IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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WILLIAM C. FRAZIER,
FRAZIER INDUSTRIES, INC.
and AIRBURST TECHNOLOGIES, INC.,

ORDER

Plaintiffs,

04-C-0315-C

v.

LAYNE CHRISTENSEN COMPANY and
PROWELL TECHNOLOGIES, LTD.,

Defendants.

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This patent case has been before the court for almost two years. It has defied the best efforts of the court to get it to trial. The docket entries exceed three hundred and the parties are in their second round of summary judgment briefing. The core problem is discovery; the parties have been at odds from the beginning. After the disputes made it impossible for the parties to try the case on May 23, 2005, as scheduled by the magistrate judge, a new trial date of October 24, 2005 was set. On September 29, 2005, when it became apparent that the discovery problems had not been resolved, the date was changed to March 6, 2006. The parties have been reminded that this date will not change.

To the court's dismay, the parties' disputes over discovery continue to escalate. If plaintiffs' allegations of defendants' discovery violations are true, defendants' recalcitrance and lack of candor will prevent plaintiffs from trying their infringement claims on March 6. To determine the truth of the allegations will require an extended hearing and probably the taking of evidence. However, the alleged violations concern only the infringement aspect of the case. They do not relate to defendants' counterclaims of invalidity of the patent in suit.

Because it is clear that I cannot resolve the discovery disputes over infringement and the pending motions for summary judgment on infringement before March 6, 2006, and certainly not sufficiently before March 6 to allow the parties to adjust to any ruling I might make, I will limit the subject matter of the March 6 trial to invalidity. Although summary judgment has been sought on invalidity, that pending motion is not a reason to delay the trial. It is evident from my review of the motion that the factual matters in dispute require trial. However, I will decide the parties' motions to strike by the end of the day, Tuesday, February 21, 2006, because the resolution of those motions bears on the evidence the parties will be able to introduce at trial.

At the invalidity trial, defendants will have the burden of proof; the burden is the middle level standard of clear and convincing evidence.

If defendants prevail at the trial of invalidity, then the only remaining issues will be whether to impose sanctions on defendants for discovery violations and the amount or

nature of those sanctions if any. If plaintiffs prevail, it will be necessary to determine whether the pending summary judgment motions on infringement can be decided, given the present state of discovery. If plaintiffs do not have the discovery they need to brief the motions properly, I will take up the problems with discovery and determine whether to set new deadlines for the filing of amended motions for summary judgment, go directly to trial or enter judgment in favor of plaintiffs on infringement and limit the trial to damages only.

If the matter is set for trial, it will take place during the week beginning August 14, 2006.

ORDER

IT IS ORDERED that the March 6, 2006 trial in this case will be limited to the issue of invalidity only. If the claims of infringement and damages are tried, trial will take place during the week beginning August 14, 2006. Plaintiffs' motion for summary judgment with

respect to defendants' claim that the '845 patent is invalid as obvious or anticipated by prior art is DENIED.

Entered this 17th day of February, 2006.

BY THE COURT:
/s/
BARBARA B. CRABB
District Judge