



Judge Sue L. Robinson Issues New Patent Case Scheduling Order to Streamline Her Dockets

On March 24th, Judge Sue L. Robinson of the District of Delaware issued the attached Patent Case Scheduling Order. With 304 currently open patent cases,¹ Judge Robinson's Order seeks to better streamline her dockets by implementing the following changes:

Plaintiff Identification of Damages Model with Initial Disclosures

In addition to the usual identification of accused products and patents, Judge Robinson's Order requires a plaintiff to disclose its "damages model" as part of its initial disclosures.² In response, defendants must produce sales figures for the accused products.³ Depending on plaintiff's damages model, defendants may be better equipped to limit broad discovery requests under Fed. R. Civ. P. 26(b)(2)(C)(iii) due to excessive expense. And, defendants will have an opportunity to contest plaintiff's damages model disclosure at a subsequent status conference with a magistrate judge.⁴ This does preclude bifurcation of damages from liability, however.

Initial and Final Infringement Contentions

The Order requires defendants, as part of their initial disclosures, to produce "core technical documents" sufficient to show how the accused products work.⁵ In turn, the plaintiff must produce initial infringement contentions in chart form.⁶ "Final" infringement contentions must be produced at a later date during fact discovery.⁷ By requiring initial infringement contentions early in the case, defendants should consider expending greater resources to search for "core technical documents" that could

¹ Lex Machina (as of March 27, 2014).

² Order at § 1(c)(2).

³ Order at § 1(c)(3).

⁴ Order at § 1(c)(4) (requiring status conference to "ensure that the initial exchanges have been meaningful").

⁵ Order at § 1(c)(3).

⁶ Order at § 1(c)(5).

⁷ Order at § 1(f)(2).

demonstrate non-infringement. Depending on the infringement allegations and accused technology, motions to compel a more complete response to plaintiff's initial infringement contentions could narrow the scope of discovery early or even end the case for failure to comply with a court order. And, by requiring "Final" infringement contentions, defendants should no longer have to resort to motion practice to force uncooperative plaintiffs to supplement contentions after extensive fact discovery has been produced.

Deadline for Court to Issue *Markman* Order

The Order requires a *Markman* Order to issue on a specific date before the start of expert discovery.⁸ Previously, Judge Robinson typically conducted joint hearings on claim construction and summary judgment, which delayed the issuance of *Markman* Orders in her court. By requiring *Markman* Orders to issue earlier and before expert discovery, expert reports will no longer have to address competing claim constructions, and settlement discussions may prove fruitful earlier in her cases.

Magistrate Judge Responsible for Motions to Dismiss, Amend, and Transfer

The Order better utilizes magistrate judges by requiring them to resolve all motions to dismiss, amend, and transfer.⁹ This should expedite rulings on such motions before discovery burdens and expenses escalate.

Daubert* Motions Permitted Only After Status Conference and No Filed Motions *in Limine

Judge Robinson will no longer hear *Daubert* motions until they are discussed at an in-person status conference and deemed appropriate.¹⁰ And motions *in limine* cannot be filed; rather, evidentiary issues shall be heard at the pretrial conference and during trial (before and after the trial day).¹¹ This will introduce further discovery efficiencies by curtailing excessive motion practice.

Overall, we believe Judge Robinson's new Patent Case Scheduling Order benefits defendants facing frivolous patent infringement suits. A magistrate will expedite rulings on motions to dismiss and transfer, plaintiffs must develop their damages model in advance of an initial status conference, initial infringement contentions are required as part of initial disclosures, *Markman* Orders will issue on a set date, and *Daubert* motions and motions *in limine* will require in-person argument and approval by the Court. This should help defendants resolve meritless claims, and narrow the scope of discovery early and reduce litigation burdens and costs as a result.

This *GT Alert* was prepared by **Scott J. Bornstein** and **John Handy**. Questions about this information can be directed to:

- > [Scott J. Bornstein](mailto:bornsteins@gtlaw.com) | +1 212.801.2172 | bornsteins@gtlaw.com
- > [John Handy](mailto:handyj@gtlaw.com) | +1 212.801.2270 | handyj@gtlaw.com
- > Or your [Greenberg Traurig](#) attorney

⁸ Order at § 5(h).

⁹ Order at § 8(a).

¹⁰ Order at § 6(d).

¹¹ Order at § 10.

| | | | |
|--------------------------------------|--|---|--|
| Albany 518.689.1400 | Denver 303.572.6500 | New York 212.801.9200 | Silicon Valley 650.328.8500 |
| Amsterdam + 31 20 301 7300 | Fort Lauderdale 954.765.0500 | Orange County 949.732.6500 | Tallahassee 850.222.6891 |
| Atlanta 678.553.2100 | Houston 713.374.3500 | Orlando 407.420.1000 | Tampa 813.318.5700 |
| Austin 512.320.7200 | Las Vegas 702.792.3773 | Philadelphia 215.988.7800 | Tel Aviv[^] +03.636.6000 |
| Boca Raton 561.955.7600 | London* +44 (0)203 349 8700 | Phoenix 602.445.8000 | Tysons Corner 703.749.1300 |
| Boston 617.310.6000 | Los Angeles 310.586.7700 | Sacramento 916.442.1111 | Warsaw[~] +48 22 690 6100 |
| Chicago 312.456.8400 | Mexico City⁺ +52 55 5029.0000 | San Francisco 415.655.1300 | Washington, D.C. 202.331.3100 |
| Dallas 214.665.3600 | Miami 305.579.0500 | Seoul[∞] 82-2-369-1000 | West Palm Beach 561.650.7900 |
| Delaware 302.661.7000 | New Jersey 973.360.7900 | Shanghai +86 21 6391 6633 | White Plains 914.286.2900 |

*This Greenberg Traurig Alert is issued for informational purposes only and is not intended to be construed or used as general legal advice nor as a solicitation of any type. Please contact the author(s) or your Greenberg Traurig contact if you have questions regarding the currency of this information. The hiring of a lawyer is an important decision. Before you decide, ask for written information about the lawyer's legal qualifications and experience. Greenberg Traurig is a service mark and trade name of Greenberg Traurig, LLP and Greenberg Traurig, P.A. *Operates as Greenberg Traurig Maher LLP. **Greenberg Traurig is not responsible for any legal or other services rendered by attorneys employed by the strategic alliance firms. +Greenberg Traurig's Mexico City office is operated by Greenberg Traurig, S.C., an affiliate of Greenberg Traurig, P.A. and Greenberg Traurig, LLP. ∞Operates as Greenberg Traurig LLP Foreign Legal Consultant Office. ^Greenberg Traurig's Tel Aviv office is a branch of Greenberg Traurig, P.A., Florida, USA. ~Greenberg Traurig's Warsaw office is operated by Greenberg Traurig Grzesiak sp.k., an affiliate of Greenberg Traurig, P.A. and Greenberg Traurig, LLP. Certain partners in Greenberg Traurig Grzesiak sp.k. are also shareholders in Greenberg Traurig, P.A. Images in this advertisement do not depict Greenberg Traurig attorneys, clients, staff or facilities. No aspect of this advertisement has been approved by the Supreme Court of New Jersey. ©2013 Greenberg Traurig, LLP. All rights reserved.*