

A Unique Solution to COVID-19-Related Delays at the US International Trade Commission

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Under Section 337,^[1] the U.S. International Trade Commission (ITC or Commission) investigates allegations of unfair practices in import trade that most often involve claims regarding intellectual property rights, including allegations of patent infringement. The ITC has long been the forum of choice for IP litigants seeking expeditious relief “at the earliest practicable time,”^[2] particularly when compared to the traditional pace of litigation in district court.

In the wake of the COVID-19 pandemic, however, the ITC was forced to suspend in-person hearings and halt its fast-paced schedules while it explored existing technological resources and reliable and secure options available for video conferencing that would protect parties’ confidential business information (CBI).^[3] After several months of evaluating its options, on July 20, 2020, the ITC announced that it had chosen “WebEx Meeting as its secure FedRAM certified video teleconferencing solution for Section 337 hearings and investigation conferences involving confidential business information.”^[4] In addition, the Commission indicated that “the Administrative Law Judge [ALJ] presiding over each investigation has responsibility for determining appropriate hearing procedures.”^[5]

Even before the Commission announced or was able to implement a secure, remote procedure to conduct Section 337 hearings, ALJ Lord (one of the ITC’s six ALJs) proposed “holding” an evidentiary hearing based only on written submissions to address the challenges of conducting evidentiary hearings during the pandemic. On April 17, 2020, in *Certain Road Construction Machines and Components Thereof*,^[6] ALJ Lord issued an order suspending the June 2, 2020 evidentiary hearing date in light of the Commission’s determination to extend its postponement of all in-person Section 337 hearings. She then scheduled a teleconference and directed the parties to be “prepared to discuss proposals for the conduct of the proceeding in compliance with the postponement of in-person hearings,” including the possibility of a determination “based on written submissions, without a live hearing.”^[7] Historically, Section 337 hearings are conducted with live testimony, although three out of six ALJs (Chief ALJ Bullock, ALJ Shaw, and ALJ Lord) generally require the parties to submit their direct examination of witnesses through written witness statements and only use live testimony for cross-examination and redirect.^[8]

Ultimately, the parties in *Certain Road Construction Machines and Components Thereof* agreed to provide written submissions *in lieu* of a live hearing and for ALJ Lord to issue her determination based on the written record.^[9] In a process much like that used in *inter partes* review trials before the Patent Trial and Appeal Board,^[10] the parties submitted fact and expert statements that served as each witness’ direct examination. The opposing party then was permitted to depose that witness based on the witness statement and submit designations from the deposition transcript *in lieu* of cross-examination. The sponsoring party then was allowed to submit counter-designations from the deposition testimony.

To facilitate the admission of exhibits, the parties were required to file an “identification of evidence” that listed the witness statements, deposition transcripts, and all the exhibits the party offered into evidence for the proceeding.^[11] For each documentary exhibit, the parties had to identify the specific witness statement or deposition testimony sponsoring the exhibit or, if the exhibit was offered without a sponsoring witness, the grounds for receiving that exhibit into evidence. The parties filed briefs addressing the issues, consistent with the traditional briefing associated with an ITC evidentiary hearing, but rather than pre-hearing and post-hearing briefs, which typically occur a few weeks before/after an evidentiary hearing, the parties filed initial briefs along with the identification of evidence. Then, the parties had five days to file statements of objections to the opposing party’s identification of evidence and 10 days to file rebuttal briefs and responses to those objections. ALJ Lord issued her initial determination based on these written submissions on June 22, 2020.^[12]

Although the orders governing this procedure were issued well before the ITC announced its solution for conducting virtual hearings, ALJ Lord’s interest in proceeding with written submissions has not waned. She recently issued Ground Rules that confirm her continuing willingness to conduct hearings in this fashion, noting that “[h]earings may be conducted *via* written submissions or remote technology during this time, and separate procedures may be issued to govern the conduct of such hearings.”^[13] In addition, she has memorialized aspects of the procedure permitted in *Certain Road Construction Machines and Components Thereof* in her Ground Rules, which now permit a party to respond to a written witness statement by (1) designating a pre-existing deposition transcript *in lieu* of cross-examination, or (2) arranging a *de bene esse* deposition and submitting designations from that deposition transcript *in lieu* of live cross-examination.^[14] While continuing to offer this written submission alternative, ALJ Lord appears willing to give parties the option of remote hearings over WebEx as well.^[15]

Consistent with the Commission’s notice discussed above, each ALJ ultimately has the discretion to determine appropriate hearing procedures, including whether to conduct a hearing via written submission. Several ALJs have acknowledged in their Ground Rules that COVID-related changes and flexibility may be necessary and appropriate.^[16] Of the six ALJs, only ALJ Lord has used and continues to entertain the possibility of conducting evidentiary hearings on the written record alone. Other ALJs, including ALJ McNamara, ALJ Cheney, and ALJ Elliot, on the other hand, have issued orders indicating their continuing preference for live testimony that enables them to gauge the credibility of witness testimony on direct examination in real-time and possible resistance to an entirely written record.^[17] Nevertheless, in light of travel restrictions, delays, and other complications created by the COVID-19 pandemic, the ability to submit written testimony may ease some of the burdens associated with the remote proceedings, and the procedures charted by ALJ Lord provide an alternative path for litigants seeking to preserve the fast-paced resolution historically offered by the ITC.

^[1] 19 U.S.C. § 1337.

^[2] See, e.g., 19 U.S.C. § 1337(b) (“The Commission shall conclude any such investigation and make its determination under this section at the earliest practicable time after the date of publication of notice of such investigation.”).

^[3] See https://www.usitc.gov/documents/337_msg_extranet_finalv4.pdf.

[4] See https://www.usitc.gov/press_room/featured_news/usitc_response_covid_19.htm#337-hearings.

[5] *Id.*

[6] Inv. No. 337-TA-1088. *Certain Road Construction Machines and Components Thereof* was a modification proceeding, which is instituted to determine whether the scope of an existing remedial order (e.g., exclusion order or cease and desist order that may be entered when the Commission finds a violation of Section 337) should be modified as a result of a changed circumstance of fact or law. See 19 C.F.R. § 210.76.

[7] *Certain Road Construction Machines and Components Thereof*, Inv. No. 337-TA-1088, Order No. 43 (Apr. 17, 2020).

[8] See, e.g., *Certain Gabapentin Immunoassay Kits and Test Strips, Components Thereof, and Methods Therefor*, Inv. No. 337-TA-1239, Order No. 2 at 23 (Jan. 25, 2021) (CALJ Bullock) (“All direct witness testimony, with the exception of adverse witnesses, shall be made by witness statements in lieu of live testimony.”); *Certain Cloud-Connected Wood-Pellet Grills and Components Thereof*, Inv. No. 337-TA-1237, Order No. 2 at 20 (Dec. 29, 2020) (ALJ Lord) (same); *Certain Active Optical Cables and Prods. Containing the Same*, Inv. No. 337-TA-1233, Order No. 2 at 12 (Dec. 10, 2020) (ALJ Shaw) (same).

[9] *Certain Road Construction Machines and Components Thereof*, Inv. No. 337-TA-1088, Order No. 44 (Apr. 20, 2020).

[10] 37 C.F.R. § 42.53 (identifying process for taking uncompelled testimony in Patent Trial and Appeal Board proceedings); see also *K-40 Electronics, LLC v. Escort, Inc.*, IPR2013-00203, Paper 34 (May 21, 2014) (noting “[t]he Board does not envision that live testimony will be necessary at many oral arguments.”).

[11] *Certain Road Construction Machines and Components Thereof*, Inv. No. 337-TA-1088, Order No. 44 (Apr. 20, 2020).

[12] *Certain Road Construction Machines and Components Thereof*, Inv. No. 337-TA-1088, Recommended Determination (June 22, 2020).

[13] See, e.g., *Certain IP Camera Sys. Including Video Doorbells and Components Thereof*, Inv. No. 337-TA-1242, Order No. 2 at 29 n.20 (Jan. 26, 2021); *Certain Cloud-Connected Wood-Pellet Grills and Components Thereof*, Inv. No. 337-TA-1237, Order No. 2 at 29 n.20 (Dec. 29, 2020).

[14] See, e.g., *Certain IP Camera Sys. Including Video Doorbells and Components Thereof*, Inv. No. 337-TA-1242, Order No. 2 at 26 (Jan. 26, 2021); *Certain Cloud-Connected Wood-Pellet Grills and Components Thereof*, Inv. No. 337-TA-1237, Order No. 2 at 26 (Dec. 29, 2020).

[15] See, e.g., *Certain Wearable Monitoring Devices, Systems, and Components Thereof*, Inv. No. 337-TA-1190, Order No. 36 (Oct. 2, 2020) (issuing Ground Rules for WebEx hearing proceedings).

[16] See, e.g., *Certain Vehicle Control Sys., Vehicles Containing the Same, and Components Thereof*, Inv. No.

337-TA-1235, Order No. 2 at Attachment A (Dec. 23, 2020) (ALJ McNamara) (including attachment to address procedural and substantive changes to Ground Rules in light of COVID-19); *Certain Polycrystalline Diamond Compacts and Articles Containing Same*, Inv. No. 337-TA-1236, Order No. 2 (Dec. 22, 2020) (ALJ Elliot) (noting “[t]hese Ground Rules may be modified...as required to accommodate the Commission’s operating status during the COVID-19 pandemic”); *Certain Active Optical Cables and Prods. Containing the Same*, Inv. No. 337-TA-1233, Order No. 2 (Dec. 10, 2020) (ALJ Shaw) (issuing Ground Rules with caveat regarding COVID-19 procedures).

[17] See, e.g., *Certain Electrical Connectors and Cages, Components Thereof, and Prods. Containing the Same*, Inv. No. 337-TA-1241, Order No. 2 at 27 (Jan. 26, 2021) (ALJ Cheney) (“Unless leave is otherwise granted, all direct testimony must be given by a live witness.”); *Certain Plant-Derived Recombinant Human Serum Albumins (“rHSA”) and Prods. Containing Same*, Inv. No. 337-TA-1238, Order No. 2 at 32 (Jan. 21, 2021) (ALJ McNamara) (“Witness statements are disfavored and except as described, will not be allowed in place of direct testimony during the evidentiary hearing.”); *Certain Polycrystalline Diamond Compacts and Articles Containing Same*, Inv. No. 337-TA-1236, Order No. 2 at 19 (Dec. 22, 2020) (ALJ Elliot) (“All witness testimony shall be made orally.”).

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