

Judge Albright Modifies His OGP Order Governing Procedures

SEPTEMBER 22, 2020

On September 22, 2020, Judge Albright again modified his Order Governing Proceedings. Judge Albright maintained his order regarding transfer motions (motions must be filed within two weeks of the CMC) and extended the deadline for amending the complaint by four weeks to 16 weeks after the *Markman* hearing. In so doing, the Court made clear that even if a party seeks to amend in response to a 12(c) motion, no motion is required.

As for the Court's *Markman* procedures, the Court has moved its target *Markman* hearing date up a week from 24 weeks after the CMC to 23 weeks after. The Court modified the language regarding the "presumed limit" of claim terms for construction, noting that the "presumed limit" in the Court's order is the maximum number of terms that "each side" (as opposed to "the parties") may request the Court construe without leave of Court. As a reminder, those limits are as follows:

Limits for Number of Claim Terms to be construed

1-2 PATENTS	3-5 PATENTS	MORE THAN 5 PATENTS
10 terms	12 terms	15 terms

The Court made clear that 12 weeks after the CMC, the parties need only identify expert witnesses (and the scope of the experts' expected testimony) they plan to rely on in their opening claim construction briefs. If they plan to rely on an expert witness on rebuttal, that expert and the scope of that expert's testimony may be identified up to 16 weeks after the CMC (two weeks after the parties file opening briefs). Minimizing the likelihood of creating disputes over what is required by such identification, the Court removed the requirement that the parties:

provide a summary of the witness's expected testimony including the opinions to be expressed and a general description of the basis and reasons therefor. A failure to summarize the potential expert testimony in a good faith, informative fashion may result in the exclusion of the proffered testimony.

In terms of the order of argument, the Court revised its procedures, noting that: "As a general rule, the party opposing the Court's preliminary construction shall go first. If both parties are unwilling to accept the Court's preliminary construction, the Plaintiff shall typically go first." The Court made clear that technological tutorials are optional.

As for trials, the Court added that: "After the trial date is set, the Court will not move the trial date except in extreme situations."

Lastly, the Court made clear that summaries of discovery disputes raised with the Court are to be neutral and non-argumentative.

Foreshadowing what is to come, the Court also added the concept of appointing a technical adviser.

The Court also updated its [Courtroom FAQ](#) to include the following. The FAQs are worth reading in their entirety, (e.g., 101 motion pages do not count against the MSJ page limits).

- The Court's view on mediation: "The Court does not require mediation, but if the parties believe[] that mediation may be helpful, the parties should notify the Court's law clerk. To the extent the parties would like to have Magistrate Jeffrey Manske mediate the dispute, the Court is willing to enter an Order to that effect."
- The Court's setting of the trial date: "At or before the CMC, the Court will provide an estimated trial date based on the number of patents-in-suit, the complexity of the case, etc. To the extent the parties would like to reset the trial date, the parties should raise that at the end of the *Markman*. After the trial date is set, the Court will not move the trial date except in extreme situations. To help the parties prepare for trial, the Court is available on very short notice to help the parties resolve issues or provide guidance that can help the case move forward. The Court is also willing, if circumstances permit, to reduce the time it has to review summary judgment and *Daubert* motions. To the extent a party believes that the circumstances warrant continuing the trial date, the parties are directed to contact the Court to request a telephonic hearing."
- Exceeding the presumed maximum claim term limit at claim construction: "The parties should (1) Divide the limit between the sides (if there are 'leftover' terms, one side can have the leftovers), and (2) Email a joint letter to the Court if there are still more disputed terms that the presumed maximum limits. The letter should identify the additional terms that need construction and describe [how] the Court should construe them."

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