

**IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF TEXAS  
AUSTIN DIVISION**

**SOFTEX LLC,**

**Plaintiff,**

**vs.**

**ABSOLUTE SOFTWARE CORPORATION  
AND ABSOLUTE SOFTWARE, INC.**

**Defendants.**

**Civil Action No. 1:22-cv-01308-RP**

**JURY TRIAL DEMANDED**

**SOFTEX LLC,**

**Plaintiff,**

**vs.**

**DELL TECHNOLOGIES INC. AND  
DELL INC.**

**Defendants.**

**Civil Action No. 1:22-cv-01309-RP**

**JURY TRIAL DEMANDED**

**SOFTEX LLC**

**Plaintiff,**

**vs.**

**HP INC.,**

**Defendant.**

**Civil Action No. 1:22-cv-01311-RP**

**JURY TRIAL DEMANDED**

**CORRECTED  
JOINT RULE 26(f) REPORT AND DISCOVERY PLAN**

Pursuant to Fed. R. Civ. P. 26(f), Plaintiff Softex LLC (“Softex”) and Defendants Absolute Software Corporation and Absolute Software, Inc. (collectively, “Absolute”), Dell Technologies Inc. and Dell Inc. (collectively, “Dell”), and HP Inc. (“HP”) (Absolute, Dell, and HP collectively, “Defendants”), jointly submit this corrected report.<sup>1</sup>

---

<sup>1</sup> The original Joint Rule 26(f) Report and Discovery Plan inadvertently proposed that the Rebuttals to Dispositive and Daubert Motions and Replies to Dispositive and Daubert Motions be due on the same day. The Parties submit this Corrected Joint Rule 26(f) Report and Discovery plan to correct this error by proposing that Replies be due seven days after Rebuttals.

**1. Rule 26(f) Conference**

Counsel for the parties conferred on March 27, 2023 and thereafter as required by Fed. R. Civ. P. 26(f). Softex was represented by Blair Jacobs, Christina Ondrick, John Holley, and Casey Shomaker of McKool Smith P.C. and Absolute, Dell, and HP were represented by Heidi Keefe, Reuben Chen, and Alexandra Leeper of Cooley LLP.

**2. Case Status**

Softex's Complaint against Absolute was filed on December 14, 2022. Dkt. 1. Absolute was served with the Complaint on December 16, 2022 (Dkt. 8), and filed its Answer, Jury Demand, and Counterclaims on February 13, 2023. Dkt. 24. Softex answered Absolute's Counterclaims on March 6, 2023. Dkt. 26.

Softex's Complaint against Dell was filed on December 14, 2022. Dkt. 1. Dell was served with the Complaint on December 16, 2022 (Dkt. 8), and moved to dismiss Softex's willfulness claims on February 13, 2023. Dkt. 12. This Court denied Dell's Motion to Dismiss with respect to willfulness based on post-filing knowledge and granted Dell's Motion to Dismiss with respect to willfulness based on pre-filing knowledge. Dkt. 25. Dell filed its Answer and Jury Demand on March 21, 2023. Dkt. 29.

Softex's Complaint against HP was filed on December 14, 2022. Dkt. 1. HP was served with the Complaint on December 16, 2022 (Dkt. 8), and moved to dismiss Softex's willfulness claims on February 13, 2023. Dkt. 14. This Court denied HP's Motion to Dismiss with respect to willfulness based on post-filing knowledge and granted HP's Motion to Dismiss with respect to willfulness based on pre-filing knowledge. Dkt. 25. HP filed its Answer and Jury Demand on March 21, 2023. Dkt. 28.

**3. Nature and Basis of Claims and Defenses**

**a. Softex's Position**

This is an action for patent infringement of U.S. Patent Nos. 7,590,837 ("the '837 Patent"), 8,516,235 ("the '235 Patent"), 8,145,892 ("the '892 Patent"), 8,287,603 ("the '603 Patent"), 8,506,649 ("the '649 Patent"), 8,137,410 ("the '410 Patent"), and 8,128,710 ("the '710 Patent") (collectively "the Asserted Patents").

Softex, Inc. is the original named assignee to the Asserted Patents. Softex, Inc. was founded in 1992 by Mahendra Bhansali and current CEO Apurva Bhansali with a mission to provide innovative security-focused software products and solutions for computing devices. Softex, Inc. has established itself as one of the top security solution provider with innovative products focused on persistent theft detection security, enterprise single sign on, identity and access management, and data protection of self-encrypting drives. Softex, Inc. pioneered a class of theft prevention and recovery software that is embedded on Basic Input/Output System (BIOS) chips and/or non-viewable portions of hard disk drives at the point of manufacture, and Softex, Inc. holds many patents directly related to this technology. Softex, Inc.'s persistent theft detection security software, including "TheftGuard," competed for some time with products sold by Absolute Software, Inc. and Absolute Software Corp. Softex, Inc. transferred all rights, title, and interest in and to the Asserted Patents to Softex LLC on August 5, 2022.

Absolute is violating Softex's patent rights by making, using, selling and/or offering to sell products that infringe the Asserted Patents, such as Absolute Home & Office, Absolute Computrace Persistence, Absolute LoJack, LoJack for Laptops, and Computrace software. Absolute also actively induces third parties to infringe by intending to encourage, and in fact encouraging its customers to activate Absolute Control, Absolute Visibility, Absolute Resilience, Absolute Home & Office, AKA Absolute Computrace Persistence, AKA Absolute LoJack, AKA LoJack for Laptops, and/or AKA Computrace onto computers sold and used within the United States in an infringing manner with the knowledge or willful blindness that the resulting acts induced thereby would constitute direct infringement by its customers. Absolute's acts of infringing all Asserted Patents have been willful and undertaken in knowing and deliberate disregard of Softex LLC's patent rights. Discovery relating to Absolute and its customers' infringement will be complex, as the infringing technology is embedded in more than 600 million devices as a result of Absolute's partnership with more than 30 international OEMs.<sup>2</sup>

Dell is separately violating Softex's patent rights by making, testing, using, selling, and/or offering for sale its devices with, for example, Microsoft Windows 10 and/or Windows 11 with Microsoft's "Find My Device" and/or Absolute Home & Office software. Dell also actively

---

<sup>2</sup> <https://www.absolute.com/platform/persistence/>.

induces its customers to infringe by intending to encourage, and in fact encouraging its customers to enable and use its devices in an infringing manner. Dell's infringing acts have been willful and undertaken in knowing and deliberate disregard of Softex LLC's patent rights at least as of the filing of Complaint. Dell's infringement requires Dell to compensate Softex for the use made of Softex's invention. Dell's infringement based on Microsoft Windows 10 and/or Windows 11 with Microsoft's "Find My Device" – which was developed by Microsoft, not Absolute – is separate and distinct from Dell's infringement based on Absolute Home & Office – which was developed by Absolute. Softex anticipates that significant third-party discovery from at least Microsoft and customers of Dell will be required in the Dell case.

HP is separately violating Softex's patent rights by making, testing, using, selling, and/or offering for sale its devices with, for example, Microsoft Windows 10 and/or Windows 11 with Microsoft's "Find My Device" and/or Absolute Home & Office software. HP also actively induces its customers to infringe by intending to encourage, and in fact encouraging its customers to enable and use its devices in an infringing manner. HP's infringing acts have been willful and undertaken in knowing and deliberate disregard of Softex LLC's patent rights at least as of the filing of Complaint. HP's infringement requires HP to compensate Softex for the use made of Softex's invention. HP's infringement based on Microsoft Windows 10 and/or Windows 11 with Microsoft's "Find My Device" – which was developed by Microsoft, not Absolute – is separate and distinct from HP's infringement based on Absolute Home & Office – which was developed by Absolute. Softex anticipates that significant third-party discovery from at least Microsoft and customers of HP will be required in the HP case.

**b. Absolute's Position**

Absolute is a leading provider of computer security software, and has been on the forefront of the computer security space since the 1990s—before the priority date of any of the Asserted Patents. Absolute's products do not infringe the Asserted Patents, either directly or indirectly, and Absolute likewise has not willfully infringed any Asserted Patent. Furthermore, each of the Asserted Patents is invalid and/or unenforceable.

Softex asserts the same Asserted Patents against Dell and HP. As relevant to this litigation, Dell and HP are computer manufacturers who sell devices that incorporate certain products made

by Absolute and Microsoft. Neither Dell nor HP designs, develops, or maintains any of the accused products in this case. None of the products accused in the Dell and HP litigations infringe the Asserted Patents, either directly or indirectly, and neither Dell nor HP has willfully infringed any Asserted Patent.

**4. Possibility of Settlement**

The parties have engaged in settlement discussions, but have not reached any agreement.

**5. Proposed Scheduling Order**

The parties propose certain modifications to the Court's Proposed Scheduling Order given the complexity of these three cases, and the parties' proposed consolidated case schedule is below. The parties agree to a schedule for claim construction disclosures and briefing. The parties' proposals diverge as to the timing of case narrowing and fact discovery. Softex believes that a short Scheduling Hearing with the Court would benefit the Court and parties given the interrelated nature of these three different cases along with the related case filed against Lenovo and currently pending in the Eastern District of North Carolina, as well as other issues pertinent to the unique complexities of scheduling for these three cases and the scheduling disputes raised by the parties herein. Defendants have no objection to a short Scheduling Hearing by Zoom, if the Court wishes it.

| <b>Event</b>                            | <b>Softex's Proposed Deadline</b> | <b>Absolute's Proposed Deadline</b>                                                                                                                                                                      |
|-----------------------------------------|-----------------------------------|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| Exchange Initial Disclosures            | Thursday, May 4, 2023             | 1 day after the claim construction hearing – other than production of core technical documents and claim construction disclosures, discovery to remain closed until after the claim construction hearing |
| Submission of Proposed Protective Order | Thursday, May 4, 2023             | No deadline appropriate – the parties shall engage in good faith negotiations regarding the protective order                                                                                             |

|                                                                                        |                                        |                       |
|----------------------------------------------------------------------------------------|----------------------------------------|-----------------------|
| Service of Infringement Contentions <sup>3</sup>                                       | Thursday, May 4, 2023                  |                       |
| Plaintiff shall serve an election of asserted claims, not to exceed 42 claims in total | No deadline. <i>See</i> § 5(a), below. | Thursday, May 4, 2023 |
| Service of Invalidity Contentions <sup>4</sup>                                         | Thursday, June 29, 2023                |                       |

<sup>3</sup> Infringement contentions must, for each asserted patent claim: (i) identify the claimed priority date; (ii) identify applicable statutory subsections of 35 USC 271; (iii) identify each accused apparatus, product, device, process, method, act as specifically as possible; (iv) provide a chart identifying specifically where and how each limitation of each asserted claim is found within each accused instrumentality; (v) for claims alleged to have been indirectly infringed, identify any direct infringement and a description of the acts of the alleged indirect infringer that contribute to or are inducing that direct infringement; (vi) identify whether each limitation of each asserted claim is alleged to be literally present or present under the doctrine of equivalents; and (vii) if a party claiming patent infringement wishes to preserve the right to rely, for any purpose, on the assertion that its own or its licensee's apparatus, product, device, process, method, act, or other instrumentality practices the claimed invention, the party shall identify, separately for each asserted claim, each such apparatus, product, device, process, method, act, or other instrumentality that incorporates or reflects that particular claim. The plaintiff shall also produce: (1) all documents evidencing conception and reduction to practice for each claimed invention, and (2) a copy of the file history for each patent in suit.

<sup>4</sup> Invalidity contentions must include: (i) The identity of each item of prior art that allegedly anticipates each asserted claim or renders it obvious. Each prior art publication shall be identified by its title, date of publication, and where feasible, author and publisher. Each alleged sale or public use shall be identified by specifying the item offered for sale or publicly used or known, the date the offer or use took place or the information became known, and the identity of the person or entity which made the use or which made and received the offer, or the person or entity which made the information known or to whom it was made known. Prior art under 35 U.S.C. § 102(f) shall be identified by providing the name of the person(s) from whom and the circumstances under which the invention or any part of it was derived. Prior art under 35 U.S.C. § 102(g) shall be identified by providing the identities of the person(s) or entities involved in and the circumstances surrounding the making of the invention before the patent applicant(s); (ii) Whether each item of prior art anticipates each asserted claim or renders it obvious. If obviousness is alleged, an explanation of why the prior art renders the asserted claim obvious, including an identification of any combinations of prior art showing obviousness; (iii) A chart identifying specifically where and how each limitation of each asserted claim is found within each item of prior art; and (iv) A detailed and complete explanation of any grounds of invalidity based on 35 U.S.C. § 101, indefiniteness under 35 U.S.C. § 112(2) or enablement or written description under 35 U.S.C. § 112(1) of any of the asserted claims. The defendant shall also produce (1) all prior art referenced in the invalidity contentions, and (2) technical documents, including software where applicable, sufficient to show the operation of the accused product(s).

|                                                                                                           |                                                               |                             |
|-----------------------------------------------------------------------------------------------------------|---------------------------------------------------------------|-----------------------------|
| Defendant shall serve a selection of prior art references, not to exceed 60 references total <sup>5</sup> | No deadline. <i>See</i> § 5(a), below.                        | Thursday, June 29, 2023     |
| Exchange Terms for Construction                                                                           | Tuesday, July 25, 2023                                        |                             |
| Exchange Preliminary Constructions and Extrinsic Evidence                                                 | Tuesday, August 15, 2023                                      |                             |
| Close of Claim Construction Discovery                                                                     | Tuesday, September 12, 2023                                   |                             |
| Defendants' Opening Claim Construction Brief                                                              | Tuesday, September 26, 2023                                   |                             |
| Plaintiff's Responsive Claim Construction Brief                                                           | Tuesday, October 24, 2023                                     |                             |
| Defendants' Reply Claim Construction Brief                                                                | Tuesday, November 7, 2023                                     |                             |
| Plaintiff's Sur-Reply Claim Construction Brief                                                            | Tuesday, November 14, 2023                                    |                             |
| Joint Claim Construction Chart                                                                            | Friday, November 17, 2023                                     |                             |
| Submission of Tech Tutorial (if Court deems it necessary)                                                 | Friday, December 1, 2023                                      |                             |
| <i>Markman</i> Hearing                                                                                    | Tuesday, December 19, 2023 or later at the Court's discretion |                             |
| Deadline to Amend Pleadings                                                                               | Tuesday, January 9, 2024                                      | Wednesday, January 24, 2024 |
| DL to M&C re Narrowing of Claims and Prior Art                                                            | Wednesday, February 7, 2024                                   | n/a                         |
| Service of Final Infringement Contentions                                                                 | Sunday, February 26, 2023                                     | Monday, March 11, 2024      |
| DL to Submit to Judge Pitman for Resolution Any Claim Narrowing Disputes                                  | Wednesday, February 21, 2024                                  | n/a                         |
| Plaintiff shall narrow its selection of asserted claims, not to exceed 21 claims in total                 | No deadline. <i>See</i> § 5(b), below.                        | Monday, March 11, 2024      |
| Service of Final Invalidity Contentions                                                                   | Monday, March 25, 2024                                        | Monday, April 8, 2024       |

<sup>5</sup> A prior art instrumentality, such as a device or process, and associated references that describe that instrumentality shall count as one reference. [*Softex's proposal: nothing further/ Defendants' proposal: as shall the closely related work of a single prior artist.*]

|                                                                                                                                                                     |                                        |                              |
|---------------------------------------------------------------------------------------------------------------------------------------------------------------------|----------------------------------------|------------------------------|
| Defendant shall narrow its selection of prior art, not to exceed 5 grounds per claim using prior art references from the previously selected 60 references in total | No deadline. <i>See</i> § 5(b), below. | Monday, April 8, 2024        |
| Close of Fact Discovery                                                                                                                                             | Friday, April 5, 2024                  | Friday, June 28, 2024        |
| Service of Opening Expert Reports                                                                                                                                   | Friday, May 3, 2024                    | Tuesday, August 6, 2024      |
| Service of Rebuttal Expert Reports                                                                                                                                  | Wednesday, June 12, 2024               | Tuesday, September 17, 2024  |
| Close of Expert Discovery                                                                                                                                           | Friday, July 12, 2024                  | Tuesday, October 15, 2024    |
| Plaintiff to Serve Written Offer of Settlement                                                                                                                      | Friday, July 19, 2024                  | Tuesday, October 22, 2024    |
| Defendant to Respond to Written Offer of Settlement in Writing                                                                                                      | Friday, August 2, 2024                 | Tuesday, October 29, 2024    |
| Opening Dispositive and <i>Daubert</i> Motions                                                                                                                      | Friday, August 30, 2024                | Wednesday, November 13, 2024 |
| Rebuttals to Dispositive and <i>Daubert</i> Motions                                                                                                                 | Friday, September 13, 2024             | Wednesday, December 18, 2024 |
| Replies to Dispositive and <i>Daubert</i> Motions                                                                                                                   | Friday, September 20, 2024             | Tuesday, January 7, 2025     |
| Hearing for Dispositive and <i>Daubert</i> Motions                                                                                                                  | To be set by the Court                 |                              |
| Pretrial Disclosures                                                                                                                                                | To be set by the Court                 |                              |
| Objections to Pretrial Disclosures/Rebuttal Pretrial Disclosures                                                                                                    | To be set by the Court                 |                              |
| Objections to Rebuttal Pretrial Disclosures                                                                                                                         | To be set by the Court                 |                              |
| Motions in Limine                                                                                                                                                   | To be set by the Court                 |                              |
| Joint Pretrial Order and Pretrial Submissions                                                                                                                       | To be set by the Court                 |                              |
| Oppositions to Motions in Limine                                                                                                                                    | To be set by the Court                 |                              |
| Civil Local Rule 88 Report on ADR                                                                                                                                   | 60 days prior to trial date            |                              |
| Final Pretrial Conference                                                                                                                                           | To be set by the Court                 |                              |
| Jury Selection/Trial <sup>6</sup>                                                                                                                                   | To be set by the Court                 |                              |

**a. Disputed Issue #1 – Fact Discovery/Time to Trial**

<sup>6</sup> Softex proposes that trial against Absolute should proceed first, with trials in the Dell and HP matters following at 2-3 month intervals as those cases additionally involve distinct issues not involved in the Absolute matter. The parties are continuing discussions on a potential stay of the Dell and HP cases. If the parties are not able to agree to a stay of the customer suits, Defendants will file motions to stay the Dell and HP matters, such that trials in those cases need not be set at this time. As will be explained in Defendants' motions to stay, the Dell and HP matters involve minimal distinct issues.

**Softex's Position:** Softex seeks a traditional fact discovery schedule and thus to promptly begin fact discovery. Absolute proposes to stay fact discovery until after the Court provides claim construction rulings. Softex's position should be adopted because this consolidated schedule actually covers discovery in three separate and distinct patent infringement actions that include infringement issues and damages issues that are completely separate and distinct as to the three separate Defendants.

Defendants incorrectly contend that the majority of discovery occurs after claim construction. The prevailing practice in US patent litigation is discovery concurrent with, not staged after, claim construction. The scenarios with discovery staged after claim construction employ expedited trial schedules similar to the procedures employed by Judge Albright but not followed by Defendants (who present a prolonged schedule for trial). The ability to obtain discovery sooner rather than later promotes not only fairness but encourages streamlining of issues and potential settlement by providing access to key information at an earlier stage of the case.

Softex understands Defendants to propose a freeze on any fact discovery, including any requests for production, interrogatories, and depositions, that goes beyond the proposed contention disclosures and deadlines as to Absolute. As to Dell and HP, the parties are discussing potential stay of these cases. If the parties do not agree to stay these cases, Softex intends to promptly file discovery in these cases and notes that both Dell and HP possess information relevant to claims against Absolute, making Defendants' proposal illogical and prejudicial. Defendants should be required to respond to discovery consistent with the Federal Rules of Civil Procedure and Local Rules.

Further, Defendants' suggestion to wait until after the *Markman* hearing to engage in fact discovery ignores the realities of these three separate cases and would result in undue prejudice to Softex in gathering the evidence necessary to proceed to trial. While the type of staged schedule proposed by Defendants may work in certain scenarios, it is not appropriate here. As noted above,

the infringing technology is embedded in at least 600 million devices worldwide by more than 30 large companies that partner with Absolute. These companies have headquarters throughout the world including all major countries in Asia and Europe. Given the unique circumstances present here, Defendants' schedule, which limits fact discovery in three cases to a short period of approximately six months, is simply unreasonable and not fair. The remedy to this problem is not to extend fact discovery – which would open after *Markman* – even further; rather, fact discovery should open immediately to allow Softex to expeditiously defend its patent rights and seek an appropriate remedy. Softex's proposed schedule, in contrast, better addresses the needs of the parties given the scope of fact discovery anticipated in these cases. Defendants' proposed schedule essentially ignores the fact that three separate cases exist here and would create undue pressure and complexities on Softex that are not necessary. The better and more just approach here is, as Softex suggests, to commence fact discovery immediately in a manner that will provide ample time for the parties to gather necessary evidence.<sup>7</sup>

Defendants' claim that fact discovery may be particularly costly for this case because it is infringing 7 patents fails to consider the fact that each Asserted Patent belongs to the same patent family, so the scope of discovery relevant to each Asserted Patent will overlap significantly. Furthermore, this overlap means there will be minimal discovery dedicated to claims not ultimately litigated at trial.

Finally, Defendants' allegation that waiting until after the *Markman* hearing to engage in fact discovery is the "practice of many cases in the Western District of Texas" fails to recognize not only the unique and undue pressures that would create because of the unique circumstances here, but also

---

<sup>7</sup> To the extent that Defendants' argue that the cases against Dell and HP should be disregarded because the customer suit exception *might*, in Defendants' opinion, apply, that argument should be categorically rejected—answers have been filed in those cases and nothing in the record suggests that schedules should not be established for cases against all three of the separate Defendants. Defendants disagree and maintain that this case is in its early stages, regardless of the filing of answers.

that only Judge Albright—one of almost 20 Western District judges—requires such a schedule.<sup>8</sup> Moreover, Judge Albright requires post-*Markman* deadlines far similar to Softex’s proposed dates, rather than the drawn out post-*Markman* schedule proposed by Defendants. If Defendants suggest this Court adopt a case schedule similar to those used in the Waco Division, Defendants’ should suggest that Waco schedule be used throughout this case (which would result in much earlier trial date(s) than that proposed by Defendants) rather than picking and choosing parts of that schedule convenient to Defendants and prejudicing Softex’s ability to gather necessary proof. For the reasons discussed above, Softex respectfully requests that the Court adopt its proposed consolidated schedule and notes that the parties agree that trial dates should be staggered with the *Absolute* case (Civil Action No. 1:22-cv-01308-RP) as the first case to trial. Softex respectfully suggests a staggering period of two to three months between trials.

**Defendants’ Position:** In keeping with the practice of many cases in the Western District of Texas,<sup>9</sup> Defendant requests that fact discovery remain closed until after the *Markman* hearing, except for claim construction discovery and limited document production with infringement and invalidity contentions as follows:

- With the exchange of infringement contentions, Plaintiff shall produce (1) all documents evidencing conception and reduction to practice for each claimed invention, and (2) a copy of the file history for each Asserted Patent;
- With the exchange of invalidity contentions, Defendant shall produce (1) all prior art

---

<sup>8</sup> Though Defendants cite two Judge Yeakel cases, below, Softex notes that the *Cloud Storage Technologies* was transferred from Judge Albright’s court after the parties had submitted a proposed scheduling using Judge Albright’s OGP (see Dkt. 14, 20), and the parties agreed to stay fact discovery until after *Markman* in the *Baker Hughes* case.

<sup>9</sup> See, e.g., *Cloud Storage Technologies, LLC v. Google LLC*, Case No. 1:22-cv-852-LY, ECF No. 27 (W.D. Tex. Nov. 7, 2022) (J. Yeakel); *Future Link Systems, LLC v. Advanced Micro Devices, inc.*, Case No. 6:20-cv-01176-ADA, ECF No. 32 (W.D. Tex. July 12, 2021) (J. Albright); *Baker Hughes Oilfield Operations LLC v. Production Tool Solution, Inc.*, Case No. 1:17-cv-291-LY, ECF No. 63 (W.D. Tex. June 11, 2020) (J. Yeakel).

referenced in the invalidity contentions, and (2) technical documents, including software where applicable, sufficient to show the operation of the accused product(s). Fact discovery is often the most time-consuming and resource-intensive phase of patent litigation. Fact discovery may be particularly costly for this case, with 7 patents and over 156 claims. Keeping fact discovery closed until after claim construction, with the above limited exceptions, will conserve the parties' and the Court's resources: it will allow discovery to be focused based on the infringement contentions, invalidity contentions, and claim constructions, including any case narrowing that occurs before or as a result of claim construction. As a practical matter, the majority of fact discovery in patent litigation typically occurs after claim construction for precisely this reason.

Defendant's proposed schedule allows sufficient time for fact discovery to unfold after claim construction. Even if the Court is inclined to permit fact discovery to open before claim construction, Defendant's proposal better accounts for the reality that fact discovery will need to account for claim construction, and the parties will require sufficient time to complete that discovery. To the extent Softex believes more than 6 months are necessary for fact discovery following claim construction, the Court could extend the deadline for fact discovery by an additional 2-4 months and move the subsequent case dates the same amount of time. Defendants are also willing to meet and confer with Softex to provide a joint proposal for the amount of time for fact discovery after claim construction.

**b. Disputed Issue #2 – Case Narrowing**

**Softex's Position:** The parties agree that claim narrowing is appropriate with the dispute largely centering on *when* narrowing should occur. Softex's proposal is reasonable as it provides for a claim narrowing deadline after claim construction and before the close of fact discovery and service of expert reports. The timing of Softex's narrowing proposal allows for informed narrowing decisions by the parties and provides an efficient process that fairly provides transparency to both parties while also preventing unnecessary work for technical expert reports. Softex's proposal also provides a mechanism to submit any claim narrowing disputes to the Court for resolution. Should any disputes

arise, the timing of Softex's proposal provides the Court with an appropriate record upon which to base any claim narrowing decision.

Defendants' proposed schedule, in contrast, would unjustly and prematurely require Softex to significantly narrow its case without the benefit of discovery, Defendants' invalidity contentions, or the Court's guidance on claim construction. Defendants' proposal would unfairly prejudice Softex and is not necessary because the concerns raised by Defendants are addressed by Softex's proposal.

Furthermore, Defendants' proposed narrowing places unfair burdens on Softex. For example, Defendants seek to force Softex to narrow its case to 42 claims—a reduction of 73% of claims at issue—before discovery commences, but allows Defendants to assert up to 60 prior art references. Defendants then seek to force Softex to cut its case in half without any parallel concession to narrow its number of asserted references. Instead, Defendants agree to assert no more than 5 grounds per claim, which could result in over 100 distinct combinations in total. The inequity created by Defendants' proposal is unreasonable, especially in light of Softex's compromise to narrow after claim construction but before the close of fact discovery and preparation of expert reports.

Defendants also unreasonably seek to mask the number of asserted prior art references by counting the closely related works of a single prior artist as one reference.

Finally, with regard to Defendants' concern with the claim construction process, Softex agrees to work with Defendants' counsel to fairly address the stated concerns by agreeing to meaningful limitations on the number of terms briefed or page limitations. Softex is committed to reducing burdens on the Court and three defendants while also allowing for a fair and reasoned consolidated discovery schedule. Softex's proposed schedule fairly addresses claim narrowing in a time period that does not disadvantage any party in the process, while Defendants' proposal unfairly forces dramatic reductions by Softex without providing the information or necessary rulings to inform decisions.

**Absolute's Position:** The parties agree that case narrowing is appropriate in this case, and the dispute is over when narrowing should begin. There are 7 Asserted Patents, with a total of 156 claims across the 7 patents. Engaging in claim construction, discovery, and expert reports on all 156 claims would be a very expensive and burdensome undertaking for the Court and the parties, particularly given that it is unrealistic that the vast majority of those claims would be included in the trial. Given the size of this case, it is appropriate to have an initial case narrowing early on—before claim construction to spare the Court the burden—with final narrowing before expert reports. Plaintiff's proposal to narrow the case only after claim construction would be inefficient and wasteful for the Court and the parties because it would require proceeding through preliminary contentions and claim construction on up to 156 claims. Defendant proposes that at the time of infringement contentions, Plaintiff elect no more than 42 claims—an average of 6 claims per patent. In exchange, Defendant will include no more than 60 references in its invalidity contentions. These proposed limits are sufficiently generous to allow case development of the most salient infringement and invalidity positions while avoiding unnecessary expenditure of resources by the parties and the Court on claims and prior art references that ultimately will not matter. Defendant then proposes a final narrowing to occur after claim construction but sufficiently in advance of the expert report deadlines, so that the parties can engage in focused expert discovery on the claims and prior art grounds relevant to summary judgment and trial.

#### 6. Rule 26(f) Discovery Plan

Although the parties so far disagree as to whether the suits against Absolute's customers should be stayed under the customer-suit exception, they have agreed to continue discussions to see if an agreement can be reached to stay the Dell and HP cases.<sup>10</sup> Otherwise, the parties conferred and agreed on the matters listed in Rule 26(f) as set forth below.

---

<sup>10</sup> Defendants have agreed to withdraw Dell's pending motion to stay to allow the parties further time to discuss whether to stay the Dell and HP matters.

**a. 26(f)(3)(A) — Initial Disclosures**

The parties do not request changes in the form for disclosures under Rule 26(a)(1)(A). As explained above, Softex proposes that the parties exchange initial disclosures by May 4, 2023. Defendant proposes that the parties exchange initial disclosures the day after the *Markman* hearing, when fact discovery opens.

**b. Rule 26(f)(3)(B) — Subjects and Timing of Discovery**

The parties anticipate discovery on all matters relevant to their pending claims and defenses, including, but not limited to, liability and damages.

**Softex’s Position:** Softex does not believe that discovery should be conducted in phases given the complexities of the numerous issues involved in these three separate cases and that it is more efficient for discovery and claim construction to proceed on concurrent tracks, which is the standard practice of nearly every court that presides over patent litigation disputes, including most courts in this district. *See supra* n.7.

**Defendants’ Position:** Defendant requests that fact discovery be stayed until after the *Markman* hearing, except for the limited discovery discussed above, in the interest of efficiency, as has been proven in many other cases in this district.

**c. Rule 26(f)(3)(C) — Electronically Stored Information**

In accordance with Federal Rule 26(f)(3)(C), the parties are continuing to discuss terms and conditions for the preservation and production of documents and electronically stored information (“ESI”) and the scope of electronic discovery.

**d. Rule 26(f)(3)(D) — Privilege and Protection Issues**

Given the nature of the parties’ claims and defenses, the parties anticipate confidential information will be exchanged in this case. The parties are therefore discussing a Protective Order and intend to request entry of a stipulated protective order.

**e. Rule 26(f)(3)(E) — Discovery Limitations**

**Softex's Position:** Softex proposes that each side (Plaintiff v. Defendants in all the related WDTX Softex cases) may serve no more than 75 common Requests for Production for all three cases and 25 unique Requests for Production for each case; serve no more than 20 common Interrogatories for all three cases and 5 unique Interrogatories for each case, and; take no more than 125 total hours of deposition testimony of party witnesses during fact discovery.

Defendants' proposal does not account for the different issues involved in the three matters and the customer suit exception does not apply to the Dell and HP matters. Defendants' proposal also fails to recognize that there are unique issues in the Absolute matter necessitating unique discovery for that matter just as there are unique issues for the Dell and HP matters necessitating unique discovery for those matters. If, after consideration of the facts and relevant law, this Court determines a stay under the customer suit exception is warranted, the parties and the Court are more than capable of modifying the case schedule accordingly. Softex, however, maintains that it is premature at this stage to propose or consider deadlines contingent on a stay which may not occur for months (or at all) and lacks merit. This is particularly true because discovery against Dell and HP is also relevant to issues in the Absolute case such as damages, among others.

**Defendants' Position:** If the parties are not able to reach agreement to stay the Dell and HP matters under the customer suit exception, Defendants will be filing motions to stay the Dell and HP cases. Defendants propose the following discovery limits in addition to the discovery limits imposed under the Federal Rules of Civil Procedure and the Local Rules, including, for example, Federal Rules of Civil Procedure 26, 33, 34, and 36, and Local Court Rules CV-26, CV-33, and CV-36: Each side (plaintiff v. defendants in all the related Softex cases) may serve no more than 75 common Requests for Production and 20 common Interrogatories. If the customer suits are not stayed, each side may additionally serve 25 unique Requests for Production and 5 unique Interrogatories for each case (i.e., 5 unique Interrogatories to Absolute, with 5 unique Interrogatories served by Absolute, and the same for each of Dell and HP). If the customer suits are not stayed, all 75 Requests for Production and 20 Interrogatories per side shall be unique to the Absolute litigation. Each side may take no more than 75 total hours of deposition testimony during fact discovery if the customer suits are stayed, and no more than 100 total hours of deposition testimony during fact discovery if the customer suits are not stayed.

**f. Rule 26(f)(3)(F) — Other Orders**

At this time, the parties have not yet requested any orders that the Court should issue under Rule 26(c) or under Rule 16(b) and (c) but will be requesting a Scheduling Order and Protective Order as discussed above.

**7. Consent to Electronic Service**

The parties consent pursuant to Federal Rule of Civil Procedure 5(b)(2)(E) that the parties may serve any document—including, for example, discovery requests, discovery responses, and expert and other disclosures—on the other party by electronic means, including but not limited to e-mail, FTP sites, or secure file-sharing services. The parties agree that service on any party by email shall be made on all counsel of record for that party.

Dated: June 22, 2023

Respectfully submitted,

/s/ Blair M. Jacobs

Blair M. Jacobs (WDTX. Bar No. 32010)  
bjacobs@McKoolSmith.com  
Christina A. Ondrick (WDTX. Bar No.  
494625)  
condrick@McKoolSmith.com  
John S. Holley (SBN 24078678)  
jholley@McKoolSmith.com  
**MCKOOL SMITH, P.C.**  
1999 K Street, NW Suite 600  
Washington, D.C. 20006

John B. Campbell (SBN 24036314)  
jcampbell@McKoolSmith.com  
**MCKOOL SMITH, P.C.**  
303 Colorado Street, Suite 2100  
Austin, TX 78701  
Telephone: (512) 692-8700

Casey L. Shomaker (SBN 24110359)  
cshomaker@McKoolSmith.com  
Matthew Folks (SBN 24116368)  
mfolks@McKoolSmith.com  
**MCKOOL SMITH, P.C.**  
300 Crescent Court, Suite 1500  
Dallas, TX 75201  
Telephone: (214) 978-4218

*Attorneys for Plaintiff*

/s/ Heidi L. Keefe

Heidi L. Keefe  
**COOLEY LLP**  
3175 Hanover Street  
Palo Alto, CA 94304  
Telephone: (650) 843-5000  
Fax: (650) 849-7400  
hkeefe@cooley.com

*Attorneys for Defendants*

**CERTIFICATE OF SERVICE**

Pursuant to the Federal Rules of Civil Procedure and Local Rule CV-5, I hereby certify that, on June 22, 2023, all counsel of record who have appeared in this case are being served with a copy of the foregoing via the Court's CM/ECF system.

/s/ Blair M. Jacobs

Blair M. Jacobs