construction hearing	April/May __, 2022
Final election of asserted claims: Plaintiffs will narrow their previous selection of asserted claims, not to exceed six (6) claims per patent and twenty (20) claims in total	Within thirty (30) days of the Court's Claim Construction order
Final election of prior art: Defendants will narrow their previous selection of prior art references, not to exceed five (5) prior art grounds per claim using prior art references from the previously selected forty-eight (48) prior art references in total	Within sixty (60) days of the Court's Claim Construction order

Substantial completion of document productions	June 17, 2022
Close of fact discovery	October 28, 2022
Opening expert reports	December 16, 2022
Rebuttal expert reports	January 27, 2023
Reply expert reports	February 27, 2023
Close of expert discovery (depositions to be completed)	March 31, 2023
Case dispositive/Daubert motions	May 5, 2023
Pretrial Conference	September 22, 2023
Trial (5 days)	October 2, 2023

Gibbs, Tracy

From: ded_nefreply@ded.uscourts.gov
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U.S. District Court

District of Delaware

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Case Name: EyesMatch Ltd. et al v. Facebook, Inc. et al

Case Number: [1:21-cv-00111-RGA](#)

Filer:

Document Number: [23](#)

Docket Text:

SCHEDULING ORDER: Case referred to the Magistrate Judge for the purpose of exploring ADR. Joinder of Parties due by 10/9/2021. Amended Pleadings due by 10/9/2021. Fact Discovery completed by 10/28/2022. Dispositive Motions due by 5/5/2023. Joint Claim Construction Brief due by 3/18/2022. A Pretrial Conference is set for 9/22/2023, at 8:30 AM in Courtroom 6A. A 5 day Jury Trial is set to start 10/2/2023, at 9:30 AM in Courtroom 6A (see Order for further details). Signed by Judge Richard G. Andrews on 6/4/2021. (nms)

1:21-cv-00111-RGA Notice has been electronically mailed to:

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