

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS**

LEXOS MEDIA IP, LLC,

Plaintiff,

v.

OVERSTOCK.COM, INC.,

Defendant.

Case No. 22-2324-JAR-ADM

**INITIAL AND CLAIM CONSTRUCTION PHASE
SCHEDULING ORDER**

On January 12, 2022, U.S. Magistrate Judge Mitchell conducted a scheduling conference in accordance with Fed. R. Civ. P. 16, by phone. Plaintiff Lexos Media IP, LLC appeared through counsel Kenneth P. Kula and David R. Cooper. Defendant Overstock.com, Inc. appeared through counsel Noel F. Chakkalakal, Philip G. Brown, and Benjamin A. Stelter-Embry.

After consultation with the parties, the court enters this scheduling order governing the initial and claim construction phase of the case, summarized in the following table:

SUMMARY OF DEADLINES AND SETTINGS	
Event	Deadline/Setting
Disclosure of asserted claims and infringement contentions and accompanying document production (D. KAN. PATENT R. 3.1 and 3.2)	January 24, 2023
Plaintiff's settlement proposal	February 6, 2023
Defendant's settlement counter-proposal	February 20, 2023
Motions to amend	February 24, 2023
Jointly filed mediation notice, or confidential settlement reports to magistrate judge	April 3, 2023
Invalidity contentions and accompanying document production (D. KAN. PATENT R. 3.3 and 3.4)	April 4, 2023
Exchange proposed terms for construction (D. KAN. PATENT R. 4.1)	April 18, 2023
Exchange preliminary claim constructions and extrinsic evidence (D. KAN. PATENT R. 4.2)	May 9, 2023
Joint claim construction statement (D. KAN. PATENT R. 4.3)	May 30, 2023
Complete claim construction discovery	June 27, 2023
Opening claim construction brief	July 11, 2023
Responsive claim construction brief	August 8, 2023
Reply claim construction brief	August 22, 2023
Joint final claim construction chart (D. KAN. PATENT R. 4.6)	7 days before claim construction hearing
Claim construction hearing (court's discretion)	To be determined
Mediation completed	October 5, 2023
Substantial completion of document production	October 27, 2023

1. Alternative Dispute Resolution (ADR).

After discussing ADR during the scheduling conference, the court determined that settlement potentially would be enhanced by early mediation. Toward that end, plaintiff must submit a good-faith settlement proposal to defendant by **February 6, 2023**. Defendant must make a good-faith counter-proposal by **February 20, 2023**. By **April 3, 2023**, either (a) the parties must file a joint notice stating the full name, mailing address, and telephone number of the mediator they selected, along with the firmly scheduled date, time, and place of mediation, or (b) each party must submit a confidential settlement report by e-mail to the undersigned U.S. Magistrate Judge at ksd_mitchell_chambers@ksd.uscourts.gov. These confidential reports must not be submitted to the presiding U.S. District Judge or filed with the Clerk's Office. These confidential reports must set forth in detail the parties' settlement efforts to date (including the amounts of offers exchanged), evaluations of the case, views concerning future settlement negotiations, overall settlement prospects, and a specific recommendation regarding mediation or any other ADR method, e.g., arbitration, early-neutral evaluation, or a settlement conference with a magistrate judge. If the parties cannot agree on a mediator and any party wants the court to select a particular mediator or other ADR neutral, then the parties may provide up to three nominations in their confidential settlement reports; such nominations must include each nominee's qualifications and billing rates, and confirmation that the nominee has pre-cleared all ethical and scheduling conflicts. Absent further order of the court, mediation is ordered no later than **October 5, 2023**. Defense counsel must file an ADR report within 14 days after any scheduled ADR process, using the form on the court's website:

<https://ksd.uscourts.gov/sites/ksd/files/adrreportrev20141.pdf>

2. **Discovery.**

a. The parties already served Fed. R. Civ. P. 26(a)(1) initial disclosures regarding witnesses, exhibits, damages, and insurance. To facilitate settlement negotiations and to avoid unnecessary expense, the parties already exchanged copies of the documents described in their Rule 26(a)(1) disclosures. Supplementations of initial disclosures must be served at such times and under such circumstances as required by Fed. R. Civ. P. 26(e). In addition, such supplemental disclosures must be served 40 days before the deadline to complete discovery so as to identify all witnesses and exhibits that probably will be or even might be used at trial so that the opposing party can decide whether to pursue follow-up discovery before the time allowed for discovery expires. Witnesses or other information included in a party's final Fed. R. Civ. P. 26(a)(3) disclosures that did not previously appear in the initial Rule 26(a)(1) disclosures or a timely Rule 26(e) supplement thereto presumptively will be excluded under Fed. R. Civ. P. 37(c)(1).

b. All claim construction discovery must be commenced or served in time to be completed by **June 27, 2023**.

c. The District of Kansas Patent Local Rules apply to this case with the dates set forth in the table on page 2 of this Scheduling Order.

d. The parties must substantially complete document production by **October 27, 2023**.

e. Consistent with the parties' agreement, electronically stored information (ESI) in this case will be handled pursuant to the ESI Order already entered. (ECF 19.)

f. No party may serve more than 30 interrogatories on any other party.

g. Each side may take up to 100 hours of depositions for the full duration of discovery, including claim construction and subsequent discovery. Individual depositions are limited to 7

hours each except party depositions pursuant to Federal Rule of Civil Procedure 30(b)(6), which are limited to 7 hours per notice. Depositions will be governed by the guidelines on the court's website:

<https://ksd.uscourts.gov/file/843>

- h.** The court has already entered a protective order to govern discovery. (ECF 20.)
- i.** The parties consent to electronic service of disclosures and discovery requests and responses. *See* Fed. R. Civ. P. 5(b) and D. Kan. Rules 5.4.2 and 26.3.
- j.** The expense and delay often associated with civil litigation can be dramatically reduced if the parties and counsel conduct discovery in the “just, speedy, and inexpensive” manner mandated by Fed. R. Civ. P. 1. Accordingly, the parties and counsel are reminded of their important obligations under Fed. R. Civ. P. 26(g) in certifying discovery disclosures, requests, responses, and objections and that the court “must impose an appropriate sanction on the signer, the party on whose behalf the signer was acting, or both” if the certification violates Rule 26(g) (e.g., overbroad discovery requests, boilerplate objections, etc.) without substantial justification.

3. Motions

- a.** Any motion for leave to join additional parties or to otherwise amend the pleadings must be filed by **February 24, 2023**.
- b.** Before filing any disputed discovery-related motion, and after satisfying the duty to confer or to make a reasonable effort to confer under Fed. R. Civ. P. 37(a)(1) and D. Kan. Rule 37.2, the party intending to file a discovery-related motion must email the court to arrange a telephone conference with the judge and opposing counsel. The email request, preferably in a joint submission, must include a brief, nonargumentative statement of the nature of the dispute; the estimated amount of time needed for the conference, and suggested dates and times; and any

preference for conducting the conference in person or by phone. The court will typically grant the request and contact the parties to arrange the conference within a few days. The court will inform the parties whether any additional information should be submitted or filed in advance of this conference. Unless otherwise requested by the court, no disputed discovery-related motion, material, or argument should be filed or submitted prior this telephone conference. *See* D. Kan. Rule 37.1(a).

c. To avoid unnecessary motions, the court encourages the parties to utilize stipulations regarding discovery procedures. However, this does not apply to extensions of time that interfere with the deadlines to complete all discovery, for briefing or hearing a motion, or for trial. *See* Fed. R. Civ. P. 29; D. Kan. Rule 6.1(c).

4. Claim Construction Hearing and Other Matters.

a. The court will subsequently determine whether and when it will conduct a claim construction hearing.

b. The parties must meet and confer within 7 days after the court issues a claim construction ruling and, no later than 7 days thereafter, submit a joint status report via email to ksd_mitchell_chambers@ksd.uscourts.gov. The joint status report must provide the court with the parties' proposed remaining case management deadlines and an explanation of the number of asserted claims and prior art references, including the parties' proposed plan (if any) for reducing the same. The court may then reconvene a scheduling conference and will issue a scheduling order to govern the remainder of the case.

c. If at any time the parties wish to consent to trial by a U.S. Magistrate Judge, they must email the Clerk's Office their signed form, "Notice, Consent, and Reference of a Civil Action to a Magistrate Judge" available on the court's website at:

<https://ksd.uscourts.gov/civil-forms>

d. This scheduling order will not be modified except by leave of court upon a showing of good cause.

IT IS SO ORDERED.

Dated January 12, 2023, at Kansas City, Kansas.

s/ Angel D. Mitchell

Angel D. Mitchell
U.S. Magistrate Judge