

Trial Alert: Countdown to Kick-Off – The Final Pre-Trial Conference

SEPTEMBER 24, 2020

On September 23, 2020, Judge Albright held the pre-trial conference for his much-anticipated first patent jury trial, *MV3 Partners LLC v. Roku, Inc.*, Case No. 6:18-cv-00308-ADA.

Judge Albright began with housekeeping issues relevant to the peculiar nature of holding a trial during the COVID-19 pandemic. In general, Judge Albright assured the parties that they would take things slowly to work out any unforeseen glitches brought on by the various social-distancing measures the court is planning. Jurors will be masked and safely distanced from each other in the jury box, the parties may not use paper exhibits to hand to the jury or to a witness, and some witnesses will be testifying remotely. On this last point, Judge Albright stated that the presentation of remote witnesses would be done as even-handedly as possible—witnesses testifying remotely are to have a neutral backdrop, and Judge Albright will instruct the jury that it was his decision to allow the witness to testify in this manner, so as not to prejudice a party or the witness by requiring them to explain why they are not appearing in person.

The parties will receive lists of the prospective jurors on September 25, six days in advance of voir dire on October 1. The jurors' home addresses will be redacted, except for their city and state of residence. The jurors will be allowed notepads. Each side will have four strikes. Additionally, the selected jurors are to watch the Federal Judicial Center's primer on patent law the day of their selection. Magistrate Judge Manske will preside over voir dire.

Each side will be allowed 15 hours to present its case, and Judge Albright predicted the trial would take approximately six days to try before it is sent to the jury. These 15 hours do not include any presentation on the inequitable conduct issue, which will take place while the jury is out. Each side will also be allowed 30 minutes for opening and for closing, but Judge Albright said he would not hold them strictly to it. However, Judge Albright admonished counsel that "let's please wrap up" does not mean "within 10 minutes," but rather "within 30 seconds."

The parties are not required to exchange opening and closing presentations or slides beforehand. Judge Albright asked the parties to police themselves and the content of their presentations, so as not to require objections from the opposing party. Judge Albright stated that he would make known to the jury his displeasure with a party's objecting for a frivolous reason, or including something warranting an objection.

Both parties are calling five fact witnesses, and Judge Albright instructed the parties to notify the other side by September 28 (one week before trial) as to which witnesses they will actually call.

Judge Albright requested that the parties confer to make three lists of exhibits. First, a list of exhibits that are agreed-to and will actually be offered into evidence. For instance, Judge Albright assured the parties that the patent would be admitted, and that it should be on this list. Second, a list of exhibits that are not agreed-to and might be objected to during trial. And third, a list of exhibits that must be ruled on beforehand, because their simple introduction could be prejudicial. This might be, for instance, the (hypothetical) criminal record of a witness.

Judge Albright stated that his preference was to have witnesses presented in one “tranche” or at least not to split their presentations, so as to allow the opposing party to have an unfair chance to prepare. For example, he may let an expert witness present their credentials on one day and the rest of their testimony on the next, but he would not allow a witness to get into the substance of their testimony in a way that would allow the opposing party to prepare.

Judge Albright outlined for the parties how he preferred to deal with testimony dealing with information marked by the parties as “confidential” or “highly confidential” under the protective order. For information marked “confidential,” Judge Albright will not clear the courtroom, but will allow the parties to present the evidence in a way that the gallery would not be able to see. For information marked “highly confidential,” Judge Albright will clear the courtroom, but the parties will only get that one chance to present that information with such a protection. Otherwise, the courtroom is to remain open to ensure public access.

The Defendants brought up several other matters for the court to address pre-trial that required briefing or argument. Judge Albright generally stated that matters brought up this close to trial were difficult to correct because of the extreme prejudicial effect a decision would have on either of the parties, because they would have limited time to adjust their case. Judge Albright did set a hearing for Thursday morning on the issue of squaring the Plaintiff’s allegedly inconsistent testimony between the IPR and the expert report in this case.

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